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The Realm of Right

On the Development and Final Formulation of
Kant's Legal Philosophy

Thesis for the degree of Philosophiae Doctor

Trondheim, February 2013

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Sich als ein nach dem Staatsbürgerrecht mit in der Weltbürgergesellschaft vereinbares Glied zu denken, ist die erhabenste Idee, die der Mensch von seiner Bestimmung denken kann und welche nicht ohne Enthusiasm gedacht werden kann.

Immanuel Kant (19:609)

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Øystein Lundestad
Trondheim, September 18, 2012.

Introduction

Considering his great, almost unparalleled influence on moral philosophy, it is strange to see that Immanuel Kant's legal and political philosophy for so long was given so little attention by scholars and non-scholars alike. Since his death in 1804, the recognition that is normally accorded to his works on moral philosophy in general (as well as on his critique of reason and his theory of aesthetics) has largely bypassed his contributions to the theoretical field of what has also been called philosophy of right. In this realm, the canon consists of works by Plato, Aristotle, Augustine, Machiavelli, Hobbes, Locke, Rousseau, and Hegel. Kant has definitely not been regarded as one of the major thinkers (cf. e.g. Höffe 2001: 11).

The last couple of decades have, however, seen a development towards a change in the estimation and understanding of Kant's legal and political philosophy. In the Anglo-American tradition, John Rawls' *A Theory of Justice* (1971) put Kant, and even moral philosophy in general, back on the map. Nonetheless, this vastly influential book shares a feature with many other writings on justice that claim to have Kant as a basic point of reference or departure: it is not primarily related to his philosophy of right; it is rather inspired by what most secondary literature today would call his moral philosophy, as we know it from the *Grundlegung* and the second *Critique*. Consequently, Kant's legal and political philosophy has also in recent years been addressed by Rawls and other scholars from a predominantly moral perspective, which, as I shall argue in this thesis, is unable to grasp the peculiarities of Kant's realm of right.[1]

Parts of German scholarship have doubtless fared better. One of the earliest works to recognise and elaborate upon the distinctive features of Kant's legal and political philosophy is Wolfgang Kersting's *Wohlgeordnete Freiheit*, first published in 1984. His call for the need to undertake a change from a moral to a legal perspective when we consider Kant's writings on political matters will be further examined below. It will also become central to a claim that I share with Kersting, namely that Kant's philosophy of right is developed and formulated at a certain distance from his deliberations on specifically moral (or moral-ethical) matters. The vital contributions by Claudia Langer (1986) and Ingeborg Maus (1994) will be used in order to explore and undergird this claim further. I will argue that it is only in this manner that the specific features and autonomy of Kant's legal and political philosophy can be fully revealed, all the way from his innate right to freedom, via his discussion of every human being's private rights, to the necessary and necessarily three-dimensional juridical framework of public right.

[1] To his credit, Rawls himself would later recognise this, admitting that he had "never felt satisfied with the understanding I could gain of Kant's overall conception" (Rawls 2007: xv). This, however, also meant that he had to leave Kant completely out of his lectures series on the history of political philosophy (cf. ibid.).

This, of course, is not to say that Kant's realm of right is developed and formulated in opposition to or in complete independence of what we today commonly refer to as his moral philosophy. Rather, it is to suggest that in most studies of his practical philosophy – despite all their similarities – there has not been paid sufficient attention to the differences between his moral and his legal philosophy. As a result, the internal relationship between the two fields of philosophical theory has not been adequately delineated. Naturally, this thesis does not set out to clarify any one of these aspects once and for all. It does, however, attempt to make a contribution to Kant scholarship in these and other regards through an in-depth investigation of the development and final formulation of his legal and political philosophy.

The concept of freedom will be pivotal in this connection. Crucial for this dissertation is my claim that freedom, not morality, is the central concept of Kant's practical philosophy. I shall argue that Kant realised only late in his writing career that it is impossible to arrive at a coherent concept of freedom in our intersubjective relations from his concept of morality. The latter is decidedly, and correctly, grounded in our internal incentives and personal autonomy. For a Kantian concept of, and the right to a use of, our external freedom, however, morality is simply unable to provide an answer. Contrary to a traditional reading of Kant on this point, I will in this thesis present his realm of right as normatively necessary to establish a concept of external freedom, a concept that, of course, is morally indispensable, but that nevertheless is attainable only from a legal perspective.

Consequently, Kant's concepts of *Recht* and legality are not to be subordinated to or deducted from his concept of morality as such. Rather, in the final formulation of his practical philosophy, I contend that legality and morality are on an equal level in his overall structural framework; in fact, the realm of right can even be seen to take on a primordial role on one key point, namely in the practical realisation of the moral law and of our normative obligations to each other. Crucially, neither this last point implies that right is ascribed only an instrumental value in the promotion and preservation of morality. Instead, as I will show in this thesis, right is not required primarily from the viewpoint of morality (which still is an autonomous concept within his practical philosophy), but from the perspective of freedom. Freedom necessitates a realm of right to guarantee its legitimate external exercise without recourse to morality *per se*, but merely with recourse to the necessity of acting freely in this world.

In other words, this dissertation about Kant's realm of right places much emphasis on his argument from freedom. One of the most constitutive arguments of this thesis, or indeed perhaps the most constitutive argument, will affirm that his philosophy of right is assigned the essential task of a normative grounding and of a factual delineation of our external exercise of

freedom. In what follows, I shall develop this and other related claims further, and proceed to argue against a traditional interpretation of his legal and political philosophy as one that can be developed on the basis of his moral philosophy *per se*. As a consequence, I suggest that we might have to reconsider both the internal structural framework of his practical philosophy and the internal relationship between morality and legality within this theoretical construct. This is an endeavour that, of course, goes far beyond the scope of this dissertation; I can here only hope to make a contribution to a process that I believe is already under way through the current renewed interest in Kant's works on legal and political philosophy.

In the rest of the introduction, I will a) present a brief overview of the subject topic of my thesis. Through this presentation, I shall also provide a very rough sketch of the chief line of argument that I am going to pursue in the main parts of the work. I shall then b) make some reflections on the process of approaching both Kant's own text corpus and the vast amount of secondary literature on the subject. Hopefully, this can provide some reasons for the selection of works that to varying degrees are employed in my ensuing investigation. Finally, I will try to clarify my use and understanding of some of Kant's key terms.

a) Kant's realm of right: an overview

The aim of this dissertation is to present an extensive account of Kant's philosophy of right. I shall argue against what I consider to be a traditional reading of his legal and political theory, as exemplified above by Rawls, according to which his position can be developed on the basis of primarily moral (or moral-ethical) works such as the *Grundlegung* and the second *Critique*. As I intend to demonstrate, a common mistake in such an interpretation of Kant's approach to matters of politics and law is to merely apply moral principles and insights in these works to *de facto* political practice and institutions as a form of moral restrictions on positive law. The interpretation that I set out to defend seeks both to reveal why such a reading is normatively flawed (and highly dangerous to the theory and practice of the rule of law) and to establish his legal and political philosophy as a theory in its own right, so to speak. I shall contend that it is a theory which is not chiefly developed from his distinctively moral deliberations of the said works; rather, it is one that is developed and grounded to no lesser extent in a certain natural rights tradition. I assert that Kant can be seen to explicitly build on as well as to distance himself from different strands within Enlightenment political thought.

It is not only time that separates us from that great tradition. As Reinhard Brandt and others have pointed out, we are highly inclined today to forget that the political thought of the seventeenth and the eighteenth centuries was formulated in a distinctively legal context, not in

a moral one. The political thinkers of the Enlightenment were not only highly knowledgeable of law and jurisprudence – many of them were even practising lawyers (cf. Brandt 1981a) – but they also addressed political matters from an explicitly legal perspective.[2] It is safe to say that later traditions in political theory have departed from that line of thought. One can perhaps gloss over the fact that few contemporary scholars have studied at the faculties of both philosophy and law (if indeed at either of them); much more seriously, in a time when national and international law and politics are undergoing great transformations in an ever more interdependent world community, the realm of right is increasingly being approached both in theory and in practice as if it merely were a continuation of morality by other means.

In contradistinction to such a morally and legally despotic stance, one of many critical insights of the philosophers of the Enlightenment in general – and Kant in particular – is the necessity of having clear and discernible criteria for a differentiation between morality and legality. Only in this way is it possible to prevent one of the two realms from intruding upon the territory of the other and thereby undermining or even negating the central concepts and principles established there. Unlike a common view both in contemporary Kant literature and in standard political theory, I shall argue that it is neither possible nor desirable to deduce the concept of legality in a straight line from the concept of morality. Although Kant seems to follow precisely this latter strategy in his early works on practical philosophy, this can, as he himself eventually realised, never establish a coherent or autonomous realm of right.

This will be the topic of the prologue, which follows directly after the introduction. I shall argue there that Kant's realm of right and its crucial concept of *Recht* simply cannot be consistently developed or grounded in his moral philosophy of the 1780s (that is, neither in the *Grundlegung* nor in the second *Critique*). Through an examination of central constituents of these works (the moral law and the two concepts of obligation and freedom), I will contend that although the relationship between morality and legality can be seen to be hierarchical in these writings, Kant is not yet in a position to deduce the latter concept of legality from the former. Further clues with regard to his understanding of this concept of *Recht,* and thus also of his realm of right, are rather to be found in his limited discussions of natural right, although these too remain inconclusive in his early publications on practical philosophy.

[2] Likewise, Kersting and Maus have underlined this vital aspect, which is readily apparent already from the titles of the most important works of the Enlightenment philosophers of right: "Montesquieu nennt sein Hauptwerk (...) 'Vom Geist der Gesetze', Rousseau kennzeichnet seinen *Contrat Social* im Untertitel sehr zutreffend als eine Untersuchung der 'Principes du droit politique' (der Prinzipien des Verfassungsrechts), die politische Theorie Kants findet sich in der 'Rechtslehre', diejenige Hegels in der 'Rechtsphilosophie', diejenige Fichtes vor allem in 'Grundlage des Naturrechts' usw. usw." (Maus 2006: 81). (This passage is also quoted by Eberl (2008: 36), who correctly adds that this aspect "gerät heute in Vergessenheit".)

With Kersting. Langer, Maus, and a growing number of scholars, I will argue in the first part of the dissertation that the final formulation of Kant's realm of right finds its one and only consistent answer in the *Rechtslehre*,[3] which constitutes the first half of his long awaited and final major text on practical philosophy, the *Metaphysik der Sitten* (1797). Before the last couple of decades, few Kant scholars devoted sufficient attention to this work,[4] although, as I aim to show, it is evident that an extensive and systematic exposition of his legal and political philosophy can be developed only on the basis of this writing.[5]

First, I shall discuss how Kant conceives of the internal relationship between morality and legality in the important introductory passages to the *Metaphysik der Sitten* in general, and to the *Rechtslehre* in particular. I argue that whereas at an earlier stage it was impossible to interpret the relationship between the two concepts as anything but hierarchical, they are in the last work assigned to two different and theoretically non-hierarchical domains: the realm of right and the realm of virtue. Above these, there is still a categorical moral imperative, but this cannot possibly be identical with all of the formulations of the categorical imperative that were listed in the *Grundlegung*. Crucially, I shall contend that the reason for this changed theoretical structure in his practical philosophy can be found in the inability of morality *per se* to ground a concept of freedom in human beings' external relations. Accordingly, it becomes necessary for Kant to establish an autonomous philosophy of right (that in one specific sense can be said to be amoral), both in order to give objective practical reality to freedom in our intersubjective relations and to provide each of us with a personal sphere that further enables us to act morally in this world.

The innate right to freedom thus becomes the natural point of departure in Kant's legal philosophy. In the discussion of private right to which he next turns, he applies this right to external objects in the world. A private, exclusive use of objects is not only required in order to prevent notions of, say, the greater moral good from allowing other individuals to intervene in one's personal realm and belongings; it is also strictly necessary in order to exercise one's freedom in a rightful manner. Kant convincingly argues that without a private right to external objects, I simply cannot act in this world without being dependent on the moral beneficence

[3] I will throughout this thesis refer to the first part of the *Metaphysik der Sitten* as the *Rechtslehre*. (The *Doctrine of Right* is the common English translation of the title.) The full original title is *Metaphysische Anfangsgründe der Rechtslehre.* It was first published, together with the general introduction, in January 1797. The second part on ethics, the *Tugendlehre* (in short), or *Doctrine of Virtue*, was then published in August of the same year.
[4] One honourable exception is the German philosopher Julius Ebbinghaus (1885-1981).
[5] Bernd Ludwig (2005 [1988]) has argued that some sections of the original work are placed in the wrong order. Accordingly, he has proposed a rearrangement of parts of the text which on most points is commonly accepted by Kant scholars today. I will return both to his rearrangement and to his interpretation of the *Rechtslehre* below.

of others; the right to private ownership and personal belongings must thus be presupposed in order for me to be an independently (and morally) acting human being in any society.[6]

However, this does not imply that Kant's realm of right is an uncritical defence of free-market capitalism. Contrary to the interpretation suggested by B. Sharon Byrd & Joachim Hruschka (2010), the *Rechtslehre* does not present some kind of blueprint for one particular economic system; it 'merely' presents what he considers to be the pure form of our possible relations of right. These are, for Kant, the individual human being's innate right to freedom (qua moral person with an inalienable dignity or *Würde*), the individuals' rights vis-à-vis each other (i.e., private right), and the specific rights inherent to the condition and the authority of public right (e.g. the rights and duties of the state). Kant's aim is certainly not to advocate a particular and contingently developed economic order, but rather to answer the question: what are the metaphysical first principles of right, that is to say: what is the structural framework of juridical rights that can be recognised by all rational beings as valid *a priori*?

Not only the differentiation between morality and legality is crucial to Kant here; the equally strict necessity of a distinction between philosophy and politics is likewise absolutely vital. This distinction prevents the mere application of theoretical legal principles (and even procedures) to actual political practice from being a possible rightful course of action. Kant's evidently anti-paternalistic position is so consistently maintained in the public right part that not even the final end of his *Rechtslehre* sections on state law, the realisation of a republican constitution, can be rightfully established without an actual consent and declaration of public will by the people (cf. 6:340).[7] In the last chapter of part I (on public right and its structures), I shall argue that Kant's concept of *Staatsrecht* lays the foundation for a modern rule of law that is also inherently democratic. This is certainly a minority position in contemporary Kant scholarship, but through a closer investigation of the relevant sections, the effort will be made to show that autonomy and (public) self-legislation are indispensable not only to Kant's moral philosophy, but also to his philosophy of right. My claim in this regard stands in diametrical opposition to the conclusion of a Kant scholar like Katrin Flikschuh: "Autonomy is irrelevant

[6] He proceeds to reduce the number of possible objects that one can add to one's private realm to three – the right to things, the right to the performance of certain actions, and the right of members of the household. The latter two categories authorise a specific rights claim to another person, whose innate right nevertheless cannot be violated. Hence, certain contracts must be made to retain the dignity (*Würde*) of the person(s) involved (e.g., wage labour, not slave contracts; marriage, not concubinage or bigamy). I will return to the different lines of argument below.

[7] Kant references and quotations are from the German *Akademieausgabe* throughout (volume:page), although italicisation and orthography mainly follow the more recently updated Wilhelm Weischedel *Werkausgabe* edition. Excerpts from Mary Gregor's English translation of his practical philosophy are also used where appropriate, cf. Kant (2009).

to Kant's philosophy of right, which is a morality of public law-giving, not of self-legislation" (Flikschuh 2009: 424).

I believe it can be established beyond doubt that Kant in his legal framework assigns a considerable role to the public deliberations and autonomy of the citizens – in fact, the united legislative will of the people is for Kant the true sovereign in the state. This will can also be realised in actual political practice through the exercise of popular sovereignty under the rule of law of separated state authorities. Accordingly, his philosophy of right strongly resembles the position taken by a contemporary Kantian such as Jürgen Habermas (1998), who argues that there is a close internal relationship between democracy and the legitimate rule of law: the subjects of law must also be the authors of exactly the same laws. On this view, the task of legal philosophy is not to establish certain principles that lead to specific outcomes, but rather to justify and delineate the formal procedures of rightful decision-making, so that citizens can exercise both their private and their public autonomy according to universal laws of freedom.

This position, that I believe Kant largely shares with Habermas, rejects all technocratic or instrumental views of good governance as the primary concern of legal and political theory. Applying this to the above scholars, I contend that Flikschuh and Byrd & Hruschka overlook the central tenets of Kant's take on public right. Ultimately, Flikschuh presents a paternalistic reading of Kant's *Rechtslehre* that is difficult to square with the original text, whereas Byrd & Hruschka clearly overstretch the argument of the private right part to give the *bourgeois* the upper hand on the *citoyen*, even in political matters. Against at least the latter position, it must be upheld that the rule of law is not there only to guarantee the private rights of the individual. In this connection, Arthur Ripstein has in his 2009 analysis of Kant's legal philosophy shown how the private individuals simply cannot exercise their freedom without intruding upon the realm of others' freedom: the three public authorities of legislative, executive, and judiciary are therefore required not to soften fallacies relating to the human condition (cf. a Lockean or even a Kantian warped wood argument); instead, they are necessary to overcome inherent structural defects of the normatively speaking indefensible state of nature.

Accordingly, Kant's philosophy of right is not a call for the immediate implementation of certain juridical principles, political or economic systems, or even individual human rights; instead, it is a clarification of the only legal framework within which different rights claims to external freedom can be mediated and settled in a perfectly rightful manner. He maintains that a realisation of this legal system cannot come about as a revolution of the citizens' minds, nor through popular revolt. Rather, the state and the individuals are for Kant normatively bound to a legal reform according to principles, to translate the title of Langer's important book on the

topic (cf. Langer 1986). Consequently, Kant's legal philosophy is a complete rejection of the totalitarian elements in any idea one might entertain of pure justice, or (which amounts to the same thing) of an immediate implementation of right. In his view, politics and justice are not by any means something to be decided or governed by a philosopher king; they are evidently reserved for the union of autonomous citizens to deliberate and decide on in their exercise of a distinctively public use of reason, which serves precisely as the medium through which public justice can be realised. On this reading, politics and justice, as such, must necessarily remain an unfinished project; unlike Kant's legal framework and rights, they cannot be delineated once and for all.

The realm of right is, however, not fully delineated by the theoretical establishment of the principles of state law. In part II of the dissertation, I move on to Kant's discussion of the rule of law beyond the state and the equally strict necessity for a rightful exercise of external freedom. Freedom is simply not to be had without the inclusion of a third dimension of public right, cosmopolitan law (*Weltbürgerrecht*), which must complement the inter-state legal order of *Völkerrecht* and complete the threefold legal framework. The two ideas and final ends of his two dimensions of international law (and therefore also of the entire *Rechtslehre*) are thus synonymous with the practical realisation of, respectively, perpetual peace (i.e., *Völkerrecht*) and cosmopolitan law (i.e., *Weltbürgerrecht*).

The influence of these two concepts in contemporary debates on international relations and global justice can hardly be overestimated. Kant's theory of peace and his inclusion of the concept of the cosmopolitan *Weltbürger* with inalienable human rights all across the world are standard points of references in almost all literature on the subjects. Nevertheless, I argue that few have thoroughly examined or even addressed the apparently mutually exclusive character of his two final dimensions of international law. In my exploration of his rule of law beyond the state, I present the argument that whereas inter-state law seeks to guarantee the principle of non-intervention and thereby outlaw war, cosmopolitan law seeks to guarantee worldwide individual human rights despite the sovereignty of states which the former dimension sets out to defend. This apparently antithetical position has to be solved and is another key question which has to be answered in any investigation of the international domain in Kant.

In my endeavour to do so, I shall argue against the increasingly common stance which relativises the necessity either of legal institutions to mediate in international disputes about rights or of the principle of non-intervention as a fundamental principle of international law. There is today a common tendency to interpret Kant's threefold legal framework of state law, inter-state law, and cosmopolitan law in a clearly hierarchical manner. Accordingly, one holds

that worldwide human rights or even peace can and, in some cases, should be realised through warfare (e.g. Tesón 1998; Byrd & Hruschka 2008; 2010). A central claim in this thesis is that such a view is a serious misunderstanding of Kant's position and can as a universal maxim of actual politics only lead to the peace of the graveyard that he warned against (cf. 8:357).

On my suggested interpretation of Kant's international juridical framework, both state sovereignty and worldwide human rights are intrinsically linked to the concept of freedom in three non-hierarchical dimensions of public right; they do not stand in some form of mutually exclusive relationship. Indeed, the two principles of *Völkerrecht* (i.e., the internal sovereignty of states) and *Weltbürgerrecht* (i.e., worldwide human rights) presuppose and evidently build on each other; his peace project cannot be realised without a formal legal recognition of both dimensions. In clear contrast to a common trend in contemporary political theory and practice, according to which it is possible to seek peace and human rights by means of war, Kant insists on the strict necessity of a threefold legal structure and of ongoing processes of international juridical institutionalisation to make an end to all wars. War is entirely extrinsic to the concept of right; it is an unrightful course of conduct that goes beyond the possible jurisdiction of each sovereign state.

Accordingly, I shall affirm that no aspect of Kant's three-dimensional realm of right can be ignored on the way to its practical realisation. In this dissertation, I shall endorse his claim that the establishment of rightful relations worldwide is not only normatively necessary; it is also perfectly possible to realise this, in theory as well as in practice. As for Kant, the point of both departure and arrival will be the following:

> – Das Postulat also, was allen folgenden Artikeln zum Grunde liegt, ist: Alle Menschen, die auf einander wechselseitig einfließen können, müssen zu irgend einer bürgerlichen Verfassung gehören. Alle rechtliche Verfassung aber ist, was die Personen betrifft, die darin stehen, 1) die nach dem *Staatsbürgerrecht* der Menschen in einem Volke (ius civitatis), 2) nach dem *Völkerrecht* der Staaten in Verhältnis gegen einander (ius gentium), 3) die nach dem *Weltbürgerrecht*, so fern Menschen und Staaten, in äußerem auf einander einfließendem Verhältnis stehend, als Bürger eines allgemeinen Menschenstaats anzusehen sind (ius cosmopoliticum). Diese Einteilung ist nicht willkürlich, sondern notwendig in Beziehung auf die Idee vom ewigen Frieden (8:349).

It is my intention to highlight the main constituents in Kant's works on philosophy of right, and thereby provide insight into both the underlying elements of international law and justice as well as the Kantian approach to these. With regard to the present state of affairs in international politics, this question of how to construe a rightful institutionalisation of an even more strongly interdependent world community is, obviously, of no small concern.

I hope, during the course of my presentation, to justify these and other claims that seek to show that Kant establishes a coherent and autonomous philosophy of right to which we must pay due attention not only in our discussion of his legal and political philosophy, but also of his moral theory. I believe that none of this will in any way lessen his importance in any of these two fields; rather, the dissertation sets out to underpin a basic starting point here, namely that Kant's realm of right is one of the most prominent and influential theories of the modern rule of law both within and beyond the jurisdiction of each sovereign state. Moreover, as I will contend, it is simply impossible to attain the realm of right and the crucial concept of external freedom from an exclusively moral perspective.

b) Approaching the text corpus: method, literature, and terminology

In order to present an extensive and systematic account of Kant's realm of right, I will attempt to make a rational reconstruction of his legal and political philosophy. This effort presupposes further clarification of its place within his overall philosophical framework. Kant himself was, as we know, a highly methodical and careful thinker, who, accordingly, put much emphasis on a correct and exhaustive delineation of his theoretical structure. During the course of my investigation, I will therefore pay particular attention to his various differentiations within the philosophical system which he proposes. A first, absolutely fundamental distinction is the one Kant draws between laws of nature and laws of freedom. (This, of course, corresponds to his distinction between his theoretical or speculative and his practical philosophy, cf. the first and the second *Critique*, respectively.) Only the laws of freedom are the objects of his normative practical philosophy, under which the realms of both morality and right sort.

Likewise, I will have to follow closely Kant's further differentiations within the realm of practical philosophy. One of my principal claims in this thesis is that the position of *Recht* and the concept of legality in Kant's overall framework have not been adequately understood in a significant part of the secondary literature, both past and present. As I have already said, I shall argue here that the internal relationship between what we today commonly call his moral and his legal philosophy is more complex than – and certainly not as hierarchical as – what I shall refer to as a traditional reading of Kant's practical philosophy suggests. Instead, the two basic concepts of morality and legality undergo critical changes during his writings, changes that we have to consider when we discuss both his realms of normative practical philosophy. In my view, it can be shown that Kant's philosophy of right takes on a more independent and – correctly understood – amoral role vis-à-vis his specifically moral (or moral-ethical) theory,

thanks to his rather late realisation of the necessity of an autonomous realm of right, and to the impossibility of establishing this from a purely moral perspective.

Therefore, I suggest an interpretation of the architectonics of Kant's legal philosophy in particular (and, in much cruder terms, of his practical philosophy in general) that takes his various differentiations within his overall theoretical framework into sufficient consideration. Naturally, only a thorough reading of the works and passages that are relevant to this purpose can hope to make any substantial contribution to Kant scholarship. By making his argument from freedom the pivotal point of the dissertation, my reconstruction of his system of rational right has a particular focus which hopefully will provide the investigation both with a specific end that is to be reached (i.e., the clarification of how external freedom can be realised in all three dimensions of public right) and with an actuality that I shall suggest makes it highly relevant to contemporary debates on all matters of right and justice, both within and beyond the legal jurisdiction of each separate state.

Kant's emphasis on freedom as the main (and in one sense only) constituent of the rule of law makes for deeply interesting reading in an increasingly dissonant and dispersed public political sphere. At a time when it seems citizens, politicians, scholars, and even bureaucrats and judges overbid each other in their attempts to justify gradually more particularistic claims to right and justice, Kant's legal argument from freedom according to universal laws remains, in my view, a tremendous theoretical achievement which harbours a very helpful corrective to current malpractice. This is not to say that it provides us with certain substantive norms that generate specific policies that have to be endorsed. Rather, his distinction between philosophy and politics emphasises that there is a difference in principle between what the philosopher and the political being can rightfully do.

In my view, the purpose of Kant's philosophy of right is therefore to clarify the legal conditions under which freedom and a rightful rule of law can be realised in political practice, while it remains clearly the task of autonomous political beings to deliberate this freedom and to decide upon it in unison as a matter of political practice. Contrary to the view of scholars who forget this last aspect, Kant's realm of right and his argument from freedom are taken up and completed not by the philosopher king, but by the citizens who act in concert under the rule of law. On his line of argument, it is evidently freedom – not morality, ethics, justice, the greater moral good, virtuous actions, etc. – that should stand at the centre of any theory of law and/or politics. I claim that the recognition of his normative arguments for these clarifications will not only help us in our understanding of his philosophy of right; it will also aid both the private and the public dimensions of our inalienable exercise of our innate right to freedom.

These first delineations of the object of study will significantly help us narrow down the terrain that has to be covered by these investigations. For one thing, we do not have to address Kant's theoretical philosophy as such; another aspect is that his contributions to, for instance, anthropology and religion, however important the insights he reaches in these fields might be to a certain political topic or climate, also fall outside of the realm of right which I attempt to correctly delineate. Kant had made it explicitly clear already in the *Grundlegung* that anthropology is the empirical side of practical philosophy, whereas *Sitten* or *Moral* would be the concept which he uses for its purely rational side (cf. 4:388). So, too, in the *Metaphysik der Sitten*: the realm of right, as corresponding to the first half of the work, containing what he calls the metaphysical first principles of a doctrine of right, is concerned with the question whether there is a purely rational side to *Recht*, one that, of course, is connected to this world, but that at the same time can be kept conceptually apart from its merely contingent factors.

This approach has (to put it mildly) not always been the case with studies that have set out to explore the political dimension in Kant's works. As I have already emphasised and as I shall maintain in the dissertation, any interpretation of his legal and political philosophy that does not centre on the *Rechtslehre* is doomed to fail. Above all, I shall argue against what I consider to be the traditional (or standard) reading of Kant in this regard, according to which it is possible to derive his position on matters of politics and law from the primarily moral (or moral-ethical) writings of the *Grundlegung* and the second *Critique*, with the main tenets of the peace essay employed to underscore such an interpretation. One important objective of this project is to make it clear why such a reading of Kant is flawed.

Two other lines of attempts to reconstruct Kant's system of rights are also found in the secondary literature, although these are not as common as the first. Although I will not argue more specifically against these strands in the main parts of the thesis, I think it will become equally evident, for precisely the same reasons, why an interpretation based primarily on pre-critical works or on the third *Critique* cannot succeed. Over the years, this last approach to his political theory has not had as many proponents as the so-called traditional moral reading; but it is not without influence. For instance, it is a pity that an otherwise attentive thinker and consummately political being such as Hannah Arendt developed her account of Kant's theory of law and politics on the basis of that work, rather than on the *Rechtslehre* (cf. Arendt 1985 [1970]).[8] Good judgement is, of course, indispensable to the quality of the evaluations that have to be made by the citizens in matters of politics and by the jury and the judge in matters

[8] In fact, Arendt explicitly endorses Arthur Schopenhauer's infamous and ill-conceived criticism that one could admit only with reluctance that the otherwise great philosopher had written the *Rechtslehre* (cf. ibid.: 18).

of law. Nonetheless, as I aim to show with my investigation, this is secondary, in Kant's view, to the question of delineating a legal philosophy that clarifies the only conditions under which good judgment can be exercised in a rightful manner, and this clarification, in turn, is found only in the final formulation of Kant's realm of right, namely in the *Rechtslehre* of 1797.

This last criticism is also applicable to the extremely rare attempt to give an exhaustive account of Kant's legal and political philosophy solely on the basis of his *Nachlass* notes that stem from the pre-critical period. Through a detailed investigation of the unpublished writings traceable to the years 1762-1780, Werner Busch holds in his 1979 analysis of *Die Entstehung der kritischen Rechtsphilosophie Kants* that this theory is essentially completed by the end of the 1770s, including its differentiation from the concept of morality. My thesis has been aided by this work and I share parts of its general outlook on Kant's realm of right. Nevertheless, I am convinced that since the principle of right, the deductions of the concepts of legality, property, sovereignty, the separation of powers, and other key principles do not find their final formulations in any published work until the *Metaphysik der Sitten*, it is clearly premature and frankly impossible to conclude as Busch does. I shall make passing references to his writing along the way, but I am certain that it goes almost without saying that Kant did not have his entire system of rights delineated before the publication of the first *Critique*.[9]

Consequently, it is the *Rechtslehre* that takes centre stage in this dissertation. The two main parts of the thesis are devoted primarily to an investigation of the main constituents of the sixty-two sections of the first half of the *Metaphysik der Sitten*, along with its introduction and conclusion. Of course, only a close and attentive reading of the various sections and of the work as a whole, aided by a minor selection of the vast amount of secondary literature that has been written on the topic over the years,[10] can have any hopes of presenting a systematic, let alone exhaustive account of Kant's text. I shall argue that the *Rechtslehre* and its various parts, chapters, sections, and paragraphs must be read and interpreted in light of each other: it

[9] Admittedly, as is well known, Kant wrote in a letter to Herder as early as 1767 that he hoped to complete his "Metaphysik der Sitten" (10:74) by 1770. Nevertheless, many years would pass before Kant had constructed his entire system within which his metaphysics of morals could find its place; and, as I aim to show in what follows, there are also a great number of legal concepts and principles that he develops only in his mature period.

[10] Obviously, several other commentaries and interpretations that also address the topics that are to be discussed here could have been included. I have in general tried to employ the secondary literature on Kant that I believe best presents thorough, systematic accounts of his position, and that also stands out in the sense that it displays the multitude of (often greatly diverging) interpretations of his realm of right. Also, I have largely avoided articles that do not limit themselves to discussions of quite specific passages in Kant's writings. Books that do not primarily relate to his works, but rather set out to defend or attack a certain 'Kantian' position or school of thought within contemporary debates have been likewise exempted.

is impossible to give a correct account of the work without a proper understanding of how its constituents interact and relate to one another.[11]

However, this is by no means to say that other publications or, for that matter, Kant's unpublished *Nachlass* notes[12] are irrelevant in this regard. On the contrary, I will turn to these whenever I hold them to be relevant, not only in order to emphasise the gradual development within Kant's own conception of the realm of right, but also to complement his final position, which, naturally, is far from constituting a clean break with all his earlier deliberations on matters of practical rationality and normative principles.[13] Obviously, I do not claim in this thesis that all his expositions in the *Rechtslehre* are brand new or stand in distinct opposition to earlier works. Rather, the claim is only that there are a number of noteworthy developments which take place during the period when he writes his practical-philosophical texts and which, at least with regard to the realm of right, culminate and find their final and most consistent formulations in this regrettably often overlooked text.

This last remark may, however, require some qualification. A growing number of Kant scholars today agree with my basic assumption that his philosophy of right can be developed only on the basis of the *Rechtslehre*. My dissertation has without doubt benefited greatly from a number of significant contributions to secondary literature that they have published over the last two or three decades. The most relevant commentators in this regard have already been mentioned: during the course of this presentation, I will return to important and fairly recent studies of Kant's philosophy of right by scholars such as Wolfgang Kersting, Claudia Langer, Ingeborg Maus, Reinhard Brandt, Bernd Ludwig, Jürgen Habermas, and Arthur Ripstein, all of whom pay particular attention to the peculiarities of Kant's legal philosophy as compared

[11] Ripstein (2009) has suggested how different structures in the private right part relate to and find their correspondences in the part on public right; I shall return to this below. Likewise, I shall underline in part II how the analogies and disanalogies between the national and the international states of nature affect the legal structure that Kant ultimately proposes for the two different levels of law. More on these points below.

[12] Naturally, the *Nachlass* presents the student of Kant's writings with the greatest number of problems in terms of an adequate understanding and interpretation. For one thing, the *Nachlass* notes were not published and therefore cannot be taken – at least not without further argument – as his final or 'official' position on any topic. Another aspect concerns the question how these should be evaluated and possibly be employed in an exploration such as mine, which sets out to point to a certain development within his works (insofar as a correct time of writing cannot be established). Yet another aspect that presents us with great difficulties revolves around the issue of censorship (which I will return to in some further detail below). As I will show, some of the remarks that Kant makes in the *Nachlass* with regard to legal and political matters are more radical than what appears (and perhaps could appear) in his printed works. Is this difference a result of a (legitimate) fear of external censorship, or of a change of heart, or does it have yet another reason? It is, of course, impossible to arrive at a conclusive answer to these and other, related questions. Nonetheless, I shall employ the *Nachlass* notes (and his other, printed works) insofar as they in my view can make a certain interpretation of Kant's realm of right more or less plausible. I shall provide my reasons for including various passages when I present the respective arguments.

[13] That, however, is a central claim in another recent commentary on the *Rechtslehre*; earlier works on political and legal matters are on this view "useful (...) only to a limited extent" (cf. Byrd & Hruschka 2010: 13). I have earlier taken issue with their work in a review (Lundestad 2012), and shall return to my main objections later.

to his moral philosophy as such. I shall try to employ their (and others') contributions, to limit the sheer magnitude of the subject that is to be discussed in this thesis by including references to their works; I will also actively involve their various, and often opposing lines of argument, in order to make certain interpretations of the main constituents of Kant's realm of right more or less plausible.

Another common denominator of the above works is their strong reluctance to endorse one specific political view as inherent to Kant's theory. Whereas some scholars on his legal and political philosophy are still prone to turn his position into a defence of one particular political or even economic order, I shall maintain, in accordance with a main line of thought in the contributions referred to above, that this falls outside Kant's scope. Rather, his project is 'merely' to delineate the basic and, in his terms, metaphysical principles of *Recht*. These principles are, in his view, principles of rational right that delineate the formal features of the end of the civil condition as such – i.e., a pure republic, "einer reinen Republik" (6:340). As I shall argue, they do not imply particular political measures or specific economic policies; they 'only' designate the rightful form of human interaction that both preserves and promotes the innate right of all individuals to the exercise of one's freedom that can be united with the identical freedom of everyone else according to a universal law.

As I have already referred to above, it is strange to see contemporary scholars such as Byrd & Hruschka (2010) argue that Kant's realm of right allows only one specific free-market understanding of economic policies. According to them, no welfare state system is compatible with his condition of public right (cf. ibid.: 42),[14] in which the state exists only in order to safeguard the private rights of the individuals; indeed, the realm of cosmopolitan law is quite explicitly nothing but "a perfect World Trade Organization" (ibid.: 7). (One can even "wage war" (ibid.: 195) in order to realise it.) I shall argue that this reading of Kant's *Rechtslehre* is profoundly wrong as it stands, and that even if one somehow could establish that Kant was an ardent advocate of a certain version of *laissez-faire* liberalism in both economic and political matters – two realms that he regards as conceptual opposites (see below) – this does not have the implications for the legal domain that Byrd & Hruschka infer. Instead, Kant sets out in the *Rechtslehre* to exclude all merely contingently developed or determined aspects of the human condition (including economic models) from the realm of right as such; evidently, he does not

[14] In contradistinction to this view, I shall contend that a social welfare system not only is possible in Kant's state through a positing of statutory laws, but that it also is included in General Remark C as an *a priori* state duty to provide the most necessary means of subsistence to all its subjects (cf. 6:325 ff. and below). The crucial point is that this Kantian individual right does not derive from mere moral-ethical considerations, but follows from the one innate right of human beings, namely freedom (understood as the independence from the arbitrary choice of others).

paternalistically propose one specific, historically developed economic system as a blueprint for all later societies, let alone for every condition of public right.

Accordingly, the question whether Kant's realm of right supports a certain political or economic order or ideology seems largely irrelevant, however much it is debated in secondary literature. Not only would that contradict the purpose and the structure of his actual reflections on the subject topic, as I shall argue; it also reveals a poor understanding of any hermeneutical principles that are applied in the process of interpreting the original works. As Hans-Georg Gadamer and others correctly point out, every age and every person will read and understand a text in its own way and on the basis of its own presuppositions (cf. Gadamer 1990 [1960]). Although that insight, of course, has a substantial bearing on how much this dissertation itself can expect in terms of establishing more precisely what Kant's realm of right is, it is certainly applicable in no small amount to those commentators who try to ground a specific political or economic stance as valid – either, as a scholar, within his legal framework and/or, as a citizen, in our public sphere here and now – simply by referring to a certain admiration or rejection on Kant's part with regard to specific political or economic currents in his own time.

In contradistinction to such a poor understanding of Kant and/or hermeneutics, I shall propose a reading of Kant which neither limits him to a certain historical time and place, nor uncritically attempts to re-interpret or re-adapt him to our present society. Through my critical reconstruction of his system of rational right, I seek to assess his freedom argument: I suggest how, on certain counts, it clearly deals with contingent challenges in late eighteenth-century Prussia and Europe, but its general outline nevertheless addresses political and legal questions that are of considerable relevance to our present state of affairs too. Of course, his legal and political arguments cannot, as such, be implemented directly in our contemporary political practice, but that was never something Kant himself advocated either for his own time or for posterity.

Instead, as Kant argues, we must take the actual state of affairs as a mere factual point of departure, which we then expose to various normative claims in order to cause a movement from fact to norms. In the realm of right, this movement takes the shape of a reform according to republican principles. These are not located in a domain that is beyond rational debate or empirical facts, but are rather applied to the actual political practice of our contemporary society. In line with his own Enlightenment emphasis on the strict necessity of subjecting all claims to truth and justice to a rational, public critique (cf. 4:9), the validity of his reflections (and of mine) can be assessed only in a public sphere that is obligated to rational discourse. In full correspondence with Gadamer's insight that no text or interpretation can transcend the

contingency of the time and place in which it was formulated and read, Kant's argument from freedom can make sense only in a political community that puts both the argument and itself to the test, and asks what right and freedom mean and entail in actual political practice.[15]

Accordingly, I argue that the *Rechtslehre* cannot be taken as a contribution to political or economic theory as such, still less to ideology or to the history of ideas. Rather, it is an attempt to found an independent and autonomous legal theory in its own right, a theory that attempts to avoid intertwinement with other academic disciplines or with merely contingently developed features of his (or our) contemporary society. Upon reading his works, one cannot fail to notice his endeavours to establish clear and discernible criteria for a correct drawing of the boundary lines between the various theoretical fields of his overall architectonic structure. Kant's objective in his legal philosophy is explicitly to establish a "reine Rechtslehre" (6:375) which attempts to avoid every presupposition of a merely contingent nature. (Consequently, it is something of a paradox that Kant is so often taken by his interpreters as the advocate of one specific political or even economic order.) Whether he succeeds in his objective is, of course, another question, and one which has to be held conceptually apart from political or economic matters as such.

Instead, I shall attempt to present here a sketch of Kant's legal philosophy, which lays the foundations for a rightful deliberation on, and distribution of, the proper allocation of such goods. I shall also consider how and why this final formulation of his realm of right evidently differs from his earlier reflections in this regard. This is not to say that these endeavours serve only an academic purpose. As I indicated above, I do not think that specific policies (political or economic) should or even can be derived from his theory. Nevertheless, in line with Kant's overall approach, I believe his works say something about what freedom is, what it demands of us, and what it entails for current political practice under the rule of law, both within and beyond each separate state. Again, this should not lead to specific state policies, but Kant's argument from freedom nonetheless contributes to a clarification and further understanding of the preconditions and principles of rightful human interaction. By discussing his approach to the realm of right, we also address a global public sphere that is already concerned with and immersed in these ongoing deliberations regarding the *res publica*.

In the process of presenting Kant's realm of right, I will not so much go into all details of his entire practical-philosophical argument as take a systematic approach to this attempted reconstruction of his theory and structure of rational right. It would, of course, go far beyond

[15] Moving somewhat beyond Gadamer, however, I will contend that my systematic reconstruction of Kant's argument from freedom and of the three dimensions of rational right has a clear normative purpose.

the possible scope of a project of these dimensions to adequately address all the issues that are relevant to the former purpose. I can only give an overview of these details and, occasionally, note references to other works that could provide the interested reader with further insights. The objective of this dissertation lies rather in an exegesis of the various text passages that are related to its subject topic. Although an in-depth presentation of his normative justification of all aspects that are related to the realm of right cannot be provided, I can hopefully still give a thorough account of both the development and the final formulation of his position.

Accordingly, the form of my presentation will resemble an extensive commentary on Kant's main writings on legal and political philosophy, and on the *Rechtslehre* in particular. This approach is dominant above all in the two main parts of the thesis, where I discuss in specific detail the main lines of argument in the *Rechtslehre*. But although this means that the dissertation is quite similar in form to a commentary to the *Rechtslehre* which was published after my work on this project had started, namely the book by Byrd & Hruschka to which I have referred above, my overall line of argument and conclusion have much more in common with another recent work on the same subject, namely Arthur Ripstein's *Force and Freedom*. Although I will relate my discussions of Kant's realm of right mainly to secondary literature from the contemporary German debate – since I hold that this is at present far more thorough than the corresponding Anglo-American debate – there will nevertheless be a particular focus on these two interpretations of Kant's *Rechtslehre*, and I shall present the reasons why I am deeply sceptical about the former reading and equally supportive of the latter, which – like this thesis – takes the innate right to freedom as its point of departure.

The dimension of freedom and a rightful, external use thereof in every human being's intersubjective relations is also one of the points where I hope this thesis can make the most significant contribution to Kant scholarship. I will argue that freedom, not morality, is the key concept of his practical philosophy, and that freedom gives us a much more promising starting point for our discussions and understanding of both his moral(-ethical) and his legal theory. Whereas the former field (and, consequently, the *Grundlegung*, the second *Critique*, and the *Tugendlehre*) seeks to ground an autonomous exercise of one's internal freedom according to the practical-rational principles of morality proper, the latter realm is concerned with a correct establishment and realisation of an autonomous exercise of one's external freedom, not of an external realisation of morality *per se*.

The novelty of Kant's approach in the *Rechtslehre*, which I hope to demonstrate in this dissertation, is that he shows there not only how this dimension of external freedom is to be established and realised in a perfectly rightful manner, but also that it is impossible to do so

from the former, exclusively moral perspective. On my suggested interpretation of the text,[16] we are well advised to re-consider its previously secondary status, and should include Kant's *Rechtslehre* in the pantheon both of his other important works on practical philosophy and of the all-time great contributions to legal and political theory.

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As a final point, let me offer some short remarks with regard to terminology and the overall structure of this thesis. A great number of terms and concepts have already been employed during these opening pages to convey the meaning of Kant's original formulations. Several phrases will be used interchangeably. I shall, for instance, refer to the theoretical field which he presents a final formulation of in the *Rechtslehre* both as his philosophy of right and as his legal and political philosophy.[17] Likewise, his three separate state institutions are referred to as so many authorities, branches of government, or powers, without there being intended any substantial difference in meaning between the various expressions. Obviously, I will strive to choose words that are as apt as can possibly be expected; at the same time, I must, in a few instances, slightly adapt my use of terms in order both to improve the flow of the text, and to take into account how some terms have been established as standard terminology in current secondary literature on Kant, although I do not always agree with all the choices that are made in that regard.[18]

The same applies, of course, to the aspect of translation. Unfortunately, my knowledge of and experience with the German language did not allow me to write this dissertation in the language in which it ought to have been written.[19] It is scarcely necessary to point out that the

[16] Earlier versions of passages in this dissertation (primarily located in part II) have been presented at various conferences and seminars at the universitites of Frankfurt, Darmstadt, Manchester, Oslo, and Trondheim. I am, of course, very grateful and indebted also to the discussants at these events.

[17] As the subtitle of the dissertation reveals, I will also refer to it simply as his legal philosophy. (However, as already has been indicated, I shall argue at one stage that Kant's legal and political philosophy cannot be regarded as a specifically political theory, at least not as this term is commonly used today.)

[18] I should, however, point out that many translated expressions clearly are ingenious and at times almost more to the point than Kant's initial wording. His accusation of certain natural rights proponents as "leidige Tröster" (8:355) becomes in Gregor's translation "sorry comforters", a rendition that might lose its original biblical reference (cf. Eberl & Niesen 2011: 360 f.), but which nevertheless, at least in my view, sits very well with the point that Kant is trying to make. On another note, I should also make clear that the title of this thesis features neither in the English secondary literature nor in the original writings. It is, obviously, a wordplay on the realm of ends (*Reich der Zwecke*) that Kant establishes as the highest good of moral philosophy (in a specific sense), but which has to be held conceptually apart from the highest good of his legal and political philosophy, to which I have given the name the realm of right. (This title would, in turn, not work well in a German translation, since *Reich* in a legal context often refers to a monarchy, which is not Kant's ideal state form or constitution.)

[19] All of Kant's works have, of course, been read in German, and I have as a general rule chosen to quote them in their original form. This might at times interrupt the flow of the text or frustrate the reader who is not familiar

transition from German to English brings with it even more problems than those that any interpretation which is formulated in the same language as the original texts encounters. For instance, one important term that does not easily translate into English is the concept of *Recht*, to which I already have referred. This crucial concept of Kant's philosophy of right has caused numerous problems for translators, commentators, and readers.

In the original German, Kant's concept of *Recht* refers both to a particular legal right (e.g. have a right (to something); *ein Recht haben*) and to the sum total of the conditions that have to be established in order to have a legal condition (cf. his own definition of *das Recht*, 6:229).[20] Translators and commentators have sought to convey the latter meaning in different manners and with different fortunes. Early translations would merely speak of 'justice', but if *Gerechtigkeit* and *Recht* do not immediately seem non-identical for Kant, it will be suggested below why 'justice' clearly is not a fitting translation. Others have tried to employ Right (with a capital R) to differentiate between the two possibilities of the German *Recht*; law has also been used. I will here, however, stick with the now common denotation 'right' (e.g. the realm of right (cf. *das Recht*)) and include a parenthesis or footnote if it should remain unclear what more precisely is meant.[21]

Another difficulty revolves around the use of English terms and expressions that have two separate meanings for Kant. 'Natural right' is one such example. In the introduction to the *Rechtslehre*, he makes an important and often ignored distinction between *Naturrecht* as a generic term for both private and public rational right and *natürliches Recht* as a specific term for the inherent (natural) private rights of man (cf. 6:242). Both these expressions find only the term 'natural right' in an English translation (as Gregor too renders them, cf. Kant (2009: 397)). I will attempt to clarify such (and other) problems when they appear, but already at this stage, I can point to certain problems that are bound to arise. Additionally, I shall also provide the original German term in parentheses when there can be doubt about the proper meaning of a word or expression (e.g. *Wille*/*Willkür*).

This last conceptual pair reveals yet another aspect that we have to be aware of when we approach the text corpus; some terms are given different meanings by Kant himself in the course of his writing career. When we compare his early with his more mature works, we

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with German; nevertheless, it is done in order to be as precise as possible in my references to and discussion of the original works. (Occasionally, I have pointed out where Gregor's standard translation is obviously incorrect.)

[20] This is today commonly known as the *Rechtsstaat*, which Kant primarily is after when employing the concept. Although not entirely identical, this corresponds to what most often is described in English as the rule of law.

[21] Obviously, the adjective *recht* (and *unrecht*) features repeatedly in Kant's texts; it, too, is translated as 'right' (and 'wrong'). Nevertheless, I believe that neither this should cause the reader any particular problems when reading the thesis. I will make comments in this regard only when that seems to be necessary.

realise that Kant employs *Wille* differently (and therefore also employs different distinctions between *Wille* and *Willkür*) in the *Grundlegung* and in the *Metaphysik der Sitten*; I return to this point below.

One last feature that has to be mentioned here is the role of censorship. Kant wrote his works, at least after the death of Frederick the Great in 1786 and certainly after the start of the French Revolution three years later, under a fairly strict censorship regime. Clearly, it would be pure speculation to try to establish how much this influenced his publications and perhaps also his thoughts. Hans Saner has underlined, in his consideration of whether state restrictions on freedom of thought and expression influenced Kant's peace essay (and writings in general, we can fairly assume), that there were three main 'neuralgic points' that the Prussian censors would react to: religious heresy; criticism of state law and administrative matters; as well as shrouded (that is, any) praise of the French Revolution, "denn der Jakobinerverdacht war das Gespenst, das im Lande umging" (Saner 2004: 47).

I will not offer an answer to the question whether this censorship regime led Kant to alter or postpone certain publications on legal and political matters (although, as I pointed out in a footnote above, some of his *Nachlass* comments are definitely more radical than what can be found in most of his published texts; but, again, this circumstance cannot be taken *per se* as proof of a more radical, 'official' Kantian stance). Instead, I fully endorse Saner's conclusion: "Niemand kann geradezu bemessen, welche Auswirkungen die Drohung der Zensur auf Kants Friedensschrift im einzelnen hatte. Die beste Hypothese ist, daß der Satz immer noch galt, den er viele Jahre zuvor (1766) an Mendelssohn geschrieben hatte: 'Zwar denke ich vieles mit der allerklarsten Überzeugung und zu meiner großen Zufriedenheit, was ich niemals den Mut haben werde zu sagen; niemals werde ich etwas sagen, was ich nicht denke' [10:69]" (ibid.).

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This dissertation has the following structure: it has two parts on, respectively, the rule of law within and beyond the state. These main parts are bracketed by a prologue and an epilogue, and are divided into chapters, subchapters, and, in a few instances, sections. As can be seen from the table of contents, the two parts are assigned Roman numerals; the chapters and subchapters have Arabic numerals; and the sections are listed according to the Latin alphabet. Hence, a reference to a passage in, for example, the section on the judicial authority in Kant, can be made by directing the reader's attention to section I.3.2.c).

Prologue: The position of *Recht* in Kant's earlier writings

To answer the question of how Kant constructs an overall legal structural framework that is to realise the innate right to freedom in external relations, we must first understand his concept of *Recht*. Although Kant is regarded as one of the founding fathers of modern rule of law both within and beyond the state, there has been great scholarly disagreement ever since his days on the position and justification of *Recht* in his works. Accordingly, an important task for this dissertation will be the attempt to clarify what he argues right is. Only in this manner can we grasp how it is related to his theoretical framework and the practical realisation of right in all three dimensions of public law. Crucial to this undertaking is my further argument that Kant's understanding of *Recht* can be seen to change during the course of his writing career and that this has to be taken into account when we discuss his legal philosophy.

The dimension of state law will be investigated in the first part of the thesis, while the discussion of the international legal order will be found in part II. These parts take Kant's expositions in the *Rechtslehre* of the *Metaphysik der Sitten* as their points of departure, since – as I aim to show – it is here that his final and most consistent articulation of the concept of *Recht* is developed. This, however, is far from affirming that his deliberations prior to this publication can be omitted. On the contrary, they present central principles of his practical philosophy and show how these are first conceptualised and justified. Also, the deliberations hold vital clues to how these key concepts are internally related at an earlier stage and to how these relationships as well as concepts have to be changed as soon as Kant realises that he cannot ground an autonomous concept of right within his old framework. These initial claims will hopefully become clearer during the course of this presentation.

In order to do justice to Kant's works and the philosophical tradition to which they belonged and from which they also took a new direction, I must give a brief presentation of the overall framework of his practical philosophy regarding the position of *Recht* in his earlier writings. This implies a focus on two main features in his texts prior to the *Metaphysik der Sitten*. In the first chapter of this prologue, I consider the largely undeveloped relationship between morality and legality as this is rendered in primarily moral-oriented writings such as the *Grundlegung* and the second *Critique*. In chapter 2, I present a short overview of his early objections vis-à-vis the natural rights tradition, as is evident from some often neglected comments he makes regarding both the German natural rights debate in his own time and his stance towards Hobbes' theory of law. This can help us understand the context in which – in the words of Allen W. Wood (cf. Wood 2002) – the final form of Kant's practical philosophy

is developed, namely in the *Metaphysik der Sitten*. Only when this context is established can we hope to properly elaborate the three dimensions of public right which constitute his legal framework as one consistent structure.

As I shall attempt to show in this prologue, the position of *Recht* in Kant's earlier writings remains largely undeveloped and ambiguous. At this stage, it is still unclear how a concept of right is to be consistently grounded within his practical philosophy, as this realm is considered primarily from what I will call a moral perspective. This is, of course, not to say that his moral philosophy prior to the *Metaphysik der Sitten* is ill-founded. The claim is rather that the position of *Recht* within his overall framework must be said to remain inconclusive until late in his writing career (and that this, in turn, has significant consequences for the overall theoretical structure, too). I will return to the final formulations of both his concept of right and the structure of his practical philosophy in general in the main parts. At present, however, the prologue will offer a brief sketch and overview of why Kant's early concept and understanding of the realm of right cannot possibly be said to constitute his final position on the subject.

1. The relationship between morality and legality in Kant's early practical philosophy

As I indicated in the introduction, the internal relationship between morality and legality in Kant's works remains mostly unspecified in current secondary literature, in regard to both his moral and his legal philosophy. Questions about how the moral realm is related to the legal realm and vice versa, what their differences and correspondences are, remain to a surprisingly large degree unanswered. Indeed, these questions are too often not even asked.[22] Although the two realms certainly are related, we still seem to ignore how quintessential the answers to these questions must be for our understanding of the two systems as related but nonetheless *different* systems of action-guiding normative principles. Of course, this unfortunate feature of Kant scholarship is intertwined with the still rather unclear status of his legal philosophy in general, which was for so long approached from a primarily moral perspective.

But as we will see in the dissertation, the late introduction of an independent Kantian legal realm is not a pragmatic response to the unfortunate deficiency of human nature to fully correspond with the moral faculty; it is a move required by pure practical reason. As will also become evident later, the change is motivated primarily by the need for an essential concept

[22] See, for instance, the anthology on *Kant's Moral and Legal Philosophy*, which does not even raise this question in the introduction or in the various contributions. Still less do these use Kant's practical-philosophical terms in a coherent manner, cf. Ameriks & Höffe (2009).

of his philosophy in general to find an actual realisation in the world, a concept indispensable to all spheres of our human condition, namely freedom. Crucially, no concept of freedom can be vouched for directly in our external relations by Kant's concept of morality. Rather, it has to be deduced from a correctly understood independent and autonomous philosophy of right, a differentiation between moral and legal philosophy which he achieves only late in his writing career.

Part of the reason for the lack of clarity in interpretations of Kant's legal philosophy is therefore attributable to an unclear differentiation between the two interrelated spheres by the author himself. Accordingly, the prologue aims to show how his own presentation of the sphere of legality and *Recht* prior to the 1797 publication of the *Metaphysik der Sitten* in fact *is* unclear and undecided on the internal relationship between morality and legality, since it – in accordance with the main focus of his earlier writings – is primarily oriented towards the concept of morality. As a consequence of this, the concept of legality, even if it occasionally surfaces in these publications, remains undeveloped and inconclusive at this stage.

After presenting a very short sketch of the central constituents of Kant's early moral philosophy as it is rendered in the *Grundlegung* and the second *Critique* (1.1), I shall proceed to question the often held assumption that there is a straightforward Kantian deduction of legality from his concept of morality (1.2). Thereby, I can hopefully determine, at least in a preliminary manner, the position of *Recht* in his early practical philosophy (that is, prior to the politically oriented publications of the 1790s), and draw the conclusion that further traces of the exact position are found instead in his deliberations and disagreements with different natural rights proponents in his own time (2.1-2.3), not within his moral philosophy as such.

1.1. Central constituents of Kant's early moral philosophy

In order to grasp the internal relationship between morality and legality in Kant, we must grasp the overall architectonics of his practical philosophy. The structure of philosophy in general is also his point of departure in his first major work on morals, the *Grundlegung* of 1785. "Die alte griechische Philosophie", Kant begins, "teilte sich in drei Wissenschaften ab: die *Physik*, die *Ethik* und die *Logik*". He proceeds: "Diese Einteilung ist der Natur der Sache vollkommen angemessen, und man hat an ihr nichts zu verbessern, als etwa nur das Prinzip derselben hinzu zu tun, um sich auf solche Art teils ihrer Vollständigkeit zu versichern, teils die notwendigen Unterabteilungen richtig bestimmen zu können" (4:387). Correspondingly, Kant grants ethics the status of the generic term from which his practical philosophy is further delineated; a practical philosophy that is a science of the laws of freedom, in contradistinction

to theoretical philosophy, which sets out to establish the metaphysical presuppositions of the science of the laws of nature.

Ethics is then further divided into two separate fields by Kant, depending on whether it is founded on grounds of experience or on *a priori* rational principles. Practical anthropology is its empirical side; the purely rational part is termed morals (*Sitten*, *Moral*) and constitutes not pure philosophy (unconcerned with every object, even rational, that is, logic), but rather a metaphysics of morals that is to determine the practical objects and form of reason itself, that is, the rational principles of any laws of freedom. Because a proper delineation of practical anthropology in a prior instance requires a clarification of which empirical actions (*inter alia* through practical reason itself) can possibly be ascribed as well as prescribed to mankind, the first and true object of Kant's practical philosophy is to discover the *a priori* principles that demarcate the laws of freedom.[23] Subsequently, his investigation of these principles (as well as my presentation of his attempts in this regard) starts with the aptly titled *Grundlegung zur Metaphysik der Sitten*.

Kant insists on the strict necessity of elaborating a "reine Moralphilosophie" (4:389) in order to discover an actual law of practical philosophy. Otherwise, any so-called principles of morals (and ethics) would only be general rules or mere precepts of advisable human conduct, in turn subordinated to a higher, and either unaccounted or non-moral principle. On his view, the need for a scientific clarification of a moral law is no less imperative for the realm of ethics than a scientific clarification of laws of nature is for physics. A moral law must, in a manner similar to laws of nature, bring with it absolute necessity and accordingly obligate a certain conduct not just by humans, but by all rational beings, since the law cannot depend on empirical aspects of human nature as such (nor on our anthropological knowledge thereof).[24] This calls for a purely rational approach, i.e., a clarification of the principles of a metaphysics of morals.

In the preface, Kant then proceeds to delimit his present investigation, both in relation to this topic (for which the 1785 writing is, as the title indicates, only a groundwork) and to a

[23] This makes it obvious why Kant's lifelong interest in anthropology did not materialise in a book until 1798; before this investigation of key empirical features of the human condition, the purely rational principles of freedom had to be delineated in the *Metaphysik der Sitten*.

[24] Already at this stage, Kant mentions lying as an example of something that, regardless of any empirical considerations, is contrary to the moral law, and he says that everyone must admit the need for absolute necessity with regard to a moral law: "Jedermann muß eingestehen, daß ein Gesetz, wenn es moralisch, d. i. als Grund einer Verbindlichkeit, gelten soll, absolute Notwendigkeit bei sich führen müsse; daß das Gebot: du sollst nicht lügen, nicht etwa bloß für Menschen gelte, andere vernünftige Wesen sich aber daran nicht zu kehren hätten, und so alle übrige eigentliche Sittengesetze; daß mithin der Grund der Verbindlichkeit hier nicht in der Natur des Menschen, oder den Umständen in der Welt, darin er gesetzt ist, gesucht werden müsse, sondern a priori lediglich in Begriffen der reinen Vernunft" (4:389).

critique that he seeks to make of pure practical reason itself. After all, we must speak of one reason, but this can be considered in both a speculative and a practical intent. For Kant, the completion of such a critique would require something beyond a metaphysics of morals, i.e., nothing less than an exhaustive account of the common principle that unites reason in its speculative as well as practical understanding. He then leaves this train of thought and offers no explicit assertion of what this principle could be.[25] Instead, he returns to the preparatory work for a future metaphysics of morals, and states the object of his present study, namely to search for and establish a first principle and thus a law of morals, i.e., of practical philosophy in its purely rational sense. In Kant's own words: "Gegenwärtige Grundlegung ist aber nichts mehr, als die Aufsuchung und Festsetzung *des obersten Prinzips der Moralität*" (4:392).

Here, and throughout the three sections of the work, it is clear that morality is the term that Kant prefers as the supreme practical-rational principle of a possible moral law. We can only assume that legality, too, comes under this concept. Since the concept of legality in fact does not appear at all in the *Grundlegung* (and the term *Recht* is barely referred to here in any meaningful juridical sense), the actual position of *Recht* at this stage of the writing career is impossible to properly determine.

Actually, it is only with the second *Critique* that what one perhaps might read between the lines in the *Grundlegung* becomes explicit. Kant does not present any concept of legality before this. Here, it is presented as a correct description of an action that is in accordance with the moral law, but that lacks any true moral value, because it is not done for the sake of the (moral) law, but only in conformity with this duty (cf. 5:71; 81; 118). Morality, properly speaking, requires on its part that actions are performed out of duty (cf. *aus Pflicht*, not just *pflichtgemäß*) and only for the sake of the moral law itself (*um des Gesetzes willen*). On this view, as we shall see, a Kantian concept and principle of legality can be nothing more than a thinned-out concept of morality, at best thickened with other, basically non- or amoral means, to serve morality in its actual realisation under non-ideal conditions.[26]

Although there are explicit references to the concept of legality in the second *Critique*, these too give us no further clues to how Kant fully conceives such a concept. It seems that these texts refer only to his understanding of the internal relationship between legality and morality, and this, in light of the second *Critique*, is also applicable to the deliberations in the *Grundlegung*. On the basis of these two writings, we receive the impression that a Kantian

[25] I cannot investigate here his endeavours in the *Opus postumum* to establish a common principle of this kind.
[26] As we will see below, this exclusively moral perspective cannot establish an autonomous concept of *Recht*. I will present there the reasons why pure practical reason requires a shift to a distinct legal perspective.

concept of legality is subordinated to the concept and principle of morality for which he is searching. The distinctions between actions that are done from duty or merely in conformity with it and actions that are performed for the sake of the moral law or not, are the only yardsticks he mentions at this stage. With this in mind, we must turn to the general argument he presents in the *Grundlegung*, to try to further understand the concept of legality exclusively in light of the delineation of its superior concept of morality. This can, of course, be nothing more than a brief and crude sketch of what we today consider to be the main aspects of his moral philosophy. I will devote special attention to three terms I hold to be critical both in this regard and for a later discussion of the internal relationship between morality and legality: a) the moral law, and the two concepts of b) obligation and c) freedom.

a) The moral law and its categorical imperative(s)

As stated above: if there is to be a supreme principle of practical philosophy (and accordingly a moral law), it must, for Kant, hold unconditionally and thereby unreservedly necessitate[27] an action. This corresponds to what he calls a categorical imperative, in contradistinction to all hypothetical imperatives. The latter take the form of either technical or pragmatic imperatives of the practical reason in its relation to the will. The first of these relate, as the word indicates, to the realm of *techné*, to the mere production or accomplishment of a given object. Pragmatic imperatives, however, concern the attainment of an object related to the subjective well-being of one or several moral persons. Both types of imperatives can be brought to this hypothetical form: 'In order to achieve X, you must perform the action Y which is necessary to this purpose'. X is then any desired object or state (e.g. the making of a shoe, shelter from rain, behaviour-inducing sanctions, self-perfection, happiness, etc.) and Y the action(s) most conducive to (that is, rationally recommended for) the actual attainment of X. In short: if you actually will the end X, you must also will the necessary means Y.[28]

[27] On the peculiarity and importance of this verb, see the start of section b) below.

[28] There is a slight discrepancy in how Kant's use of terms related to the volitional act in his publications on practical philosophy. This is normally referred to as the difference between *Wille* and *Willkür* (moral will and choice, respectively). The distinction is upheld with full consistency for the first time in the *Metaphysik der Sitten*, where *Wille* only relates to the volition of a truly moral will (also holy), whereas *Willkür* is the arbitrary human will that chooses (hence normally translated as 'choice') according to a multitude of possible alternatives. One of these alternatives is, of course, to act out of respect for the moral law (cf. *Wille*), but it is still human choice (*Willkür*) that is at play. In earlier publications (as here), Kant is more prone to use *Wille* (will), *Wollen* (volition), *wollen* (to will), etc. to describe actions that would be described later as belonging to the realm of *Willkür* (choice). In the following deliberations in this chapter, I stick to the verb 'to will', although it would be more correct to decide in each case whether Kant (and translators) would have classified it later as the more accurate 'to choose the necessary means Y', etc. My use of the verb 'will' instead of 'choose' throughout this chapter can thus also serve to underline the discrepancy that is effective in Kant's own works at the time. I will return to a further clarification of the two terms and related discussion in part I of the dissertation.

Kant is clear that such practical imperatives can yield no true moral value or principle: although they make a singular action (or set thereof) practically necessary, this is only in order to achieve something else. These imperatives can correctly be said to be rational or even good in this regard, but they only demarcate means to another end. Consequently, they can only be for him "*Regeln* der Geschicklichkeit, oder *Ratschläge* der Klugheit" (4:416).[29] They cannot prescribe actions that are objectively necessary in themselves and can therefore never constitute "Gebote (Gesetze) der Sittlichkeit" (ibid.), which are exactly what Kant seeks. But what, then, is a categorical imperative? Can there be a moral law that commands immediately and regardless of all empirical, arbitrary considerations? Kant's task in the *Grundlegung* is to prove that there is such a law.

A fruitful point of departure is Kant's criticism of earlier moral theories that the search for and establishment of the supreme criterion for moral action (i.e., morality proper) need not be described in terms of attainment of an (external) object causing virtue, pleasure, happiness, or the like. In line with his overall philosophy and its emphasis on self-reflection (that is, the relationship of understanding to understanding itself), we can consider the will not only in regard to objects external to it, but also in its relation to itself. Rational beings, it seems, not only cannot avoid considering themselves the authors of their own actions; it is precisely for this reason that they also stand in a relationship to the will itself. This aspect of the human volition is the starting point also for Jennifer K. Uleman's recent introduction to Kant's moral philosophy; the fact that the human will not only can but also necessarily must be thought of

[29] Kant (4:414 ff.) describes the two forms of hypothetical imperatives along these lines, as based either on a problematic or an assertoric practical principle. The action in question is good in relation either to a possible or to an actual purpose. Whereas problematic principles relate to a possible purpose and are "unendlich viel" (4:415) in regard to the possible undertakings that may be conducted to attain any practical end (voluntary problem-solving, as in arts, science, business, building construction, etc.), there is, in Kant's eyes, one end that can be actually and necessarily presupposed in all rational beings, namely happiness. He holds that this is an assertoric practical principle, and that it is impossible for rational beings to act contrary to it. They may, of course, be wrong in several regards: they may lack the skill to choose the means most conducive to this end (i.e., they may lack prudence); they may have this skill, but later realise that they are pursuing happiness along the wrong track, or develop another impression of what true happiness is along the way; moreover, they may be physically hindered by others from pursuing both means and end; etc. But regardless of all this, Kant holds that one cannot subjectively avoid acting with one's personal impression of one's own happiness in mind, whatever this might be. But an imperative relating to the end of happiness (an assertoric imperative) will not know a common, objective principle (for what makes one person happy does not necessarily do so with another), nor is it equivalent to moral duty, even if there were a possibility of establishing an objective criterion of what happiness is (cf. his critique of the Epicureans (e.g. 5:112) and, indirectly, the utilitarians). It is still a hypothetical imperative, since one also must will the means that are conducive with the end; and this implies that it is dependent on the morality of something other than the end itself (for it to have true moral value). Therefore, assertoric imperatives can only herald prudential advice of human conduct (in order to become happy), but never ground the morality of an action *per se*. (In the *Tugendlehre*, Kant clarifies his stance with regard to happiness. Because one cannot act without a view to one's own happiness, it does not make sense to speak of a duty with regard to this end – Kant sees only the promotion of *others'* happiness as both an end and a duty. In the same context, he emphasises that self-perfection is a moral end, but a duty only to oneself (cf. 6:385 ff.).)

as independent of all empirical conditions is, in Kant's own words: "befremdlich genug und hat ihres gleichen in der ganzen übrigen praktischen Erkenntniß nicht" (5:31).[30]

This 'strange thing' points to an uncircumventable facet of the human condition. Kant is adamant that we, qua rational beings, cannot avoid considering ourselves as initial causes of our own actions and thus as free in a certain sense. We are, as embodied beings, evidently subject to the laws of nature (physics), but are also able to transcend the dictate of these laws and initiate and determine our own actions to a certain degree, thereby creating a new chain of causation in the actual world. It can thus be argued that, for Kant, to proclaim 'I am not free' is as void of meaning as claims such as 'I cannot speak (or, as here, write)' or 'I do not utter (or write) these words'. None of these claims is physically or theoretically impossible to state, of course, but one all the same seems to get entangled in a practical contradiction if one also intends anything that pertains to truth. But from the inherent performative contradiction in the claim 'I am not free', Kant still has a long way to go to establish and determine what, more precisely, this freedom of will implies for moral actions, let alone what freedom of the will actually amounts to.

However, this impossibility of rejecting at least some kind of freedom of the rational will and its possibility of reflection on itself – the will in its active, determining relation to itself – now open up a new space into which the search for a moral law can be taken. Instead of external, material objects that one seeks to attain through hypothetical imperatives, the will in its relation to itself constitutes, for Kant, a possibility of a purely formal practical principle, that is, of a categorical imperative that makes an action objectively necessary in itself. For this can be the case with a will that is considered not in relation to the attainment of an external object, but as a universalisation of the principle upon which it is subjectively willed by the acting individual. Kant calls this subjective principle of the will the maxim of the will (cf. 4:400; 420).

A maxim will always have a material component that it 'wills'[31] (an end, e.g. a shoe, happiness, etc.), but this end need not necessarily be external to the maxim; it can also be the

[30] Passage also quoted in Uleman (2010: 1): "The thing is strange enough and has no parallel in the remainder of practical knowledge". This is also an improvement on the original translation by Gregor (cf. Kant (2009: 164)).
[31] Again, as I have pointed out in an earlier footnote, 'wills' is not the entirely correct term here, but it is the one Kant uses (e.g. 4:414 ff.; 5:28). As I also pointed out, the distinctions between willing and choosing (as well as wanting and mere wishing) are not fully, or at least not consistently, elaborated. Although he uses 'wills' here in this sense (namely of choice), it is still rooted in the basic assertion he has in mind already in the *Grundlegung*, namely that *Willkür* or choice is not something one simply can 'will' in a strong sense, since the actual attainment of the 'willed' (strictly speaking 'wanted') object depends upon contingent factors beyond the scope of the individual will itself. In this sense, *Willkür* (or choice) has more in common with our mere wishes (*Wünsche*) than with the willing of the moral law, which requires a necessarily given possibility and postulates a strict necessity to act on a certain maxim, i.e., the moral law itself.

maxim itself. In the latter case, the subjective will has the form of itself universalised, that is, itself made into a universal law. This can also actually take place without contradiction, independently of every consideration of the phenomenal existence and possible attainment of external objects, 'merely' through a correct formulation of such maxims. On this view, a maxim that can universally will itself is not only possible, but also strictly necessary with regard to morality proper. For Kant, such a maxim can be established as a universal moral law and a categorical imperative of practical reason; it grounds an action as objectively necessary in itself, without recourse to empirical conditions – it is a free will that consistently and freely can will itself.

Kant underlines that this is the only possibility of knowing beforehand how one ought to act and thus of knowing a moral law and not merely prudential rules for the possible (but uncertain) attainment of another end; cf. his distinction between categorical and hypothetical imperatives to which I referred above. This line of reasoning leads up to the first formulation (of several) of the moral law in the shape of a categorical imperative:

> Denn da der [kategorische] Imperativ außer dem Gesetze nur die Notwendigkeit der Maxime enthält, diesem Gesetze gemäß zu sein, das Gesetz aber keine Bedingung enthält, auf die es eingeschränkt war, so bleibt nichts als die Allgemeinheit eines Gesetzes überhaupt übrig, welchem die Maxime der Handlung gemäß sein soll, und welche Gemäßheit allein der Imperativ eigentlich als notwendig vorstellt. Der kategorische Imperativ ist also nur ein einziger und zwar dieser: *handle nur nach derjenigen Maxime, durch die du zugleich wollen kannst, daß sie ein allgemeines Gesetz werde* (4:420 f.).

Although he describes it as the one and only formulation of the categorical imperative (according to which one must act only in accordance with a maxim through which you can at the same time will that it becomes a universal law) Kant proceeds to reformulate this basic thought and principle in a number of ways. To use Allen W. Wood's helpful categorisation (and abbreviations) of the different formulations of the categorical imperative, this version is best known as The Formula of Universal Law (FUL).[32] It is equivalent to the Formula of the Law of Nature (FLN) which is presented by Kant almost immediately after the FUL, and is defined quite similarly: "*handle so, als ob die Maxime deiner Handlung durch deinen Willen zum allgemeinen Naturgesetze werden sollte*" (4:421). In this context, Kant also states that the FUL and its variant, the FLN, are sufficient formulations of the moral law from which we can attempt to explicate our moral duties.[33]

[32] Cf. the list of formulas and their abbreviations in Wood (1999: xx ff.). This list draws, in turn, heavily on the works of H. J. Paton (1967 [1947]) and Onora Nell [O'Neill] (1975).
[33] Since Kant both in the *Grundlegung* (cf. the line of argument up to and conclusion in its controversial third section) as well as in the second *Critique* actually postpones presenting a final and ultimate proof of the

At this point, Kant not only introduces four examples to explicate what can already be recognised as actions contrary to the moral law (suicide, making false promises, leaving all talents undeveloped, refusing to aid those in need). He has also, as I have said above, already made perfectly clear that the entire moral worth of an action hinges on whether the action in question is performed from duty *as such* or just in accordance with it. It is in one's personal disposition (*Gesinnung*) which leads up to an action, that we find his first principle of morality (*Sittlichkeit*), i.e., whether or not an action is performed for the sake of the moral law (*um des Gesetzes willen*).[34] This also corresponds to his definition of duty as a whole: "*Pflicht ist die Notwendigkeit einer Handlung aus Achtung fürs Gesetz*" (4:400). Only if we act out of respect for the moral law and its moral necessity can we legitimately claim to be acting in accordance with morality proper.[35]

It is important to notice, with regard to the relationship between morality and legality, that morality proper is formulated in the *Grundlegung* in a thoroughly intersubjective manner. One might perhaps think that this would be the criterion for a later differentiation between the two realms, but this is not something Kant is prepared to even consider. Morality is already as such an intersubjective practical principle rooted in the personal ability of every individual (or every rational being, to be precise) to make an objective ground of volition (*Bewegungsgrund* or motive) its subjectively held incentive (*Triebfeder*) for performing an action. Thanks to the strange thing that human beings are not merely possessors of a physical, but also of a rational nature, they can form a principle of morality which entails that each and every being who is capable of rational action exists as an end in him- or herself. On this account, I cannot avoid considering myself as a rational being who is somehow and to some extent free; but, equally, I cannot consider myself as the only existing possessor of this rational nature (because such a rational nature would be mere subjectivism and solipsism). Even though the decisive criterion of morality proper is rooted in the individual itself, it is nonetheless clear that, in Kant's view,

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(synthetic a priori) certainty of these early assessments, he also states (on numerous occasions) that he merely anticipates the undisputable consequences given a future proof of the correctness of his working theses, cf. his insistence here that all moral duties can be derived from the categorical imperative (or else the concept of duty will be empty), even if he lays no claim to have ultimately settled the point at each particular time of presenting his argument.

[34] As he wrote on the categorical imperative a few pages earlier: "Er betrifft nicht die Materie der Handlung und das, was aus ihr erfolgen soll, sondern die Form und das Prinzip, woraus sie selbst folgt, und das Wesentlich-Gute derselben besteht in der Gesinnung, der Erfolg mag sein, welcher er wolle. Dieser Imperativ mag der *der Sittlichkeit* heißen" (4:416). All result-oriented, consequentialist moral theories are accordingly discredited as moral theories by Kant – they offer prudential advice to achieve an end that requires its own moral justification.

[35] For Kant, only a categorical imperative of practical reason can therefore lay claim to a law that commands immediate respect from the individuals subjected to it. Moreover, in line with the distinctions he goes on to explicate in the second *Critique*, legality must for its part be said to concern actions that are not necessarily performed out of respect for the law itself and thus out of moral duty *per se*, but that only are *pflichtgemäß*.

I act out of duty only insofar as I, as a moral person, take part in an intersubjective, purely intelligible realm of practical reason. Consequently, the law must of necessity include every moral person as a full and equal member of the realm of morality, if it is to be a law at all.

One of Kant's crucial remarks on this point is highly reminiscent of the justification as well as the overall position often attributed to Johann Gottlieb Fichte[36] and the recognition of the other as implicitly presupposed in the constitution of one's own self (qua moral person). Kant can, however, be seen to precede Fichte already in the *Grundlegung*, when he asserts the basis for the existence of both the other as moral person and the moral law as an objective practical principle, making every rational being an end in him- or herself:

> So stellt sich notwendig der Mensch sein eignes Dasein vor; so fern ist es also ein *subjektives* Prinzip menschlicher Handlungen. So stellt sich aber auch jedes andere vernünftige Wesen sein Dasein zufolge eben desselben Vernunftgrundes, der auch für mich gilt, vor; also ist es zugleich ein *objektives* Prinzip, woraus, als einem obersten praktischen Grunde, alle Gesetze des Willens müssen abgeleitet werden können (4:429).

This leads to the second formulation of the moral law, which is described by Kant as a practical imperative and by Wood (and others) as the Formula of Humanity as End in Itself (FH): "*Handle so, daß du die Menschheit, sowohl in deiner Person, als in der Person eines jeden andern jederzeit zugleich als Zweck, niemals bloß als Mittel brauchst*" (ibid.). Thus, no rational being (that is, moral person) can be used as a mere means in the process of pursuing one's own purposes, but must instead be considered as an end in him- or herself, precisely because neither he nor she can be reduced to the status of a thing or commodity. A rational being, for Kant, is always a person with his or her own dignity (*Würde*), a dignity that cannot legitimately be violated and that necessarily applies to every member of mankind.[37]

Kant highlights in this context how the different formulations of the moral law and the categorical imperative must not be confused either with the so-called Golden Rule of ethics or with religious doctrines. This rule – (do not) do to others what you (do not) want others to do to you – can, for him, constitute only a hypothetical imperative and is, accordingly, no more than prudent advice based on pragmatic grounds. Not only can it not be made a universal law, Kant is keen to argue, "denn es enthält nicht den Grund der Pflichten gegen sich selbst" (4:430); it also makes inconsistent or at least dubious all matters of criminal punishment (cf. ibid.). In short: any moral-ethical validity of the Golden Rule – which he nonetheless grants,

[36] See, in particular, Fichte (1971b [1796]: 30 ff.).
[37] See also my reference below to the distinction between price (*Preis*) and dignity (*Würde*) as corresponding to the distinction between thing and person in my discussion of the Kantian thought-figure of a realm of ends in which all moral persons partake.

but only under the following condition – is in a first instance dependent upon and derived from yet another, superior principle of practical philosophy, that is, the moral law and its categorical imperative(s).

The practical imperative (or FH) that instates humanity and every rational being as an end in itself is, for Kant, precisely a variant of the supreme principle of morality under which any ethical advice or rule can claim normative status. First of all, taken in its pure form and its universalizability, it is a principle that is not based on empiricist considerations (and hence limited by contingent factors), but is directed towards every rational being qua rational being (i.e., a being capable of determining itself by acting on the representation of certain laws). Secondly, he argues, this means that humanity (or, better, all rational agents) cannot become a subjective end of human beings as an object, but is rather an objective end, that in the shape of a moral law, is an objective principle that places a limitation on every subjective action (cf. 4:431). This leads Kant to the vital formulation of "das dritte praktische Prinzip des Willens, als oberste Bedingung der Zusammenstimmung desselben mit der allgemeinen praktischen Vernunft, die Idee *des Willens jedes vernünftigen Wesens als eines allgemein gesetzgebenden Willens*" (ibid.). Wood characterises the final sentence of this passage as a third formulation of the moral law and as the Formula of Autonomy (FA).

The FA is pages later also given as a principle of autonomy. It means "nicht anders zu wählen als so, daß die Maximen seiner [des Willens] Wahl in demselben Wollen zugleich als allgemeines Gesetz mit Begriffen seien" (4:440), or, in the English translation: "choose only in such a way that the maxims of your choice are also included as universal law in the same volition" (Kant 2009: 89, cf. Wood 1999: xx; 163). The aspect of autonomy here highlighted can hardly be overestimated in discussions of Kantian practical philosophy. As Kant himself underlines, it opens up an entirely new and possible realm of normative human interaction.

With the formula and principle of autonomy, the individual human will is, for Kant, not subjected only to the moral law, but also to the moral law as self-legislated.[38] This aspect of self-legislation becomes pivotal for Kant also in regard to earlier attempts to establish a supreme principle of morality. These efforts could conceive of moral law and duty, but not of this law and duty as valid because it was self-imposed through reason, and thus that one could legitimately be objectively bound or subjected by a principle imposed by one's self: "Man sah den Menschen durch seine Pflicht an Gesetze gebunden, man ließ es sich aber nicht einfallen,

[38] See, for instance, the following passage: "Der Wille wird also nicht lediglich dem Gesetze unterworfen, sondern so unterworfen, daß er auch als *selbstgesetzgebend*, und eben um deswillen allererst dem Gesetze (davon er selbst sich als Urheber betrachten kann) unterworfen angesehen werden muß" (4:431).

daß er *nur seiner eigenen* und dennoch *allgemeinen Gesetzgebung* unterworfen sei, und daß er nur verbunden sei, seinem eigenen, dem Naturzwecke nach aber allgemein gesetzgebenden Willen gemäß zu handeln" (4:432). This is, as he emphasises, something quite different from acting out of duty for a moral law as an interest (that is, for another end – which calls for yet another law for justification).[39] Rather, when acting autonomously, one acts out of respect for the law, and this autonomy stems from the pure form of the moral law as self-legislated.

In other words, insofar as one cannot avoid regarding the subjective maxims on which one acts as stemming from the universal legislative will of practical reason (the categorical imperative), one shares a purely intelligible moral realm with every other rational being who acts accordingly and thus has the same practical ends as oneself, namely the realisation of the moral law itself. This leads Kant to "einen (…) sehr fruchtbaren Begriff, nämlich den *eines Reichs der Zwecke*" (4:433).[40] The realm of ends comprises a "systematische Verbindung verschiedener vernünftiger Wesen durch gemeinschaftliche Gesetze" in which one must treat every rational being – oneself included – "*niemals bloß als Mittel*, sondern jederzeit *zugleich als Zweck an sich selbst* " (ibid.). In this realm of ends, which obviously is an intersubjective and entirely voluntary association of moral rational beings, morality is completely realised: it stands as the final end of his moral philosophy and is also rendered in the so-called Formula of the Realm of Ends (FRE): "handle nach Maximen eines allgemein gesetzgebenden Gliedes zu einem bloß möglichen Reiche der Zwecke" (4:439).[41]

It should be kept in mind that an actual realisation of this moral realm will, of course, lack empirical proof. Since its criteria are entirely normative and accordingly, for Kant, purely intelligible, establishing an actual (i.e., phenomenal) realm of ends qua fact is quite simply not possible. It is, like the moral law and the categorical imperative in all its shapes, a normative end to strive for and a rational principle that offers a purely formal procedure for testing one's subjective maxims. As with Kant's profound psychological insight that one cannot establish as a fact that one has indeed acted morally (since there may always be a subconscious desire or will at play, cf. e.g. 4:407; 6:392; 447), we cannot establish the realm of ends as a physical

[39] Cf. ibid.: "denn ein solcher abhängender Wille würde selbst noch eines andern Gesetzes bedürfen, welches das Interesse seiner Selbstliebe auf die Bedingung einer Gültigkeit zum allgemeinen Gesetz einschränkte".
[40] Quotation in full: "Der Begriff eines jeden vernünftigen Wesens, das sich durch alle Maximen seines Willens als allgemein gesetzgebend betrachten muß, um aus diesem Gesichtspunkte sich selbst und seine Handlungen zu beurteilen, führt auf einen ihm anhängenden sehr fruchtbaren Begriff, nämlich den *eines Reichs der Zwecke*". Accordingly, Kant also describes morality as follows: "Moralität besteht also in der Beziehung aller Handlung auf die Gesetzgebung, dadurch allein ein Reich der Zwecke möglich ist" (4:434).
[41] This, in turn, is related to Kant's claim that all rational beings (but only these) have an inner worth and can never have a price and thus be sold, like a thing: "Im Reiche der Zwecke hat alles entweder einen *Preis*, oder eine *Würde*. Was einen Preis hat, an dessen Stelle kann auch etwas anderes als *Äquivalent* gesetzt werden; was dagegen über allen Preis erhaben ist, mithin kein Äquivalent verstattet, das hat eine Würde" (4:434).

phenomenon. But this does not take anything away from his principal and highly important claim: despite this, we nonetheless *know* what must be the case in order for an action to be fully moral and for a realm of ends to be actually realised – and we have a moral duty to strive for both (cf. e.g. 4:408; 439).

Kant's deduction of the supreme principle of morality may also be considered in the light of the concept of the autonomy of the will. As opposed to the concept of the heteronomy of the will, which can only command actions for the sake of something else and hence only form hypothetical imperatives, the autonomy of the will is the only moral principle that, for him, is compatible with a practical law of morals (*Sittlichkeit*). Only insofar as the law itself is the sole motive or determining ground (*Bewegungsgrund*) for an action, can one legitimately claim to have acted out of true morality; otherwise, one has made something that is external to the pure form of the moral will the end – this, consequently, is the true object that is craved and the incentive for the action, not the moral law itself.

Kant draws the conclusion that the heteronomy of the will leads only to contingency and thus to arbitrary 'principles' of morality. Only the autonomy of the will (as laid down by and in the moral law) can, in his view, ground morality. Actually, the autonomy of the will also basically is the supreme principle of morality. Autonomy is self-legislation according to a universal practical-rational law, as opposed to the heteronomy of letting something else be the object to which the legislation in turn is adapted. For Kant, the latter choice of action must necessarily be based on prudence and a whole world of contingent factors, which in turn are in dire need of moral justification and a universal law.[42]

Accordingly, a moral human will stands under the practical necessity of the categorical imperative, and nothing else. Only in this way is it truly autonomous and also thereby a moral will. Kant is clear on the point that a divine (or holy) will cannot stand under an imperative, since, *per se*, it cannot act contrary to the moral law. As he puts it: "das *Sollen* ist hier am unrechten Orte, weil das *Wollen* schon von selbst mit dem Gesetz notwendig einstimmig ist" (4:414). But for human beings, for whom the will does not necessarily coincide with what one ought to do (i.e., is not purely rational), but also has all kinds of inclinations (*Hang*, *Neigung*) on which it is wont to base its maxims, the categorical imperative grants objective necessity and perfection to the subjective "Unvollkommenheit des Willens" (ibid.).

[42] An implicit critique of moral theories based on what Kant would call hypothetical imperatives and heteronomy of the will (e.g. utilitarianism) is that it would require infinite prudence to know every consequence of all of one's own (and others') actions in order to know what to do in specific cases. (See also my reference above to his claim that only with a categorical imperative can one know beforehand what one ought to do (4:420).)

b) The concept of obligation

In a fine article on the formative years of Kant's early moral conceptions, Clemens Schwaiger has emphasised how Alexander Gottlieb Baumgarten's linguistic invention of 'necessitation' (*Necessitatio*) is actively used in Kant's vocabulary. Not only is it a practical necessity for the subjective will to act out of duty for the objective moral law; it is the latter that necessitates (*nötigt*) this move. The moral law does not only place a duty upon us; it actively necessitates the moral law to determine our maxims to constitute us, in the deepest sense, as moral rational beings despite our morally imperfect being or condition as such. From the sheer contingency and mere pragmatic necessity of all hypothetical imperatives, the "concept of 'necessitation'", Schwaiger underlines, "implies the transformation of something contingent into something strictly necessary". This is evident in Kant's moral teachings, where the practical necessity of morality is grounded neither in other ends nor in divine commands *per se*, but rather "presents itself to our will, as distinct from the divine will, as a form of necessitation" (Schwaiger 2009: 70).[43]

The crucial Kantian concept of obligation (*Verbindlichkeit*) is developed along these lines of mankind's moral imperfection and the necessitation of the moral law. If we remember Kant's claim from the preface of the *Grundlegung*, where he set out to establish a pure moral philosophy free from all anthropological features, this may seem to move us into different territory. The claim here, however, is merely that the concept of obligation – like the rest of his moral philosophy – appears to us qua morally imperfect beings and follows necessarily from our very ability to act contrary to the moral law at all, that is, from the recognition that we are not divine beings (and thus free to act contrary to the moral law). The concept of obligation is consequently no more dependent on knowledge of practical anthropology than is the very search and establishment of a principle of morality as such.

I must defer a conclusive answer to the question of how the concept of obligation will later play an indispensable part in Kant's practical philosophy; this is discussed in the main parts of the dissertation. In the *Grundlegung*, there is almost no reference to it at all, but Kant still gives a full definition of it when he summarises the main concepts he has introduced up to this point in section two. Obligation is rendered in more or less the same instance as the concept of duty which has already been mentioned many times, and the two concepts can be

[43] Appropriately, Kant in turn describes the truly moral will as holy: "Der Wille, dessen Maximen notwendig mit den Gesetzen der Autonomie zusammenstimmen, ist ein heiliger, schlechterdings guter Wille" (4:439).) In his article, Schwaiger also shows how the development of the Kantian concept of obligation is deeply influenced by Wolff's attempts to ground it in inner motivations and later, and more profoundly, by Baumgarten's emphasis and "radicalisation of the problem of obligation" (cf. Schwaiger 2009: 63 ff., quotation from p. 68).

applied interchangeably here, so to speak. The moral law places a duty or obligation on us to act only on a maxim that can be made a universal law. And since mankind does not have a perfectly moral will, the normatively required autonomy of the will can be attained only if we are necessitated by the categorical imperative to guide our actions according to its universal moral law as a matter of practical-rational self-legislation.

In this summary of the main line of thought in section two of the *Grundlegung*, where morality is given yet another articulation ("das Verhältnis der Handlungen zur Autonomie des Willens, das ist zur möglichen allgemeinen Gesetzgebung durch die Maximen desselben" (4:439)), Kant's concept of obligation is defined for the first time. "Die Abhängigkeit eines nicht schlechterdings guten Willens vom Prinzip der Autonomie (die moralische Nötigung) ist Verbindlichkeit" (ibid.). Obligation is the moral necessitation of the moral law understood as a principle of the autonomy of the will and thereby of morality as well, with due emphasis on this practice as one of the self-legislation of practical reason. In the prolongation of this line of definitions, the concept of duty is accounted for once again, now in a possibly subordinate relationship to the concept of obligation, although this aspect is not further developed at this stage. Instead, duty is simply defined as "[d]ie objektive Notwendigkeit einer Handlung aus Verbindlichkeit" (ibid.).

Let me attempt to provide a summary of the main concepts in Kant's moral philosophy up to this point in his argument: after the differentiation of ethics as a generic term for the entire realm of practical philosophy into the two fields of (empirical knowledge of) practical anthropology and pure rational moral philosophy (morals), he delimits his investigation in the *Grundlegung* to the latter field and proceeds to search for and establish a supreme principle of morality therein. This moral law must hold unconditionally and, as such, necessitate an action, an action that must be performed for the sake of the moral law and out of duty, and not just in accordance with what morality prescribes. Kant accuses earlier attempts to find this supreme principle of only producing so-called hypothetical imperatives which serve as the best means to achieve another end – theories that then fail to provide a justification for why one ought to instate this end as the highest good of mankind. His own approach centres on the fact that we do not necessarily have to consider our will only in relation to such a contingently determined attainment of an external end (commodities, happiness, utility, efficiency, etc.), but also in its internal relation to itself.

Admitting that this aspect of the human condition – i.e., that we cannot avoid holding ourselves to be the authors of our own actions, that we act according to the representations of something else than the laws of physics – certainly is strange, Kant proceeds to examine the

normative space that this admission opens up. The relation of the will to itself can now, taken only in its pure form (and not in relation to an external matter), be seen to constitute an action that can indeed be willed universally and hold categorically, namely to subjectively will the action that can be made an objective law. This moral law leads Kant to a formulation of a categorical imperative in different variants,[44] which again is equivalent to the autonomy of the will, since the subjective will, out of duty for the categorical imperative, acts on a maxim that at the same time also can be objectively willed as a universal moral law. This procedure is in turn necessitated by morality and constitutes the supreme principle of the *Grundlegung*, which precisely prepares the ground for a future metaphysics of morals. Consequently, Kant sees autonomy as self-legislation according to a universal law of practical reason.

Nevertheless, an ultimate proof of how the will can be fully autonomous is not given in the *Grundlegung*. The *via negativa* taken in the first two sections of the work leads only to an aporia in the third. This last section is supposed to make a transition[45] from a metaphysics of morals to a critique of pure practical reason, but strands in this respect on its inability to prove the freedom of will as a synthetic *a priori* proposition, which again is a prerequisite for explaining the autonomy of the will. Kant holds that he thus far has shown analytically what a good will is (i.e., one that acts out of respect and duty for the moral law), but not synthetically that such a will is free. As he makes emphatically clear at this stage, the concept of freedom becomes pivotal in this regard. Consequently, a positive concept of freedom is required (cf. 4:446 f.). Although he does not end up with a positive concept of freedom, he still hints at the way forward in later works. It is, as we will see, only in Kant's late publications on practical philosophy that the concept of freedom fully unfolds itself. Still, important insights on the role and concept of freedom are found at this rather early stage as well.

c) The concept of freedom

In section three of the *Grundlegung*, Kant points to the duality of our being as members both of a world of sense and of a world of understanding (*Sinnenwelt*/*Verstandeswelt*). For Kant, it is in practice possible to consider oneself from two standpoints, either according to the laws of nature (i.e., heteronomy) or according to the laws of freedom (i.e., autonomy). And viewed

[44] These are, as I have said above, the so-called FUL, FLN, FH, FA, and FRE, in addition to various other formulations of the moral law, e.g.: "Dieses Prinzip ist also auch sein oberstes Gesetz: handle jederzeit nach derjenigen Maxime, deren Allgemeinheit als Gesetzes du zugleich wollen kannst; dieses ist die einzige Bedingung, unter der ein Wille niemals mit sich selbst im Widerstreite sein kann, und ein solcher Imperativ ist kategorisch" (4:437).

[45] On the importance of transitions and the use of this term (*Übergang*) in Kant's practical philosophy – mainly as exemplified in the *Grundlegung* – see Dieter Schönecker (2009).

from the latter standpoint, the concept of obligation is explicitly referred to as the one that bridges the two worlds of sense and understanding. He writes: "wenn wir uns als frei denken, so versetzen wir uns als Glieder in die Verstandeswelt und erkennen die Autonomie des Willens samt ihrer Folge, der Moralität; denken wir uns aber als verpflichtet, so betrachten wir uns als zur Sinnenwelt und doch zugleich zur Verstandeswelt gehörig" (4:453).[46]

In that we stand under moral obligation, we belong to both worlds. At the same time, Kant is convinced of the futility of proving this duality as fact, since morality is a principle that works at a purely intelligible level. With reference to the distinction between appearance and the thing in itself (*Erscheinung*/*Ding an sich*), he ridicules those who through common understanding try to grasp the formal concepts of practical philosophy (qua objects beyond the sensual world) as objects of intuition (*Anschauung*). This does not make them "einen Grad klüger" (4:452). Looking for an empirical proof of a purely intelligible concept will forever remain a futile and utterly foolish project. Rather, the further search for and establishment of a positive concept of freedom must not start from the wrong point of departure, nor set off in the wrong direction, nor expect any confirmation in the world of sense *per se*. Kant makes this clear in no uncertain terms: "Freiheit [ist] kein Erfahrungsbegriff, und kann es auch nicht sein" (4:455).

This view is rooted in the concept of freedom as such, as distinct from the concept of nature. Kant emphasises in this connection that freedom is "nur eine *Idee* der Vernunft, deren objektive Realität an sich zweifelhaft ist".[47] Nature – qua the conceptual opposite of freedom – is, for its part, not a concept of reason; it is only a concept of the understanding, but this means that it can prove its reality differently: "Natur [ist] aber ein *Verstandesbegriff*, der seine Realität an Beispielen der Erfahrung beweiset und notwendig beweisen muß" (ibid.) The objective reality of freedom, however, which it is strictly necessary to prove from the point of view of practical philosophy, cannot be established at this stage of his writing career; it cannot be done through mechanistic physics, which tries to rid us of the idea that there is such a thing, nor through a groundwork to a metaphysics of morals. For the time being, Kant goes 'only' on to describe an inherent dialectics of reason between freedom as an idea of reason (i.e., practical reason) and nature as a concept of the understanding (i.e., speculative reason).

[46] Similarly, regarding the specific human, moral relationship between ought and would: "Das moralische Sollen ist also eigenes notwendiges Wollen als Gliedes einer intelligibelen Welt und wird nur so fern [vom Menschen] als Sollen gedacht, als er sich zugleich wie ein Glied der Sinnenwelt betrachtet" (4:455). (Italics exempted.)
[47] Although it is often overlooked and/or misinterpreted in later Kant scholarship, to prove this concept of the objective reality of freedom is, as we shall see, fundamental to his entire philosophical system. As I shall show below, the concept is distinctively practical and has not just a moral, but also a distinctive legal component to it.

In a fine metaphor, Kant places the human vocation at a parting of the ways at which speculative reason finds the road of natural necessity straighter and more useful, but practical reason finds the uncertain step into freedom the only possible path to traverse. Still, it is a step into the unknown. We stand here, in Kant's words, at the furthermost boundary of all practical philosophy. We must show the objective reality of freedom, or, as he puts it, how pure reason of itself can be practical. He emphasises that this task is "völlig einerlei mit der Aufgabe (…), zu erklären, wie Freiheit möglich sei" (4:459).

This is also the point of departure for the *Critique of Practical Reason* of 1788. In the preface, Kant openly admits that the second *Critique* will not actually take us every step of the path. It is thus not a critique of pure practical reason, only of its practical ability. The work will nonetheless help us on the road to freedom as it further maps the topography and possible route. As already implied in earlier publications (also the *Grundlegung*), pure practical reason, in contrast to pure speculative reason, cannot transcend its own ability as such. Even if pure speculative reason can conceive of the concepts of God, the immortality of the soul, and freedom, these three antinomies of the first *Critique* have shown that the concepts could not be proven from such a perspective. From the viewpoint of pure practical reason, however, it would be contradictory to claim that what can be conceptualised from this perspective has no reality to it. We must take Kant's dictum 'ought implies can' in this sense, too; it must be and is possible to realise in actual practice what reason necessitates us to do. Kant can therefore make this critical claim about practical rationality and its nature: for pure practical reason, it holds that "wenn sie als reine Vernunft wirklich praktisch ist, so beweiset sie ihre und ihrer Begriffe Realität durch die Tat, und alles Vernünfteln wider die Möglichkeit, es zu sein, ist vergeblich" (5:3).[48]

It is now established that proving the objective reality of freedom is essential not only to Kant's practical philosophy, but to nothing less than his entire philosophical system: "Der Begriff der Freiheit, so fern dessen Realität durch ein apodiktisches Gesetz der praktischen Vernunft bewiesen ist, macht nun den *Schlußstein* von dem ganzen Gebäude eines Systems der reinen, selbst der spekulativen, Vernunft aus" (5:3 f.).[49] He emphasises, as we have seen,

[48] Accordingly, as is well known, Kant believes that he has proven the objective reality (or existence) of God as well as the immortality of the soul in the later stages of the second *Critique*, cf. the postulates of pure practical reason in this regard (5:122 ff.). I cannot, of course, discuss in detail each separate justification here. For a brief overview see, for instance, Ricken (2009).

[49] The passage continues as follows: "..., und alle andere Begriffe (die von Gott und Unsterblichkeit), welche als bloße Ideen in dieser ohne Haltung bleiben, schließen sich nun an ihn an und bekommen mit ihm und durch ihn Bestand und objektive Realität, d.i. die *Möglichkeit* derselben wird dadurch *bewiesen*, daß Freiheit wirklich ist; denn diese Idee offenbart sich durchs moralische Gesetz" (ibid.). (An apodictic law corresponds to the categorical imperative in the same way as technical and pragmatic rules accord with hypothetical imperatives.)

that transcendental freedom is ascertained and conclusively proven in the practical ability to act out of duty and respect for the moral law, but also that this cannot be demonstrated as fact. The key question to complete his practical as well as theoretical philosophical system is then the following: how can we show that freedom actually is, so that moral action does not lose all meaning whatsoever? This becomes from now on the question that he devotes most of his time and effort in his practical-philosophical publications to answer.

On basis of the position set out in these quotations, we realise and must agree with the implication Kant himself draws, namely that it is sufficient to show the practical possibility of freedom in order to prove its objective reality. This will show that freedom actually is (qua capability of moral action, even though we may never witness a factual instance of exercised morality), and Kant holds that this can reveal itself only through the moral law. He goes on in the preface to further develop the novel account of the close interconnectedness and, so to speak, the identity of freedom and the moral law. Freedom is on the one hand, the condition for the moral law: "Freiheit ist (…) die einzige unter allen Ideen der spekulativen Vernunft, wovon wir die Möglichkeit a priori *wissen*, ohne sie doch einzusehen, weil sie die Bedingung* des moralischen Gesetzes ist, welches wir wissen" (5:4). Kant's own footnote to the passage in turn sheds light on an important claim he will go on to make in the second *Critique*, namely that the relationship between the two concepts works both ways and cannot be separated: freedom is not just the condition for the moral law, but the moral law is in its turn also the condition for freedom:

> Damit man hier nicht *Inkonsequenzen* anzutreffen wähne, wenn ich jetzt die Freiheit die Bedingung des moralischen Gesetzes nenne und in der Abhandlung nachher behaupte, daß das moralische Gesetz die Bedingung sei, unter der wir uns allererst der Freiheit *bewußt werden* können, so will ich nur erinnern, daß die Freiheit allerdings die ratio essendi des moralischen Gesetzes, das moralische Gesetz aber die ratio cognoscendi der Freiheit sei. Denn wäre nicht das moralische Gesetz in unserer Vernunft eher deutlich gedacht, so würden wir uns niemals berechtigt halten, so etwas, als Freiheit ist (ob diese gleich sich nicht widerspricht), *anzunehmen*. Wäre aber keine Freiheit, so würde das moralische Gesetz in uns gar *nicht anzutreffen* sein (ibid.).

Kant accordingly leaves the territory covered by pure speculative reason and embarks on the new path or track (*das neue Gleis*) of a critique of practical reason to further investigate this mutual reciprocity and dependence of freedom and the moral law.[50] He presupposes the concept of duty as well as "eine bestimmte Formel" of the moral law from the *Grundlegung*

[50] This is also explicitly referred to in the same paragraph as a transition (*Übergang*) from speculative to practical philosophy, cf. (5:7). Freedom may also be a concept of the former domain, but it is in his view only from the latter perspective that one can investigate how it is connected and intertwined with the moral law.

(but does not yet say which one): "sonst besteht [das System der reinen praktischen Vernunft] durch sich selbst". In other words, it holds independently of the speculative reason of the first *Critique*, in order to provide "den rechten Gesichtspunkt, aus dem das Ganze derselben richtig vorgezeichnet werden kann" (5:8).[51] Consequently, the object of the second *Critique* is here explicitly acknowledged by Kant as the establishment of the right perspective from which the entire system of pure practical reason can be correctly sketched out.

Kant's point of departure after his clarifying remarks in the preface is a demonstration of the objective reality of practical reason (and thereby of freedom). He must therefore answer the question "ob reine Vernunft zur Bestimmung des Willens für sich allein zulange" (5:15) affirmatively, i.e., that the human will can be unconditionally determined by pure practical reason vis-à-vis all empirical considerations. Kant reiterates the *Grundlegung* arguments and stresses how only this would constitute a free human will, namely one that acts out of duty and respect for the moral law. This practice as one of rational self-legislation turns up again in his definition of the free will[52] and in the explicit interconnectedness between freedom and the moral law: "Freiheit und unbedingtes praktisches Gesetz weisen also wechselweise auf einander zurück" (5:29). The two concepts are thus reciprocally implied in one another.

Freedom, as we have seen, is also a concept of speculative reason and so a theoretical principle thereof. But for Kant, it can be neither explained nor fully elaborated from this point of view, since it also has a crucial practical component. And only from the latter perspective of practical reason and a moral, that is, free, human will can it become the status of a rational law. Our *understanding* of the concept of freedom can never be anything but entirely negative – i.e., mere independence from contingency – if it is impossible to prove its reality from the perspective of practical reason. On this basis, Kant emphasises the primordiality of practical reason, since speculative reason simply cannot provide us with an affirmative, actual account of freedom: freedom must, from this perspective, necessarily remain an antinomy. However, for Kant, it is indeed possible to speak of freedom from the perspective of practical reason. In

[51] Quotation in full: "Ob ein solches System, als hier von der reinen praktischen Vernunft aus der Kritik der letzteren entwickelt wird, viel oder wenig Mühe gemacht habe, um vornehmlich den rechten Gesichtspunkt, aus dem das Ganze derselben richtig vorgezeichnet werden kann, nicht zu verfehlen, muß ich den Kennern einer dergleichen Arbeit zu beurteilen überlassen. Es setzt zwar die *Grundlegung zur Metaphysik der Sitten* voraus, aber nur in so fern, als diese mit dem Prinzip der Pflicht vorläufige Bekanntschaft macht und eine bestimmte Formel derselben angibt und rechtfertigt; sonst besteht es durch sich selbst" (ibid.).

[52] "[E]in Wille, dem die bloße gesetzgebende Form der Maxime allein zum Gesetze dienen kann, [ist] ein freier Wille" (5:29). This is also conceived as a will that must "gänzlich unabhängig von dem Naturgesetz der Erscheinungen, nämlich dem Gesetze der Kausalität, beziehungsweise auf einander, gedacht werden. Eine solche Unabhängigkeit (…) heißt *Freiheit* im strengsten, d. i. transzendentalen Verstande" (ibid.).

his view, freedom is a rational concept of autonomy that, through the moral law, necessitates certain practical grounds for human action.

The formula of the moral law stemming from the *Grundlegung* that is set out in the second *Critique* is, in turn, not identical with any of the five formulations of the categorical imperative I referred to in the brief presentation above. Instead, it is given as a fundamental law of pure practical reason (*Grundgesetz der reinen praktischen Vernunft*): "Handle so, daß die Maxime deines Willens jederzeit zugleich als Prinzip einer allgemeinen Gesetzgebung gelten könne" (5:30).[53] It is in this context that Kant alludes to the strange thing mentioned above: a will that merely "durch die bloße Form des Gesetzes als bestimmt gedacht und dieser Bestimmungsgrund [wird] als die oberste Bedingung aller Maximen angesehen" (5:31). For Kant, a will whose subjective maxim is fully determined by the mere form of the objective, universal moral law is thereby identical with the latter and, accordingly, a free and moral will.

As we already have seen, Kant holds that it is impossible to prove the objective reality of such a will and thereby of practical reason as a matter of fact. But as it is not impossible to think of such an unconditioned rule of practical reason as fully determining the will *a priori* – since this, in the final instance, actually is what practical reason is – he introduces another key term to describe the prescriptions of pure practical reason. Kant calls the very consciousness of a moral imperative and the aforementioned fundamental law of pure practical reason "ein Faktum der Vernunft". This fact follows for Kant from the argumentation above, "weil man es nicht aus vorhergehenden Datis der Vernunft, z. B. dem Bewußtsein der Freiheit (denn dieses ist uns nicht vorher gegeben), herausvernünfteln kann" (5:31). The term has been and still is subject to considerable disagreement in secondary Kant literature, but its justification can perhaps be made more comprehensible if we view it in its internal relationship to the interconnected concepts of the freedom of the will and the moral law of pure practical reason.

In the reciprocal implication of freedom of will with both practical law and the strange and undeniable circumstance that it is impossible even to think of the human will as not being the author of its maxims for action, the moral law must for its part be considered as "gegeben", unlike our consciousness of freedom, since (as I have just quoted) "dieses ist uns nicht vorher [*a priori*] gegeben" (5:31). This corresponds to the distinction which Kant made between freedom as *ratio essendi* of the moral law and the moral law as *ratio cognoscendi* of

[53] It should perhaps be noted here that there is no direct reference of this fundamental law to the concept of morality (or legality) at this stage. The law is described as a practical rule (praktische Regel) that is "unbedingt, mithin, als kategorisch praktischer Satz, a priori vorgestellt, wodurch der Wille schlechterdings und unmittelbar (durch die praktische Regel selbst, die also hier Gesetz ist) objektiv bestimmt wird. Denn reine, *an sich praktische Vernunft* ist hier unmittelbar gesetzgebend" (5:31).

freedom to form a circular process in which freedom and moral law mutually confirm one another. Freedom is the rational ground for the existence of the moral law (cf. *raison d'être*), whereas the moral law is in turn the rational ground for knowing our freedom (cf. *raison de connaître*).

It is thus only through the strange fact of our consciousness of independence from all natural causality that we are aware of ourselves as free beings (in a narrow, negative sense). But through the moral law in ourselves, we can know and recognise ourselves as autonomous and truly free beings (in a positive sense), since the moral law shows itself as a fact of pure reason, a practical reason "die sich dadurch als ursprünglich gesetzgebend (...) ankündigt". This is, on my reading, the true meaning of the fact of reason: it 'incorporates' the noumenal concepts of freedom and moral law, and qua uncircumventable to all practical thought, it now "dringt [sich uns] als synthetischer Satz a priori [auf], der auf keiner, weder reinen noch empirischen Anschauung gegründet ist". This leads Kant to his conclusion in the important §7 of the second *Critique*: "Reine Vernunft ist für sich allein praktisch und gibt (dem Menschen) ein allgemeines Gesetz, welches wir das *Sittengesetz* nennen" (5:31). Accordingly, the moral law is based on a fact of reason in its practical application.

If only to avoid a main line of criticism regarding this important term in the secondary literature, let me point out here that Kant himself is quick to counter an interpretation of this fact as any other empirical fact or as a *contradictio in adjecto*: "es [ist] kein empirisches, sondern das einzige Faktum der reinen Vernunft" (5:31). The fact of reason is therefore, in plainer and simpler terms, no fact in the ordinary sense of the word, but the very activity (*Tat*) of practical reason. A few pages later, he formulates the same point as follows; it is a fact only in the sense that it is a fact "worin sich reine Vernunft bei uns in der Tat praktisch beweiset, nämlich die Autonomie in dem Grundsatze der Sittlichkeit, wodurch sie den Willen zur Tat bestimmt" (5:42). To recapitulate the philosophical-theoretical framework on which he builds: in Kant's view, the insistence that one has to discover a first origin of the moral law and so ultimately prove the fact that practical reason has this uncircumventable ability to be the cause of actions of the will can lead only onto the path of old metaphysics. Instead, practical reason proves itself in its actual ability to be the supreme and immediate determining ground of the will, which, accordingly, is both free and moral.

What does this all mean? In the ensuing remarks, Kant emphasises how the moral law, as autonomy of the will, in this manner also proves itself satisfactorily for speculative reason. The purely negative concept of freedom that the theoretical understanding could muster now actually attains a positive determination of the will in the immediacy of acting out of respect

for the universal legislative form of the moral law and it alone. To employ Kant's vocabulary here, this leads pure reason for the first time to take a step not into extravagancy, but in fact gives objective *practical* reality to a rational idea (freedom) and so *changes* the transcendental use of it into an immanent use as a causal factor in the field of experience. Kant actually says here, quite clearly, that through a positive concept of freedom (autonomy), we are able to give objective practical reality to an idea in the phenomenal world. The vital passage in full reads as follows:

> Diese Art von Kreditiv des moralischen Gesetzes, da es selbst als ein Prinzip der Deduktion der Freiheit, als einer Kausalität der reinen Vernunft, aufgestellt wird, ist, da die theoretische Vernunft wenigstens die *Möglichkeit* einer Freiheit anzunehmen genötigt war, zu Ergänzung eines Bedürfnisses derselben, statt aller Rechtfertigung a priori völlig hinreichend. Denn das moralische Gesetz beweiset seine Realität dadurch auch für die Kritik der spekulativen Vernunft genugtuend, daß es einer bloß negativ gedachten Kausalität, deren Möglichkeit jener unbegreiflich und dennoch sie anzunehmen nötig war, positive Bestimmung, nämlich den Begriff einer den Willen unmittelbar (durch die Bedingung einer allgemeinen gesetzlichen Form seiner Maximen) bestimmenden Vernunft, hinzufügt und so der Vernunft, die mit ihren Ideen, wenn sie spekulativ verfahren wollte, immer überschwenglich wurde, zum erstenmale objektive, obgleich nur praktische Realität zu geben vermag und ihren *transzendenten* Gebrauch in einen *immanenten* (im Felde der Erfahrung durch Ideen selbst wirkende Ursachen zu sein) verwandelt (5:48).

Accordingly, the idea of freedom is, for Kant, the one, necessary "Unbedingtes" in the world of experience and purely natural causes. This is due to the normative fact of practical reason that the latter "von selbst" can and actually does determine the causality of (rational) beings in this world. Moreover, and crucially, this all-important idea of freedom is understood by Kant "als eines Vermögens absoluter Spontaneität". Although freedom is "ein analytischer Grundsatz der reinen spekulativen Vernunft" (5:48), it can find objective reality in a practical sense (and this only, since no actual example can ever provide empirical proof of such a still evidently correct principle).[54] And, decisively, this objective practical reality is found in the causation of freedom, namely as *Tat* or action.[55]

I here anticipate the full consequences of this Kantian insight that is not yet wholly elaborated in the second *Critique*, but that will be further developed in later works: we now begin to realise that from the transcendental concept of freedom we arrive in a position where we can bridge the gap between what he refers to as the noumenal and the phenomenal world. Through an immanent use of the former concept of freedom in the latter world of empirical actions, we have a moral law that is not only a great theoretical achievement in its own right,

[54] Accordingly, Kant also calls freedom the regulative principle of reason as a whole (cf. ibid.).
[55] This is in full agreement with the passage quoted above from the preface to the second *Critique*, where Kant had made his vital claim about the nature of practical rationality: if only practical reason "durch (…) Tat" (5:3) can show that it can cause actions in this world, it also shows the reality both of itself and of its concepts.

but that also is, and has to be, active in an otherwise entirely determined, mechanistic universe void of freedom. In this dissertation, I shall argue that, contrary to some notions of it, Kant's practical philosophy will in due course present itself as, respectively, a theory of autonomous human action (i.e., morality) and interaction (i.e., legality) also within our world of physical laws and contingent circumstances; it is not just external to this world.

We must wait for the main part of the thesis before I can begin to fully discuss what all this amounts to. But as Kant proceeds to further explain how he conceives of this activity of practical reason and the idea of freedom in the second *Critique*, he makes, for the first time, explicit references to our topic here, that is, the internal relationship between morality and legality in his early practical philosophy. In the subchapter that I now turn to, we will witness how Kant seems at first to treat the concept of legality as something that can and must be deduced from a supreme and more basic concept of morality, although he does not actually clarify how this is to be done. We must therefore ask ourselves whether, at this stage, Kant conceives of a future elaboration of the concept of legality as one deduced from, and thus also subordinated to, the concept of morality as such, or if he actually suggests another path to be taken in this regard. As we will see, this will later be crucial for our understanding of how his concept of freedom can attain objective practical reality.

1.2. A straightforward deduction of legality from the concept of morality?

To start with, it should be made perfectly clear that Kant's concept of legality, from the very outset, is not in any way identified with the actual civil constitution of any state. As in the case of morality, the attempt is made to ground and justify it, together with its obligations, exclusively as concepts of pure practical reason, in diametrical opposition to any grounding and justification of legal obligations qua positive law. This is demonstrated even before the introduction of the concept of legality.

In the second *Critique* (cf. 5:40), Kant sets up a table to classify how principal strands in practical thought have previously identified the determining grounds for us to act upon, and so concord with and promote their highest principle of morality (*Sittlichkeit*), however this is ultimately envisioned in the respective theories. One of these practical determining grounds is to make it a duty to act in line with what the actual civil constitution prescribes; this approach is attributed to Mandeville. (Other grounds listed are education (Montaigne), physical feeling (Epicurus), moral feeling (Hutcheson), perfection (Wolff and the Stoics), and the will of God (Crusius and other theological moralists) (cf. ibid.).) But as we recall from the *Grundlegung*, Kant holds that material grounds of this kind can constitute only hypothetical imperatives;

they know no moral law in the shape of a categorical imperative. Consequently, they fall short of his designated mark. They are material practical principles, not formal practical principles.

This stance is reiterated in the second *Critique*: for Kant, to act according to the actual civil constitution, just because it is positive law, cannot be made a practical principle of pure reason.[56] The formal practical principle of pure reason, although it may, of course, prescribe exactly the same actions as positive law actually does, is grounded in the respect for the moral law, not positive law. Normatively speaking, they are clearly distinct. His emphasis is firmly placed on the formal principle that renders possible a universal legislation of a supreme and immediate determining ground of the will, not on the material principle that dictates specific actions because positive law prescribes them. In the latter case, the *de facto* civil constitution is mediately made the determining ground for a given conduct, not the practical-rational law.

But what can be said more precisely about a Kantian concept of legality, and what is its relationship to the moral law that now is established? The concept is mentioned for the first time in the third chapter of the analytic, on the incentives of pure practical reason. Here, Kant stresses the strict necessity that a moral action must be performed out of duty: the objective moral law must be made the subjective maxim (incentive or determining ground) of the acting individual. This constitutes, as we have seen, the entire moral dimension of an action. "Das Wesentliche alles sittlichen Werts der Handlungen kommt darauf an, *daß das moralische Gesetz unmittelbar den Willen bestimme*" (5:71). His initial attempt at a distinction between morality and legality is made along these lines: "Geschieht die Willensbestimmung zwar *gemäß* dem moralischen Gesetze, aber nur vermittelst eines Gefühls, welcher Art es auch sei, das vorausgesetzt werden muß, damit jenes ein hinreichender Bestimmungsgrund des Willens werde, mithin nicht *um des Gesetzes willen*: so wird die Handlung zwar *Legalität*, aber nicht *Moralität* enthalten" (ibid.).

On this view, legality cannot lay claim to an independent deduction in Kant. Rather, it has to be derived from morality. As I have indicated with regard to the relationship between morality and legality in his early practical philosophy, the latter concept cannot be seen in the second *Critique* to have an autonomous status vis-à-vis morality. As the last quotation clearly shows, there is no indication here of anything but legal subordination to the supreme principle

[56] I quote his conclusion in this regard: "weil materiale Prinzipien zum obersten Sittengesetz ganz untauglich sind (wie bewiesen worden), [ist] das *formale praktische Prinzip* der reinen Vernunft, nach welchem die bloße Form einer durch unsere Maximen möglichen allgemeinen Gesetzgebung den obersten und unmittelbaren Bestimmungsgrund des Willens ausmachen muß, das *einzige mögliche* (…), welches zu kategorischen Imperativen, d. i. praktischen Gesetzen (welche Handlungen zur Pflicht machen), und überhaupt zum Prinzip der Sittlichkeit sowohl in der Beurteilung, als auch der Anwendung auf den menschlichen Willen, in Bestimmung desselben, tauglich ist" (5:41).

of morality. This is further revealed in the second *Critique* in his equation between the two concepts of legality and morality and whether actions are performed only in correspondence with duty (*pflichtmäßig*) or out of duty (*aus Pflicht*) for the moral law (cf. 5:81).[57]

In other words, at this stage, the lack of moral incentive is the branding iron of legality for Kant. It may be related to practical reason, but it is evidently a watered-down version of morality. The external character of moral actions may be there; nevertheless, it lacks all moral value due to its internal void. He concludes in the second part of the second *Critique* without further deliberations: such a lack of proper practical determining ground may certainly bring about "*Legalität* der Handlungen, aber nicht *Moralität* der Gesinnungen". We could still act in complete accordance with the letter of the moral law, but "der Geist" thereof could all the same be missing entirely. In that case, we would for Kant "unvermeidlich in unseren eigenen Augen als nichtswürdige, verworfene Menschen erscheinen müssen" (5:151 f.).[58]

This is more or less all that Kant says on the concept of legality and its relationship to the moral law and morality as such in his two main practical-philosophical publications of the 1780s. The distinction between legality and morality is ultimately traced back to the moral incentive of actions, which is the domain of morality, whereas legality is the mere conformity to this. The realm of right is, on this view, what we might call unexplored normative territory in its subordination to morality as the latter provides all premises and merely exempts the former from the hallmark signature of true morality, i.e., the moral incentive. This inevitably leads to the conclusion that legality is seen as something which only can be derived from the concept of morality, although it is not evidently clear how.

The matter is not helped even if we were to take the concept of freedom as our point of departure. One might perhaps think that Kant would use the classification from the table in the second *Critique* – where practical determining grounds were subdivided into subjective or objective, external or internal practical determining grounds – to instate legality as a *formal*, objective, and *external* determining ground of the will, in contrast to the *internal* determining ground of morality proper. This, however, is not done. The objective reality of freedom is

[57] The mere correspondence, then, constitutes the legality of an action; the respect for the moral law brings about morality. See also ibid.: "Der Begriff der Pflicht fordert also an der Handlung, *objektiv*, Übereinstimmung mit dem Gesetze, an der Maxime derselben aber, *subjektiv*, Achtung fürs Gesetz, als die alleinige Bestimmungsart des Willens durch dasselbe. Und darauf beruht der Unterschied zwischen dem Bewußtsein, *pflichtmäßig* und *aus Pflicht*, d. i. aus Achtung fürs Gesetz, gehandelt zu haben, davon das erstere (die Legalität) auch möglich ist, wenn Neigungen bloß die Bestimmungsgründe des Willens gewesen wären, das zweite aber (die *Moralität*), der moralische Wert, lediglich darin gesetzt werden muß, daß die Handlung aus Pflicht, d. i. bloß um des Gesetzes Willen, geschehe".

[58] I also note that he correctly infers from this that morality in fact always has "*mehr Macht*" over the human mind than legality can ever provide, regardless of all its empirical incentives (cf. ibid.).

only shown in the practical use of pure reason, and this is only to be identified with the ability of the moral law to immediately determine the individual will of imperfect rational beings, i.e., morality proper. Freedom (at least qua autonomy) is hence, at this stage of his writing career, not inherently connected to the concept of legality. From this moral perspective, any positive Kantian concept of freedom can only be considered as immanent to the concept of morality, and extrinsic to the concept of legality. In the two main works in his early practical philosophy, nothing but a derivation of legality from morality seems possible.

This has for many years also been the standard interpretation of Kant's philosophy of right, which was based primarily on these two publications. Robert B. Pippin's claim that all "political duties are a subset of moral duties" (Pippin 1997: 58) is typical in this regard.[59] The concept of legality is inferior here to the concept of morality; all legal duties and obligations are to be derived from the latter. In the treatment of the *Rechtslehre* in the main parts of the dissertation, I shall give a thorough justification for why this cannot be seen to be Kant's (nor Pippin's) final view and discuss actual misinterpretations of his political and legal philosophy. I shall argue that these occur precisely because they are based on readings of his main works on moral philosophy. On the basis of these writings, such analyses must be considered to be accurate: only a straightforward deduction of legality from the concept of morality can be read out of these two texts. The crux of my critique is, rather, that Kant can be seen to change his position late in his writing career, where the autonomy of the concept of legality finally emerges.

This, nonetheless, is not to say that the position of *Recht* sketched above is the only approach to legal and political philosophy that Kant developed prior to the publication of the *Rechtslehre*. Further traces of his understanding of the concept of legality and the position of *Recht* can be found in other, minor works from the same period. These writings are, however, related to discussions with the preceding and contemporary natural rights tradition rather than to deliberations on moral philosophy as such.

At this point, therefore, we are well advised to leave the scarce remarks he makes with regard to legality and *Recht* in the *Grundlegung* and the second *Critique* for a brief discussion of Kant's line of reasoning pro and contra various proponents of natural right in his own time. We will discover that a vital question that is not answered, let alone addressed, in his moral philosophy now emerges up with great effect in the realm of legal philosophy: if the concept

[59] When he speaks of political duties, Pippin also means legal or juridical duties, since he – quite typically – uses these terms interchangeably for Kant's *juridische Pflichten*. As we shall see, however, the political and legal realm must be kept apart in an analysis of the accounts Kant gives of right and politics. To Pippin's credit, I should add that he later presented a more nuanced interpretation (cf. e.g. Pippin 1999; 2006).

of legality is subordinated to the concept of morality, are all moral duties also legal duties (bar the moral incentive)? And if this question is answered negatively, how do we then properly determine which moral obligations should also be legal obligations and which should not?

Here, Kant can be seen to move onto another path when it comes to a clarification of the position of *Recht* in its relationship to morality. It is a move that places him in the context of a natural rights tradition of practical-rational claims to individual rights and universal legal principles, but that at the same time importantly incorporates the structures and necessity of positive law as part of the reflexive turn of Enlightenment thought.

2. Kant and the natural rights tradition

Some of the complexity of Kant's legal philosophy can be clearly seen in the great difficulty and scholarly disagreement concerning the legal theory tradition in which one is to place him. Without laying claim to any final identification of the variety of theory positions that exist *de facto*, I will, for the sake of his argument as well as of presentational clarity, briefly revisit a major debate in the history of legal philosophy between two main strands, in relation to which he actively positioned himself. In the effort to shed some light on his early understanding and concept of *Recht*, we will see how he argued both for and against proponents of the two main legal theory positions in question, namely, the natural rights tradition on the one side and what developed into legal positivism in almost anything but name on the other.[60]

Most scholars today would say that Kant's theory belongs to a natural rights tradition of some sort, where certain inalienable rights are ascribed to all human beings regardless of their nationality, race, age, sex, religious and political conviction, etc. These rights then place a certain suprapositive obligation on the actions of the state because the normative validity of natural rights is prior to *and* superior to any claim to validity that the contingent entity of the existing legal order (qua fact) can make. I must return later to what this latter claim more precisely entails. At present, however, it is safe to say that this theory tradition is once again diametrically opposed to any kind of legal positivism, where rights merely lend their validity from their spatiotemporal positing and enactment in state law. Kant's principled argument for certain inalienable rights of man qua human being seems to exclude a positivist reading and to be a most fruitful starting point for an exposition of an overall theory of justice that grounds

[60] The beginnings of this dichotomy have been traced to the immediate aftermath of Kant. Byrd & Hruschka (2008: 607n.) argue that a Stuttgart librarian and author named Johann Wilhelm Petersen, writing under the pseudonym of Placidus, was the first scholar to use the modern German term *Rechtsstaat* (rule of law) when he attributed this position in 1797 to Kant's philosophy of right (and to the positions of Fichte and Reinhold). These belong to the "'the critical school or the school of the *Rechts-Staats-Lehrer*' (…), which Petersen somewhat sarcastically contrasts to the *Staats-Rechts-Lehrer* (…) [who] we today would view as the legal positivists".

its first principle in humanity or, more specifically, man's reason, moral capabilities, inherent dignity or the like. As we know, over the years, many political theories have been formulated in this indubitably Kantian vein, and rightly so.

However, when it comes to the more detailed debates on political and legal theory, the picture soon becomes somewhat more complicated. Although most of those who discuss his works today place him firmly within what we can call the natural rights tradition, the more minute reading of Kant's works after his post Cold War re-instatement as one of the leading political philosophers has prompted some voices to call for a reassessment of his position. For instance, Jeremy Waldron with his article "Kant's Legal Positivism" has been something of a standard source of reference for those who want to portray the Kantian political position with a more positivist hue. In the same breath, one is often reminded of the multiple similarities to Hobbes in parts of his theory, and this is undoubtedly a correct assessment. This also applies to Kant's often substantial disagreements with the natural rights tradition of his own time; all these aspects can lead rather hastily to the conclusion that his philosophy of right has more in common with traditions to which it is most often seen as a counterbalance.[61]

This focus on the dichotomy between the natural rights tradition on the one side and legal positivism on the other – similar to the grouping of so-called idealists and realists in the realm of international relations – can easily lead us astray from the matter itself, that is, how the first principle of right and justice is to be consistently established. Nonetheless, if one goes to the sources, the question of a justification of an overarching principle for legal and political theory can be found at the centre of both traditions. But whereas the latter position denies any possible explication of this from a position outside the sphere of law itself, the former claims the opposite: namely, that man is endowed with certain natural rights prior to any formulation of these by the state. The claim to norm adherence is thereby made with reference to standards of either legitimacy or legality, where one concept is held to be superior to the other. In short: natural rights theorists trump legality with legitimacy, and legal positivists reject (or certainly disfavour) legitimacy for legality.

In this chapter, I shall attempt from Kant's perspective to indicate how this dichotomy reveals some fundamental misapprehensions of the modern rule of law, since both sides fail to integrate into their overall position its significant dual character of containing the demands of legality *and* legitimacy in a consistent manner. This will provide a conceptual background for my claim in part I of the dissertation that Kant's *Rechtslehre*, as the culmination of a long line

[61] See, for instance, the article by Waldron (1996) mentioned above.

of Enlightenment legal and political thought, successfully mediates the inherent claim of both positions in what I call a procedural turn. This, I argue, forms a frequently overlooked facet in his justification and explication of the modern rule of law. A brief presentation of the inherent problems that he highlights within the two factions will hopefully show both their theoretical and philosophical shortcomings; this will hopefully enable us at a later stage to further clarify his attempts at a possible mediation between the two.

2.1. Kant and the German natural rights debate

If, for our purposes, we start here with the natural rights tradition, a closer investigation will reveal the necessity of specifying what exactly is held to be the founding principle of right and justice within the theory tradition itself. Throughout his writing career, Kant on numerous occasions addresses the natural rights debate – mainly the German-speaking tradition – and its quest for a solid ground on which to build its entire legal framework. In particular, he draws attention to critical implications that necessarily follow from the underlying (and too often unquestioned) moral premise on which the various theoretical positions rest on, and he casts serious doubts on whether the tradition is fully aware of how it justifies its own stance. As we will discover, his highly critical remarks on theoretical validity suggest that, prior to his more mature texts on philosophy of right, he holds the possibility open that there can be no straight line of deduction between the concepts of morality and legality, hence signalling that the line he takes in the deduction of *Recht* will deviate from earlier natural rights approaches.

One telling example of his discordance vis-à-vis traditional natural rights doctrine is shown in his 1786 review of the young German jurist Gottlieb Hufeland's efforts to identify the first principle of right. In his *Versuch über den Grundsatz des Naturrechts*, Hufeland had tried to demonstrate that the quintessential difficulty of establishing a binding obligation (*Verbindlichkeit*) to norms must leave the mere form of the free will behind, in order to seek the obligating principle of practical laws in an object that nature, in turn, prescribes. This led Hufeland, who had also studied philosophy, to ground the founding principle of natural rights in the promotion of each individual's self-perfection qua rational and moral being.[62] The first principle of natural right was to be located in humanity and its (moral) prosperity.[63] If we

[62] On this and the previous points, see (8:128).

[63] In his review, Kant merely states that Hufeland is bound to end up with inherent problems in his theory, if he does not ground his principles in knowledge of pure concepts (of reason), but rather in an antecedent natural obligation. (It is, accordingly, this natural obligation that lends rights their decisive feature as coercive rights and thereby entitles one to legitimately force other individuals to act accordingly.) On Kant's theoretical justification of practical principles as purely formal or procedural concepts that cannot consistently have certain objects as

leave aside Hufeland's deduction of *Recht* here and just focus on his presumably humanitarian stance as such, this may appear to be akin to Kant's own position on morality (and on the role of nature in our development qua rational, moral beings).[64] But, according to Kant, Hufeland is dangerously mistaken in his grounding of the supreme principle of natural right in humanity itself.

Apart from Hufeland's reluctance to explore the purely formal aspects of the principle, and partly as a direct result of this, there is one major cause for concern to which Kant dedicates much of his review. Kant sees Hufeland's attempt to ground the first principle of right and justice in humanity itself as no doubt well meant, but nonetheless inconsistent, since it breaks down on the coercive character of rights. To answer the question of what obligates the adherence to a (legal) norm with reference to an antecedent natural right to force other individuals to act in a certain way only seems to delay the entire problem. As Hufeland himself readily admits, this natural obligation does not further explain how and why this way of grounding a right puts a coercive, binding obligation on another individual's actions. This person, too, must be able to act according to the same natural rights principle; for that matter, he might not acknowledge these specific rights either. The basic question still remains to be answered, as Kant insists, "unter welchen Bedingungen ich den Zwang ausüben könne, ohne den allgemeinen Grundsätzen des Rechts zu widerstreiten; ob der andere nach eben denselben Grundsätzen sich passiv verhalten oder reagieren dürfe" (8:128).

This difficulty seems to point to a blind spot within much of the natural rights theory tradition: how can a natural rights *claim* consistently place a binding, *coercive* obligation on another person to subject himself or herself to it? This does not follow from the rights claim (*Rechtsanspruch*) in itself. Kant makes here a passing, but crucial reference to Hobbes, and suggests that he is the first to address an inherent problem with the theory tradition, namely its inability to explain how and why rights claims authorise a coercive obligation on others, who by all universal accounts really should have the same, equal right: "Hobbes merkt schon an, daß, wo der Zwang unsere Ansprüche begleitet, keine Verbindlichkeit anderer, sich diesem Zwange zu unterwerfen, mehr gedacht werden könne" (ibid.).

Although he is somewhat reluctant to draw the full consequences of what this insight means regarding the central aspect of obligation in any theory of rights, Kant believes that

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their obligating principle, see the discussion in chapter 1 of the prologue for his early moral philosophy. I shall return to his justification of his purely formal (or procedural) concept of right in part I of the thesis.

[64] See, for instance, Kant's insistence elsewhere that nature forces us to fully develop all our faculties and capacities as well as his emphasis on "the great artist Nature" as the guarantee of perpetual peace in his peace essay, especially (8:360 ff.), not to mention the association between humanity and morality (and moral dignity as such) in his exclusively moral writings.

Hufeland is obviously aware of at least the problems inherent to this position (if not the blind spot itself): "Hieraus schließt er, daß die Lehre von den Verbindlichkeiten im Naturrecht überflüssig sei und oft mißleiten könne. Hierin tritt Rezensent dem Verfasser gerne bei" (ibid.).[65] But if one were to follow his proposal to resolve this dilemma – that is, by locating the rights obligation in an imperative prescribed by nature that allows the use of coercion whenever there are violations of such an antecedent rule – one has soon approved of more than one first intended. That nature must (or even can) oblige us in this regard seems to Kant neither evident, necessary, nor desirable, "vornehmlich weil der Grund mehr enthält, als zu jener Folge nötig ist" (8:129).

The contours are vague, but are nonetheless still there: unlike what can be seen at the level of his writings on what we refer to today as his moral philosophy, Kant seeks already at this stage of his works on legal and political philosophy to avoid the traditional natural rights theory's notion of legal norm adherence as substantively resting on inner obligations of moral or ethical perfection (or any imperative of nature, for that matter). Kant holds that one would find oneself in a most awkward position if one were to assign human beings (natural) rights that are grounded in an inner, moral obligation to one's self-perfection. This is because of the necessarily coercive and inter-subjective character of legal rights. Once the attempt is made to realise these rights in actual practice, one ends up having no substantial barrier against what one originally seeks, that is, a legal guarantee against all external coercion in the inner realm of morality and personal freedom, since the authorisation to use coercion is precisely founded in and proceeds from this no longer exclusively personal realm.

If the legal and political system which is institutionalised to secure individual rights and civic peace is founded in morality or humanity as such, there is no principle within this system that hinders it from intruding on these realms, since it is exactly these that it is set to guarantee and to sustain with force. There is here quite simply no principled argument against a concept of coercive obligation that in fact forces one to act morally and to perfect all one's possible capabilities. But such a position would obviously be inconsistent not only with the natural rights of man, but also with morality in any proper sense (*inter alia* because it makes moral adherence a task for the state).

For Kant, the natural rights tradition – here exemplified by Hufeland and his Wolffian inspired attempt to ground a first principle of right in a moral human nature – gets it critically

[65] One might assume that this agreement between the two relates primarily to the misleading character of coercible obligations in traditional natural rights doctrines. However, as Kant's subsequent remarks reveal, it also extends to the superfluousness of a justification of such obligations once a court of law has been established (cf. ibid.).

wrong by linking norm adherence to an inner realm of morality (or humanity): "Denn daraus scheint zu folgen, daß man von seinem Rechte sogar *nichts nachlassen* könne, wozu uns ein Zwang erlaubt ist, weil diese Erlaubnis auf einer innern Verbindlichkeit beruht, sich durchaus und mithin allenfalls mit Gewalt die uns gestrittene Vollkommenheit zu erringen" (8:129).[66] One ends here up with the situation, which some find paradoxical, that in trying to found the principle of right in moral compliance, the inherent coercive feature of legal rights results in exactly the opposite of what one intended: once the right to coercion is defined as sustainment of a moral (or ethical) order, there is no guarantee that the adherence to these standards will not in turn lead precisely to the intrusion into one's inner, moral realm of natural rights that was feared at the outset.

A somewhat similar critique of this position is found in Kant's argument in his peace essay against more renowned theoreticians of the German natural rights debate. Discussing the use of the term *Recht* in international law and a possible justification of a supposed right to go to war – which for Kant is something of a *contradictio in adjecto*[67] – he is surprised by the fact that the concept of right has not been banished altogether from the debate on what he calls war politics. He fires a famous broadside against the esteemed political philosophers and proponents of natural right Hugo Grotius, Samuel Pufendorf, and Emerich de Vattel, accusing them of being nothing more than "lauter leidige Tröster" (8:355). They are, as Gregor aptly puts it in her English translation, only "sorry comforters" (Kant 2009: 326). They present no overall concept or principle for abandoning war as such; on this issue, they ultimately have to resort to purely moral appeals. Besides this, as was the case with Hufeland's attempt, their insistence on adherence to certain natural rights that are independent of law and politics can lead precisely to an enactment of these rights as justification for state actions that they would initially be very reluctant to support, to say the least. In this way, the warmongering statesman could argue, with no obvious self-contradiction, that through his or her policies the state was merely putting into practice what the philosophers' theory prescribed: due to the inherent moral value of man as the supreme principle of right and justice, one is entitled (or in fact obliged) to use coercion (i.e., to go to war) against the oppressive regime of another state for its violations of the supreme principle.[68]

[66] Accordingly, Kant wants to make natural rights proponents aware of this important point, so that they do not obfuscate (*verwirren*) "den eigentlichen Rechtsgrund (…) durch Einmengung ethischer Fragen" (8:128)
[67] The possibility – or rather, for Kant, impossibility – of *ius ad bellum* is discussed further in part II.
[68] The argument was also used for colonial warfare (cf. Busch 1979: 160): "Grotius erlaubt einen Strafkrieg auch gegen die Völker 'die gegen die Natur sündigen', d.h. die in den Augen ihrer Nachbarn als sittenlos gelten".

Kant's claim here is not that the natural rights tradition is fundamentally wrong when it ascribes certain rights to every individual, but that it fails to consider what happens to these rights once they are laid down as positive law, let alone if they can consistently be posited as such. This is particularly evident at the international level, where the absence of the rule of law means that everyone must pursue their normative claims through unilateral means, that is, war. His main point here is that the principles of right proposed by Grotius, Pufendorf, and Vattel, even their entire legal codes as such, cannot have "die mindeste *gesetzliche* Kraft", and that this holds regardless of whether they are "philosophisch oder diplomatisch abgefaßt" (8:355). Kant holds that when they are translated into legal principles, their rights doctrines of already given moral standards need not have liberating power: they can just as easily turn into instruments of oppression. Because their first principle rests on an inner obligation of moral improvement and self-perfection, there is no argument in principle that restrains the ruling powers from transgressing the realm of morality and/or personal freedom, since the state (or indeed anyone) is authorised precisely to rule accordingly.

The main objection from Kant's side is clear: in their failure to provide the relevant *legal* criteria for their rights theory and its authorisation in actual politics, the proponents of natural right will remain in the inner realm of morality, where comfort may be found in the occasional insight into the natural rights of man, but where the subsequent realisation and guarantee of these principles are entirely missing or flawed. One may claim that certain rights have validity *per se* and therefore ought to be posited as law, but if this rights claim is refuted by another individual will and there exists "no court that could judge with rightful force" (that is, his definition of the state of nature in Kant (2009: 320)), one stands, so to speak, naked in front of one's own moral conscience, and the only option is to pursue the realisation of the claim through a unilateral use of force. This gives rise to an apparent dilemma: without a state, one lacks the medium to realise justice, and might replaces right as the means to pursue one's however legitimate particular claims. On the other hand, in an already established state, one must abide with the law as it is.

Taken by itself, the moral appeal of the natural rights tradition may be perfectly sound. But unless the claim is posited as law, it will not and cannot have a rightful factual resonance in the world without violating either the rights condition that it believes it anticipates (by unilateral means) or the rights condition it finds itself in and subjected to. With regard to the latter scenario, Kant seems to take an overly positivist stance when he affirms that the rights claim as such cannot be implemented as positive law in the sense that there cannot be an effective appeal to any 'higher' (whether moral or natural rights) principles within the realm

of positive law as such (cf. 8:303). For there to be a rule of law, he argues that there quite simply cannot be higher-ranking natural rights hovering above positive law which in one way or another can defy or trump the latter; in short: no law above the (positive) law. Kant's 1793 *Gemeinspruch* essay concludes on this matter by insisting that: "Alles Recht hängt nämlich von Gesetzen ab" (8:294).[69]

This rejection of natural rights as effectively superior to positive law within the state can be interpreted as a clearly Hobbesian feature in Kant's legal philosophy. For our present purposes, I will not delve into the difficult question of how much influence Hobbes actually had on his political and legal philosophy, but will only point to the indisputable fact that there are obvious similarities between the two theoretical approaches. Even if Kant can be said to have been sympathetic to parts of the German natural rights tradition, I think his philosophy of right is at least as strongly influenced by the tradition that starts with Hobbes. This tradition signifies a distinct shift away from a traditional natural rights viewpoint in legal and political matters. A short presentation of Hobbes' legal argument and Kant's highly critical assessment of this position (to which he nonetheless is indebted) can give us further knowledge of the relationship between legality and legitimacy and/or morality in the modern rule of law.

2.2. Kant and Hobbes' legal positivism

Deeply unsatisfied with previous attempts to find truths in questions relating to the sphere of morals, and having the strong conviction that it is possible to here establish natural laws with a precision similar to what at that time was under development in the natural sciences, Hobbes was more than ready to expel all previous moral doctrines from the realm of true scientific knowledge. In a discussion of the need for a revolutionary change of approach to the question of moral certainty, Hobbes is adamant about the sorry state of affairs in moral and political philosophy, when he writes the following passage:

> [T]hose men who have written concerning the faculties, passions, and manners of men, that is to say, of moral philosophy, or of policy, government, and laws, whereof there be infinite volumes have been so far from removing doubt and controversy in the questions they have handled, that they have very much multiplied the same; nor doth any man at this day so much as pretend to know more than hath been delivered two thousand years ago by Aristotle. (…) The reason whereof is no other, than that in their writings and discourses they take for principles those opinions which are already vulgarly received, whether true or false; being for the most part false (Hobbes 1994 [1650]: 75).

[69] It would be trivial to insist that this relates only to the lawful form as such (i.e., would be equally attributable to moral or natural rights). That is obviously also true, but Kant speaks in this context of a necessity of being *de facto* subjected (*unterworfen*) to laws in an actual political community in the shape of a state under positive laws.

In turning away from the Aristotelian teleological ideal of values and rights as inherent to nature and man (i.e., a natural order of things in which their realisation rests on inner qualities developed in the right environment), Hobbes sets out to establish a science (also of moral-philosophical principles) without such problematic assumptions. Among other aspects that we cannot discuss at length here, this led Hobbes to an all-out attack on the contemporary natural rights tradition. As with Kant, the question of obligation became pivotal in this process.[70]

For Hobbes, the fact that there can no longer be a validated natural order of things means that man has no already-existing common obligation by which he must live. In Hobbes' view, natural rights withdraw into a finite number of individual value judgements of good and evil, right and wrong. They do not point to any kind of objective order from which a definitive principle of justice can be deduced. In the state of nature, every individual will do what he or she thinks will best promote his or her own self-preservation; accordingly, the description of actions (or objects, for that matter) cannot be viewed independently of the individual who claims them. Consequently, Hobbes holds that value judgements cannot be separated from the person who applies them, since they do not refer to a certain truth content about the actions (or objects) in question; "there being nothing simply and absolutely so; nor any common rule of good and evil, to be taken from the nature of the objects themselves; but from the person of the man (where there is no commonwealth;) or, (in a commonwealth,) from the person that representeth it; or from an arbitrator or judge, whom men disagreeing shall by consent set up, and make his sentence the rule thereof" (Hobbes 1996 [1651]: 35).

Although he differs from Hobbes' reasoning and subsequent theoretical expositions, Kant is, as we have seen, to some degree indebted to Hobbes. He follows him with regard to pointing out the inherent key problem of traditional natural rights theory, namely: how can a natural rights claim yield a coercive obligation for someone against someone else, who surely must have the same right? According to its own definition, there is no higher principle within the tradition itself that can be invoked when one claim in its actual realisation is confronted by a conflicting claim: natural rights doctrine is *per se* superior to any other principle of justice, so that the divergence can be solved only by the use of unilateral means, and we have come no further. As I noted in the description of a blind spot in Hufeland's doctrine, any claim made by one individual simply does not constitute an obligation on the other part. We remain in the state of nature, where, in Hobbes' classic formulation: "there is no place for industry; because the fruit thereof is uncertain: and consequently no culture of the earth; no navigation,

[70] Of course, only a very brief outline of Hobbes' general theory can be given within the scope of this thesis.

nor use of the commodities that may be imported by sea (…); no knowledge of the face of the earth; no account of time; no arts; no letters; no society; and which is worst of all, continual fear, and danger of violent death; and the life of man, solitary, poor, nasty, brutish, and short" (ibid.: 84).

There is thus a severe discrepancy between the perceived natural rights as they appear to us in our conscience as binding norms and the act through which they would put such an obligation on everyone else. Hobbes draws the consequence: a sharp distinction between the internal and external obligation of laws: "The laws of nature oblige *in foro interno*; that is to say, they bind to a desire they should take place: but *in foro externo*; that is, to putting them in act, not always. (...) And whatsoever laws bind *in foro interno*, may be broken, not only by a fact contrary to the law, but also by a fact according to it, in case a man think it contrary" (ibid.: 105). With this division between the internal and external realm of obligation and the claim that natural rights can necessarily bind only the former will, Hobbes insists on the need for the institutionalisation of a sovereign power, the Leviathan, to instate and uphold man's obligations *in foro externo*, that is, between men. This clear change towards the rule of law as the single guarantee of external obligations in a commonwealth literally lifts the unresolved question of natural rights to another level. The focus here is on the institutional framework of the sovereign state and how this precisely can (or cannot) discern and/or mediate between the various natural rights or moral theories; the material content of the laws themselves is now of secondary concern.

Although this shift of focus does not *per se* leave behind the question of natural rights, the enquiry by Hobbes' and the subsequent tradition into the first principle of right and justice takes a distinctive turn towards the formal characteristics of the state. Despite the controversy that the *Leviathan* sparked within the Enlightenment tradition of political thought, it is fair to say that although there was profound disagreement with Hobbes, none of the major political thinkers after him ignored the importance of his contribution. Rather, they adapted (or adapted to) his conceptual framework. In fact, the commonly shared theoretical presuppositions even make it possible to speak of the tradition in the wake of Hobbes as constituting a paradigm of political thought.[71] With the social contract as the legitimating figure, the individuals of the

[71] As Nils Gilje plausibly argues in his analysis of the tradition of political philosophy tradition from Hobbes to Kant, it is possible to speak of a contract paradigm of natural right that lasted from Hobbes' 1651 publication to the political thought at the end of the eighteenth century, with Kant's theory as the final and most coherent formulation of the original Hobbesian insight. By expanding Thomas Kuhn's concept of paradigm (understood as a disciplinary matrix) to include a linguistic component, Gilje opens up the scope of Kuhn's concept to potentially include the humanities and the social sciences as well. Political philosophers like Spinoza, Pufendorf, Locke, Rousseau, and Kant can thus be said to belong to the same linguistic matrix of political philosophy.

Hobbesian state of nature give up their natural right to use whatever means they perceive to be necessary to further their self-preservation. Instead, they authorise a ruler of the state, in Max Weber's later formulation, who has a 'monopoly on the legitimate use of physical force' (cf. e.g. Weber 1994 [1919]: 36) and the sovereign right to legislation. In return, each person – now a legal subject – is, as a matter of principle, granted security and equal freedom under law. From here on, the formal requirements of the state take centre stage.[72]

This shift by Hobbes towards the formal characteristics of the sovereign state, a shift that must be seen as a clear break with traditional natural rights doctrine, does seem to leave behind all material criteria for the legitimacy of state actions. So, according to this apparently absolutist or even straightforwardly positivist version of natural rights theory that he seems to advocate, what actual rights or, perhaps better, laws is the legal subject entitled to qua human being? Approaching this question from the mainly formal standpoint that he himself favours, and as long as the sovereign decides what is right and has all powers to exercise this right, one would quite correctly assume that the individuals have none. They and their rights seem to be entirely surrendered to the law-abiding, benevolent will of the sovereign head of state.[73]

This absolutist-turned-positivist reading of Hobbes, according to which rights must be posited and enforced by state law before they are legally valid, obviously stands in diametrical opposition to natural rights doctrines that assume the validity of certain rights regardless of their positive enactment. Consequently, the latter position is inclined to infer that the superior legitimacy of these natural (or moral) rights 'trumps' their legal validity and that they must therefore be accepted as valid legal norms. Theoretical complexities and internal differences

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Although there are important differences between these Enlightenment thinkers, as already shown with regard to Pufendorf and Kant, they still belong to the same tradition and share some, or even most of the basic thought-figures, concepts, symbolic generalisations, metaphors, etc. (cf. Gilje 1990). As I shall argue below, this contractual natural rights basis will finally lead to a procedural turn within the natural rights tradition, which (to make a reference to the distinction drawn by Benjamin Constant in another context) separates the ancient concept of freedom from the modern.

[72] On the shift towards the formal characteristics of the state, see, for instance, Gilje (1990: 19), who also refers to the path out of the state of nature as a learning process from *ius naturalis* to *lex naturalis*, with the latter demanding the submission of all to the civil code of *lex civilis*, see ibid., pp. 187 and 229. This then laid a basic foundation for the European states' gradual transformation into the legitimate rule of law through modern doctrines of natural right. (For an analysis of the shift initiated by Hobbes interpreted as a fall from grace, see the defence of the classical natural rights tradition in Strauss (1953).)

[73] This is, of course, not an entirely accurate description of Hobbes' position. Every reader of his works knows that he grants the individual certain rights to self-defence, even against the Leviathan. But my primary concern here is underlined by the fact that these rights cannot themselves constitute legal rights backed up by juridical force in his formal institutional model; they cannot themselves stand above the sovereign and thus constitute a new sovereign. Despite all his efforts to bridge these natural rights into a framework of natural law, they remain outside the realm of positive law. Granted, it would be inaccurate to label his position as absolutist or positivist *tout court*, see Maus (2011: 300 ff.), who sees Hobbes as the first proponent of the rule of law (but one without a democratic foundation). I do not disagree with this. For the purposes here, however, it suffices to show how Kant disagrees with the clearly positivistic or absolutistic strains in Hobbes' legal theory.

aside, the strife between legal positivists and natural rights proponents comes nowhere else to the fore with more clarity than over the issue of a juridical possibility to a right to resistance (*Widerstandsrecht*). Whereas Hobbes – and, as we will see, Kant – insists that no consistent theory of law can include a legal right to resistance, quite a few natural rights advocates go to considerable lengths to establish such a right, for instance in the case of preventing a greater evil from being carried out by the state ruler.

For Hobbes, a right to resistance could not be reconciled with his strict, but ultimately premodern, concept of sovereignty. There simply cannot be *posited* a natural rights constraint of any sort upon the head of state within the rule of law; this will only instate a new Leviathan within the state which is no longer sovereign. For Hobbes, traditional natural rights doctrine does not know any actual (or at least consistent) concept of state sovereignty. Kant does at first glance seem to argue quite similarly to Hobbes (and any other legal positivist position), for instance in his 1793 *Gemeinspruch* essay where he says that there has to be an absolute prohibition of violent resistance against the sovereign and his agents (cf. 8:297 ff.).[74]

For Kant, too, any attempt to slip in empirical or eudaemonistic standards (let alone exceptions) into a theory of right will only lead to sophistry and incoherence. He thus clearly opposes the claim by the German philosopher and natural rights theorist Gottfried Achenwall that there must be certain empirical circumstances under which a state's obligations on its subjects no longer hold. Achenwall, like many other natural rights proponents, held that if the danger posed to the people by their own prolonged sufferance from a state ruler's injustice is greater than the danger posed by armed resistance and ousting of the tyrant, the people has a perfect right to rebel.[75] Kant hides neither his disagreement nor his bewilderment with regard to the justification of such an argument. Not only does Achenwall confuse the (still uncertain) actual outcome of a long line of actions with what entitles a rights claim, thereby, so to speak, putting the cart before the horse;[76] he also gets a number of other aspects wrong.

Firstly, Achenwall and his cognate "wohldenkenden Verfasser" commit the common fallacy of subordinating the principle of happiness (*Glückseligkeit*) to the concept of right in order to support their case, although this tends much more strongly to make the entire legal framework sway. Kant does not challenge the claim that happiness does not play an important or even fundamental role in our human activities. On the contrary, he is perfectly clear on the

[74] Moreover, in Kant's view, not even a right of necessity (*Notrecht*, *Ius Necessitatis*) due to physical oppression (or the like) can be involed on behalf of the people. (As we shall see, in his *Metaphysik der Sitten*, this right of necessity is quite stringently placed outside his *Rechtslehre* altogether.)
[75] For Kant's presentation of Achenwall's position, see the *Gemeinspruch* essay (cf. 8:301).
[76] See, in this regard, also Kant's contempt in the peace essay for statesmen who justify or at least excuse their own war polities with hindsight, on the basis of the favourable outcome – cf. the adage *fac et excusa* (cf. 8:374).

point that it is simply impossible to switch off our own quest for happiness when we act.[77] But this is far from saying that this principle should (or even can) serve as a first principle of right. Not only would such a claim not only be an evidently unfounded synthetic proposition that must still be proven; the principle of happiness is, as such, also unsuitable as a legal principle in Kant's eyes. For one thing, it does not constitute a certain way of life that should (or even can) be implemented as a legal standard. Moreover, it refers primarily to personal preferences, not to given moral-ethical standards that the state can merely posit (something which in any case would be contrary to a right to individual freedom). And it is also clearly counter to the principle of happiness itself that it should be guaranteed or coercively brought about through state policy (and not through the individual pursuit).[78]

In addition, there is yet another objection that is of perhaps even greater concern to our deliberations here, since it points to a distinctive feature of the legal system and the realisation of rights claims and obligations therein. Kant rejects the view held by Achenwall (and others), insisting that regardless of how constitutive the thought-figure of the social contract is for the legitimacy of the rule of law, it cannot put forward an *immediate* claim to validity vis-à-vis the present rule of law. The moral either/or-distinction, according to which any significant moral development must happen as a "revolution in the mind",[79] is not the correct benchmark in the realm of law and politics. Here, Kant holds, all true progress must be understood as gradual reform, not revolution.[80] Achenwall fatefully blends moral criteria into his doctrine of natural right when he incorporates a right to resistance *within* his legal framework. For Kant, this is a grave and dangerous misunderstanding of the concepts involved, especially in terms

[77] See, for instance, his critique of Garve's reading of his moral philosophy: "Ich hatte die Moral, vorläufig, als zur Einleitung, für eine Wissenschaft erklärt, die da lehrt, nicht wie wir glücklich, sondern der Glückseligkeit würdig werden sollen. Hiebei hatte ich nicht verabsäumt anzumerken, daß dadurch dem Menschen nicht angesonnen werde, er solle, wenn es auf Pflichtbefolgung ankommt, seinem natürlichen Zwecke, der Glückseligkeit, *entsagen*; denn das kann er nicht, so wie kein endliches vernünftiges Wesen überhaupt; sondern er müsse, wenn das Gebot der Pflicht eintritt, gänzlich von dieser Rücksicht *abstrahieren*" (8:278). See also his remarks in the *Tugendlehre* on this point (cf. 6:385 ff.), to which I have also referred above.

[78] Rather, the state must guarantee the private sphere in which each one can follow his or her conceptions of what makes them happy or their lives meaningful. As with Kant's critique of Hufeland, these inner, personal realms are endangered if the principle of right is founded in a moral or ethical category of this kind. For Kant, happiness has a clearly individual, non-state nature that is oriented and orients us towards the good life and its *ethos*. However universal it is as a human end, it is nonetheless, as he argues against Achenwall, ill-founded as a legal principle (let alone as the first legal principle).

[79] Cf. Kant's formulation in his *Religionsschrift*: "*Daß* aber *jemand* nicht bloß ein *gesetzlich*, sondern ein *moralisch* guter (Gott wohlgefälliger) Mensch, d. i. tugendhaft nach dem intelligiblen Charakter (…), *werde*, welcher, wenn er etwas als Pflicht erkennt, keiner andern Triebfeder weiter bedarf, als dieser Vorstellung der Pflicht selbst: das kann nicht durch allmählige *Reform*, so lange die Grundlage der Maximen unlauter bleibt, sondern muß durch eine *Revolution* in der Gesinnung im Menschen (…) bewirkt werden" (6:47).

[80] On Kant's reformative approach to law and politics, see especially Langer (1986) and Kersting (2007); I return to this question below.

of the internal relationship between the factual and normative dimensions that are involved in a practical realisation of the underlying theoretical principles.

To briefly elaborate: by interpreting the social contract model as placing an *immediate* obligation on the ruler to factually guarantee certain natural rights, thus granting the people a coercive right against the ruler whenever they claim he has broken the contract is to completely invert the roles the contract in a first instance prescribes. For Kant, to ascribe a positive right of this kind to someone who by definition stands under obligation, regardless of whether there has been a breach of contract by the other party, is tantamount to perpetuating the state of nature: the people remain judges in their own causes, since they secretly hold there exists a right to legitimately defy the sovereign power whenever they believe there is a breach of contract. In the belief that a theoretical figure of thought (i.e., the social contract) that cannot be proven as a fact nonetheless *in fact*[81] can authorise an immediate right to resistance, the individuals of Achenwall's doctrine of natural right remain in the lawless state of nature where everyone merely acts according to "*was ihm recht und gut dünkt*" (6:312).

Hence, at a formal level, the approval of any imperfect civil condition (*Rechtszustand*) is withheld indefinitely, since the individuals choose to let only subjective claims of private right govern their relations indefinitely. The foundation of the social contract and of public right is consequently not only upheaved, it is actually also inverted: the individuals remain judges in their own causes even at the level of theory. In Kant's view, these aspects constitute insurmountable problems for most proponents of natural right. But what, if anything, can at this stage of his writing career be said of his own efforts to overcome the problems indicated here?

In a thorough analysis of what she refers to as Kant's political theory, Claudia Langer correctly describes his objective in the realm of law and politics as a process that generates a *Reform nach Prinzipien*. As Langer appropriately emphasises, the relationship between theory and practice is radically different in this sphere from the realms of morality and traditional

[81] On this point and the two general objections which Kant brings forward against Achenwall and similar natural rights theorists, see the entire passage in (8:301 f.): " – Nur will ich, bei diesem Hange so vieler wohldenkenden Verfasser, dem Volk (zu seinem eigenen Verderben) das Wort zu reden, bemerken: daß dazu teils die gewöhnliche Täuschung, wenn vom Prinzip des Rechts die Rede ist, das Prinzip der Glückseligkeit ihren Urteilen unterzuschieben, die Ursache sei; teils auch, wo kein Instrument eines wirklich dem gemeinen Wesen vorgelegten, vom Oberhaupt desselben akzeptierten und von beiden sanktionierten Vertrags anzutreffen ist, sie die Idee von einem ursprünglichen Vertrag, die immer in der Vernunft zum Grunde liegt, als Etwas, welches *wirklich* geschehen sein müsse, annahmen und so dem Volke immer die Befugnis zu erhalten meinten, davon bei einer groben, aber von ihm selbst dafür beurteilten Verletzung nach seinem Gutdünken abzugehen". Kant employs the term '*wirklich*' here in a manner that corresponds to a great extent with a twentieth-century term such as 'factually' (as well as 'factual', 'facticity' etc.), such as we find it in the works of Heidegger, Habermas, and other thinkers.

natural rights doctrine. Whereas the latter two make an immediate claim to validity to human activities as soon as the theory is established as consistent, the natural rights tradition of the late eighteenth century, and Kant in particular, grows aware of the gulf between theoretical justification and practical realisation in law and politics. The moral Ought which obliges us to instantaneously act in a certain way in order for the principle to be realised – cf. our earlier reference to Kant's description of its practical realisation as attainable only as a "revolution in the mind" – does not have the same mode of effectuation in practical politics. On the contrary and as Langer insists; in order for the moral Ought to be legitimately and coherently realised in society at large, there is indeed a lack of immediacy attached to it: the realisation of the moral Ought in law and politics in fact requires a special form of political practice that is not identical with the moral prescriptions of the *Grundlegung* or with traditional natural rights principles (cf. Langer 1986: 14 ff.).

Applied to a traditional natural rights doctrine, e.g. Achenwall's, this suggests that any implicit claim to an immediate realisation of the perceived rights is premature and ultimately inconsistent. I agree fully with Langer when she explicates her basic position: an excessively swift translation of natural rights principles from theory into practice will lead directly into moralism and despotism (cf. ibid.: 18). An insistence on such a translation fails to take into consideration the fact that the subsequent realisation of any rights principle must reform an already existing state power, not overthrow the entire order through violent resistance and revolution. It is not the practical principles as such, but the practical realisation of rights that must take the lie of the land into account. This must not be interpreted, as traditional natural rights theorists did until well into the eighteenth century, as a "Kapitulation des Naturrechts vor der Wirklichkeit" (ibid.). Once the admission is granted that the realisation of rights rests on an already existing (but necessarily imperfect) state power, facticity is not automatically given priority over validity, to use Habermas' terminology.[82] Through more precise treatment of the concepts, Kant argues that the worries expressed by traditional natural rights theorists can be alleviated.

At this point, a traditional reading of natural right (whether or not it uses the social contract model as grounds for the state's legitimacy) would insist on the primordiality of the rights doctrine and correspondingly deem the current juridical system illegitimate, insofar as it does not include the established categories of rights. But this is to reduce the entire juridical order to not much more than morality: rights put an immediate obligation on the state to

[82] Cf. Habermas (1998). For an account of the similarities in Habermas and Kant's approaches to political and legal philosophy, see for instance Maus (2002). I will return to this feature in the main parts of the thesis.

adhere to certain theoretically established norms; otherwise, the social contract and thus the very basis of the people's obedience to the law is broken and binds no longer. (The problem here is, as I already have anticipated, that this reading confuses theory with practice, and facts with norms.)

Kant's novel claim to overcome the dead end of earlier natural rights theory is that the social contract cannot and need not be proven as fact. Therein lies the important insight, an insight that Kant shares with Rousseau and Fichte.[83] The traditional natural rights proponents misunderstand the social contract model, since they hold that it basically must be conceived in terms of either a factual agreement or a normative permission to revolt once it is broken (or thought broken). But this can only lead to fatal mistakes in the conceptions of legitimacy within an existing legal order. Their interpretation of the model removes the entire basis of the state's rights, dissolving its factual legitimacy to posit, apply, and enforce positive laws. Their reading establishes the people's right to resistance against perceived injustice on an equal footing with the already existing state's claim to exercise its right to rule. A new sovereign is thus created *ex nihilo*, so to speak, whenever and wherever a violation of rights is subjectively held to have taken place.

This makes the authorisation of the needed realisation of rights claims irrelevant, since it also resides as a fact in the people until the state is in full concordance with the theoretical justification that underpins its right to factual existence. For Kant (and Hobbes), however, the rights themselves depend upon the still imperfect state for a factual realisation. If the right to issue and effectuate positive laws cannot be justified in practice until the legal system itself is fully established, then the entire civil condition is suspended indefinitely, since no effort to even constitute such a state can be vindicated: any claim to power whatsoever is here opposed to the traditional natural rights reading. The state of nature correspondingly remains. In other words, if we are to avoid such blind alleys, it must be possible to have a right to rule on the part of the sovereign state (and individual rights) even prior to the establishment of a fully just legal order. But this, as we have seen, is not possible in the thought-figure of the Hobbesian state of nature, nor in a traditional natural rights theory where rights are derived from and immediately imposed on a head of state who is *de facto* tied to a category of moral rights that are inherent to man.

[83] In 1793, Kant explicitly criticises the French revolutionary Georges Danton for this confusion, a confusion which renders all previous claims to rights and property obsolete, cf. 8:302. Fichte similarly fumed over the quixotic reading of Rousseau on this crucial point by the advocates of natural right, see his "Beiträge zur Berichtigung der Urtheile des Publicums über die französische Revolution" (cf. Fichte (1971a [1793]: 80 f.)).

Kant seems, in other words, to place himself somewhat at a distance from a traditional natural rights reading, although it is not entirely clear at this early stage of his writing career how we are to understand his own position. His first formulations of a supreme principle of right are not made before the 1790s, in the *Gemeinspruch* essay (cf. 8:289 f.) and the peace essay (cf. 8:381). In both these essays, he articulates a view that is in strict opposition to any theory that gives the people a right to rebel against the state ruler. This seems at first sight to be in perfect agreement with Hobbes, since no such rights claim can be coherently explicated within the legal system in which it must find resonance. Applying his first formulation of right in the peace essay (the so-called transcendental formula of public right), Kant upholds that it is "von den Untertanen im höchsten Grade unrecht, auf diese Art ihr Recht zu suchen, und sie können eben so wenig über Ungerechtigkeit klagen, wenn sie in diesem Streit unterlägen und nachher deshalb die härteste Strafe ausstehen müßten" (8:382).[84] Although this first formulation of a principle of right in the peace essay takes the shape of what he calls a principle of publicity,[85] he holds that no right to resistance can be derived from it. On this basis, it appears that an interpretation of his legal and political theory as a positivist account is further vindicated.[86]

These remarks are sufficient to distance Kant at least from a certain direction within traditional natural rights theory. But in Kant's view, to argue for the inviolability of the head of state and the impossibility of a positive, coercive right to rebellion is by no means logically intertwined with a descent into the pitfalls of authoritarianism and legal positivism. After the disagreement with Achenwall and his compatriots, Kant swiftly turns against the Hobbesian line of reasoning. It is one thing to rule out the possibility of a secret reservation to rebel against the state whenever the people unilaterally believe injustice is committed; but it is quite another thing to give the state ruler a carte blanche in its constitutional rights. Kant explicitly rejects any flattery of the ruling power when he affirms his stance against rebellion, but he

[84] Likewise, Kant argues in the *Gemeinspruch* essay that there just cannot be a constitution through which the people "in Geheim Rebellion vorbehält. Denn daß die Konstitution auf diesen Fall ein Gesetz enthalte, welches die subsistierende Verfassung, von der alle besondern Gesetze ausgehen, (gesetzt auch der Kontrakt sei verletzt) umzustürzen berechtigte, ist ein klarer Widerspruch: weil sie alsdann auch eine *öffentlich konstituierte* Gegenmacht enthalten müßte, mithin noch ein zweites Staatsoberhaupt, welches die Volksrechte gegen das erstere beschützte, sein müßte, dann aber auch ein drittes, welches zwischen Beiden, auf wessen Seite das Recht sei, entschiede" (8:303). We must assume that a feature of any consistent theory is a universalisation of a claim to rights, and that the theory seeks to realise this; Kant insists in both essays that a universalisation of any rights claim contrary to the factual law of the land is equal to anarchy, since it grants the people a right to coerce the no-longer-sovereign sovereign.

[85] I will return below to the justification of this principle and show it is superseded in the *Rechtslehre* by a principle of public right.

[86] However, Waldron (1996: 1544) reads Kant's theory not merely as an account of positivism, but also as "authoritarianism in politics". As will become apparent below, this is to overlook Kant's aim, namely to incorporate Hobbes' insights on the necessity of a concept of state sovereignty into natural rights theory.

nevertheless goes on to insist that the people does have "seine unverlierbaren Rechte gegen das Staatsoberhaupt" and that man is endowed with certain inalienable rights "die er nicht einmal aufgeben kann, wenn er auch wollte, und über die er selbst zu urteilen befugt ist" (8:303 f.). He clearly distances himself from the absolutist strains in Hobbes' theory with his insistence on the people's uncircumventable rights against the state ruler and proceeds to give the following verdict on Hobbes' structural model and contractual conception of the right of the people:

> Nach ihm (...) ist das Staatsoberhaupt durch Vertrag dem Volk zu nichts verbunden und kann dem Bürger nicht Unrecht tun (er mag über ihn verfügen, was er wolle). – Dieser Satz würde ganz richtig sein, wenn man unter Unrecht diejenige Läsion versteht, welche dem Beleidigten ein Zwangsrecht gegen denjenigen einräumt, der ihm Unrecht tut; aber so im Allgemeinen ist der Satz erschrecklich (8:303 f.).[87]

Hobbes' positivist mistake is not to deny any possibility of a popular right to violent resistance, but to hold that the people has no rights whatsoever against the sovereign ruler. Hobbes may have been right in claiming that there cannot be a right to rebel against the state – since this would amount to a relapse into the state of nature; the rule of law necessitates the irresistible force of the (still imperfect) executive power. But in Kant's eyes, at least one step too far is taken when the rights of the legal subjects are ruled out altogether. In trying to rid state law theory of all talk of the inherent or natural rights of man, Hobbes also throws the baby out with the bath water – and all validity claims regarding the rights of the people (and the individual) must be said to go down the drain of legal positivism.

2.3. A third way between natural rights theory and legal positivism?

Our endeavours thus far seem only to have presented us with a negative view of Kant's own position. In the light of his critique of two diametrically opposed theories, how are we to establish a concept of right on the basis of such apparently antithetical reflections? For Kant, neither the advocates of natural rights doctrine with their claims to 'legitimacy, then legality' on the one hand nor Hobbes' dictum of 'legality, then legitimacy' on the other hand provide adequate descriptions of a coherent first principle of right and justice. But is Kant himself in a position to establish an affirmative account? What, if anything, can be said up until this point about a Kantian philosophy of right that preserves the dual character of modern legal orders as containing the claims of both legality and legitimacy in one system?

[87] Kant here makes a reference to Hobbes' *De Cive*, chapter 7, §14. This is found in Hobbes (1991 [1658]: 198 f.).

At this stage, Kant appears, according to his own discussion towards the end of the peace essay, 'only' to have identified a disagreement between morals (here representative of inherent claims of legitimacy) and politics (here representative of inherent claims of legality) that, as yet, remains insoluble.[88] If anything, his position so far must be considered to be closer to the tradition stemming from Hobbes than to traditional natural rights theory.

But a portrayal of Kant's position as legal positivist is, at best, only half the picture. As Langer points out, there is a certain duality inherent to his rights model, a duality that we often overlook in our reading of his later publications. As we recall, his first formulation of a principle of public right as a principle of publicity excludes the possibility of reconciling any right of the people or the individual with violent defiance of the state ruler. Here Kant shows, as Langer correctly writes: "nichts anderes als eine konsequent rechtspositivistische Position" (Langer 1986: 45). So far, so good for those, like Waldron, who interpret Kant as some sort of legal positivist. But this, surely, is not the whole story. Langer then quotes the following vital passage from the peace essay to underscore how wrong it would be to just read Kant in such a direction: "Denn es läßt sich nicht umgekehrt schließen: daß, welche Maximen die Publizität vertragen, dieselbe darum auch gerecht sind" (8:384 f.).[89]

Just because the state despot can get away with a factual promulgation of his or her ill-conceived maxims (in the sense that the people can have no Kantian right to violently oppose these), this does not mean that the despot can do as he or she pleases. Towards the end of the peace essay, Kant asserts his so-called *affirmative* principle of right: political maxims are also *required* to correspond with a principle of publicity in order not to violate their inherent claim to express an instance of political will understood as public right: "In dieser Absicht schlage ich ein anderes transzendentales und bejahendes Prinzip des öffentlichen Rechts vor, dessen Formel diese sein würde: 'Alle Maximen, die der Publizität *bedürfen* (um ihren Zweck nicht zu verfehlen), stimmen mit Recht und Politik vereinigt zusammen'" (8:386). But what, more precisely, does this mean? Kant seems merely to have postulated a positive principle of public right that says that there are (or there have to be) certain limits to the exercise of state power. But can his entire doctrine of right be developed from this affirmative principle of publicity?

Kant does not answer this question in the peace essay. The principle is formulated in what is almost the last passage of the text. He explicitly postpones the further investigation of

[88] Cf. his admission that up to this point, he has only negatively described what is inconsistent with right (8:384).
[89] With this quotation, Langer draws our attention to what she quite appropriately calls the "hoffnungsvollere Kehrseite" (Langer 1986: 45) of his first formulations of a principle of public right. Ingeborg Maus (1994) has likewise emphasised the duality in Kant's theory of right, although she elaborates this in relative independence from Langer's general line of argument. I will return to the interpretations by both Langer and Maus below.

the principle of public right to a later occasion, this, of course, being the publication of the *Rechtslehre* in his final major work, the *Metaphysik der Sitten*. However, the formulation of a principle (as well as of a *concept* of public right) in this later text will differ from this second version of the principle. The last formulation, as the attentive reader will already have noticed, has still not precisely delineated how the dual character of modern legal systems as containing the inherent claims of both legality and legitimacy is to be reconciled; and it must be said that the peace essay hovers in limbo somewhere between the natural rights and legal positivist tradition insofar as it has not yet answered the question of how to mediate between separate individual rights claims within a formally empowered and sovereign state system that may very well have another answer to the question of what is right. So, as we begin to round off this chapter, what can, after all, be said of the position of *Recht* in Kant's writings prior to the *Rechtslehre*?

Let me recapitulate; we have seen that primarily moral writings like the *Grundlegung* and the second *Critique* yield no definite clue as to how Kant regards the position of *Recht* in his practical philosophy, nor how the latter can unite inherent rights claims of both legality and legitimacy. As far as *Recht* is concerned, we know neither the central constituents of such an investigation, nor how and whether it is to be derived from an overall principle of morality, let alone its final formulation or how all this relates to the debate between traditional natural rights proponents and the legal positivist position that I attributed to Hobbes. The second formulation of the principle of right in the peace essay sees publicity as the benchmark for the validity of political maxims, but provides no objective, institutional procedure for the rightful realisation of the test outcome. As with the concern that I have already voiced about Busch's otherwise fine text: as long as the deduction of the concepts of legality, property, sovereignty, separation of powers, etc. is not fully developed, we lack knowledge of how Kant conceives and constructs the legal framework that is supposed to mediate and posit different rights and rights claims as instances of public law.

All these critical challenges remain, in my view, unanswered until Kant publishes his *Rechtslehre*, which is the first writing in which he sets out to gather every loose thread left in earlier texts and thus present the full picture of his legal and political philosophy. I will return to this in the two main parts of the thesis; here, my intention is only to show how the position of *Recht* in Kant's earlier works remains undeveloped until the 1797 publication. But despite my insistence on this claim, there are still, as I have already indicated, some very noteworthy remarks that can be found in writings and preliminary works prior to this. These stake out the contours of a possible way between the two adversary routes I have referred to thus far. This

is the path Kant will follow in the final work, and it can be recognised – at least in hindsight – on the basis of two distinct features in his publications on natural rights up until that point. I shall now direct the reader's attention to these. The first feature concerns a) the inclusion and role of permissive laws in the peace essay, the other is related to b) Kant's new understanding and classification of natural right.[90]

a) The inclusion of a permissive law in the peace essay

Despite my claim that Kant's understanding of *Recht* and its position within his philosophical framework remains ambiguous until the *Rechtslehre*, some development can nevertheless be observed in the peace essay too. The first significant clue to this was also noticed by a most attentive reader in his own days. His fellow German philosopher Johann Gottlieb Fichte makes a highly interesting remark in this regard in the introduction to his *Grundlage des Naturrechts*,[91] published the year after the peace essay. On the basis of an extensive footnote in which Kant admits the possibility and necessity of a *lex permissiva* to which he now wants to draw the attention of the natural rights proponents, Fichte writes in his introduction not only that he was "auf das angenehmste überrascht" by the essay, but also that he had no idea beforehand that another philosopher would stray from "die gewöhnliche Weise, das Naturrecht zu behandeln" (Fichte 1971b [1796]: 12), as he himself would do in the main part of his book.[92] He states that the position this footnote yields cannot be found in any of Kant's earlier publications (cf. Fichte 1971b [1796]: 12 ff.) and signals a new course of direction in Kant's works on law and politics, which can be traced to a new understanding of the concept and deduction of natural right from within the tradition itself. Fichte then goes on to assert a close affinity between Kant's rights system and his own (cf. ibid.).[93]

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[90] As we shall see, however, these two features find their final formulations only in the *Rechtslehre*.

[91] In this 1796 work, Fichte derives his principle of right not from an overarching principle of morality, but from the right to freedom in external relations. This is similar to what Kant was to do in the following year.

[92] Fichte's surprise refers both to the very concept of *lex permissiva* in Kant and to a deduction of natural right separated from the realm of pure morality. With regard to this latter claim, Fichte, in his comment on the people's judgement of the French Revolution, had strongly advised against treating the realm of right as a sanction-based addition to the moral teachings, and had thus advocated a sharp distinction between the two domains: "das Sittengesetz der Vernunft geht die bürgerliche Gesetzgebung gar nichts an, es ist ohne sie völlig vollendet, und die letztere thut etwas Ueberflüssiges und Schädliches, wenn sie ihm eine neue Sanction geben will. Das Gebiet der bürgerlichen Gesetzgebung ist das durch die Vernunft Freigelassene; der Gegenstand ihrer Verfügungen sind *die veräusserlichen Rechte des Menschen*" (Fichte 1971a: 83). With the term "bürgerliche Gesetzgebung", of course, Fichte means something different from the principles of *Staatsrecht*, which he sees as pure concepts of reason. (Instead, he speaks of the simple legislation of positive law, not principles of right.) The term "Sittengesetz der Vernunft" is akin to Kant's principle of morality. I will come back to the specifics of Kant's terminology in the *Metaphysik der Sitten* (cf. 6:222 ff.) in chapter I.1 of the dissertation.

[93] I should note that he readily admits that, if we confine ourselves to the comment in the footnote, it remains unclear what deduction of rights Kant eventually will settle for. As yet, all we see is the exposure of a weakness in traditional natural rights theory. Kant has not taken any final position, still less offered a thorough explication.

But what is this new permissive law that supposedly changes everything? The footnote that addresses this question is a couple of pages long and does not really relate to the rest of the peace essay.[94] Placed at the end of the preliminary articles, it centres on Kant's admission that reason must endorse a so-called *lex permissiva* to allow, in a preliminary manner, actions that reason, in its demand for universality, really ought to have prohibited. For Kant, however, reason must allow a permissive law that can get the entire process of an actual realisation of universal natural rights claims under way at all. Without such a law, the necessary transition (*Überschritt*) from an imperfect state of nature (that is, of mere private justice) to a perfectly rightful condition of public justice can never be attained, since it would not be possible to claim any preliminary right to the power and property that are necessary for the transition (cf. 8:347). For earlier natural rights theorists, it was impossible to include such a preliminary law within their systems, as it for them would be equivalent with the view that rights claims in a first instance rest on *Gewalt* and not *Recht*.

But, as Fichte goes on to remark: "Doch wird durch die Bemerkung über den Begriff eines Erlaubnissgesetzes (...) wenigstens höchst wahrscheinlich, dass seine Deduction mit der hier gegebenen übereinstimme" (ibid.: 13).

[94] The footnote in its entirety: "Ob es außer dem Gebot (leges praeceptivae) und Verbot (leges prohibitivae) noch *Erlaubnisgesetze* (leges permissivae) der reinen Vernunft geben könne, ist bisher nicht ohne Grund bezweifelt worden. Denn Gesetze überhaupt enthalten einen Grund objektiver praktischer Notwendigkeit, Erlaubnis aber einen der praktischen Zufälligkeit gewisser Handlungen; mithin würde ein *Erlaubnisgesetz* Nötigung zu einer Handlung, zu dem, wozu jemand nicht genötigt werden kann, enthalten, welches, wenn das Objekt des Gesetzes in beiderlei Beziehung einerlei Bedeutung hätte, ein Widerspruch sein würde. – Nun geht aber hier im Erlaubnisgesetze das vorausgesetzte Verbot nur auf die künftige Erwerbungsart eines Rechts (z. B. durch Erbschaft), die Befreiung aber von diesem Verbot, d. i. die Erlaubnis, auf den gegenwärtigen Besitzstand, welcher letztere im Überschritt aus dem Naturzustande in den bürgerlichen als ein, obwohl unrechtmäßiger, dennoch *ehrlicher*, Besitz (possessio putativa) nach einem Erlaubnisgesetz des Naturrechts noch fernerhin fortdauern kann, obgleich ein putativer Besitz, so bald er als ein solcher erkannt worden, im Naturzustande, imgleichen eine ähnliche Erwerbungsart im nachmaligen bürgerlichen (nach geschehenem Überschritt) verboten ist, welche Befugnis des fortdaurenden Besitzes nicht statt finden würde, wenn eine solche vermeintliche Erwerbung im bürgerlichen Zustande geschehen wäre; denn da würde er, als Läsion, sofort nach Entdeckung seiner Unrechtmäßigkeit aufhören müssen. Ich habe hiemit nur beiläufig die Lehrer des Naturrechts auf den Begriff einer lex permissiva, welcher sich einer systematisch-einteilenden Vernunft von selbst darbietet, aufmerksam machen wollen; vornehmlich da im Zivilgesetze (statuarischen) öfters davon Gebrauch gemacht wird, nur mit dem Unterschiede, daß das Verbotgesetz für sich allein dasteht, die Erlaubnis aber nicht als einschränkende Bedingung (wie es sollte) in jenes Gesetz mit hinein gebracht, sondern unter die Ausnahmen geworfen wird. – Da heißt es dann: dies oder jenes wird verboten: es sei denn Nr. 1, Nr. 2, Nr. 3 und so weiter ins Unabsehliche, da Erlaubnisse nur zufälliger Weise, nicht nach einem Prinzip, sondern durch Herumtappen unter vorkommenden Fällen, zum Gesetz hinzukommen; denn sonst hätten die Bedingungen *in die Formel des Verbotsgesetzes* mit hineingebracht werden müssen, wodurch es dann zugleich ein Erlaubnisgesetz geworden wäre. – Es ist daher zu bedauern, daß die sinnreiche, aber unaufgelöst gebliebene, Preisaufgabe des eben so weisen als scharfsinnigen Herrn *Grafen von Windischgrätz*, welche gerade auf das letztere drang, sobald verlassen worden. Denn die Möglichkeit einer solchen (der mathematischen ähnlichen) Formel ist der einzige echte Probierstein einer konsequent bleibenden Gesetzgebung, ohne welche das so genannte ius certum immer ein frommer Wunsch bleiben wird. – Sonst wird man bloß *generale* Gesetze (die im *allgemeinen* gelten), aber keine universale (die *allgemein* gelten) haben, wie es doch der Begriff eines Gesetzes zu erfordern scheint" (8:347). This fully accords with our earlier assertion that as long as there is no room for what the traditional natural rights proponents would deem unlawful possession or execution of power/coercion prior to a morally flawless legal order, no such order can ever be established. It remains a pious wish, *ein frommmer Wunsch*.

For Kant, however, such a position could never bridge the gap between the theory and practice of natural right. It would only lead to inconsistencies and to painful admissions that the state ruler is a necessary evil in the realisation process – a process that in actual practice nonetheless (in a Hobbesian manner?) is entrusted to this evil. In Kant's view, a rights claim can only take the form of "ein frommer Wunsch" when it is supposed to be realised in virtue of itself. The principles and laws that the natural rights tradition proposes thus fail to live up to their names, since all they can prescribe are "*generale* Gesetze (die im *allgemeinen* gelten), aber keine universale (die *allgemein* gelten)" (ibid.). Kant therefore hints at the necessity and also the possibility of a permissive law that can overcome the grave difficulties of the natural rights tradition. It is only in this manner that a preliminary account of right in an imperfect state order can be theoretically justified, without leaving the door open to a positivist reading of legitimacy.

A Kant scholar who has repeatedly drawn attention to the role of the *lex permissiva* in his *Spätwerke* is Reinhard Brandt (cf. Brandt 1981b; 2004). Brandt makes it clear that as late as in Kant's 1793/94 lectures on his long awaited *Metaphysik der Sitten*, it is still unclear from the Vigilantius lecture notes whether he thinks a permissive law can be consistently included in a theory of morals. At an earlier stage, Kant would only allow laws in the realm of morals that, through the categorical imperative, designate either commands (*Gebote*) or prohibitions (*Verbote*). Actions that fall outside of this division are quite simply allowed, since they are to be considered morally indifferent (*adiaphora*). He seemed at that point to reject the idea that something which is morally permitted can fall under a law and require a corresponding lawful exposition, although Hufeland had raised some concerns in him.[95] But in 1795, the extensive footnote in the peace essay makes it clear in no uncertain terms that the concept of a *lex permissiva* "sich einer systematisch-einteilenden Vernunft von selbst darbietet" (8:347*).* We ask, with Brandt:[96] how is this possible? And what has caused this clear change of mind in Kant on the very structure of reason itself?

The central question here is nothing else than what is at stake in the apparent dilemma that arises in the controversy between traditional natural rights doctrine and legal positivism:

[95] Cf. Brandt (2004: 72), who quotes from the Vigilantius notes: "'Eine andere intrikate Frage ist es, die Hufeland aufgeworfen: ob es secundum jus naturae leges permissivae gäbe? Herr Kant verneint die Frage: da, insofern ein moralisches Gesetz konkurriert, um zu bestimmen, was erlaubt oder nicht erlaubt sei, nicht mehr eine indifferente Handlung zum Grunde liegen kann' [27:513]"; although Kant also admits "'daß man die Frage: an datur lex permissiva in jure naturae? nicht schlechthin verneinen kann...' [27:515]".

[96] Cf. Brandt, ibid.: "Aber wie soll ein derartiges Gesetz neben Gebot und Verbot systematisch möglich sein? In der Schrift *Zum ewigen Frieden* verfügt Kant sichtlich über eine ihn befriedigende Lösung: das Erlaubnisgesetz bietet sich der systematisch-einteilenden Vernunft von selbst an. Aber wie die Einteilung aussieht, wird nicht ausgeführt". This, too, is made clearer only in the *Metaphysik der Sitten*, to which will I return below.

can one act in a lawful way regarding something that lies outside the scope of a first principle of right, and yet be permitted to act in this manner as a matter of law? As we will see when we in part I turn to Kant's discussion in the *Rechtslehre*, one prominent example in this regard concerns rights claims to particular objects (e.g. power and property) in a less than ideal legal condition: how can I, outside a conclusive legal order, rightfully implement a universal rights claim to particular objects, a coercible rights claim that all others, according to the reciprocity of all laws, must be said to have an equally rightful claim to? Kant insists that this question has to be answered in order to *de facto* realise universal, coercible rights claims as a matter of law and not of mere force or exceptions. In other words, a lawful transition from natural rights theory to practice must be able to take place without violating anyone's inherent rights in the process. Kant underlines in the extensive footnote that a *lex permissiva* appears to be required in this regard and also that it is a purely rational concept, but he does not go into much further detail on this pivotal point. However, he seems to base a substantial amount of his criticism of both Hobbes and the German natural rights tradition on precisely this aspect.

According to their own standards, a lawful transition from theory to practice cannot be explained consistently by either of the two other rights traditions. The legal positivists refuse to recognise any criterion for lawful action that is not already contained in a system of factual, positive law (and thereby surrender all rights to the state sovereign), whereas the natural rights advocates refuse to recognise criteria for rightful action which fail to correspond with the dos and don'ts of their moral categories. For Kant, both these theories can only collapse into pure fact or pure morality. This is because, broadly speaking, one side prescribes nothing else than what the head of state dictates and the other side proscribes the legitimacy of all attempts to even install rights relations and a head of state unless these attempts correspond entirely with their own, subjective catalogues of rights. Here, the first side identifies *Gewalt* with *Recht*, and the second always gives *Recht* priority over *Gewalt*.

Brandt draws on a parallel to suggest a way out of this dilemma. The classification of a *lex permissiva* within the dichotomy of the moral law can be read along the lines of Kant's distinction between a provisional (*provisorisch*) and a conclusive (*peremtorisch*) acquisition of something external, a division first made in the private right part of the *Rechtslehre*. It must be possible also in the state of nature, Kant argues, to acquire something external as mine (or yours): rightful possession cannot *per se* be excluded as unrightful, even if we do not have a *de facto* rightful condition as such and it is, in fact, a result of the right of the stronger.[97] This

[97] Or, in his *Rechtslehre* formulation, it is "die Folge von einseitiger Willkür" (6:259) and cannot be established otherwise.

can only make any possession and use of power unrightful, and accordingly imposes no legal obligation upon others to adhere to it. This perpetuates the state of nature. Crucially, this is the admission that natural rights theorists cannot give within their traditional approach, because it seems to grant a right to the stronger party to do as it pleases. But this only results in their unhelpful verdict that the legal system is unlawful and forms no rightful condition at all.

With this late distinction between the provisional and the conclusive acquisition of something external, Kant aims to overcome the grave difficulty of establishing a basis for the realisation of rightful rights relations that is not already from the outset at odds with its own principles. He must therefore admit a provisional right to the acquisition of external objects in the state of nature (through *Gewalt*), but he emphasises at the same time that conclusive right is possible only in a civil condition (through *Recht*).[98] (This theoretical conception of how a civil society under the rule of law is put into practice is, as we will see, decisive for his later elaborations on the topic, also at an international level.) For Kant, actions that otherwise are prohibited, i.e., first acquisition through occupation, are permitted as an anticipation of a civil condition.[99] Unless this is so, the rule of law can never be legitimately instated and exercised, since no one claim to right (or to power) can be understood as more binding than any other. Kant's main point is, I believe, summed up well by Brandt in the following formulation:

> Im Prinzip gilt, daß jede Gewalt rechtlich legitimiert sein muß – "Gewalt muß nicht für Recht gehen" [27:514]; dies Verbot erleidet jedoch eine Ausnahme im status naturalis: der Übergang in den Staat ist faktisch nur mit Gewalt möglich. Wollte man diese Gewalt mit einem universalen Verbot sanktionieren, "so würde dies den gesetzlosen Zustand verteidigen, mithin

[98] This also sheds light on his substantial disagreement with Hobbes. In his *Nachlass*, Kant occasionally refers to the existing head of state merely as a usurper who, through *Gewalt,* possesses a preliminary right to rule which the legal subjects cannot violently defy, but whose laws nonetheless violate a supreme principle of *Recht*. This latter claim is something that Hobbes could not make within his theoretical framework. In some additional notes to his personal copy of Achenwall's *Iuris Naturalis*, Kant describes Hobbes and the gross limitations of his theory in the following terms: "*hobbes* sahe alle Gesetze, selbst die moralische, als despotisch an, d. i. solche, wozu unsre wenigstens vernünftige Einwilligung oder Beystimmung gar nicht erfodert wird. Denn er glaubte die Gewalt möge hinkommen wo sie wolte, so mache sie das Recht. Imgleichen unterschied er nicht das Unrecht, was der *Usurpator* begeht, von dem was er den Unterthanen thut" (19:483, R. 7667). Kant points to the obvious distinction (which Hobbes at any rate underemphasised) between *Gewalt* (power, authority, violence) and *das Recht* (the rule of law). He also points to two different forms of injustice (*Unrecht*), the second of which reveals the usurping character of any head of state prior to a possible future rightful instatement. For reasons discussed above, there cannot be a rights claim of the people to revolt against the ruling power. But this does not in the least mean that there is no principle of right that the latter might violate. On the contrary, as I will explore in part I of the thesis when I examine his final formulation of *das Recht*, there is another principle that makes it possible for Kant to put forward the following claim without ultimately being inconsistent: "Der *Usurpator* hat jederzeit Unrecht, aber das Volk hat kein Recht gegen ihn. Denn iener ist im Besitz das Recht zu verwalten und dieses ist das *principium*, woraus alles beurtheilt werden muß von den Unterworfenen" (19:509, R. 7762).

[99] This is, of course, not to warrant a Kantian defence of, say, the colonial exploits of his or any other time as legitimate, or indeed lawful, regardless of whether or not they were labelled a civilising mission to realise the end of man. At best, such an acquisition is only provisional and can lay no claim to *Recht.* Instead, it is an extreme instance of legitimising means by the end they provide, a merely pragmatic practice that is easily transparent and equally repugnant (*verwerflich*), cf. 6:266. I will later return to his rejection of colonialism and why not all first acquisitions through occupation are the same as an original acquisition (cf. 6:259).

> einen Zustand, wo kein Gesetz vorhanden oder nicht anerkannt wäre: dies ist aber ein dem allgemeinen Imperativ der Sittlichkeit zuwiderlaufender Zustand, mithin muß man annehmen, daß die Natur es zulasse, in der Art, die freie Willkür der Menschen mit der allgemeinen Freiheit nach dem allgemeinen Gesetz in Übereinstimmung zu bringen; und also ist hier ein natürliches Erlaubnisgesetz zu der angewandten Gewalt vorhanden" [27:515] (Brandt 2004: 74).

It is crucial to note that the aspect of *lex permissiva* as a *law* (and an *a priori* insight) cannot be found in the realms of ethics or morality as such. In these, it is only a question of whether the disposition or an action is commanded or prohibited, there are no laws relating to the realm of *adiaphora*. This is affirmed by Kant in his general introduction to the *Metaphysik der Sitten* (cf. 6:223), but, in contradistinction to his footnote in the peace essay, he insists here that if a permissive law can be established, it covers a realm of practical actions that are not morally indifferent.[100] Now, we have already ruled out the prospect of anything other than commanded or prohibited actions in morality and ethics. But if we here follow Brandt in his emphasis on the possible and necessary inclusion of a *lex permissiva* in Kant's rational rights theory, then we must admit that there are indeed actions that are not indifferent with regard to defining practical-rational laws, but that still belong outside the scope of morality and ethics altogether. Brandt specifies the realm to which these actions and their respective laws belong (i.e., natural right), and goes on to draw the following vital conclusion: "Kant behauptet das Gegebensein von Erlaubnisgesetzen im Naturrecht, nicht in der Ethik. Will man ihre sachliche Intention verstehen, wird man an eine spezifisch rechtliche Problematik anknüpfen müssen, nicht eine allgemein moralische und nicht eine spezifisch ethische" (Brandt 2004: 73 f.).

This admission of a possible *lex permissiva* understood as a preliminary right to power and property even before a conclusive and just civil condition is established will be developed further in part I,[101] where I will examine Kant's important distinction between provisional and conclusive acquisition and how this requires a transition from private to public right under the rule of law of *Staatsrecht*. This realm of right relates directly to the specific legal problematic to which Brandt refers. For the time being, however, it suffices to say that, in principle, the door is not closed to an autonomous concept of *Recht* that is not derived in a straight line from an overarching concept of morality or ethics, and that can nevertheless avoid the pitfalls of

[100] The important passage in full: "Man kann fragen: ob es dergleichen [sittlich-gleichgültigen Handlungen] gebe, und, wenn es solche gibt, ob dazu, daß es jemanden freistehe, etwas nach seinem Belieben zu tun oder zu lassen, außer dem Gebotgesetze (lex praeceptiva, lex mandati) und dem Verbotgesetze (lex prohibitiva, lex vetiti) noch ein Erlaubnisgesetz (lex permissiva) erforderlich sei. Wenn dieses ist, so würde die Befugnis nicht allemal eine gleichgültige Handlung (adiaphoron) betreffen; denn zu einer solchen, wenn man sie nach sittlichen Gesetzen betrachtet, würde kein besonderes Gesetz erfordert werden" (6:223).

[101] In part II on international law, I will also consider Kant's related but second kind of permissive law, to which he refers in the peace essay (cf. 8:373). This allows despotic states to postpone their republican reforms if the reform process is threatened by (or may increase the power of) extralegal forces inside or outside of the state.

legal positivism. If this can be shown to be plausible, it will provide further verification of the assertion made here: that there is a third way between these two traditions.

b) A new understanding and classification of natural right

From the major reservations he has already voiced with regard to the natural rights tradition, as exemplified by his major disagreement with Achenwall and with Hobbes, it should be clear that Kant does not simply stubbornly reject their attempts as such; all he does is to point to serious shortcomings in their theories of law. Despite his criticism of Hufeland's reluctance to ascribe an exclusively formal character to the obligating principle of right and practical laws, Kant is nonetheless highly sympathetic to the young jurist and his attempt to identify the first principle of natural right. This is, *inter alia*, directly related to a key question here: Hufeland was aware of the need to find a solution to the philosophical problem of how to bridge the gap between natural and positive law. Although Hufeland's attempt eventually failed, it is obvious from his review that Kant greatly appreciated his reluctance to accord supremacy either to natural rights or to positive law; some sort of way or position between the two legal theories was undoubtedly called for.

Towards the end of the review, Kant praises the young jurist for his efforts to establish a consistent theory on the "Entdeckung des Kriterii der Wahrheit in Sätzen des Naturrechts", and expects to read and hear more from him in the future. He regards the appendix as a much promising early investigation into key legal concepts such as first acquisition and acquisition through contracts, as well as the relationship between national and international law. Last, but certainly not least, Kant pays attention to the fact that Hufeland towards the final stages of his publication "eine neue notwendige Wissenschaft vorschlägt, welche die Lücke zwischen dem Natur- und positiven Rechte ausfüllen könne". Kant could hardly agree more with Hufeland on the necessity of such an endeavour, and he concludes: "Denn diese Art von Experiment ist in keiner Art von Erkenntnis aus bloßen Begriffen nötiger und dabei doch zugleich so tunlich, als in Fragen über das Recht, das auf bloßer Vernunft beruht" (8:129).

This last insistence stresses Kant's point of departure: it is not only strictly necessary – on his view, in fact, the most necessary task for scientific knowledge – but also possible to delineate pure concepts of reason within the realm of *Recht*. Kant believes that Hufeland went astray by ultimately locating the aspect of obligation in an object or objective order (that is, nature and a pre-given, Wolffian standard of moral perfection). Nevertheless, he had grasped something important, when he pointed to a gap between natural and positive rights. The chief question seems to be: can there be developed a theory of law (or of jurisprudence in general)

that overcomes the innate and grave difficulties we have observed both in overtly positivistic theories and in traditional natural rights readings?

One highly important factor here is the new stance taken by Kant vis-à-vis the role played by the model of justification (i.e., the social contract) in its relationship to the domains of facts and norms, and how this significantly differs from justification in the sphere of moral actions. In her important study, Langer has pointed out how Kant's contract theory is able to overcome the inadequacies of traditional natural rights theory and positivism. Although she does not highlight the aspect of permissive laws to the same degree as Brandt, we can see clear similarities between his approach and Langer's reformative reading of Kant with regard to a possible justification of the preliminary or factual right to power and property that caused so much trouble for the other two legal positions.[102]

Langer argues along similar lines as Brandt when she emphasises that Kant's concern is not some sort of apologetic excuse directed towards the *de facto* head of state, no natural rights surrender in the face of reality. Rather, it is a recognition of the factual dimension as an uncircumventable starting point for any rights theory in its practical realisation. The present state of affairs is thereby not hypostatised as a given to which the natural rights theory in turn must adjust (or vice versa), but is exactly "als Ausgangspunkt für Veränderungen verstanden" (Langer 1986: 18). As we know from Hume, the factual dimension has no normative force, but is necessarily – thanks to our very existence in the empirical world – the substance that the normative dimension confronts and that it demands to alter. However, to give the normative dimension an immediate right to instate a certain legal order is to confuse these two spheres from the outset.[103] Applied to the factual dimension, such normative categories will provide a product rather than a process.

Although the notion of product over process is clearly rejected in both realms, we have already seen that Kant's concept of morality requires an immediate change of disposition (cf. revolution in the mind). But whereas immediacy is a viable approach in the realm of morality, it is not something he subscribes to in the realm of law and politics. In this sphere, Langer argues, Kant develops a reformative, procedural understanding of natural (or rational) right that leads to other, important consequences than what one could expect from an entirely moral (or traditional natural rights) perspective. In her description, the sought-for "Kategorien der

[102] The limited amount of references to Brandt by Langer can be explained not only because the aspect of *lex permissiva* as such does not play the same role in her approach, but also because most of the work (and therefore also the line of argument) was written prior to the publication of Brandt's main text on permissive laws in 1981, of which the 2004 article is a summary.

[103] This was the case with the majority of traditional natural rights proponents in Kant's own days, and is the case with moral readings of any theory of law and politics today. I will return to this latter aspect below.

naturrechtlichen Staatstheorie" amount for Kant neither to an account of an historical, *de facto* process, nor to a model of justification that confers legitimacy on an already-existing rights order. Instead, the natural rights categories are rational, legal (not moral) principles for the reform of an already established rights order (*Rechtsordnung*). In other words, they are "die Norm für ihre Veränderung", "der archimedische Punkt des ganzen Konzepts" (Langer 1986: 91).

Here, it is imperative to bear in mind that in the wake of Hobbes, there are a number of new and significant developments that gradually evolved within one part of the natural rights tradition itself. The turn towards the state institutional framework and social contract theory initiated by Hobbes gradually let in more distinctions and conceptual nuances which visibly altered the established picture (cf. e.g. Gilje 1990). This is not only related to how leading members of the Enlightenment natural rights tradition after Hobbes (e.g. Locke, Rousseau, Fichte, and Kant) undertook a radical shift away from the earlier, pre-modern natural rights doctrine with its mere implementation of morally grounded rights categories to a mediation of rights claims within a specific juridical institutional framework. It is also closely related to the acknowledgment of the norm standards inherent in the social contract model as such, which are in turn related to the procedures of the legal system itself. Langer writes that, together with Rousseau, Kant is the first to explicate a consistent legal positivist and natural rights critique from a position inside the contract model.

Langer presents a particularly important discussion of how Kant, following Rousseau in his pioneering works on the subject,[104] breaks with both theory positions in a revolutionary new understanding of the social contract as the basis for the legitimate rule of law. Earlier natural rights proponents, she writes, had tried to use the contract model to bind the factual power to a system of objective ends and thereby put a stop to the arbitrary decision-making regarding the rights and duties of individuals.[105] Theoretically conceived as an agreement once entered upon between the rulers and the ruled, in order for the exercise of state power to be legitimate, the natural rights tradition with which Kant would part company accordingly held that "die Unterwerfung unter die Herrschaft eines Souveräns in der Zustimmung der Untertanen fundiert sei" (Langer 1986: 55). For Kant, this is merely to buy into a conception

[104] For more on the vital influence of Rousseau on Kant's philosophy of right, see, for instance, Maus (1994).
[105] Cf. Langer (1986: 56): "die Naturrechtstheorie des 18. Jahrhunderts [hatte] die vertragliche Legitimation des imperium behauptet [um] die Definition von Rechten und Pflichten willkürlicher Bestimmung zu entziehen und den Monarchen an ein 'System vernünftiger Zwecke' [(Koselleck)] zu binden". See here the references above to Hufeland's attempt to ground a first principle of right in man's inherent moral worth and, with regard to binding factual power, the breakneck attempt by Danton and other revolutionaries to interpret the original contract as a fact.

of rights and power that indirectly justifies Hobbes' legal model and that also is conceptually inconsistent with the basic idea of a contract.

What Kant (and Rousseau) reveals is the simple fact that the *pactum subiectionis* (which in earlier theories of natural right authorised the exercise of state power) is from the outset in breach of the idea of a contract. Hobbes' model of legitimacy, where the individuals surrender their claims to the private exercise of justice through submission to a sovereign ruler, had been adopted by natural rights advocates, who had attempted to reformulate it in the wake of its early Hobbesian conception. But as Langer stresses, this notion of a contractual model is fundamentally flawed: "im Anschluß an Rousseau [verweist Kant] auf die innere Widersprüchlichkeit und juridische Unmöglichkeit eines pactum subiectionis" (ibid.). The very idea of a contract rules out the possibility of an agreement between two unequal parties; it is simply impossible to make an obligating agreement in which one side (the people) *ex ante* is regarded as inferior to the ruling power. Rather, an implicit recognition[106] of both sides as equals is inherent to the social contract, since otherwise, the contract simply could not have been made. It might seem paradoxical at first sight, but for Kant (and Rousseau), it is only after the agreement that a hierarchical structure emerges and legal sanctions can be rightfully enforced. At the same time, the social contract cannot be conceived of as a matter of fact. These crucial remarks call for further clarification.

One aspect is the grave implications this has for the Hobbesian model at a later stage, but at this point, the question is how a legitimate basis for state power can be provided at all, and it is still the natural rights tradition that has to explain how the desired transition from an existing legal order to a more legitimate one is to come about. In the positivist reading which I have attributed to Hobbes, this problem is solved; or, more precisely, there is no problem. Here, the right of the stronger rules supreme and any lasting state structure will thus constitute a legitimate exercise of power. Ultimately, this boils down to the fortunate circumstance that there are no binding norms (or rule for their justification) other than those the system itself *de facto* posits. But any tradition that holds that individuals have natural rights regardless of state power must, when confronted by the opposing will of the state, either: a) hold that these rights have relevance primarily in theory, succumbing to the will of the head of state and uttering them as pious wishes with the hopes that one day the benevolence of the ruler will change his

[106] The principle of recognition accordingly becomes central to political philosophy concerned with the aspects of legitimacy. Fichte, for instance, in his *Grundlage des Naturrechts* makes the intersubjective recognition of the Other the basis for a subsequent rights deduction. Major contemporary political thinkers like Hauke Brunkhorst and the already mentioned Habermas have in a Kantian vein applied the concept of intersubjective recognition to both a national and an international political level. See, for instance, Brunkhorst (2002) and Habermas (1999). I shall briefly return to the concept of recognition as central to the international level in the second and final part.

or her mind; or b) reject the validity of the legal order as such until these rights are enforced, rebelling against the tyrant and hence allowing private justice to reign indefinitely.

If the *pactum subiectionis* is the basic explanatory model for state legitimacy, the natural rights tradition cannot consistently explain the transition from theory to practice. If, as in a), it conceives rights to be a primarily theoretical enterprise, they remain precisely that, namely theory, and have no factual resonance in the world. If, as in b), it claims a practical realisation without regard to the law ("in Geheim Rebellion vorbehält"), it perpetuates the state of nature. No preliminary right of the ruling power can be explicated within this legal conceptual framework, since here the factual power can be exercised legitimately only if it is the individuals who *de facto* have handed over power in the first place; and obviously the natural rights tradition cannot prove this. As long as the contract cannot be proven as fact, it has no factual imprint on, or way of influencing, the state power. Either one must rely entirely upon the benevolent will of the ruler, or one must discard any power basis for the legal order. When the normative basis of the actual state ruler is interpreted from a predominantly moral perspective, no preliminary right to demand norm adherence can be explicated for the existing legal system. Any claim alledged by the state is immediately measured against its normative truth content, of which it often falls short.

Langer underlines how Kant follows a different path here. By refusing to interpret the social contract model – a model which is primarily discussed in the *Gemeinspruch* essay[107] – as providing a normative basis for the factual emergence of state power, Kant apparently sides with a legal positivist position. The social contract is not a fact to which individuals can lay claim in their subsequent confrontations with an imperfect legal order; it is indeed, as Kant writes, "gar nicht möglich" (8:297) to prove such a thing as a historical fact. In a manner similar to Hobbes' position on this topic, the preliminary right of the current head of state to posit and enforce positive laws cannot be made a subject of actual legal disagreement.[108]

For Kant, every form of unlawful resistance is thus strictly forbidden and it deserves the severest penalty: "alle Widersetzlichkeit gegen die oberste gesetzgebende Macht, alle Aufwiegelung, um Unzufriedenheit der Untertanen tätlich werden zu lassen, aller Aufstand, der in Rebellion ausbricht, [ist] das höchste und strafbarste Verbrechen im gemeinen Wesen: weil es dessen Grundfeste zerstört". He sees the wish by the proponents of natural rights to grant individuals an inherent right to violently confront the sovereign, given certain empirical

[107] In fact, he is here closer to the *Rechtslehre* position than he is in the peace essay. See below, subchapter I.3.1.
[108] Cf. his insistence on this point in all of his mature works on legal and political philosophy: the *Gemeinspruch* essay (e.g. 8:303), the peace essay (e.g. 8:374), and the *Rechtslehre* (6:318 ff.).

conditions, as merely another extralegal effort to promote a private rights approach that ignorantly skips the first question that has to be answered, namely: "wer soll entscheiden, auf wessen Seite das Recht sei?" (8:299 f.). But the controversy does not stop there.

Another contrast to traditional natural rights theory is Kant's further insistence that it is impossible to provide a normative justification for the validity of the existing legal order. Surprising as it may seem, he actually excludes this sort of justification from the sphere of natural rights as such. Langer is adamant about this vital feature of his natural rights approach, asserting that "Kant hat (…) die Frage der normativen Begründung der gegebenen Ordnung aus der Naturrechtstheorie ausgeklammert. Das gegebene imperium und die positive Rechtsordnung haben einen eigenen Grund ihrer Geltung" (Langer 1986: 56). The justification of the existing legal order has, in other words, no contractual or any other normative basis in practice, but stems from its factual claim to the power and norm adherence that it itself represents and posits. The legal subjects cannot disclaim the right of the ruling power to both issue laws and demand that these are obeyed, since the legitimacy of the existing legal order is not bound to such objections.[109]

At first sight, this appears to bring Kant's conceptual framework over to the side of legal positivism. He seems to discount any real progress made by the natural rights tradition since Hobbes. Langer makes no secret of this: "Was ergibt sich aus diesem Ansatz? Auf den ersten Blick hat es den Anschein, als ob Kant damit hinter die Naturrechtstheorie des 18. Jahrhunderts zurückfiele" (ibid.: 56). On closer inspection, however, we shall see that Kant intends to follow another direction.

Although it is impossible to provide a normative justification for the validity of an existing legal order as such, Kant nonetheless contends that the current state order is legally permitted *and* that this is not equivalent of a legal positivist position. How can this be? Earlier natural rights doctrine had held a moral-ethical justification of the existing legal order to be necessary, in order to steer clear of the normative void opened up by the positivist account and its relativisation of the validity of legal norms. But Kant held that there must be another way to bridge the gap between natural and positive rights in a consistent manner. And here we are introduced to one important facet of his effort, one that goes to the very core of the lesson

[109] With references to Kant's own text notes in Achenwall's *Iuris Naturalis* – which he used in his lectures on natural right – Langer is able to supply confirmation to this strong contention: "Das summum imperium ist 'facto vsurpirt' (…) und 'der Souverain, wenn er vom Volke unterschieden ist, (hat) sein Vorrecht nicht aus einem Vertrage sondern bloß facto' (…). Daß das imperium gewaltsam und nicht vertraglich begründet ist, berührt allerdings nicht die Frage seiner Geltung (quaestio iuris) und heißt keineswegs, daß es für die Untertanen nicht verbindlich sei, ihm zu gehorchen" (Langer 1986: 55 f.). Kant quotations from (19:592, R. 8046) and (19:583, R. 8018), respectively.

that he learnt from Hume and held in so high regard, namely a rejection of the need for a normative justification of the existing legal order based on a sharp distinction between the realms of facts and norms. In the two theory traditions that we have examined thus far, this distinction is either absent or profoundly confused.

Kant's awareness of this distinction prevents him from confusing these two spheres from the outset. He can therefore establish a radical new form of legitimacy that is developed from within the natural rights tradition itself. His legal and political philosophy thus centres on a model of justification for modern rule of law that transcends all prior efforts. It sets out to ground a philosophy of right that contains the dual claims of legality and legitimacy in one overall juridical system through a procedural conception of *Recht* that, through the rule of law, ascribes inalienable rights to all individuals. I will examine this claim more closely in the next part. Up to this point, all I have wished to do is to show how Kant holds that the efforts of both a strict legal positivist position and the traditional natural rights theory fail to bind the legal order to the above-mentioned "System vernünftiger Zwecke". This is because their *modi operandi* cannot reconcile the claims of both legality and legitimacy. In his approach, Kant is going to differ significantly from both theory traditions, and the deliberations in part I of the thesis will share Langer's own objective and precise summary of his philosophy of right:

> im folgenden [wird] zu zeigen versucht, daß Kant über die naturrechtliche Vertragstheorie des 18. Jahrhunderts hinausgeht. Denn er gewinnt mit diesem Ansatz erstens, daß das Bestehende in seiner Faktizität aufgedeckt und positives Recht in seiner Differenz zum Naturrecht, d.h. zum Vernunftrecht, erst sichtbar wird. Zweitens, indem Kant dem summum imperium und der positiven Rechtsordnung die naturrechtliche Legitimation entzieht, werden sie veränderbar: (…). Der Vertrag als eine Idee der praktischen Vernunft (…) stellt das Kriterium für die Veränderung des Bestehenden dar; der Vertrag als Idee wird zum Regulativ der Reform der positiven Rechtsordnung und des imperium. (…) Der einmalige Akt der Legitimation wird verzeitlicht zu einem unendlichen Prozeß der annähernden Verwirklichung der Idee des Vertrags. Das – zusammen mit dem systematischen Ausgangspunkt vom Prinzip der Freiheit, "welche jede angegebene Grenze übersteigen kann" [3:248] – ist das Neuartige an Kants Lösung des Legitimationsproblems der bürgerlichen Gesellschaft. Die Legitimation der bürgerlichen Gesellschaft wird selbst prozessual (ibid.: 56 f.).

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Before I consider how Kant's view is elaborated and justified in the *Rechtslehre*, let me sum up the discoveries that have been made with regard to the question asked at the start of this prologue. Although no conclusions can be drawn at this stage, we are now better able to draw at least a preliminary sketch of where he will ultimately locate *Recht* within his philosophical framework. On the basis of the above investigation, we realise that his approach to *Recht* will

more likely be developed from a theory of natural right, rather than from his moral philosophy as such. Even if it seems to be related to both in some way, there is – as both Langer and Brandt underline – a distinct legal context involved here, again related to a certain procedural concept of natural, or, better, rational right (*Vernunftrecht*).

We can arrive at a more precise delineation of this concept only by an examination of the *Rechtslehre* proper. Nonetheless, before we move on to that territory, there are a couple of earlier texts where Kant actually offers a glimpse of how it will be done. In these passages, we begin to recognise how his mature understanding of natural right makes him locate it as a generic term within the overall realm of practical philosophy, whereas new divisions of both practical philosophy and natural right – divisions first completed in the *Metaphysik der Sitten* – will realise a Kantian realm of law and politics as a practical-rational field in its own right.

The first decisive passage I here refer to is the very last paragraph of the introductory parts of the *Metaphysik der Sitten* and concerns this latter, new division within the sphere of natural right which, for Kant, separates his concept from earlier, traditional notions. Like the inclusion of the extensive footnote on a permissive law in the peace essay, this passage enters the text in an abrupt manner. It has no immediate connection to the preceding discussion, but merely declares:

> Die oberste Einteilung des Naturrechts kann nicht (wie bisweilen geschieht) die in das *natürliche* und *gesellschaftliche*, sondern muß die ins natürliche und *bürgerliche* Recht sein: deren das erstere das *Privatrecht*, das zweite das *öffentliche Recht* genannt wird. Denn dem *Naturzustande* ist nicht der gesellschaftliche, sondern der bürgerliche entgegengesetzt; weil es in jenem zwar gar wohl Gesellschaft geben kann, aber nur keine *bürgerliche* (durch öffentliche Gesetze das Mein und Dein sichernde), daher das Recht in dem ersteren das Privatrecht heißt (6:242).

This distinction between natural (private) and civil (public) right as the two constituents of the concept of *Naturrecht* will prove a most fruitful division when applied to the debate between natural rights proponents and legal positivists. Kant's vital point becomes clouded in Gregor's translation when both 'Naturrecht' (as overall natural right concept)[110] and 'natürliches Recht' (as private right) are termed 'natural right', but Kant's intention is clear and twofold. First of all, natural right is a concept that includes both private and public claims to *Recht*; secondly, the state of nature is neither opposed to nor overcome by some social (or ethical or religious) form of right; this is achieved only through a distinctively civil, legal and public form of right.

[110] This is the term I have referred and to which I shall continuously refer to when I speak of 'natural right'. Following Kant's own distinction, I reserve the term 'private right' to his conception of 'natürliches Recht'.

This stance entails an implicit critique of Achenwall's natural rights conception. Kant explicates this critique further in §§41-42 of the *Rechtslehre* on the transition from private to public right. I will discuss this vital transition in detail later on; but it is not hard to detect the outline of his main objection against Achenwall and other natural rights proponents, on the basis of this distinction: they falsely hold that it is a kind of social *praxis* that constitutes a final farewell to the state of nature. Or, at least, they do not properly distinguish between societal formations as such and the peculiarities of *civil* society (*bürgerliche Gesellschaft*).[111] Kant thus divides natural right into a private and a public dimension of right. Both include different principles of rational right that in turn come under the common concept (or generic term) of *Naturrecht*.

The other important passage that indicates how Kant will finally delineate the internal structure of his overall practical philosophy is found in a lecture given as early as 1772. With modernity and its processes of increasing rationalisation and differentiation as a backdrop, Kant sketches a scientific development in which it is not only the natural sciences that have made great progress. The realm of law and jurisprudence can likewise take pride in the recent academic developments. At any rate, this is how Kant himself interprets his own time. In his lecture series on logic, in its introductory talk on the history of philosophy, he describes the scientific advancements since antiquity in the following manner:

> Die Neuern haben in einigen Wissenschaften keinen Vorzug vor den Alten, z. E. in der Logik, Metaphysik und Moral, obgleich ihre Bearbeitungen darin höher zu schätzen sind als das Produkt, so sie wirklich geliefert. In der Naturkunde und Rechtswissenschaft haben die Neuern einen wirklichen Vorzug. Die Alten vermengten Moral und Recht der Natur miteinander, jetzt hat man die beide nicht nur unterschieden, sondern sie auch noch vom Staatsrecht abgesondert (24 (1):334).[112]

In other words, there are two things, for Kant, that primarily separate the scientific knowledge of the moderns from the ancients: our knowledge of nature and our knowledge of the law (i.e., jurisprudence). Our moral insights have accordingly not surpassed the wisdom of the Graeco-Roman world. What has been clarified, however, is a conceptual confusion with regard to the term 'Moral'. Whereas the ancients treated all facets of moral-practical wisdom under one overarching concept, Kant argues that the moderns have a different and ingenious understanding of normative practical philosophy, which in turn is divided into the new realms

[111] Other natural rights philosophers were more aware of this important aspect. Gilje (1990: 108 ff.) points out in his analysis that at an early stage of the natural rights contract paradigm which he describes, certain members such as Hobbes and Locke, despite not explicitly making the distinction, still think and implicitly address the later modern division between civil society and other societal formations that is similar to what I am referring to here.

[112] Busch, who quotes the same excerpt in his 1979 analysis, drew my attention to this important passage.

of *Moral*, *Naturrecht*, and *Staatsrecht.* Kant later differentiated the second and third of these along the lines I indicate here.

Whereas no trace of this division of the realms of Kant's practical philosophy is found in his earlier publications, we will see in the main parts of the dissertation that this is precisely how he draws his distinctions in the *Metaphysik der Sitten*. His philosophy of rational right is divided into the two realms of private and public right, neither of which is subsumed under what is described today as his moral philosophy. Although somewhat altered, the latter realm is found in the second half of his final major work, namely the *Tugendlehre* or *Doctrine of Virtue* (which I unfortunately cannot discuss in detail here). For Kant, moreover, *Naturrecht* is not merely related to the natural (i.e., private) rights of man; it also has a specific public right component to it. This will be developed in the *Rechtslehre* as his account of *Staatsrecht*, and will also be expanded to include public right at the international level.

The highly instructive remark that Kant made as early as 1772 more than suggests that he would settle in due time for a concept of *Recht* that is neither identical nor derived directly from a concept of morality *per se*. Nonetheless, he does not fully clarify the complex internal relationship between morality and legality until the publication in 1797 of the *Metaphysik der Sitten,* to which I now turn. But in his final work on rational practical philosophy, we can see that he does exactly this, as well as elaborating on the above-mentioned *Naturrecht* distinction between private and public right. As I intend to show in the first part of the thesis, it is only in this manner that the position and concept of *Recht* within his overall normative framework can be properly delineated.

I shall explore the justification and consequences of what I consider to be the change of perspective that Kant undertakes in his practical philosophy in order to arrive only late at an autonomous concept of *Recht*. I will endeavour to show that the *Rechtslehre* is in fact his attempt to establish the new and necessary science that Hufeland called for, to close the gap between natural and positive rights. Last, but not least, part II of the thesis sets out to examine Kant's fundamental argument for the necessity and the possibility of complementing his legal framework of the rule of law within the state (*Staatsrecht*) with an international legal order of both *Völkerrecht* and *Weltbürgerrecht*. This juridical model will hopefully provide us with a theoretical basis for and, consequently, also a possible practical realisation of Kant's realm of right.

I.

Staatsrecht

The Rule of Law within the State

1. The change of perspective within Kant's practical philosophy

As I have attempted to show in the prologue, the position of *Recht* remains unclear in Kant's works on practical philosophy prior to the *Metaphysik der Sitten*. This, in turn, is related to a lack of clarification with regard to the internal relationship between morality and legality. This certainly changes when the concept of legality clearly takes on a more central position in the politically oriented writings of the 1790s, a position that – as I will maintain here – is not merely subsumed under the concept of morality. This claim calls for a closer investigation of the relationship between morality and legality in his last major work on practical philosophy. So before we turn to the deliberations of the *Rechtslehre*, I must first examine the introductory passages of the *Metaphysik der Sitten*, to clarify how the specific legal and political dimension of his philosophy is to be understood in relation to his moral (and ethical) considerations.

This first chapter of part I is divided into three subchapters. These will sometimes overlap in both theme and scope, but they can be delineated as follows. First, I present a brief sketch of an important contemporary scholarly discussion about how the Kantian relationship between his two concepts of morality and legality (i.e., his moral and legal philosophy) should be understood. With regard to this debate, I hold that neither the so-called 'derivationists' nor the 'separationists' are sufficiently aware of changes in the terminology and understanding of key concepts during the course of his writing career. On the basis of the general introduction to the *Metaphysik der Sitten* – common to its two parts of a doctrine of right (*Rechtslehre*) and a doctrine of virtue (*Tugendlehre*) – I intend to show that he undertakes a vital, but often overlooked re-evaluation of the relationship between morality and legality here, and to explain why he does so (1.1)

This, in turn, makes it possible for a Kantian concept of *Recht* to attain a position that is not subsumed under and derived from the moral-ethical context of the *Grundlegung* and the second *Critique*, but instead is autonomous and has a complementary role to Kant's concept of morality as such. An examination of the introduction specific to the *Rechtslehre* enables us to give at least a preliminary answer to his fundamental queston: *Was ist Recht?* (1.2). In the last section, I will begin by looking at the final introductory passages of the work, to consider the divisions of the *Rechtslehre* and what I see as its only natural point of departure, the innate right to freedom. Finally, I shall return to the question of the differences and convergences between the two concepts of morality and legality, to show that Kant's philosophy of right is

not only equal or equiprimordial to his moral philosophy, but also primordial in one specific sense, namely in the actual realisation of practical norms and ideals in real life (1.3).[113]

The possibility and necessity of performing a so-called change of perspective will be underlined throughout this chapter. Drawing on Wolfgang Kersting and his groundbreaking study of Kant's philosophy of law and the state (cf. Kersting 2007 [1984]), I argue that we have to perform this shift from a moral (or moral-ethical) to a legal point of view, not merely to grasp the specific features of right, but also to attain a coherent concept of *Recht* in the first place. Only in this manner is it possible for us to uphold the two concepts of morality and legality in Kant as complementary, but still autonomous and not mutually exclusive concepts, both of which address the practical, normative side of the human condition.

1.1. The relationship between morality and legality in the *Metaphysik der Sitten*

In the discussions in the prologue, we have seen the inability of moral claims themselves to have an actual moral impact on other persons' choices, inasmuch as these claims ceased to be of a genuinely moral nature as soon as they demanded that other persons had to act according to the moral law of the *Grundlegung*. It was simply impossible for any external obligation upon others to be made by morality as such, since the internal ground of moral obligation could not be transferred or projected on to the legal sphere without the outcome of a Wolffian natural rights theory, as Kant's critique of Hufeland showed. The obligation would then go, in Kant's own words, more than one step too far, since it located the formal ground of coercion in the internal sphere of moral perfection, hence authorising the ruler to obtain a given moral standard as he himself saw fit. While there is, of course, some degree of correspondence between the realms of morality and legality in Kant, we are (at least prior to the three main legal-political writings of the 1790s) scarcely better off when it comes to an elucidation of the nature of legal norms and rights claims.

Robert B. Pippin has a similar point of departure in a 2006 article. Here, he examines what a legitimate rights claim really is for Kant: how can we legitimately settle disagreements regarding what is mine or yours without doing injustice to each others' equally rightful rights claim? This query leads to a more basic problem: "what *sort* of normative claim on others is a rights claim?" (Pippin 2006: 421). Pippin elaborates three different answers to this question, the third of which is his own intermediate stance between the two other positions. As his own

[113] Accordingly, the three subchapters roughly correspond to Kant's own division of the introductory passages of the 1797 work; first, there is an *Einleitung in die Metaphysik der Sitten* (cf. 6:211 ff.), then an *Einleitung in die Rechtslehre* (cf. 6:229 ff.), and, finally, an *Einteilung der Rechtslehre* (cf. 6:236 ff.).

position is not conclusively developed in the said article, I will delimit the presentation to a brief outline of his rather illuminating dichotomy between the so-called 'derivationists' and 'separationists', to clarify their approaches to the relationship in Kant between morality and legality.

To put it briefly, the derivationists hold that Kant's legal philosophy is derived from his moral philosophy and its presuppositions. This corresponds to what I have earlier referred to as a traditional and moral reading of Kant's philosophy of right, a stance that is attributable to Rawls and the majority of contemporary Kant scholars.[114] On this view, "claims of right are," as Pippin phrases it, "in some sense a *subset* of our moral obligations to others, leading commentators to look for some way to understand claims of right as an 'application' of Kant's highest moral principle, the categorical imperative" (ibid.: 419). In the original literature, as Pippin goes on to argue, there are several good reasons for asserting this position, not only in writings prior to the *Metaphysik der Sitten*, but in its preliminary phases as well.

Kant starts the general introduction to this work by distinguishing between laws of nature and laws of freedom. This latter category, belonging to practical philosophy in a broad sense, is then further elaborated in a way that at first sight seems to indicate a straightforward subsumption of Kantian legal philosophy under its moral equivalent. Kant writes on laws of freedom: "Diese Gesetze der Freiheit heißen zum Unterschiede von Naturgesetzen *moralisch*. So fern sie nur auf bloße äußere Handlungen und deren Gesetzmäßigkeit gehen, heißen sie *juridisch*; fordern sie aber auch, daß sie (die Gesetze) selbst die Bestimmungsgründe der Handlungen sein sollen, so sind sie *ethisch*" (6:214). This definition is certainly reminiscent of the position in the second *Critique* (and in the *Grundlegung*), where legality is described as morality bar the necessary moral incentive; Kant's later description of all duties (*Pflichten*) as being indirect ethical (cf. 6:220 f.) seems only to point further in a derivationist direction.

Before we examine such an understanding more closely, it should be made perfectly clear, as Pippin duly does, that the derivationists do not thereby in any way hold that moral incentives or moral recognition can be rightfully asked for in the legal realm. This is precisely the difference between the two spheres: in the moral dimension, it is required that the action is performed out of duty (*aus Pflicht*); whereas the legal realm 'only' demands that the action is in accordance with duty (*pflichtmäßig*).[115] But what is left out of this approach to Kant's legal

[114] Among the commentators who endorse this reading, Pippin includes Otfried Höffe, Wolfgang Kersting, Mary Gregor, Bernd Ludwig, Onora O'Neill, and Paul Guyer. I shall emphasise below that at any rate the position taken by Kersting should not be directly located in this category. (At an earlier stage, as I also pointed out above, Pippin himself must be said to have held this derivationist view, cf. Pippin (1997).)
[115] Cf. the distinction in the second *Critique* (5:82).

philosophy is that there are a number of highly significant aspects relating to the sphere of law which cannot be fully explained from this exclusively moral point of view.

One indication of this is what prompts Pippin to bring in the separationist perspective, namely the entire lack of references in the *Metaphysik der Sitten* to a particular moral status of rights and rights claims. Kant assigns no specified moral task for these; the absence of a moral justification throughout the *Rechtslehre*, where the terms *Moral* and *moralisch* hardly surface at all, is peculiar. Pippin underlines an objection that is also raised by Allen W. Wood (2002) against the derivationist position, when he questions the assumed internal relation between the moral view of the *Grundlegung* and the rights perspective of the work to which the former is supposed to lead up: "what is troubling for this [derivationist] position is that Kant nowhere argues for any (...) indirectly moral status for principles of right. It appears that he attempts no derivation, works through no 'application', and even though the *Groundwork* is supposed to be laying the foundation for the entirety of the *Metaphysics of Morals*, he suggests no direct route from the former to the latter" (Pippin 2006: 423).[116]

For the so-called separationists, rights claims are not a subset or subdivision of moral claims, but are exclusively of a juridical character. They do not see this as implying in any way that Kant is some sort of legal positivist, but only that rights claims are neither to be confused with, nor to be deduced from, our moral duties and/or entitlements. Scholars such as Wood and Markus Willaschek[117] underline here the amoral character of the legal domain, and although it is related to his practical philosophy, Kant's realm of right must nevertheless be considered as working unassisted by the moral sphere. In significant correspondence with my own concerns, voiced in the prologue, Wood criticises supposedly 'Kantian' accounts of legal philosophy that take his moral philosophy as their point of departure and then overlook the fact that the road taken by Kant himself is different in his last work on the subject: "Whatever their philosophical merits, such accounts necessarily diverge from Kant's own treatment of such topics [i.e., individual rights, natural right, political authority, etc.], simply because the territory covered by the doctrine of right necessarily falls entirely outside that surveyed by both the *Groundwork* and the second *Critique*" (Wood 2002: 9).

[116] To talk of principles of right in plural can be somewhat imprecise in this connection. Kant undoubtedly mentions only one universal principle of right (see next subchapter), although there are three postulates of right and numerous structural implications that follow from the overall concept of right.

[117] See, for instance, Willaschek (2009). For reasons to which I shall return later, he does not go as far as Wood on all accounts, but certainly draws a conclusion along the same lines when he asserts that "the fundamental principles of right are independent expressions of rational autonomy, on a par with, or at least not derivable from the Categorical Imperative" (Willaschek 2009: 67).

Thanks to a fact that not even a derivationist would disagree with, namely that Kant's realm of right governs only the external actions of rational beings (whereas morality depends completely on the internal incentives of the individual), Wood and Willaschek designate two different realms for Kant's moral and legal philosophy. But whereas Willaschek holds that the two spheres have principles of rational, practical autonomy in common and are thus not to be understood in complete independence from each other, Wood undeniably seems to go beyond that view when he writes that juridical duties as such "belong to a branch of the metaphysics of morals that is *entirely independent* of ethics and also of its supreme principle" (ibid.).[118] This position is clearly at odds with the derivationist stance.

At least at this point, we must ask whether the disagreement rests on sound premises – above all, are the discussants actually referring to the same concepts and terminology when asserting their views? As I shall show in this chapter, the relationship between morality and legality in the *Metaphysik der Sitten* is not the same as in Kant's earlier texts on the topic, and a substantial amount of ground is gained regarding our approach to both his moral and legal and political philosophy if we can correctly interpret the introductory passages of this work.[119] Of particular importance will be the concepts and divisions involved here, since they lay the foundations for the rest of the work, and some of them must also be said to drastically differ from earlier formulations in Kant. If successful, these efforts can help us solve a number of the disputes between derivationists and separationists, and give us a better perspective on his practical philosophy in general.

Although many of Kant's own comments in the introduction suggest that not even he himself may have been entirely clear about how the relationship between the moral and the legal realms is to be delineated more precisely,[120] one thing that has been and remains a cause of considerable scholarly disagreement in this regard is settled beyond doubt through the most basic inspection of the division of the writing, namely, the position of ethics. With reference to ancient Greek philosophy and its division of the sciences, Kant's explicit acclamation in the

[118] This is also referred to by Pippin (2006: 424), who in the same passage quotes Willaschek from 1997 on the following point: "the realm of right is an 'expression of human autonomy akin to, but independent of, the moral domain', and so that the principle of right is an 'independent, basic law of practical rationality'". With regard to the first quotation, I should note that Willaschek in his 2009 publication clarifies his view when describing "the realm of right as an expression of rational autonomy structurally similar to, but normatively independent of, his moral theory" (Willaschek 2009: 66).

[119] It can therefore also be argued that the concept of morality itself changes during the course of his writings. Of course, due to the topic and scope of this dissertation, I cannot here answer, let alone adequately address such an issue, only point to the fact that most of the main features of his early concept of morality are in the *Metaphysik der Sitten* located in the *Tugendlehre*, and not in the *Rechtslehre*. I will retun to some of these aspects below.

[120] This is argued by Willaschek (2009). I will return to the possible ambiguities in Kant's own description as they surface in the ensuing passages.

opening paragraph of the preface of the *Grundlegung* to *Ethik* as generic term for practical philosophy as such is no longer upheld. It cannot be said to be "vollkommen angemessen" (4:387), as he then believed. Rather, the 1797 work sees ethics as one distinct part under a general concept of *Moral*, *Sitten*, or *Sittlichkeit*,[121] which is most often translated as 'morals' in English. Ethics, or, as a doctrine, *Tugendlehre*, must thus be read as a branch underlying an overall concept of morals in Kant. Its duties are ethical, as are its laws and legislation. (Unlike the *Rechtslehre*, it also includes a doctrine of method and a doctrine of elements, cf. 6:411.) Ethics no longer lays claim to the whole of morals, and certainly not to practical philosophy in general, as the first paragraph of the *Grundlegung* would imply.

This dissertation does not focus on the role of ethics, with its doctrine, principle(s), its changed concept in the later stages of Kant's works, etc. – all of which are, of course, highly important for any scholarly investigation outside his realm of right. My object is exclusively the parts that are relevant to his legal philosophy. That is not to say that no passages related to ethics are of importance to us here, but that the doctrine of ethics as such is not our topic, cut off from the general debate on practical philosophy and the question of *Recht* in particular. One factor is that this division considerably helps us narrow down the terrain to be covered by the explorations; another key aspect is the consequences it has for the derivationist debate. In a sense, the division kills two birds with one stone.

First, it certainly rules out any derivation of the *Rechtslehre* – which is on the same level as the *Tugendlehre* under the generic term 'morals' – from ethics as such, thus rendering obsolete at least the terminology used in much Anglo-American scholarship on Kant's legal philosophy.[122] Second, it removes much of the sting of the derivationist critique by Wood and others: the juridical duties to which Wood refers are, as such, most certainly (to repeat my quotation) "*entirely independent* of ethics", for the simple reason that if the derivationists followed Kant's division in the *Metaphysik der Sitten*, they would not claim that legal duties are derived from ethics as such, but from the generic term for both ethics and right, i.e., *Moral* or *Sitten*. (To a significant degree, representatives of both groups therefore are simply talking past one another, since they fail to correctly comprehend the internal relationship between his moral and legal philosophy or, at least, fail to take his changes in terminology into account.)

[121] *Sittlichkeit* is sometimes, depending on the context, translated as 'morality'. Kant's usage of this term is, however, ambiguous, as it refers both to the general concept of morals (6:215; 241) and to morality proper (6:219; 225). In what follows, therefore, I shall use *Moral* and *Sitten* to underline the more abstract character of morals in the text, as distinct from morality (*Moralität*) as such. (In the sense of doctrine, he also uses *Sittenlehre* as generic term.)

[122] One example of this is the continuous employment of ethics as generic term to both directions in the introduction (presumably written by Karl Ameriks) to Ameriks & Höffe (2009), already referred to.

Correspondingly, half of Wood's statement is unquestionably true, insofar as ethics and right must be said to be on an equal level and are thus, by definition, not to be subsumed under one another. However, he cannot assert with equal precision the last part of his initial assertion, namely that juridical duties are entirely independent not only of ethics, but also of its "supreme principle". Although we may say at this point that we do not have to consider the ethical (or, perhaps better, moral-ethical) dimension of Kant's practical philosophy in further detail, since the topic of these reflections is the realm of right, the internal relationship of the latter to the overall term of *Moral* is still not clarified. Here, I believe that neither Wood's approach nor that of most of the derivationists is adequate. If we are to fully grasp the internal relationship between *Moral* and *Recht*, and also between morality and legality, we are well advised to closely consider an important, but often overlooked text passage in the peace essay. This is the first passage in any of Kant's publications to reveal the new architectonic structure of his practical philosophy; a theoretical structure that is finally formulated and established in the *Metaphysik der Sitten* through its division into a *Rechtslehre* and a *Tugendlehre*.

In the prologue, I mentioned the idea in the peace essay of a *lex permissiva*, a footnote that led Fichte to declare a close correspondence between the morally independent deduction of right in his 1796 *Grundlage des Naturrechts* and Kant's final concept of right. As we will see in the discussion of this and of its overall place in the private right part of the *Rechtslehre*, the importance of this permissive law is not to be underestimated. Still, there is also another comment that is not considered by Fichte in his review of the peace essay and that has crucial consequences for Kant's view on *Moral* and *Recht*.[123] The passage that I think of is located towards the end of the essay, where Kant, as a direct consequence of his deliberations on the agreement and disagreement of politics with morals (*Moral*), quite abruptly divides the latter concept into two. I cannot go into all the details of the entire textual argument preceeding this division here,[124] but the point in question can be said to run along the following lines.

Subjectively, "in dem selbstsüchtigen Hange der Menschen" (8:379), there may be discord between politics and morals (e.g. in our actual views and actions), but objectively, i.e., in theory, there can, for Kant, be no possible contradiction between the two realms. This is, of course, not to say that they are identical – he certainly does not claim that good intentions are all there is to the art of statesmanship, which is also dependent on contingent factors – but

[123] This may be due to the simple fact that the comment did not feature in the first edition of the essay, which, as far as I know, was what Fichte reviewed. It is located in the second appendix, which was added in later editions.
[124] This would require a full textual investigation of the latter half of the peace essay, something neither practically feasible nor necessary for my purpose here, which is to present the basic structure of Kant's legal philosophy and to show how it is formulated and culminates in the *Rechtslehre*. For a more thorough and commendable commentary on the peace essay, see Eberl & Niesen (2011).

only to say that in theory, qua doctrines, they do not contradict one another. For morals, "als Inbegriff von unbedingt gebietenden Gesetzen, nach denen wir handeln *sollen*", are "schon an sich selbst eine Praxis in objektiver Bedeutung" (8:370). It follows that politics cannot cover an entirely different set of laws that is not somehow interconnected with the realm of morals as such. Both are concerned with, and can go no further than, what individuals can be obliged to do within their own possibilities (cf. Kant's reference to the Latin dictum *ultra posse nemo obligatur*).[125] Politics, even with its clear peculiarities vis-à-vis morals, must in at least one sense be said to be dependent upon and thus united with morals. The example that Kant uses to illustrate such a correspondence of politics with morals is the normative-rational possibility and necessity of the moral politician, who adopts his political maxims according to the moral law, and the similar impossibility of a political moralist, "der sich eine Moral so schmiedet, wie es der Vorteil des Staatsmanns sich zuträglich findet" (8:372).

But at the same time, politics has a duality that sets it apart from the moral realm. Not only is it directly concerned with the external world, and thereby its contingent factors, in a manner which theoretical moral philosophy (at least of the *Grundlegung*) is not. This fact also makes it possible for state rulers to postpone the implementation of moral politics out of consideration for a current state of affairs that makes it improbable that the right reform will be realised in actual politics. This is not an argument that Kant *per se* rejects; he seems to agree entirely with the state rulers' right and even apparent duty to resist premature changes to the state or constitution, however valid the principles underlying the reform(s) might be.[126] What he does not endorse, though, is the hypocrisy of state rulers who praise such principles in theory, but then utterly reject them in practice. 'Ought' implies 'can' in the realm of actual politics too. It is the subjective inclination of state rulers to act according to their unilateral will which leads to a superficial disagreement between morals and politics. Kant goes on to lament the *Zweizüngigkeit* of such political maxims, but, as we have seen, he cannot be said to support the revolutionary cause *per se*. A perceived moral right on the part of the people is no rightful reason to resist the political power.

It is in this context that Kant for the first time attempts to clarify the internal structural relationship between *Moral* and *Recht*. When he rejects the hypocrisy of the state rulers who grant moral principles theoretical validity but at the same time shun their practical realisation,

[125] Cf. Kant (8:370). As we have seen in the case of Kant's moral philosophy, as long as political principles are not considered only as a doctrine of prudence (*Klugheitslehre*) in order to obtain another goal (i.e., instrumental reason), there is no fundamental disagreement between theory and practice, cf. Kant (8:370 ff.) and also his overall argument in this regard in the *Gemeinspruch* essay.
[126] See here, for instance, his second kind of permissive law in the peace essay (cf. 8:373).

Kant – without having presented the reader with the entire argument behind this move – ascribes a certain duality to the general concept of *Moral* too, when he sarcastically comments on the reluctance of state rulers to unite theory and practice: "Mit der Moral im ersteren Sinne (als Ethik) ist die Politik leicht einverstanden, um das Recht der Menschen ihren Oberen Preis zu geben: Aber mit der in der zweiten Bedeutung (als Rechtslehre), vor der sie ihre Knie beugen müßte, findet sie es ratsam, sich gar nicht auf Vertrag einzulassen, ihr lieber alle Realität abzustreiten, und alle Pflichten auf lauter Wohlwollen auszudeuten" (8:386).[127] This important remark about the internal relationship between *Moral* and *Recht* (and *Ethik*) is not further elaborated in the appendix that sets out to overcome the only superficial disagreement between politics and morals, but it is easy to recognise this division in the very structure of the *Metaphysik der Sitten*: first, there is an introduction about the metaphysics of morals as such (i.e., *Moral, Sitten*, *Sittenlehre*), then there are the two separate parts on *Rechtslehre* (or *Recht*) and *Tugendlehre* (or *Ethik*).

Before we move to the 1797 text itself, we must note a few points about this quotation. First of all, it is clear that actual politics readily agrees with *Moral* in the moral-ethical sense, at least with regard to the appraisal of the rights of man. (With Kant, I assume here that *Moral* serves as generic term for all norms and practical rationality; there is no political maxim, qua norm, that can avoid this requirement.) This admission is empirically shown in the eagerness of state rulers to present their case and their cause as just. But they are not so eager to let these principles become principles of law or contract and thereby give them practical reality. The preference to conceive of their duties as state rulers as based simply on their own beneficence is characteristic of such policies. The major key to fully understanding Kant's assertion here is his formulation that politics can and will only bend its knee to right qua (positive) law, not to moral or moral-ethical norms *per se*; this is why state rulers prefer to interpret all obligations, even political ones, as merely moral or ethical in nature. The justification and implications of the content of this passage is followed up two years later in his final systematic writing on practical philosophy, to which we must now turn.

As I have indicated, the starting point of the *Metaphysik der Sitten* is the division that runs through Kant's entire opus between laws of nature and laws of freedom. Whereas his theoretical philosophy denounces the old and grounds a new metaphysics to clarify the *a*

[127] A similar point is made in the *Nachlass*: "Viele Menschen haben wohl lust, gute Handlungen zu thun, wollen aber desfals unter keiner schuldigkeit gegen andere stehen; wenn man ihnen nur mit Unterwerfung komt, so thun sie alles; sie wollen sich nicht den rechtsamen der Menschen unterwerfen, sondern solche nur als Gegenstände ihrer Grosmuth ansehn. Es ist nicht einerley, unter welchem titel ich etwas bekomme. Das, was zu dem meinigen gehört, muß man nicht blos meiner bitte gewähren" (19:145, R. 6736). (Also quoted by Schneewind (1994).)

priori conditions of the possibility of natural science, a science that is necessarily concerned with external objects,[128] Kant's realm of practical philosophy and its metaphysics of morals can be seen to identify laws of freedom that are entirely *a priori*. He continues the main line of argument from the *Grundlegung* and the second *Critique* to deny that *de facto* experiences and traditions as such can have any normative implications. My consciousness of the moral law within me, making it possible for me to act autonomously and thus freely, is, as we recall from the prologue, precisely what opens up a sphere of human choice that is independent of the causal chain of nature. No matter how much natural scientists may point to any possible predispositions to act in a certain manner: "Die menschliche Willkür ist dagegen eine solche, welche durch Antriebe zwar *affiziert*, aber nicht *bestimmt* wird" (6:213).

But while the earlier works on practical philosophy concentrated on laws of freedom as the more or less exclusively internal, moral relationship of the rational being to its own free will or choice (*Willkür*),[129] this approach offers few suggestions about how laws of freedom in human beings' external relations to one another are to be regarded. I have referred above to Kant's describtion of all laws of freedom as moral laws, but at that point, I had to postpone the further investigation of his subsequent division of these into legal or juridical (*juridisch*) and ethical laws – to be covered by the *Rechtslehre* and the *Tugendlehre*, respectively – in order to take a closer look at the dispute between derivationists and separationists. And since both these groups would agree that, according to his distinction, juridical laws were concerned merely with external conformity and ethical laws also required that the moral law was the sole internal determining ground of the action, when we return at this point to the details of the work, it soon becomes clear from the general introduction to the *Metaphysik der Sitten* that this relationship is much more complex than a simple differentiation between the external and internal dimensions of freedom or the moral law. The introduction common to both doctrines goes on to list the central preliminary concepts of the metaphysics of morals as such. Coupled with the paragraphs on the division of the writing itself, Kant establishes an understanding of the structural relationship between morality and legality that is far more elaborate than earlier distinctions such as internal/external (taken by itself) or *aus Pflicht*/*pflichtmäßig*.

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[128] As we know, Kant sees Newton's physics as the most accomplished example of this, applicable to objects of experience qua laws of nature as it is.

[129] Kant stops describing the moral will (*Wille*) as free in the *Metaphysik der Sitten*, since it is itself practical reason and is not capable of legislating (or choosing) otherwise (cf. 6:213). He thus also clarifies the difference between will and choice (*Willkür*): "Von dem Willen gehen die Gesetze aus; von der Willkür die Maximen. Die letztere ist im Menschen eine freie Willkür; der Wille, der auf nichts Anderes, als bloß auf Gesetz geht, kann weder frei noch unfrei genannt werden, weil er nicht auf Handlungen, sondern unmittelbar auf die Gesetzgebung für die Maxime der Handlungen (also die praktische Vernunft selbst) geht, daher auch schlechterdings notwendig und selbst keiner Nötigung fähig ist. Nur die Willkür also kann frei genannt werden" (6:226).

First of all, the internal/external divide does not exhaust the differences between the two parts of the work. For instance, ethical duties relate not only to the individual and his or her internal realm, but also to the external sphere of human beings in a more explicit manner than previously.[130] Accordingly, it is false to claim that only right, and not ethics, is concerned with the external use of freedom. On the other hand, the legal or juridical sphere is not only related to the external realm – the legislation of external, juridical laws can also be internal.[131] Moreover, as the introductory stages make perfectly clear, the differentiation is not reducible to a performance of certain actions either out of duty or only in conformity with duty (cf. the distinction *aus Pflicht*/*pflichtmäßig*); there are evidently duties that belong only to one realm. If this admission only had gone one way, one could, perhaps, still argue for the distinction *aus Pflicht*/*pflichtmäßig* or for the derivationist position as potentially decisive benchmarks for delineating adequate borders between morality and legality. It could be argued that the only remaining task was to identify those duties that one can rightfully be forced to obey and those that one cannot rightfully be forced to obey – perhaps along the lines of strict/narrow/perfect (legal) and broad/imperfect (ethical) duties.[132] But once Kant claims that there is (at least) one example of a duty adherence to which concerns only the realm of right, i.e., the duty to keep one's promises,[133] things are no longer so straightforward.

Kant still insists that all duties, qua duties, are either directly or indirectly ethical, since all actions can be executed from the perspective of having to do what is one's duty, and the internal determining ground can in every case be adequate to this. But this does not mean that all juridical laws can be explicated from ethical duties. On the contrary, Kant asserts that there is a central difference in the legislation of the ethical and the juridical spheres that is far more significant for their distinction: "Rechtslehre und Tugendlehre unterscheiden sich also nicht sowohl durch ihre verschiedene Pflichten, als vielmehr durch die Verschiedenheit der Gesetzgebung" (6:220). Here, in other words, with regard to legislation, the internal/external divide has yet another application. Ethical legislation, in keeping with his earlier view on morality, is for him exactly "diejenige, welche nicht äußerlich sein *kann*", in contradistinction

[130] Friendship and philanthropy are examples of external duties to other persons that neither the *Grundlegung* nor the second *Critique* explicates as such.
[131] For example, it must obviously be possible for the individual through his or her own internal, private use of reason to know what is externally right. As will become apparent in the following, this is a necessary condition for the practical realisation of right and the legitimacy of juridical laws. It is, however, not sufficient for Kant.
[132] Cf. the frequently cited distinction between right and ethics in current commentary literature, following Kant's description in the *Tugendlehre* (6:390) of the difference between the scope of obligation of ethical duties and duties of right. This division is, however, by no means constitutive for deciding what are ethical and juridical duties. It is much more a measure of the virtuous character of an action.
[133] "Es ist keine Tugendpflicht, sein Versprechen zu halten, sondern eine Rechtspflicht, zu deren Leistung man gezwungen werden kann" (6:220).

to the juridical, "welche auch äußerlich sein kann" (ibid.). So whereas, in the field of duties, ethics is related to both the internal and the external uses of choice, as a law of freedom (and right considers only the external dimension), legislation is a field where it is right that covers both the internal and the external sides. Juridical legislation can and must be constituted, as I shall consider more closely in this and the following sections, by both an internal and an external component; its ethical equivalent, on the other hand, is entirely internal.

Although these brief observations may only underline the complexity of this topic, we have at any rate attained a certain measure of clarification. Perhaps most important is the way in which the realm of right is set apart and granted some independence not only from Kant's 1797 conception of ethics, but, more crucially, from his conception of practical philosophy and its supreme principle in earlier publications as well. For while we can still speak of a superior concept of *Moral* above the two equal realms of right and ethics, this concept cannot be said to be identical with all aspects of the supreme principle of morality from the 1780s. Instead, it can be claimed that morality, as known from that period, is now to be found primarily, not in an overall concept of *Moral*, but rather in the sphere of ethics. It is only here that there is a necessity to make the practical law also the determining ground of the action, only here that the setting of ends is relevant (and constitutive) for the normative validity of the action, only here that one necessarily must act out of duty for the action to have moral worth, etc.

This evaluation of the role of morality is readily shown in the introduction to the 1797 work, in which it nowhere takes a superior position to legality in terms of deductability, but rather relates to the part of ethics. Moral (or practical) laws of freedom that prescribe a certain external action in accordance with their universalisability are the common denominator of the spheres of legality *and* morality; the difference consists in the latter's requirement that the law should be made the incentive of the action as well.[134] So instead of a hierarchical relationship between the two (as in the *Grundlegung*), they are now on an equal level under a clearly more abstract concept of *Moral* or *Sitten*. One important consequence of this is the manner in which such a formal equiparation of legality and morality now places the vast majority of his earlier reflections on practical philosophy primarily under the topics that are further discussed in the *Tugendlehre*. (Since the present investigations do not seek to discuss the moral-ethical part of his practical philosophy, I will not go into details of the implications this altered relationship

[134] Cf. the full text of the above-mentioned division between laws of nature and laws of freedom, and the latter's separation into juridical and ethical laws: "Diese Gesetze der Freiheit heißen zum Unterschiede von Naturgesetzen *moralisch*. So fern sie nur auf bloße äußere Handlungen und deren Gesetzmäßigkeit gehen, heißen sie *juridisch*; fordern sie aber auch, daß sie (die Gesetze) selbst die Bestimmungsgründe der Handlungen sein sollen, so sind sie *ethisch*, und alsdann sagt man: die Übereinstimmung mit den ersteren ist die *Legalität*, die mit den zweiten die *Moralität* der Handlung" (6:214).

have for the *Tugendlehre*.)[135] For the purposes of this thesis, a much more pressing question relates to what the generic term morals at this point must be said to signify for Kant, since it is no longer identical with morality as such, but is rather a superior concept of its own, a concept held in common by both legality and morality (or, if one prefers, by right and ethics).

Although one would be correct to claim that this changed understanding also yields a 'less' morally pregnant first principle of practical philosophy in Kant, it would be incorrect to conclude that this causes a weakened or neutralised normativity in his theory. It is my firm belief that this move is necessary to preserve the independence and autonomy of both legality and morality in a way that he could not achieve with morality, as such, as generic term. A full justification of this claim cannot be made until I have examined more closely all aspects of his legal philosophy (since it is here that all the aspects of the legality of an action are developed), but for the time being – in the general introduction to the *Metaphysik der Sitten* – it is possible to at least indicate how his main thought seems to be preserved but also more than slightly altered in his new conception of *Moral* (understood as superior to both right and ethics).

Perhaps the most indicative feature of a somewhat changed approach in the 1797 work is the emphasis on two concepts that are more or less identical with the overall term morality in earlier writings, but are not immediately coupled with all its facets here. The two concepts I think of are freedom and autonomy. Above all, the descriptions of freedom in the introduction now suggest at several points a less direct, immanent relationship to morality *per se*. Freedom takes on a more independent role vis-à-vis morality, since it can be related to an exclusively external use (qua legality) without recourse to morality as such. Like external objects in the science of nature, freedom in the legal sense is oriented solely towards the spatial relationship of bodies to one another, not to the inner qualities of the specific objects. Neither the science of nature nor the realm of right[136] can know these qualities. Kant's normative justification of the relations of right, which is admittedly quite similar to Hobbes and his approach on this

[135] Although, of course, I certainly believe that there are implications here that should be given a larger place in the scholarly debate of Kant's moral/moral-ethical/ethical philosophy that what we find today. (My proposal and working thesis here is merely, as emphasised in the last paragraph, that his early concept of morality corresponds to the realm of virtue, ends, and ethics of the *Tugendlehre*, and not to the realm of right of the *Rechtslehre*.)

[136] In the "Einteilung der Metaphysik der Sitten überhaupt", Kant explicitly rejects even the possibility of any legal system to legislate the determining ground and virtues of the individual, quite simply "weil sie auf einen Zweck gehen, der (oder welchen zu haben) zugleich Pflicht ist; sich aber einen Zweck vorzusetzen, das kann durch keine äußerliche Gesetzgebung bewirkt werden (weil es ein innerer Akt des Gemüts ist)" (6:239). On another note: the establishment of our moral independence is perhaps the finest achievement of Kant's moral philosophy, i.e., to show that the realm of morality works within its own world independently of nature and positive law. (At the same time, it is also part of the reason for the misunderstanding of his legal philosophy, as one is wont to believe that this theory too must have a moral imprint. But as I aim to show here, the moral character of Kant's legal philosophy is of a different and more general kind than his moral-ethical philosophy.)

point,[137] does not go via the realm of morality *per se*; instead, it is grounded in a concept of freedom that is concerned only with external actions and their conformity to universal law. From this perspective, the realm of right seems to be perfectly approachable without recourse to morality, since it is concerned 'merely' with freedom in the external relations of singular bodies. This claim might seem to endorse a strict separationist position, but closer reflection will hopefully reveal that it in fact rises above the debate between the two camps.

The obvious objection at this stage from those interpreters who side with the so-called derivationists is that freedom itself is nothing else than the moral imperative, and thus that all aspects of the legal sphere (rights, duties, legislation, etc.) are a derived subset of this. (Again, such a reading sits perfectly well with the view of Kant's earlier practical philosophy, but, as I have noted, it fails to take account of the many terminological changes that pertain to the text for which the *Grundlegung* was meant only as a preparatory work.) But whereas this claim certainly holds in the most immediate sense of their interpretation, I shall suggest here that it does not imply all the consequences that they derive from it. A brief investigation of a key passage in the introduction to the *Metaphysik der Sitten* will help us address the derivationist-separationist debate at a different and higher level to show they are in fact both mistaken. In his discussion of the internal relationship between duties and rights, Kant writes:

> Warum wird aber die Sittenlehre (Moral) gewöhnlich (namentlich vom *Cicero*) die Lehre von den *Pflichten* und nicht auch von den *Rechten* betitelt? da doch die einen sich auf die andern beziehen. – Der Grund ist dieser: Wir kennen unsere eigene Freiheit (von der alle moralische Gesetze, mithin auch alle Rechte sowohl als Pflichten ausgehen) nur durch den *moralischen Imperativ*, welcher ein pflichtgebietender Satz ist, aus welchem nachher das Vermögen, andere zu verpflichten, d. i. der Begriff des Rechts, entwickelt werden kann (6:239).

This passage is exemplary, not merely because it is often quoted by both derivationists and separationists to support their own views,[138] but also with regard to its implications for the internal relationship between morals and freedom when it is set in the context of the rest of the introduction. A derivationist reading of the passage would suggest that although duties do not stand in a hierarchical position vis-à-vis rights (unless they would falsely reserve duties to the ethical realm and rights to the legal realm), the concept of right and all the rights that stem from it nevertheless underlie the overarching moral imperative. Wood is at pains to avoid the direct implications of this obviously correct interpretation, and sacrifices the

[137] This rather mechanistic apprehension of the legal sphere finds further textual support in §E of the introduction to the *Rechtslehre*, according to which the concept of right can be constructed "nach der Analogie der Möglichkeit freier Bewegungen der Körper unter dem Gesetze der *Gleichheit der Wirkung* und *Gegenwirkung*" (6:232). Although there are a few parallel lines to Hobbes here, we have already seen how Kant differs from him on central points, and he will continue to do so in his subsequent treatment of the constituents of the *Rechtslehre*.
[138] This is pointed out by Wood, who also uses it as a separationist assertion (1999: 413).

concept of right to a moral deduction, while attempting to rescue the *principle* of right from such a fate (cf. ibid.). I shall return in the next section to what the specifics of the concept and the principle of right amount to, and we shall see that neither is to be directly deduced from a moral reading of Kant's practical philosophy in a derivationist fashion; at present, however, we must take a closer look at a distinctive feature of the quotation that both Wood and his adversaries seem to ignore.

Unlike the two camps, I propose that the pivotal point in Kant's passage concerns the relationship between morals and freedom, and, moreover, that this has crucial implications for our understanding of his concept of external freedom. For if not only internal freedom, but – as Wood's adversaries implicitly claim – also all aspects of external freedom are ultimately derived from the concept of morality, we must surely endorse the derivationist view. But at least two aspects of such an assertion are made too abruptly. The first objection, which would have considerably helped Wood's argument, is the still open possibility that whereas we may know our own freedom (as autonomy, both in an internal and an external sense) only through the moral imperative, it does not thereby necessarily follow that the concept of right (here identified by Kant as the capacity to put others under obligation), in all its aspects, is derived from the moral imperative. We may attain our concept of freedom from it, but this does not mean that it is derived from the moral imperative as such; the usage of the verb 'entwickeln', 'explicate', does not automatically yield such a conclusion.

The other concern regards the implicit equation of the moral imperative in the passage with the categorical imperative of the *Grundlegung*, which is identical with the concept of morality and thus the first principle of practical philosophy in that work. But as we have seen in the case of Kant's formal equalisation of morality and legality under an overall and more general concept of morals, not all aspects of the earlier version of the categorical imperative (which admittedly *as such* still must be considered a supreme principle and generic term for both the *Rechtslehre* and the *Tugendlehre*) are identical with the categorical imperative of Kant's final take on the subject.

What the derivationists (and Wood) forget is the more abstract character of the 1797 formulation of the overarching moral imperative, which is described there as follows: "Der kategorische Imperativ, der überhaupt nur aussagt, was Verbindlichkeit sei, ist: handle nach einer Maxime, welche zugleich als ein allgemeines Gesetz gelten kann" (6:225).[139] Evidently,

[139] Unlike the *Grundlegung*, there is only one more (and to all effects identical) formulation of the categorical imperative in the introduction to the *Metaphysik der Sitten*: "Der oberste Grundsatz der Sittenlehre ist also: handle nach einer Maxime, die zugleich als allgemeines Gesetz gelten kann" (6:226).

this is a formulation cannot possibly include all the various formulas of the *Grundlegung*,[140] since it does not require the maxim to be made the incentive of the action (as the FUL and FLN both do), and does not say anything about ends (as the FH and FRE). Correspondingly, it rules out both the past (incentive) and the future (end) in order to establish only the possible present conformity ("gelten kann") of the action with universal laws as the sole criterion. As the formal equalisation of morality and legality already implicitly suggests, this clear change in his practical philosophy means that none of the central constituents of morality itself (other than, of course, the principle of universalisability) is now included in the overall concept of morals. It would therefore be false not only to claim that legality is derived from morality, but also that legality is subordinated to the categorical imperative, if one means by that something more than is given by the 1797 formulation.

If we apply this insight to the debate between separationists and derivationsists, we see that Wood (like Fichte) correctly argues that Kant can be considered to arrive at legality from a position that is independent of morality. Nevertheless, Wood and Ficthe fail to acknowledge that there still is a superior and moral imperative above the two spheres of right and ethics (or morality proper). Derivationists are, however, wrong if they interpret this moral imperative to be morality itself, rather than the more abstract and less specified version of the *Metaphysik der Sitten*, which can scarcely be used to support their view that Kant's philosophy of right is derived in a more or less straight line from his moral philosophy. The categorical imperative of his final text on normative practical philosophy cannot be defined as identical with former formulations, since it is now clearly applicable to two equiprimordial realms of either right or ethics. Here, it 'only' tests what actions and maxims for actions can correspond with, and thus be valid as, a universal law of freedom (either in an external, legal or in an internal, ethical sense).[141]

Another indication of this change in Kant's central practical-philosophical concepts is his specification in the 1797 moral imperative with regard to obligation. He clearly adjusts his earlier position when he insists that the categorical imperative only affirms what obligation is (cf. "überhaupt nur aussagt, was Verbindlichkeit sei"). It does not in any sense lay down the law with regard to how one should fulfill this obligation, since a crucial point is that the two realms of morality and legality part company here in a way that follows the internal/external

[140] See above, subchapter 1.1 of the prologue. (The following references to the various formulations and abbreviations of the moral imperative in the *Grundlegung* also relate back to those discussions.)
[141] This change is surprisingly similar to Habermas' change of approach with regard to the internal relationships between ethics, morality, and right, beginning with Habermas (1991). I have discussed these similarities at some length in Lundestad (2006).

divide. I have already shown that, with regard to the distinction between morality and legality, this division could not be directly applied to their duties, use of freedom, or legislation. But when we now come to the aspect of obligation, we have finally arrived at a clear, discernable criterion for separating the two domains. Despite all their correspondences in other regards, they have, as Kant underlines, "nur nicht die Art der Verpflichtung gemein" (6:220). The kind of obligation that is related to legality is exclusively external; the kind of obligation related to morality is solely of an internal character. This is the basic insight that underlies the division of the *Metaphysik der Sitten* into a *Rechtslehre* and a *Tugendlehre*, the two parts in which the vital implications for his legal and his moral(-ethical) philosophy are further developed.

Before we move on to the introduction that is specific to the former doctrine, we must look at one further implication that Kant draws in the general introduction, although its topic is identical with the object of the *Rechtslehre* proper. Since external legislation does not and cannot influence the morality of an action – as both Hobbes and Kant insisted, it is possible to act morally under a despotic rule – and it is impossible to rightfully include the inner realm of morality in external legislation,[142] obligatory laws (*verbindende Gesetze*) regarding a possible external legislation are likewise a field that is reserved for legality. These are called external laws, and it is at least in this sense possible to reserve this term for legality, while internal laws remain the subject of morality proper. In the *Metaphysik der Sitten*, the discussion of the latter laws and duties is accordingly allocated to the doctrine of ethics (*Tugendlehre*).[143]

In order to avoid any confusion about the decisive clarification that Kant makes on this point, let me state here that ethical laws and duties can, of course, also be related to external actions (e.g. laws pertaining to friendship or philanthropy); but the crucial point is that these cannot be achieved by means of external legislation, but only of internal legislation. This means that we can speak of and specify external laws that are distinctively legal in character, that is to say, laws that are external and at the same time are the possible object of external legislation.[144] These laws in turn fall into two categories – those discernable *a priori* through practical reason and those dependent on *de facto* (*wirkliche*) external legislation in order to be

[142] The inner incentives of an action must, as he categorically states, "durchaus nicht in die äußere Gesetzgebung einfließen" (6:219). This is the case, not only because that would lead to a terror regime of virtue, but also because for Kant, as I have already pointed out, true morality "ein innerer Akt des Gemüts ist" (6:239).
[143] Tellingly, this is the only point that Kant makes in the general part of the *Einleitung zur Tugendlehre* (prior to its eighteen specific sections). Here, he also emphasises that this is the precise reason why morals (*Sittenlehre*) now, in contradistinction to antiquity, is divided into two different doctrines (cf. 6:379).
[144] For the remainder of this dissertation, I will therefore use the term 'external law' in this juridical sense; the same applies to 'external freedom', however relevant this may also be at a next stage to the realm of ethics.

binding. This division corresponds to that between natural and positive laws,[145] a division that also finds resonance in the internal structure of the *Rechtslehre* itself, as we will see. At this stage, as we proceed to the introduction that is specific to this doctrine, we begin to arrive at the real point of departure for Kant's discussion of the position and peculiarity of *Recht* in his overall practical philosophy.

1.2. An answer to the question: *Was ist Recht?*

This assessment of rights relations as solely concerned with laws subject to a possible external legislation is also mirrored in §A of the ensuing introduction that is specific to the *Doctrine of Right*. Here, Kant sets out the topics of the following discussion. The *Rechtslehre* is "[d]er Inbegriff der Gesetze, für welche eine äußere Gesetzgebung möglich ist" (6:229), and it is a doctrine of positive right, insofar as this legislation is actual or real (*wirklich*, cf. ibid.).

In this opening section, Kant makes a reference to the scholarly relationship between the two faculties of law and philosophy, a fundamental conflict that also arises in *Der Streit der Fakultäten* of 1798.[146] A person who is versed in this actual, external legislation is a jurist, and may also be considered experienced or even an expert, if competent in an application of the laws to singular cases. This, however, does not mean that he or she is necessarily familiar with the purely theoretical field of law, which is not concerned with one's experiences with right in particular cases. For the positive legislation cannot, *per se,* be said to be immutable.

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[145] Cf. Kant's remark in the general introduction: "Überhaupt heißen die verbindenden Gesetze, für die eine äußere Gesetzgebung möglich ist, äußere Gesetze (leges externae). Unter diesen sind diejenigen, zu denen die Verbindlichkeit auch ohne äußere Gesetzgebung a priori durch die Vernunft erkannt werden kann, zwar äußere, aber *natürliche* Gesetze; diejenigen dagegen, die ohne wirkliche äußere Gesetzgebung gar nicht verbinden (also ohne die letztere nicht Gesetze sein würden), heißen *positive* Gesetze. Es kann also eine äußere Gesetzgebung gedacht werden, die lauter natürliche Gesetze enthielte; alsdann aber müßte doch ein natürliches Gesetz vorausgehen, welches die Autorität des Gesetzgebers (d. i. die Befugniß, durch seine bloße Willkür andere zu verbinden) begründete" (6:224). One specific phrasing in this section must be highlighted here. From the original manuscript, both the *Akademieausgabe* and Ludwig's reconstructed text have in line 34 replaced 'natürliche' with 'positive', so that the passage reads: "die lauter positive Gesetze enthielte". This may from one point of view be correct and give the passage more fluency, but this reading nevertheless overlooks one of Kant's key later claims, which can be read out of the original phrasing. As we will see from the relationship between private and public right in the *Rechtslehre* proper, and as Maus (2011: 256) correctly underlines, even if a constitution were to contain only *a priori* natural (private) rights (not just positive laws), it is still strictly necessary to have an *a priori* natural (i.e., rational) law that authorises someone (the sovereign legislator) to posit these rights according to a certain procedure. Neither the *Akademieausgabe* nor Ludwig's reformulations of the text leave any indication of this quite crucial point in Kant, whereas the Weischedel edition sticks with the original term. (Another question that both the *Akademieausgabe* and Ludwig have to answer, in order to be completely correct in their reformulations, concerns the question of what a legislation of supposedly "lauter positive Gesetze" would look like, if indeed it were possible at all.)

[146] Although it was published after the *Rechtslehre*, there are indications that most of the 1798 work was written years prior to its publication, and was held back by Kant under the stricter regime of censorship in Prussia in at least the early days of *La Terreur*. Although it is presented mainly as an essay on the relationship between university faculties, it also contains several important clues to Kant's views on right, politics, and the French Revolution. References to this work will accordingly be made throughout, where relevant.

Rather, to anticipate one of the tenets that Kant subsequently elaborates, it remains undeniably acts of volition under the authority of their deliberate perseverance. The theoretical field of law, which brings in the philosopher qua philosopher,[147] "kommt der *systematischen* Kenntnis der natürlichen Rechtslehre (ius naturae) zu, wiewohl der Rechtskundige in der letzteren zu aller positiven Gesetzgebung die unwandelbaren Prinzipien hergeben muß" (6:229). Thus, the philosopher must seek in this natural doctrine of right the immutable principles of law which lay the normative ground for all positive legislation.

This division of labour is also immediately recognisable in the opening stages of §B, the section which seeks to give at least a preliminary answer to the question: *Was ist Recht?* The jurist, insofar he or she does no more than point to what at a given time and place is held as right (that is, positive law), is referring only to empirical standards and has no more idea of what right is than the logician who thinks it possible to answer the question 'What is truth?' through logic alone. For Kant, since the jurist qua jurist stays (and must stay) only within this mode of argumentation, he or she is not giving an account of right (*Recht*), but much rather of what is laid down as right as a matter of fact, i.e., positive law (*Rechtens*):

> Was Rechtens sei (quid sit iuris), d. i. was die Gesetze an einem gewissen Ort und zu einer gewissen Zeit sagen oder gesagt haben, kann er noch wohl angeben: aber ob das, was sie wollten, auch recht sei, und das allgemeine Kriterium, woran man überhaupt Recht sowohl als Unrecht (iustum et iniustum) erkennen könne, bleibt ihm wohl verborgen, wenn er nicht eine Zeitlang jene empirischen Prinzipien verläßt, die Quellen jener Urteile in der bloßen Vernunft sucht (wiewohl ihm dazu jene Gesetze vortrefflich zum Leitfaden dienen können), um zu einer möglichen positiven Gesetzgebung die Grundlage zu errichten. Eine bloß empirische Rechtslehre ist (wie der hölzerne Kopf in Phädrus' Fabel) ein Kopf, der schön sein mag, nur Schade! daß er kein Gehirn hat (6:229 f.).

This is not to discard the importance and value of empiricist principles in jurisprudence, but only to state the obvious (and what Kant had argued in the first *Critique* as well): empirical objects do not themselves know an organising principle, and we need a rational basis if we are to assert their validity and interpret them at all. Nevertheless – as the above quotation clearly states – positive laws can serve as excellent guides for rational judgements. But taken only as revealing empiricist principles (at face value, so to speak), their organising principle remains unknown to us, and is merely of a mythical, unquestioned origin. This already makes it clear that the concept of right that he sets out to develop in the subsequent sections is to be founded

[147] A philosopher and anyone else can, of course, be a jurist (*Rechtskundiger*) in the knowledge of actual law, just as the jurist and anyone else can be a philosopher in their love of wisdom, but – and this is Kant's implicit claim in the opening section – jurists cannot be philosophers as jurists, any more than philosophers can be jurists as philosophers. The jurist, as §B (and the rest of Kant's remarks on the subject) makes perfectly clear, can only be concerned with actual laws in their specific application to particular cases.

on the theoretical, rational basis not of positive law, but of its possible, positive legislation (cf. *die Grundlage zu einer möglichen positiven Gesetzgebung errichten*).[148]

The concept of right is then desribed as relating to three different features insofar as it lays claim to a corresponding obligation, as Kant says.[149] These three concern:

> 1) only the external and practical relationship between one person and another, insofar as their actions can have (direct or indirect) influence on each other;
>
> 2) only the reciprocal relationship between the choice (*Willkür*) of one and the choice of the other, not the unilateral relationship between choice and wish (*Wunsch*);[150]
>
> 3) only the form of this mutual relationship of the choice of one with another, insofar as it can be considered free and the action of one can be united with the freedom of the other according to a universal law (cf. 6:230).[151]

One significant element of these features of the concept of right is their distinctively relational and thereby also intersubjective character, an intersubjectivity that is built into the definition of the concept of right itself – and is hence already present from the outset of the *Rechtslehre*. Right thus addresses and establishes intersubjective normative relationships in a manner that is decidedly different from what morality does. Another aspect is that the realm of right deprives both the incentive and the end of any action of all juridical relevance;[152]

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[148] This reveals a certain dialectic involved (or to be involved) in Kant's legal and political philosophy when it comes to an actual realisation of the realm of right. On the one hand, there are the immutable principles of *Recht* and the systematic knowledge of the doctrine of natural right, which are the topic of his investigation and prior to any existing state of positive law, but which, on the other hand, in their realisation will reveal themselves as presupposing the actual existence of a state of positive law (*Rechtens*). The dialectical process involved here will be seen to run through his legal-philosophical argumentation.

[149] Cf. the opening line of the succeeding section: "Der Begriff des Rechts, sofern er sich auf eine ihm korrespondierende Verbindlichkeit bezieht, (d. i. der moralische Begriff desselben) betrifft..." (6:230). To note here is Kant's specified description of the concept of right as "der moralische Begriff desselben". Not only does he use *moralische* in the general sense referred to above, but for the concept of right to be moral (in this sense), it is required that it concurs with its corresponding obligation, namely the juridical or legal. This concept, whose obligation we have seen is entirely external and hence not coupled to morality or ethics, is accordingly – perhaps at first thought counterintuitively – normatively valid (moral) insofar as it does not pertain to the realm of morality or ethics, but only to the conditions of external obligation. (The Weischedel and Ludwig editions – not Gregor's English translation – change, however, *desselben* into *derselben*, making it a reference to the obligation itself (something which I believe is incorrect)).

[150] Although both related to the faculty of desire (*Begehrungsvermögen*), the difference between the two is in short that choice is related to the ability to carry out or refrain from an action, wish to the inability of the same. The exclusion of others' wishes as part of relations of right (wishes fall into his realm of ethics) rules out "Handlungen der Wohltätigkeit oder Hartherzigkeit" (6:230) from the legal realm. For more on the relationship between choice and wish (and the faculty of desire), see section I of Kant's general introduction.

[151] It is in other words not juridically relevant which matter of choice (i.e., end) I have. As long as my choice can be united with everyone else's, I cannot rightfully be refused to, for instance, acquire a commodity on basis of what I (might) intend to do with after acquiring it.

[152] Arguably, they may enter a legal argument in terms of, for instance, the severity of criminal punishment. But, as we will see in I.3.5, Kant does not include these aspects in his purely rational account of *Strafrecht* either.

these two characteristics can only be the object of morality (or ethics). Although, as I argued above, it would be to exaggerate to say that morality proper does not have an inherently intersubjective component,[153] the realm of true morality and virtue is nevertheless – unlike what is the case in the realm of right – located entirely in the *foro interno* of the individual itself, constituted by the internal relationship between the individual maxim and the *a priori* moral law as it is.

This intersubjective dimension of Kant's legal philosophy (and its contrast to his moral philosophy) is not so apparent in the formulation of the universal principle of right, *das allgemeine Prinzip des Rechts*, which is a juridical variant of the categorical imperative and as such – like the categorical imperative of the *Grundlegung* – is a rule for subjectively testing one's maxims through rational procedure: "Eine jede Handlung ist *recht*, die oder nach deren Maxime die Freiheit der Willkür eines jeden mit jedermanns Freiheit nach einem allgemeinen Gesetze zusammen bestehen kann" (6:230). This formulation covers his basic thinking on this point, but it does not emphasise the genuinely intersubjective character of the realm of right that runs throughout the sections of the *Rechtslehre*.

The definition of right itself towards the end of §B will prove to be more accurate in this sense. After listing the three features of the concept of right, Kant answers the question *Was ist Recht?* as follows: "Das Recht ist also der Inbegriff der Bedingungen, unter denen die Willkür des einen mit der Willkür des andern nach einem allgemeinen Gesetze der Freiheit zusammen vereinigt werden kann" (ibid.). The important clue here is the reference to the sum total of conditions necessary to unite the choice of one with the choice of another. If and only if the totality of certain conditions is met is it possible for his universal principle of right to be realised *de facto*. This seems to require a reading of the *Rechtslehre* that relates to more than just an individually performed testing of maxims,[154] and a closer look at the key constituents of the rest of the introduction (and the main text) will reveal that this interpretation is correct.

The inherently coercive character of all right is not present, as such, in the formulation of the universal principle of right. This crucial feature is emphasised in the remainder of the section and is made explicit in §D: "Das Recht ist mit der Befugnis zu zwingen verbunden" (6:231). For Kant, the use of coercion is analytically connected with external freedom, since it would be clearly inconsistent to claim that a person who infringes upon my freedom (and thus wrongs me) can nevertheless have a right to do so. This would be an obvious transgression of

[153] This, however, is Habermas' discourse-theoretical critique and leads to his attempt to reformulate Kant's question *Was soll ich tun?* in intersubjective terms (*Was sollen* wir *tun?*), cf. e.g. Habermas (1983; 1991).
[154] To mention only one, and perhaps the most important, example already at this point, this is connected above all with the necessity of an institutionalisation of law and its implications; more on this crucial aspect later.

my right to use my external freedom. Regardless of how unwanted (negligent, disappointing, indifferent, etc.) my external actions may be in the eye of others: as long as I do not wrong anyone through these actions (that is to say, as long as I do not infringe upon anyone else's use of their external freedom in accordance with a universal law), it is in Kant's view always resistance against such actions that needs to be justified, since this is in fact a use of external freedom that infringes upon someone else's freedom, in this case mine.[155] Resistance which hinders such a wrong (still according to a universal law) is thus not only compatible with right (*das Recht*), but is precisely what right must entail in the first place, namely the authorisation to use coercion to hinder any particular use of external freedom that is a hindrance to freedom in accordance with a universal law. In his own words, coercion (*Zwang*) is a "*Verhinderung* eines *Hindernisses der Freiheit* mit der Freiheit nach allgemeinen Gesetzen" (6:231).

This strict understanding of right is further elaborated in §E of the introduction, where Kant rejects any reading of right that would understand (external) freedom and coercion as two entirely separate matters. He insists that legal obligation and the authority to use coercion must not be conceived as two components between which a checks-and-balances approach of state law attempts to mediate.[156] This would imply that there is some sort of inherent conflict between the two, and that every use of coercion is in some sense wrong (although the attempt is nevertheless made – in a moral manner, one would assume – to justify the use by appeal to a superior, but still unaccountable normative principle which state law must regulate). If state power is interpreted in such a moralistic and yet highly amoral way, one can hardly view it as anything else than a (sometimes permissible) use of force.

But Kant, contrary to quite a few pre- and post-modern thinkers, is here adamant about the necessity of a conception of right "als die Möglichkeit eines mit jedermanns Freiheit nach allgemeinen Gesetzen zusammenstimmenden durchgängigen wechselseitigen Zwanges". Only with such an approach to right "kann [man] den Begriff des Rechts in der Möglichkeit der Verknüpfung des allgemeinen wechselseitigen Zwanges mit jedermanns Freiheit unmittelbar setzen" (6:232). In short: it is only through a coercible concept of right that freedom can be attained at all.

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[155] See 6:230 f.: "Wenn also meine Handlung, oder überhaupt mein Zustand mit der Freiheit von jedermann nach einem allgemeinen Gesetze zusammen bestehen kann, so tut der mir Unrecht, der mich daran hindert; denn dieses Hindernis (dieser Widerstand) kann mit der Freiheit nach allgemeinen Gesetzen nicht bestehen".

[156] Although I am clearly anticipating his later sections on both private and public right (and *Staatsrecht* in particular), it must be pointed out that Kant at this stage nowhere makes any mention of the civil condition or the rule of law as such, nor its specific components. Only the more abstract discussion of the *Rechtslehre* itself and its subject of investigation come into consideration here.

Here, at any rate, we arrive at a crossroads where morality and Kant's early practical philosophy in general cannot take *both* directions. In the intersubjective realm of right, which by definition also goes beyond the moral individual itself (and must allow for a certain use of coercion), morality cannot remain moral in the strict sense *and* be true to its own principles at the same time. In the unilateral attempt to uphold a certain moral order or standard in societal formations, the moral individual, who cannot possibly know (let alone demand) the morality of another person's dispositions, would fatefully remove the moral basis on which the claim was made in the first place. Any attempt to ground the use of coercion in Kant by reference to a moral standard (or supremacy) must ultimately admit that this attempt cannot itself possess the moral character that it claims to guarantee. Put more simply, the problem is not just that a moral individual cannot generate true morality in other persons, but also that it cannot compel external moral behaviour (whatever this would mean in detail) *and* live up to the standards of morality that it aims to protect and preserve. Its own position in authorising coercion remains unclarified and unjustified. It appears very difficult, if not indeed impossible, to derive right, and thus also the authorisation to use coercion, from a concept of morality *per se*.

Although, as we have seen, a strict derivationist line of thought is prominent in Kant's practical philosophy until fairly late in his writing and his scholarly teaching,[157] he definitely does not follow this path in the *Metaphysik der Sitten*. In §C, he stresses that it, normatively speaking, is impossible for the rightfulness of external actions to depend on whether or not the individual acts upon a certain maxim – "[d]as Rechthandeln mir zur Maxime zu machen, ist eine Forderung, die die Ethik an mich tut" (6:231). The implications of this aspect are shown *inter alia* in the application of the universal principle of right to intersubjective relations: Kant is in complete accordance with his above juridical argument, but breaks with the derivationist stance when he formulates the universal law of right (*das allgemeine Rechtsgesetz*). This law, as we will see from its definition, cannot be said to impose a categorical duty or obligation of right upon the individual in the manner we know from Kant's moral philosophy:

> Also ist das allgemeine Rechtsgesetz: handle äußerlich so, daß der freie Gebrauch deiner Willkür mit der Freiheit von jedermann nach einem allgemeinen Gesetze zusammen bestehen könne, zwar ein Gesetz, welches mir eine Verbindlichkeit auferlegt, aber ganz und gar nicht erwartet, noch weniger fordert, daß ich ganz um dieser Verbindlichkeit willen meine Freiheit auf jene Bedingungen *selbst* einschränken *solle*, sondern die Vernunft sagt nur, daß sie in ihrer Idee darauf eingeschränkt *sei* und von andern auch tätlich eingeschränkt werden dürfe; und dieses sagt sie als ein Postulat, welches gar keines Beweises weiter fähig ist (ibid.).

[157] As both Ludwig and Brandt touch upon, the starting point even of the 1793/94 lectures on the metaphysics of morals is that rights relations and the use of coercion in sustaining claims connected to these are to be grounded in a strictly moral conception of *Recht*.

This passage is also the point of departure for an important discussion of the juridical legislation of reason in Wolfgang Kersting's groundbreaking analysis of Kant's philosophy of right and the state. In full agreement with what I have highlighted up to this point, Kersting emphasises that such an understanding of *Recht* cannot possibly be in line with a reading of right that underlies the principle of morality as such – a principle that commands immediately and unconditionally. Since, according to this passage, the universal law of right explicitly does not impose on me a categorical obligation to limit my freedom, it cannot be interpreted as stemming directly from morality. If this were the case, then Kant could not formulate the universal law of right as he does. The practical-rational law in question here does not impose an obligation upon me "ganz um dieser Verbindlichkeit willen", but merely postulates a right for me (and anyone else) to limit others' freedom *de facto* in accordance with a universal law. To treat this obligation as a strictly moral imperative that commands me to unilaterally limit my own actions (whatever other persons may do) may be morally laudable, but this form of moral asceticism in *de facto* intersubjective relations is downright foolish, unless there already is established a reciprocal assurance of everyone's adherence to this law. An interpretation of the realm of right merely as the external exercise of internal morality would be incorrect – it would approach the subject from the completely wrong angle, since morality as such cannot in fact arrive at *Recht* without ruining the autonomy of both concepts.

Instead of this, Kersting proposes an interpretation of Kant's practical philosophy that strongly resembles the more abstract character I have indicated up until this point, where the decisive feature of morality rather belongs to the sub-branch of ethics under the general term of normative reason or practical philosophy: morality itself is not the supreme principle. But if right and its entire doctrine are not to be directly derived from a superior principle of morality, the urgent question is whether or not it can be established that practical reason has not only one type of legislation, but two: a moral-ethical and a juridical type. Such an affirmation calls for the theoretical basis of what Kersting describes as a doubling of the legislation of reason, "eine Doppelung der Vernunftgesetzgebung" (Kersting 2007: 139). Hence, Kant's practical philosophy, in addition to the process of rational legislation related to morality, must also be shown to have a specifically juridical and rational legislation (as distinct from that of positive law) that is exclusively related to the realm of right (as distinct from morality or ethics).

To make this claim plausible, Kersting investigates in greater detail what the common constituents and the peculiarities of the *Rechtslehre* and Kant's moral philosophy are, this in

order to clarify the internal relationship between the two realms.[158] For Kersting, both rely on the possibility of a pure, practical reason, as Kant has presented this in the second *Critique* – that is, pure reason must be assumed to have "einen praktisch, d.i. zur Willensbestimmung hinreichenden Grund in sich" (5:19). Kersting interprets this to imply that both the moral and the legal concept of obligation is then dependent on the possibility of transcendental freedom; only in that case can there be objective practical laws. Otherwise, "so werden alle praktische Grundsätze bloße Maximen sein" (ibid.).[159]

Kersting maintains in this connection: "Damit erweist sich [auch] die Rechtslehre in geltungstheoretischer Hinsicht von der 'Kritik der praktischen Vernunft' abhängig" (Kersting 2007: 101); nevertheless, he also accentuates a so-called problem of a juridical legislation of reason, as seen from a strictly moral perspective. We must assume that Kant and every Kant scholar believe that this legislation is meant both to be obligating (in the external sense that, as I have shown, morality as such cannot guarantee) *and* at the same time to have a rational-practical basis. But how, then, can the concept of juridical legislation be deduced from the concept of moral legislation and still be binding in a rational-practical sense, when it entirely circumvents the morally essential feature of internal obligation? In Kersting's own words, this rather acute dilemma "stellt (…) die Frage, wie die (…) reine praktische Vernunft ein Gesetz enthalten kann, dessen Besonderheit darin besteht, auf das wesentliche Moment praktischer Vernunftgegesetzgebung zu verzichten" (ibid..).

Any attempt to resolve this problem by eliminating the importance of the determining ground will run into the dead end of which Kant wanted to make both natural rights advocates and those who tried to deduce legality from morality aware. Either you have a problem in explaining why legal norms and rights claims are supposed to be binding in the first place, or else you cannot properly distinguish those norms that can legitimately be physically enforced (i.e., legal norms) and those that cannot (i.e., moral or moral-ethical norms).[160] Unless one then somehow claims that all external moral duties should or could be made coercible legal duties – a totalitaristic claim to which one would hardly agree – one is obliged in both cases to

[158] The following presentation of Kersting's points is based on his own examination in Kersting (2007: 100 ff.).
[159] I am, however, not equally convinced that transcendental freedom has to be presupposed in order to establish a consistent concept of legal obligations, since these are related to the external exercise of freedom and this only. Also, autonomy means something different in the legal context as comparted to the moral realm, something which I believe Kersting underestimates. I shall return to this line of argument below.
[160] Although many scholars hold this view, Kant's own distinction in the *Tugendlehre* between wide and narrow duties is not helpful in this regard either, as it only describes narrow duties as in correspondence with juridical obligation, since these do not include the disposition or end of the action, whereas the wide duties do so (and, accordingly, are ethical). But this distinction in no way answers the question of which norms and actions legitimately can be coercively enforced and which can not. Applied to this question, the distinction is merely a tautology.

let positive law decide what is right – with the moral plea as nothing more than sorry comfort or a mere pious wish. Such a stance is, of course, the exact opposite of what was originally intended, where practical reason was supposed to yield *a priori* criteria for the evaluation and possible critique of positive law.

How is this problem of a possible juridical legislation of reason to be resolved? As we have seen, it cannot be conceived simply as moral legislation without a moral incentive. It is in this context that Kersting refers to another remark, this time from the general introduction. The first part agrees completely with Kant's earlier view on the relationship between morality and legality, namely that all laws of freedom –"als reine praktische Vernunftgesetze für die freie Willkür überhaupt" – can be considered as deriving from what we consider the main aspect of his moral philosophy, our inner determining ground and its ability to sufficiently determine human choice in accordance with a universal law. But Kant also adds a comment on these laws of freedom that goes beyond this moral perception: while it may be true that we can know our internal and external freedom only from the correspondence between our inner determining ground and a universal law, at the same time it must also be said that these laws of freedom "nicht immer in dieser Beziehung betrachtet werden dürfen" (6:214).[161]

Kersting then approaches the question of a possible juridical legislation of reason from the amoral space opened up by Kant himself. Instead of viewing legal philosophy primarily from a moral perspective, like the natural rights advocates and all others who try to derive the concept of legality from the concept of morality, Kersting examines the possibility of another interpretation. Following Kant's own admission, it is now possible "von diesem moralischen Standpunkt abzusehen, es ist erlaubt, das Grundgesetz der reinen praktischen Vernunft aus einer außermoralischen Perspektive zu betrachten. Und erst dieser Standpunktwechsel ist es, der vor das Rechtsgesetz als solches bringt" (Kersting 2007: 102).[162] What Kersting here calls *Standpunktwechsel* – or change of perspective,[163] as I will refer to it in what follows – is then applied to the interpretation of the *Rechtslehre* and its constituent elements.

The main reason for the necessity of this change of perspective with regard to Kant's legal philosophy is, as I already have suggested, the impossibility of consistently grounding in

[161] Kersting admittedly believes that Kant must have meant 'müssen' instead of 'dürfen', although I hold Kant's original formulation to be both stronger and more to the point than Kersting's suggestion, which, as we have seen Wood criticises him for, draws him closer to a derivationist interpretation.
[162] As we have seen, the *Rechtsgesetz* (i.e., universal law of right) cannot be understood as a moral imperative in the sense of Kant's early practical philosophy, since it is intersubjectively conditioned, cf. above.
[163] This translation is not only an improvement from 'change of position' or the like; it also corresponds with Ingeborg Maus' suggestion of a similar *Perspektivenwechsel* (1994: 271). This is another important reading of Kant's philosophy of right to which I will return later.

moral philosophy the immanently coercive character of right.[164] Morality, as the supreme principle of moral philosophy, cannot supply the intersubjective, reciprocal guarantee of the actions that it itself prescribes. Guaranteeing this must be the task of the legal dimension of practical philosophy, which cannot consist only of the substitution of moral duty with threats of external force and restraint – because this still does not settle the crucial question of which moral norms, once established as such, cannot (automatically) be legal norms too, and why this has to be so. As Kersting correctly emphasises in this context, such an exclusively moral understanding of the concept of legality and rights relations "würde der Zwangsandrohung der Charakter praktischer Notwendigkeit verliehen, würde Zwangsanwendung selbst zur Pflicht werden und ein Rechtsverzicht die Qualität einer sittlichen Verfehlung besitzen" (ibid.: 105 f.).[165] In short, viewed from a predominantly moral perspective, we are locked into a position that admittedly is morally untenable, where morality cannot offer a guarantee of moral actions in our intersubjective relations, and would also become manifestly totalitarian, if the moral(-ethical) legislation of reason were to be directly transferred to the realm of right. Kersting draws the following inference:

> Im Lichte dieser Interpretation gewinnt die Doppelung der Vernunftgesetzgebung nicht nur Plausibilität, sondern Notwendigkeit. Kant hat dieses Lehrstück abrupt eingeführt, ohne es in den Kontext seiner praktischen Metaphysik argumentativ einzufügen. Dadurch entsteht der Eindruck der Inkonsistenz. Denn betrachtet man es ausschließlich von der Perspektive der 'Kritik der praktischen Vernunft', muß die modale Aufspaltung der Vernunftgesetzgebung unverständlich bleiben. Der Eindruck mangelnder Konsistenz rührt daher, dass Kant die im engeren Kontext der Moralphilosophie selbst nicht zu entwickelnde, für die Rechtsphilosophie aber zentrale Frage unterschlägt: nämlich die nach der moralischen Begründung von Zwangshandlungen (ibid.: 106).

The change within Kant's practical philosophy from an exclusively moral perspective to a normatively necessary and complementary legal perspective is thus based, not so much on an argumentation of pure practical reason itself as on normative requirements which derive from the facticity of our embodied existence in a phenomenal world. In one sense, until the full realisation of all three dimensions of right, the juridical domain will always lag behind the *de facto* current state of political affairs. Nevertheless, practical reason will still provide the *a priori* legal principles for adjudging and correcting all political maxims, thereby providing the criteria for a normative critique and change of these.

[164] As Kersting too emphasises (2007: 102): "Der Anlaß, der diese außermoralische Hinsicht auf das Sittengesetz erfordert, ist nicht schwer zu finden. Er liegt in dem für die Rechtslehre zentralen Problem des äußeren Zwangs".
[165] In the following footnote, Kersting makes a highly relevant reference to Kant's criticism of Hufeland and the Wolffian natural rights tradition on this point; cf. my discussion of this aspect above.

The realisation of Kant's normative principles of rational right cannot, however, take the concrete form of immediate rights claims related to the factual dimension of legality. In contradistinction to the moral sphere, where all normative improvement must take place as a "revolution in the mind", the intersubjective realm of right necessarily prescribes normative change as political reform. Furthermore, as we have seen, morality cannot itself supply the coercive character that is required for such an intersubjective reform, without letting go of its own principles. The 'deficiencies' of moral philosophy in this regard must be supplemented by an autonomous legal philosophy, in order genuinely to guarantee freedom in the external realm, since otherwise, the realm of right can only be a light version of morality that offers only a highly dangerous, unaccounted, and unclarified concept of any authorisation of the use of coercion. Rather than letting go of the principles of morality in order to establish such a normative authorisation, Kant assigns this task to a practical-rational philosophy of right.

Accordingly, with regard to the realisation of intersubjective normative obligations and their principles, Kant's practical-rational theory must precisely explicate (*entwickeln*) the normative and principled reform from facticity to freedom, not only from the internal freedom of morality to the external freedom of legality. Granted, morality guarantees the freedom of the will as internal legislation; this insight into individual autonomy and personal freedom thereby also sets limits to possible external legislation and coercion. This point is, of course, essential both in and for all political theory, but this aspect of internal freedom cannot as such guarantee external freedom, and hence rightful relations in the intersubjective realm of human action. In other words, our normative exercise of freedom has a dimension that is immanently related to reality itself. This dimension cannot simply be realised by morality *per se*, but must rather be explicated by a philosophy of right. Consequently, Kant's view from within must be complemented with a legal perspective that centers on the external, and in a certain sense amoral, use of freedom.

Since morality cannot as such integrate differing claims to a specific use of external freedom – claims that may potentially be equally rightful – a change of perspective must take place, if we are to better comprehend Kant's understanding of rightful relations in the realm of intersubjective action. This is not a blind leap of faith, but something necessitated by pure practical reason in its admission that morality cannot guarantee any external concept of freedom, but 'only' an internal concept. And since we are embodied beings, *inter alia* with a duty to act morally towards others too, the need for freedom to act externally (i.e., external freedom) becomes, if not more, then certainly not less important to the concept of freedom than the one-sided focus on and understanding of internal freedom that we see in the

Grundlegung and second *Critique*. The imposition of binding *internal* obligations on someone to act in accordance with practical-rational laws can occur only as an internal form of self-obligation, i.e., as morality proper. To impose binding *external* obligations on someone to act in accordance with practical-rational laws is, however, possible only through coercion. As we have seen in the prologue, the attempt to guarantee this through a concept of morality leads inevitably into the pitfalls of either a Wolffian natural rights doctrine or legal positivism.

On Kersting's (and Maus') suggested reading, with which I largely agree, instead of viewing the legal philosophy of external freedom and possible coercion as a domain that lacks true normativity and that therefore must be curbed by morality, Kant realises the necessity and the possibility of undertaking a change of perspective to an autonomous realm of philosophy of right. Only in this domain can the external freedom that is necessary in order to act in a moral manner unconstrained by external forces be consistently guaranteed and preserved. If we consider actual intersubjective relations only (or primarly) from the moral perspective of the *Grundlegung* or second *Critique*, we are, as embodied beings, torn between the normative and the factual dimensions. First of all, we are bound by morality to act morally, regardless of the acts of others. Secondly, however, we are also bound (or limited) by the *de facto* acts of others. Then, unless every other person is as morally virtuous as we are, we are in danger of becoming moral fools who succumb either to the lack of morality in others or to the need to break our own principles and join the struggle for power and survival in a state of nature.

We must here admit that nothing less than the concept of moral action itself is at stake. It is indeed morally laudable and possible – even a moral duty – to stick to the principles of morality in less than ideal social conditions. But this gives little help for a genuine realisation of moral action and morality in the phenomenal world – and that too is a moral duty. Kant's solution to this apparent problem is not to waver on the moral principles themselves, but to add an independent legal dimension with clear normative criteria for a rightful regulation of human actions, insisting that these interactions must not always be normatively considered from the perspective of morality proper.

As Kersting emphasises, the inclusion of this legal dimension must appear unfounded, both argumentatively and normatively, from the moral point of view of the second *Critique*. But the fact that rightful external freedom is required as a genuine guarantee of the external exercise of internal freedom in normatively-bound human interaction requires a shift from the moral to a legal perspective. Only a juridical dimension, grounded in the free exercise of will according to a universal law of external freedom, can guarantee a concept of free interaction through the reciprocal recognition of the Other *in* the concept of external freedom, which in

turn is analytically connected to a rightful use of coercion.[166] The inalienable right to external freedom is the supreme basis for this, and gives both you and every other person a legal right to your own self, your freedom, and the exercise of your will independently of the wills and desires of all others. The crucial point is that this right cannot be explicated from the point of view of morality itself.

Like Kersting (and Maus), I affirm that the change of perspective provides the vital key to grasp this fundamental shift within Kant's practical philosophy. In purely theoretical terms, the concept of external freedom must in a first instance be considered secondary to the concept of internal freedom, which can be acquired only through the knowledge of morality proper. But with regard to our finite existence as embodied beings with moral duties in our factual, intersubjective relations, the concept of external freedom becomes fundamental to any exercise of moral actions at all. This concept not only complements the overall concept of freedom, but rather completes it. Likewise, the realm of right must be said to complete our normative obligations to one another, instead of 'merely' complementing these in the sense of pragmatically aiding our moral-ethical obligations in a non-ideal world.

On the basis of Kant's position in the *Metaphysik der Sitten*, the realm of right is now his designated sphere for any rightful and, of course, strictly necessary externalisation of the concept of freedom. When we relate this to the factual dimension of the human condition, we realise that internal freedom is not primary to the concept of external freedom. Instead, we can see that they acquire here not only a complementary, but also an equiprimordial position to one another, since they recognise, strengthen, and depend upon each other. It is important to note that Kant can now do this without having to compromise with the principles of legality or morality in order for these to be truly and fully realised.

Instead of a strictly moral legislation with an unknown and undeveloped principle that prevents every moral duty from also being an enforceable legal duty, Kant must – as Kersting correctly emphasises – develop a specific juridical legislation of pure practical reason in the *Rechtslehre*. The discussions in the public right part will discover how this is conceived and what its precise nature is. At this point, I underline once again the impossibility of deducing such a procedure from the process of moral legislation as we know it from the *Grundlegung* and the second *Critique*. Therefore, to truly realise normative (or moral) human interaction, it is necessary that we undertake a change of perspective to a philosophy of right that addresses

[166] Kant's criteria for this are, of course, explicated in the private and public right parts of the *Rechtslehre*, and they are the subject of my investigation in the subsequent chapters.

the legitimate conditions under which a rightful use of coercion can be exercised in order to guarantee a rightful use of our external freedom.

As I have shown, the juridical legislation of practical reason in Kant cannot be said to be subordinated to (and certainly cannot be identical with) its moral-ethical equivalent. This means that the juridical legislation must be considered a separate branch of reason in its self-constituting ability to be practical, that is, to give itself its own universal laws which also give the will a sufficient determination to act upon them. It remains to be seen what this juridical legislation of reason more precisely is and entails. His remarks up to this point have, however, focused on the specific externality of the kind of obligation that is connected with right. Thus, rightful legislation in the juridical domain is concerned only with laws of freedom that can be adhered to in an exclusively external way. In his thorough analysis, Kersting shows how the peculiarities of Kant's philosophy of right can be perceived only after we have undertaken a change from a strictly moral point of view to a (correctly understood) amoral perspective on the subject. In order to better comprehend the full meaning and implications of this vital shift we ought to pause briefly at this stage, before we turn to the last passages of the introduction to the *Rechtslehre*, and consider the ground that we have gained thus far with regard to our understanding of Kant's philosophy of right, in relation to his practical philosophy in general and to his moral philosophy in particular.

The main aim of this investigation of the *Rechtslehre* is not to settle the differences between the derivationists and separationists (since this would also require a full semantic analysis of all their works),[167] but to show that and how Kant's legal philosophy can be seen to gradually develop and change during his writing career. Whereas his *Grundlegung* position sees morality as the supreme principle of morals (*Sittenlehre*) and of practical philosophy, the final formulation in the work for which the *Grundlegung* was initially only an introduction inserts a more abstract concept at the top of the pyramid. In the introduction to the *Metaphysik der Sitten*, it becomes clear that the concepts of morality and legality cannot consistently be read as subordinate to one another, since both concepts constitute their own supreme principle of the sub-branches *Tugendlehre* and *Rechtslehre* under the conceptual umbrella of morals (*Moral*, *Sitten*). The general introduction also shows that this concept has a far more abstract character than the concept of morality as such, covering the doctrines of both right and ethics.

This less specific character of the supreme principle of practical philosophy is readily apparent in the new formulation of the categorical imperative, which no longer demands that

[167] I do, however, argue that their differences could be, if not entirely overcome, then certainly more explicit by an emphasis on freedom, and not morality as the key term for Kant. (Nor Pippin is sufficiently aware of this.)

one must make one's subjective determining ground correspond with the objective moral law (i.e., act out of duty); rather, it 'only' affirms what a normative obligation is, and what laws practical reason validate (in their universality). Obligation is then the pivotal point in Kant's practical philosophy, not moral duty or freedom *per se*, since the internal/external divide that is often used in secondary literature to analyse the difference between the two realms of ethics and right does not function in an entirely exhaustive manner to separate ethical and legal duties, freedom, or even legislation. This is achieved only with the concept of obligation, which has an exclusively internal character with regard to morality and a solely external character with regard to legality. Accordingly, while it may be perfectly adequate and correct to talk of Kant's use of terms such as morals (*Moral*) and moral (*moralisch*) laws, duties, etc. as standing directly under the overall concept of morality in the writings from the 1780s, this definitely changes with the publication of the *Metaphysik der Sitten*.

Here, 'morals' and 'moral' designate a realm that is common to both right (legality) and ethics (morality), a realm that does not specify the particular legal or ethical character of norms. This specification is first done in the respective spheres, and for very good reasons, as we will see when we have further examined the part on public right in the *Rechtslehre*. But Kant's general position ought to be clear by now: although they are internally linked to an overall concept of practical philosophy or morals, the spheres of legality and morality, i.e., of legal and moral philosophy, are kept conceptually separate with regard to their two doctrines, right and ethics (*Rechtslehre* and *Tugendlehre*), the two parts of the final form of his practical philosophy. They certainly have in common some of their basic features, terms, and concepts, but this does not mean that they are deduced from one another. Instead, there are in my view some very important aspects of legality that morality cannot explain consistently out of its own resources. One of those – as already noted – is the use of coercion.

Along these lines, Kersting proposes that we must undertake a change of perspective in order to fully understand the specific legal sub-branch of Kant's practical philosophy. This essential part of his theory is not deducible from the realm of morality, if we were to examine it from a strictly moral-ethical point of view (as in the *Grundlegung*, the second *Critique*, and the *Tugendlehre*). The shift takes place within Kant's practical philosophy in general, not his moral philosophy as such. This must not be interpreted as the establishment of a philosophy of right that lacks moral criteria for its rightfulness. Rather, the rational-practical principles that pertain to both his moral (or moral-ethical/ethical) philosophy and his philosophy of right must be conceived more abstractly in the first place. The specific moral (or moral-ethical) and legal characters are then developed in their respective realms precisely in order to maintain

their respective autonomy and prevent an intrusion of one realm upon another. Key concepts such as duty, right, law of freedom, legislation, obligation, etc. are certainly shared by the two realms, but this does not imply that they are exactly identical when they are specified in their respective domains. Legal duties, rights, freedom, etc. are for Kant not identical with their moral-ethical equivalents; nor, as Kersting underlines, is their process of legislation.

The meaning and implications of this last claim cannot be completely grasped until the legislative procedures of public right are presented below.[168] But the key aspect involved in drawing a distinction between the two spheres is already revealed by Kant in the introduction: it lies in the kind of obligation (*die Art der Verpflichtung*) attached to them. For morality, the obligation is exclusively internal; for legality, the obligation is exclusively external. On the basis of this distinction, we can infer that Kant's realm of right is concerned only with what can rightfully be made a physically enforceable obligation, that is to say, coercible, external actions. This, in turn, gives rise to the central concept of the *Rechtslehre*: external freedom.

How this freedom can be consistently and systematically contained and guaranteed in a system of rights is the object of the *Rechtslehre*. But before Kant takes on this task, he includes in the remaining passages of the introduction both an appendix and a division of the *Rechtslehre,* in order to delineate the investigation more clearly. The main features of these segments must here be indicated, since this can help us sum up the introdutory stages of the writing that lead up to the doctrine of right.

For Kant, there are two cases which are insoluble for the *Rechtslehre* proper and must therefore be treated outside it, although it must be said that they in fact belong to the realm of right, since they certainly do not fall into the realm of ethics.[169] As I have shown, right and the authorisation to use coercion are analytically connected in his legal framework. Nonetheless, there are two instances which can best be described as having only one of these two features, namely either right without coercion (equity, *Billigkeit*) or coercion without right (a right of necessity, *Notrecht*).[170]

The first is an appeal to right, although the ill in question "auf dem Wege Rechtens nicht abzuhelfen [ist]" (6:235) and therefore belongs before a court of conscience rather than a court of civil law, since "die für den Richter erforderlichen Bedingungen mangeln, nach

[168] See I.3.1-I.3.4.
[169] See 6:233: "– Aber, ohne ins Gebiet der Ethik einzugreifen, gibt es zwei Fälle, die auf Rechtsentscheidung Anspruch machen, für die aber keiner, der sie entscheide, ausgefunden werden kann, und die gleichsam in *Epikurs* Intermundia hingehören. – Diese müssen wir zuvörderst aus der eigentlichen Rechtslehre, zu der wir bald schreiten wollen, aussondern, damit ihre schwankenden Prinzipien nicht auf die festen Grundsätze der erstern Einfluß bekommen". Following my above definition, these cases must concern external actions whose obligation can only be of an external kind, without any recourse to moral-ethical legislation as such.
[170] Also, to underline this point: "ein Richter [kann] nach unbestimmten Bedingungen nicht sprechen" (ibid.).

welchen dieser bestimmen könnte" (6:234). The call for equity is, as Kant clearly states, not a wish that the other part should benevolently cede what he or she can claim by right (for that would be a call for the performance of an ethical duty), but a right that cannot be a positive right (i.e., a coercible right). The only possibility for a *right* to equity, then, is that the judge *de facto* is authorised to go beyond the letter of the law and use his or her own conscience to compensate (to take Kant's example) a lack of means of subsistence which is the result of a severe devaluation of currency during a contract period from the time of entering to the actual time of payment. This is what he means when he speaks of a wide right, as distinct from the strict or narrow right of the *Rechtslehre* proper (and, for that matter, any wide right of ethics); namely, a juridical right that corresponds to the adage that he himself endorses and quotes at this point: "Das strengste Recht ist das größte Unrecht" (6:235).[171]

The right of necessity, on the other hand, relates to actions that, as Kant formulates it, allegedly authorise a right to a use of coercion (although this is still not a right) in times of mortal danger. What he has in mind here is not self-defence, but a subjective right against someone who does *not* threaten me in any way through his or her actions. Kant's example to illustrate this point concerns a person who is shipwrecked and lost, and in order to save his life shoves another survivor off the board to which this person is already clinging (the board can only carry one of them). Objectively, the former person is thereby (directly or indirectly) guilty of murder. This action to save one's own life by taking the life of another person is not an inculpable crime, but Kant holds that it must nevertheless be regarded as unpunishable.[172] He insists that this must be viewed as a merely subjective case of impunity, not as an instance of objective impunity – since that would imply that it was somehow still in accordance with right. "Der Sinnspruch des Notrechts heißt: 'Not hat kein Gebot (...)'; und gleichwohl kann es keine Not geben, welche, was unrecht ist, gesetzmäßig machte" (6:236).

Common to both these instances of actions that concern right but still fall outside the realm of the *Rechtslehre* itself is what Kant calls the ambiguity (*Doppelsinnigkeit*) involved in the attempt to reach a correct verdict. Whereas a court of reason (objectively) recognises the appeal to right involved in the first case and a court of law (subjectively) cannot, the opposite is true in the second case. Here, reason knows the wrongfulness of the action. Nevertheless, it is a wrong which the court of law cannot rectify. These two cases must therefore be omitted

[171] Kant describes the reason of equity as "eine stumme Gottheit, die nicht gehört werden kann" (6:234), evoking the memory of Locke's famous call for the heavens in cases of severe moral or legal disagreement. However, Kant makes the attempt to solve the question of equity within the medium of law itself (although he has, necessarily, to leave it out of the *Rechtslehre* proper).

[172] One premise in Kant's argument here is admittedly the death penalty he advocates for all (first-degree) murders. For his justification of (capital) punishment, see my treatment thereof in subchapter I.3.5.

from the subsequent treatment of the doctrine of right, and I will not elaborate further on these points. However, their place in the text itself attests that there will be no discrepancy between the verdicts of the court of reason and a court of positive law in their evaluations of the rights belonging to the *Rechtslehre* (strict right). For Kant, there is no inherent discrepancy between positive law and the concept of right.

1.3. The divisions of the *Rechtslehre* and the innate right to freedom

The final paragraphs of the introduction that is specific to the *Rechtslehre* concentrate on its internal division. This enables us both to sum up the main train of thought in our deliberations prior to the investigation of the doctrinal sections themselves and to point forward to the details of the stepwise argument in them. The passages begin with a general division of what Kant holds to be duties of right (*Rechtspflichten*). Following the Roman jurist Ulpian,[173] he divides these into three: internal duties to be an honourable and rightful human being (*honeste vive*), external duties to not wrong anyone (*neminem laede*) and the duty to enter into a society in which everyone can keep what is his or hers (*suum cuique tribue*).

The actual meaning and correct interpretation of this division remains controversial in secondary literature. Do this construction and Kant's own reference to a practical syllogism show that right is derived from morality *per se,* given that the first duty of *honeste vive* seems to be exclusively ethical?[174] It is admittedly true that this duty strongly resembles the specific moral-ethical realm of Kant's practical philosophy. And as Kersting points out, this first set of duties was in fact interpreted by Kant as a principle of ethical duties as late as the lectures on the metapysics of morals in 1793/94.[175] This view is also present in his preparatory notes to the publication. Here, the duty of *honeste vive* is allocated to ethics in the narrow sense of the *Tugendlehre*,[176] while the *Rechtslehre* is meant to contain the aspects of *neminem laede* and *suum cuique tribue*, which in turn are parallell to its two parts – private and public right, or the right of the state of nature and the right of the civil condition (cf. 23:386).

In the *Metaphysik der Sitten*, however, Kant explicitly makes all these duties duties of right rather than duties of virtue, i.e., ethical duties. Here, the internal duty of *honeste vive* is a

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[173] Ulpian, otherwise known as the first to systematically make an amoral grounding of right, is here used in a less than sound hermeneutical manner (cf. e.g. Pippin (2006: 435)) regarding a division of which he is commonly taken to be the author: "Man kann diese Einteilung sehr wohl nach dem *Ulpian* machen, wenn man seinen Formeln einen Sinn unterlegt, den er sich dabei zwar nicht deutlich gedacht haben mag, den sie aber doch verstatten daraus zu entwickeln, oder hinein zu legen" (6:236).
[174] For a discussion and overview, see *inter alia* Pippin (1999: 63 ff.) and Höffe (2001: 147 ff.).
[175] Cf. Kersting (2007: 168), with reference to Vigilantius' lecture notes.
[176] At this preparatory stage, Kant still operates with ethics as a potential common denominator for both *Rechtslehre* and *Tugendlehre*, but, as we have seen, this cannot be said to be the case in the 1797 writing.

juridical duty to assert one's own worth as a human being. As a legal duty it is, of course, a duty vis-à-vis others, but it is nonetheless explained as "Verbindlichkeit aus dem Rechte der Menschheit in unserer eigenen Person" (6:236), hence grounding legal duties towards oneself without recourse to moral-ethical benevolence or similar considerations. Consequently, one may not, for instance, annul oneself as a legal person, and this as a question of right and not of virtue. Likewise, the prohibition against using oneself entirely as a means for another person is not only a duty of virtue (and thereby incoercible), but also a duty of right. If this were not the case, if *honeste vive* were an exclusively ethical duty, one would have no right to coerce others to refrain from actions that only affect their own selves, since their actions as such do not come into conflict with the choice of others (but only their own).[177]

The second formula, 'do not wrong anyone', has a specific legal dimension, which in a certain sense is completely antecedent to ethics. Expanding the initial demand of *neminem laede*, Kant underlines that this duty implies that even if this entails avoiding all communal life, one is obliged to do so. The implications of this addition for our understanding of the relationship between morality and legality are not to be underestimated. Kant explicitly claims that if just social relations are not attainable through legal means, one must shun social – and thus all intersubjective, moral-ethical – intercourse in actual life. (As will become clearer later in this dissertation, this is because he regards legal jurisdiction as the *only* way to solve our potential differences in a rightful manner.) The juridical task of *neminem laede* is therefore in a certain sense antecedent to every social relation, and thus precedes and is more fundamental to intersubjective relations (and thereby also to the human condition) than morality itself.[178]

Hence, unless one can in fact shun all society – something which Kant rejects, with a reference to the spherical surface of the earth – the duty of the third formula applies: "Tritt (wenn du das letztere nicht vermeiden kannst) in eine Gesellschaft mit andern, in welcher jedem das Seine erhalten werden kann (suum cuique tribue)" (6:237).[179] This juridical duty to

[177] Accordingly, coercion can in other words be rightfully used against people even if their actions actually only affect their own selves, as in the cases of suicidal or severely mentally ill persons. Höffe (2001:151) is correct to underline that Kant also distinguishes between the legal *honeste vive* and the ethical *honeste interna* (cf. 6:420).
[178] It should be clear by now that this suggested reading of Kant's practical philosophy by no means regards the relationship between morality and legality as competitive, and certainly not as mutually exclusive. Rather, it puts emphasis on the fact that for Kant, all social actions stand under obligations from both spheres and that the demands of morality are no more immediate or antecedent than its legal equivalents. If anything, the opposite is true (as indicated here in this specific sense). The duties we have to one another are not only based on a moral-ethical imperative: for Kant, the very possibility of intersubjective relations, indeed of basic human relations at all, also immediately generates a legal obligation to enter into rightful relations with each other.
[179] We should also note Kant's subsequent elucidation of the term 'jedem das Seine': "– Die letztere Formel, wenn sie so übersetzt würde: 'gib jedem das *Seine'*, würde eine Ungereimtheit sagen; denn man kann niemanden etwas geben, was er schon hat. Wenn sie also einen Sinn haben soll, so müßte sie so lauten: '*Tritt* in einen Zustand, worin jedermann das Seine gegen jeden anderen gesichert sein kann'" (6:237).

enter what he will later elaborate as civil society, and its justification, are identical with the postulate of public right that is developed in the transition from private (*neminem laede*) to public right (*suum cuique tribue*) in §42 of the *Rechtslehre*, to which I will return below. The division of duties of right is thus the following: first, internal duties of right towards oneself; second, external duties of right towards others; and third, the strict necessity of entering a civil condition of public right where everyone's rights can finally be assured and fully realised.

After indicating this internal division of the *Rechtslehre*, Kant goes in the introduction on to divide rights into natural and positive rights. This division concerns them not only as rights, but also as doctrines, i.e., capable of a systematic exposition that is to be developed in the text itself. At this stage, however, he merely draws a preliminary distinction between the two, by asserting that natural rights follow exclusively from rational legal principles, whereas positive rights depend upon the will of a *de facto* legislator in contingent circumstances. Kant also makes a provisional distinction between what he calls innate and acquired rights (cf. 6:237). Both these types of rights belong to everyone by nature, but are dependent upon an act of positive law, if they are to be valid in actual practice. I shall discuss in greater detail in the following chapters how all these rights are justified and conceptually related to one another.

At the end of these comments on the highly important introductory passages of the *Metaphysik der Sitten,* I wish to emphasise Kant's insistence that there is, and can be, only one innate right. This right is independent of all contingent factors of the external world and forms the natural point of both departure and arrival in his legal philosophy. In earlier texts, he had designated a triad of freedom, equality, and (in)dependence[180] as the *a priori* pillars of any civil condition, but the *Rechtslehre* now grants only one *a priori* right, again in complete agreement with his earlier descriptions of the concept, the principle, and the law of right: "*Freiheit* (Unabhängigkeit von eines anderen nötigender Willkür), sofern sie mit jedes anderen Freiheit nach einem allgemeinen Gesetz zusammen bestehen kann, ist dieses einzige, ursprüngliche, jedem Menschen kraft seiner Menschheit zustehende Recht" (6:237).[181]

The innate right to freedom necessarily also implies, as a formal, universal concept, the principle of equal freedom, and it is the only human right that Kant refers to as internally mine (cf. ibid.). In the *Rechtslehre,* to have a right or rightful rights claim is generally referred

[180] In the peace essay, it is referred to as dependence ("Abhängigkeit aller von einer einzigen gemeinsamen Gesetzgebung (als Untertanen)" (8:349)); in the *Gemeinspruch* essay, it is the more economically oriented concept of independence ("Selbstständigkeit jedes Gliedes eines gemeinen Wesens, als Bürgers" (8:290)), which also prompts his strained attempt to qualify the wig-maker but not the barber as eligible to vote. (See also below.)

[181] With reference to the above discussion on the necessity and advantages of a change of perspective, this is Kant's definition of what must be explicated (*entwickelt*) by the autonomous legal philosophy of the *Rechtslehre*.

to as having something as mine or yours – either externally or, as here, internally. (As we will see, this 'mine or yours' structure returns in and is characteristic of his take on private right.) But no external positive law can ever conceivably legislate or sanction something against the innate right to equal freedom, since this is an inalienable right that derives directly from my right qua rational, free human being. For Kant, in other words, freedom is the true and only human right. This innate right to freedom, which is internally linked to the autonomy and purposiveness of human action and interaction, belongs not only to an inalienable, personal realm that is entirely outside the scope of positive law; it constitutes each and every one of us as legal persons, too.[182]

However, this does not in the least mean that the individual right to freedom can do without positive law. On the contrary, what this innate, but still rather imprecise, or at least indeterminate, right actually spells out as *de facto* rights (and rights claims) in our external, intersubjective relations is another question, and precisely this is the question that the *Rechtslehre* attempts to answer. As soon as the external exercise of this internal freedom is involved, we are bound to intervene in freedom spheres to which others originally have an equal right. The subject of the *Rechtslehre* proper is the rightful mediation of these rights and rights claims to what is externally mine or yours. The main problem to be solved is how one legitimately "auf sein angebornes Recht der Freiheit (welches nun nach seinen verschiedenen Verhältnissen spezifiziert wird) methodisch und gleich als nach verschiedenen Rechtstiteln berufen [kann]" (6:238).

In the following chapters, I shall give a more detailed answer to the question '*Was ist Recht?*' through a clarification of what our innate right to freedom implies. I shall examine the two parts of that constitute the *Rechtslehre* proper, i.e., private and public right. But before this, it may be appropriate here to briefly sum up the implications of Kant's obviously new understanding of *Recht* with regard to the internal relationship between legality and morality, and to conclude by looking at the main differences and similiarities between the two realms.

We have seen that the main criteria for a division or differentiation between the two realms covered, respectively, by a doctrine of right and a doctrine of virtue are the kind of obligation and, subsequently, the laws that are legislated. In the realm of right, the obligation can only be external, that is to say, it does not and cannot demand an internal obligation from the legal subjects. In the realm of virtue, however, the obligation must be internal, and only internal. This is the central criterion for separating the two realms. But, as I have emphasised,

[182] In his interpretation of Kant's legal and political philosophy, Arthur Ripstein has written with great insight about the right to freedom as an innate right of humanity (cf. Ripstein 2009: 30 ff.); I return to this below.

this also means that the objects of legislation become, respectively, entirely external and internal. External laws as a result of external legislation are obtained only within a doctrine of right; the realm of morality and the doctrine of virtue may have some laws that are external in character (imposing an obligation on external actions towards others), but the important point is that these can only be the result of internal legislation. This decisively keeps the two realms separated – not necessarily in order to prevent all moral-ethical aspects from being posited as statutory juridical laws, but to keep the two realms apart at their core in order to preserve their autonomy and prevent one from usurping the other on a formal, rational level.

It is obvious, from the sections on this one innate right of mankind, that the external exercise of innate freedom is the only relevant criterion for the realm of right (and thus for the use of coercion). Here, taking the example of the unconditional ethical duty of not lying, Kant makes it perfectly clear that what constitutes the distinction between right and ethics is not found in the difference between narrow (or strict or perfect) and wide (or imperfect) duties. Nor can we use the division between actions that are performed out of duty and actions that are merely in accordance with duty. As I have emphasised, one of these two routes was the only possible path to arrive at an early concept of right in Kant.[183] But the prohibition on lying is not only a perfect duty in the *Metaphysik der Sitten*. (Consequently, on such a reading, it should not belong to the realm of ethics in which it is obviously located. It should rather be located exclusively in the sphere of legality.) This strict prohibition is also subject to another principle in the realm of right, namely, the principle of external freedom. For Kant, it is only the violation of this principle that can authorise coercion.

The example of lying that Kant presents here clearly shows his new-found position. It is still strictly forbidden to lie, but 'only' from a moral-ethical perspective. In the realm of virtue, there can be no normative possibility to circumvent the general rule.[184] But in the realm of right, it would not just be practically impossible to enforce a universal prohibition on lying; it simply does not constitute a rights violation in all instances. Kant emphasises that lying is juridically wrong only when it directly infringes upon the rights of others, depriving

[183] Nor can the *Tugendlehre* distinction between ethically wide obligations and legally narrow obligations be used for this purpose, since this only says that (narrow) legal conformity is required for legal norms, whereas a wider ethical obligation is required for ethical norms. This, of course, only begs the original question: how do we legitimately separate legal norms from ethical norms? As we have seen, the pivotal point for Kant is the kind of obligation that is involved, which in actual legal duties (as opposed to actual ethical duties) can entail coercion and provide a guarantee for a rightful exercise of our external freedom.

[184] Let me repeat an important point: this claim does not contradict his earlier claim that the duty to keep one's promises is a juridical obligation, not an ethical one. To falsely state 'I will hand over your purchased item tomorrow' is a breach of a legal duty for which I am juridically accountable; to lie to my colleague that 'it will rain tomorrow' is on the other hand not such a breach, however much it is a breach of my ethical obligation(s).

someone of what is lawfully his or hers (cf. 6:238). Lies in relation to contracts or public testimonies are examples of this, as is the spreading of dishonouring rumours. But the latter action is not necessarily legally wrong, and lying in general is certainly not *per se* a violation of rights. There cannot be a juridical duty to speak the truth in all cases, even if one were omnisciently to be in possession of it.[185] In all speech acts, as Kant underlines, it remains up to the listener to make of these whatever he or she wants. Lies may, of course, limit or even deliberately manipulate one's outlook on the world, but they do not automatically constitute a rights violation (cf. 6:238). It should by now be clear that he does not delineate the distinction between the realms of right and ethics on the basis of the character of norms and/or duties as such (let alone the virtue or benevolence of persons), but entirely on the basis of the division between external and internal obligation, and thus also freedom.

What more can be said about the relationship and division of labour between the two realms? Obviously, the legal domain allows coercion to make people adhere to norms in a manner that morality could not do without contradictions. In this way, the attempt is made to preserve the autonomy of both spheres, so that the moral person can act morally without being either repressive – qua moral dictator who forces everyone to be moral through his or her own understanding of moral laws – or a fool, through a unilateral acceptance of moral constraints on action without receiving the same guarantee from other persons. Although Kant makes it clear that it is possible, and normatively required, to act morally regardless of the civil or non-civil condition one happens to find oneself in, we also see that legality takes on a primordial role vis-à-vis morality and ethical conduct in some highly important senses. For one thing, we can maybe first and only expect a full realisation of morality and ethical individual conduct when a full legal order is established in order to guarantee everyone's adherence to external laws. Perhaps much more surprising, though, is Kant's claim that he does not expect that the realisation of this order will be the fruit of an increase in the morality of the individuals.

Kant leaves no doubt that what is required to form a true and rightful civil condition is not an overall increase in morality. On the contrary, the process works the other way around.

[185] As Kant argued against Constant in his 1797 essay *Über ein vermeintes Recht aus Menschenliebe zu lügen*, the reciprocal character of all duties means that a legal duty to refrain from lying would entail a coercible right to the truth. But no-one can with right forcefully demand the truth from another person (other than in contract agreements, testimonies, etc.). This must be kept in mind when discussing Kant's essay, which is taken surprisingly often as arguing that one has a Kantian moral-ethical duty to inform the murderer at the door of the whereabouts of his or her victim. But Kant clearly discusses the *legal* dimension related to the example (cf. e.g. the very title of the text), and states quite rightly that philanthropy (i.e., moral benevolence) does not juridically excuse anyone from the actions one causes in this world. Moreover, he also uncontroversially argues that no one can be held juridically accountable simply by being truthful (cf. 8:426), even if he controversially claims that one is juridically accountable if one sends the murderer in another direction but thus inadvertently leads him or her to the fleeing victim. For an overview of the example and a possible rightful solution, see Varden (2010).

It is the true and rightful civil condition that must be established in order to realise morality in human society, not morality in order to inaugurate the republican tradition. In an important *Nachlass* discussion of a possible realisation of the republic and the highest good of political philosophy, that is to say perpetual peace, Kant writes that to accomplish this "ist es nicht erst der Schritt von der Tugend- zur Rechtspflicht überzuschreiten *sondern vielmehr umgekehrt* (...) von den Rechtsgesetzen zu dem der Tugend fortzuschreiten" (23:354, my italics).[186] The identical point and phrasing are found in the peace essay too, when he assesses the necessary realisation of both national and international law. Consider the following passage, where he also takes issue with the belief that morality must be the prime mover in actual politics:

> [A]uch an den wirklich vorhandenen, noch sehr unvollkommen organisierten Staaten [können wir] sehen, daß sie sich doch im äußeren Verhalten dem, was die Rechtsidee vorschreibt, schon sehr nähern, ob gleich das Innere der Moralität davon sicherlich nicht die Ursache ist (wie denn auch nicht von dieser die gute Staatsverfassung, sondern vielmehr, umgekehrt, von der letzteren allererst die gute moralische Bildung eines Volks zu erwarten ist) (8:366).

Once again, Kant does not describe the relationship regarding a practical realisation of the standards of legality and morality in such a way that the former realm would be dependent on the latter. The exact opposite is the case. In his *Spätwerken,* legality is given a primordial position vis-à-vis morality with regard to an intersubjective realisation of normativity and true moral relationships and is, at least in this sense, more 'fundamental'. The sequencing of the *Metaphysik der Sitten*, with the *Rechtslehre* preceding the *Tugendlehre*, offers further support to this view, where the legal institutionalisation of civil society (both at the national and the international levels) proves a prerequisite also for the full realisation of morality and ethical conduct. In this sense, too, we must speak of a change of perspective in Kant and his practical philosophy.

Although the realm of right takes on this assisting role vis-à-vis the realm of virtue and of morality proper, this must not be interpreted to imply that legality has only an instrumental value for Kant. The necessity of right and rightful relations is not grounded in the need for a consistent realisation of morality in intersubjective relations, too. Instead, as I have attempted to show here: Kant's concept of right is based in and required by practical reason in order to act freely in this world. It is not to be confused with the moral-ethical obligation to act in a virtuous manner at all times. Kant does not let right and external freedom simply be reduced to or equated with their often positive effects on the realm of morality proper. They are rather required in order for mankind to be free and to express this freedom in a rightful manner.

[186] In the same passage, he gives this as a reason to reject philosopher rule as a political ideal too; see also below.

This division of labour between legality and morality is also readily apparent in one of the more controversial but nonetheless unequivocal examples that he uses with regard to the inauguration of a republican constitution: the so-called 'nation of devils' argument. Against the accusation, common at that period, that such an inauguration would require "ein Staat von *Engeln*", Kant insists that "[d]as Problem der Staatserrichtung ist, so hart wie es auch klingt, selbst für ein Volk von Teufeln (wenn sie nur Verstand haben) auflösbar" (8:366).[187]

With reference to the indented quotation above, Peter Niesen, in an insightful essay on the nation of devils argument, has correctly underlined a peculiar causal direction at work in Kant's account of republican theory: "Nicht von gemeinwohlorientierten Einstellungen ist die Reproduktion eines freiheitlichen Staatswesens zu erwarten, sondern es ist die freiheitliche Staatsverfassung, von der 'allererst die gute moralische Bildung zu erwarten ist'" (Niesen 2001: 599). Niesen makes an important and valid claim when he writes that this different causal direction also sets Kant apart from the contemporary civil republican tradition. Instead of being an adversary and a legal-political alternative to the moral-political benevolence view of liberalism, current civil republicanism theory likewise ends up with a morally or ethically dependent (and strained) position, since it makes civic virtue the prime mover for justice.

If anything in particular can be said to be a prime mover for Kant in this regard, it is perhaps man's "ungesellige Geselligkeit" (8:20), which he first adheres to in his 1784 *Idee zu einer allgemeinen Geschichte in weltbürgerlicher Absicht*. For Kant, this peculiar aspect of social unsociability is nature's own tool to force us to enter relations of right with one another, even if we subjectively have a natural inclination (*Hang*, *Neigung*) to exempt ourselves from binding intersubjective norms.[188] As has been correctly pointed out elsewhere, Kant develops this term in direct opposition to other contemporary and highly moralistic political theories (e.g. Herder and the young Fichte) which put faith in man's so-called natural sociability (cf. Nakhimovsky 2011: 23). Kant also evidently says that morality is not the main actor with the role of generating legal justice.[189] Although he gives no final indication of what (if anything)

[187] This problem is then (in the peace essay) defined as: "'Eine Menge von vernünftigen Wesen, die insgesammt allgemeine Gesetze für ihre Erhaltung verlangen, deren jedes aber in Geheim sich davon auszunehmen geneigt ist, so zu ordnen und ihre Verfassung einzurichten, daß, obgleich sie in ihren Privatgesinnungen einander entgegen streben, diese einander doch so aufhalten, daß in ihrem öffentlichen Verhalten der Erfolg eben derselbe ist, als ob sie keine solche böse Gesinnungen hätten'. Ein solches Problem muß *auflöslich* sein" (ibid.).
[188] I note briefly that the same idea – how wanting to avoid legal limitations to personal freedom actually contributes both to legal limitations and to freedom – is also in play in the peace essay argument on nature's role as guarantor of perpetual peace (cf. 8:360 ff.). A corresponding line of argument does not surface in the *Rechtslehre*, which is concerned 'merely' with the structure of the legal system and the relations of right therein.
[189] The most important thing is that justice through right is achieved in accordance with right. Consequently, "was guter Wille hätte tun sollen, aber nicht tat" (8:311) is nonetheless still done. Again: how this is realised is as such not an issue in the 1797 work, which is concerned with the *a priori* metaphysical first elements of right.

he regards as the prime mover for justice, it should be obvious that Kant does not assign to morality as such the key role of realising right and justice. Instead, the reverse is true: right is required first, in order to realise morality among human beings.

Kant keeps the two realms separate in order to have clear and discernable criteria for what should be considered as moral norms on the one side and legal norms on the other. Only the latter are the rightful concern of the legal system, and thus coercible by external law. He is safe here in the knowledge that morality cannot be brought about by the state apparatus (all it can do is to lay the grounds for moral individual conduct), and he is highly sceptical about any state intervention in the moral-ethical realm. In this context, Niesen appropriately quotes Kant's essay on religion, about the need for juridical orders to refrain from legislation in the moral-ethical domain, if the two spheres are to be fully realised: "Weh aber dem Gesetzgeber, der eine auf ethische Zwecke gerichtete Verfassung durch Zwang bewirken wollte! Denn er würde dadurch nicht allein gerade das Gegenteil der ethischen bewirken, sondern auch seine politische untergraben und unsicher machen" (6:96).[190]

The important differences between Kant's legal and moral realms that come into focus in this thesis do not, of course, imply that there are no great correspondences between the two realms. First of all, they have in common the general concept or generic term 'morals' (*Moral* or *Sitten*) and its categorical imperative of pure practical reason. The final formulation of this imperative in the *Metaphysik der Sitten* is, as we have seen, not the same as in earlier works: it now 'merely' explicates what obligation is (the necessity of a free action under a categorical imperative of reason), and this is then specified as legal- and moral-rational procedures in the respective realms. These two forms of procedures share several basic features: they are purely formal, reflexive, and rooted in the human being's rational self-legislation of equal freedom (external or internal). This is not to make a list of which norms shall be held as legitimate and which not, but to constitute two autonomous processes that discredit maxims that are based on false grounds or procedures (i.e., that cannot be universalised), and therefore do not qualify as practical-rational norms. It is the kind of obligation, and with it the legislative procedure, that cannot be equal in the two realms: in the realm of right on which I concentrate here, we must limit ourselves to exclusively external laws. Through a possible use of coercion, these laws

[190] Kant draws what may be a surprising conclusion from this: "– Der Bürger des politischen gemeinen Wesens bleibt also, was die gesetzgebende Befugnis des letztern betrifft, völlig frei". I will come back to this conclusion once his public right theory of the state and its republican legislation is fully developed. The stance presented in the above quotation can be said to hold for the domain of religion vis-à-vis the state as well. As will become apparent in chapter I.3 on public right, Kant advocates a strict separation of the church/religion and the state.

regulate the external freedom spheres of human beings (and in time, at the international level, those of states too), and only these.

From Kant's moralistically laden theory of right in previous works, we have seen that his legal philosophy in the *Metaphysik der Sitten* can perhaps best be grasped by means of a change of perspective which concerns both the independence of, and the shift towards, an autonomous philosophy of right. The internal relationship between morality and legality, i.e., his moral and his legal philosophy, can therefore not be understood as strictly hierarchical. In fact, when it comes to a practical realisation of norms, the realm of right can be seen to have a primordial status vis-à-vis the realm of virtue and thus also true morality. This last aspect is apparent in his unambiguous comments on how a full realisation of both the legal and moral dimensions depends in the first instance on the development of legality through the rule of law, rather than on a similar *de facto* development of morality through the individuals' (or citizens') moral progress. Therefore, in Kant's view, both the innate right to freedom and the two practical-rational realms can be fully realised only through a realisation of the principles of private as well as public right. To these we must now turn. I begin with the first part of the *Rechtslehre*, explicating the principles of private right.

2. Private right and the transition to a condition of public right

The change of perspective offered by Kersting (and Maus) to further comprehend the specific legal dimension of Kant's practical philosophy will be further referred to and elaborated in the following chapters. This may help us to overcome the legal aporia of the different approaches mentioned in the prologue. We saw there that his moral philosophy as such was insufficient to safeguard the universal adherence to norms in our external relations, and that he even then was aware of the grave problems connected to any practical implementation of the juridical-philosophical principles advocated by both natural rights proponents and legal positivists.

And although the basic structure of his practical philosophy is decidedly altered by the division into right and ethics in the *Metaphysik der Sitten*, with the general and more abstract concept of morals on top, Kant still adheres to the rational normative basis of previous works from which the doctrines of right and ethics flow. In the field of legal philosophy, as we will see, Kant proceeds to establish a theory of rational right that sets out to mediate between the various insights and claims of natural and positive law. He employs the concept of *Naturrecht* as the point of departure for his detailed discussions of the basic normative constituents of the realm of right. This might seem to imply that he belongs to the natural rights tradition. In one sense, this is, of course, correct. But the tradition is, naturally, no homogenous group, and we must investigate further what his theory of natural or rational right more exactly amounts to.

It is essential to notice here Kant's interweaving of natural right and rational principles of right. Nature plays a similar role in Kant to what we find in other Enlightenment political thinkers of his time; it is the uncircumventable law and providence that is valid regardless of human (or some other purely accidental, empirical) intervention. Rational principles of right do not and cannot contradict the principles of natural right: they refer to and designate a realm of right that is not influenced by positive law in any sense; they are quite simply beyond its reach. But whereas this view had led other natural rights advocates to think of natural right(s) as an extra- or suprajuridical entity situated outside positive, state law to function as a moral control mechanism for the possible legitimate domain of the latter (cf. Grotius, Pufendorf, and Vattel), Kant attempts a different route. He sets out to incorporate the principles of natural right into existing positive law without falling into a legal positivist (or absolutist) position. If we now build, from a legal viewpoint, on the comments already made in the general as well as the specific introduction to the *Metaphysik der Sitten* and keep in mind his earlier objections to both traditional natural rights advocates and Hobbes, we begin to see the contours of the critical stance taken by Kant's philosophy of right.

As we recall from the prologue, Kant includes in the last paragraph of the introductory parts a passage about a new understanding and division of natural right.[191] In his rejection of earlier attempts by natural rights theorists to contrast the state of nature with a social condition (cf. Achenwall), Kant stresses the specific civil and statelike character of a distinctively public realm of right in order to overcome the state of nature. Moreover, he proceeds to divide the overarching concept of *Naturrecht* into two separate domains; natural (private) right and civil (public) right. This division is mirrored in the structure of the main text, which consists of two parts: *Privatrecht* and *öffentliches Recht*.[192] The first part explicates, as he puts it in the table of division, the "Inbegriff derjenigen Gesetze, die keiner äußeren Bekanntmachung bedürfen". This is in clear contrast to the subsequent part on public right, which contains the "Inbegriff derjenigen Gesetze, die einer öffentlichen Bekanntmachung bedürfen" (6:210).[193]

Consequently, the private right part that will be the main subject of my investigation in this chapter deals with those rights that Kant thinks we, as rational principles, can recognise *a priori* as natural rights of man qua private person. Kant will go on to insist that they can be rightfully acted on even prior to the establishment of a public authority. This admission of the possibility and necessity of rightful actions even outside the realm of public right may at first sight appear contrary both to the general view he takes elsewhere[194] and to the overall point I am trying to make with regard to the strict necessity of a legal order, if there are to be rightful relations at all. But as a closer reading will show, it is quite clear that this must be regarded as his final stance on the subject, since it is strictly required, if the actual transition to a public state of law is to be made at all. Moreover, this admission is explicitly referred to in the very definition of the part of private right, namely its clarification of the sum of laws that do not need to be promulgated (in order for them to be rightful). The main task for Kant's part on private right is to show how this is viable, and our exploration of it will have to look closely at the structure of his argument.

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[191] The paragraph in full: "Die oberste Einteilung des Naturrechts kann nicht (wie bisweilen geschieht) die in das natürliche und gesellschaftliche, sondern muß die ins natürliche und bürgerliche Recht sein: deren das erstere das Privatrecht, das zweite das öffentliche Recht genannt wird. Denn dem Naturzustande ist nicht der gesellschaftliche, sondern der bürgerliche entgegengesetzt: weil es in jenem zwar gar wohl Gesellschaft geben kann, aber nur keine bürgerliche (durch öffentliche Gesetze das Mein und Dein sichernde), daher das Recht in dem ersteren das Privatrecht heißt" (6:242).

[192] These will be investigated here in chapters I.2 and I.3 respectively, with the international dimension of the latter part coming under closer scrutiny in the second half of the dissertation.

[193] This closely corresponds to the definition of the concept of public right in the peace essay, even if, as we will see, it also goes significantly beyond this in both precision and scope. Regardless of the more extensive and satisfactory elaboration in the *Rechtslehre*, it is clearly incorrect to claim that Kant "drops (…) the principle of publicity from the *Doctrine of Right*" (Byrd & Hruschka 2010: 14), since it evidently still features in a key role, namely as the criterion for distinguishing the two parts of the work.

[194] See, for instance, the peace essay, where the entire dimension of right seems to be based on the necessity of private actions to be compatible with publicity in order for them to be rightful.

It should already here be noted that the private right part will be directly relevant only to the discussion of state law. In clear contrast to the current international law regime, there is no such thing as international private law for Kant. Indeed, a condition of merely private right is in his view still a state of nature, since, as he will go on to affirm, the private individuals as such cannot overcome the structural normative defects that are inherent to the condition. The condition itself calls for a transition to a state of public right (2.5). Nevertheless, the private right part is required to delineate the pure form of the rightful relations that can exist between private individuals (rights relations that then have to be posited and guaranteed by the public authority of the state).

Another important aspect of Kant's condition of private right is that it also serves as a preliminary rightful order prior to the establishment of a condition of public, conclusive law. I shall argue that a chief, but often overlooked task of the private right part is to discern criteria for what amounts to a rightful (and non-rightful) use of force in a condition that is de-void of public law. Here, Kant can be seen to anticipate the condition of public right with a number of principles that make certain actions compatible or incompatible with a future realisation of the rule of law.[195]

With its forty-two sections – more than double the length of the public right part – the part on private right is by far the most substantial part of the *Rechtslehre*. Kant claimed in the preface to the work (cf. 6:209) that a main reason for this was that the latter part to a certain degree could be inferred from the former. This, however, presupposes that we have a correct understanding of the central constituents of both parts and are completely aware of their key differences. The formal aspect of rights claims is one such dissimilarity. Another concerns the dimension of international law, since private right do not find any application at that level. Yet, one thing remains certain: an accurate account of Kant's theory of *Staatsrecht* cannot be given without a thorough investigation of the form and purpose of his part on private right.

The private right part also contains the material that is most unexpected for the avid reader of Kant's other writings. At the very least, it is not easy to develop the view advanced in this part on the basis of his previous works. Whereas the main characteristics of the legal structures of public right had already been presented in both the *Gemeinspruch* essay and the peace essay, and Kant's concept of legality was long in the making – however much he would differ from his earlier, predominantly moral-ethical notions of it when he finally formulated it

[195] In this sense, its discussion is actually highly reminiscent of what Kant does in the preliminary articles of the peace essay (and some of the sections on international law in the *Rechtslehre*); its central function is to designate criteria for a rightful use of force outside of a legal condition. I will return to this claim in part II of the thesis.

in the *Rechtslehre* – the central features of private right cannot be said to have been addressed in any of the previous writings.[196]

The only exception to this is Kant's mention of the necessity of a *lex permissiva* in the peace essay, which, as we shall see, is at the core of the part on private right. But Kant did not further clarify its role there, and although the principle of right established in the introduction to the *Rechtslehre* signals a reciprocity and equality in our spheres of freedom qua persons, it does not (as I have stressed) further specify what I can rightfully call my own in the external world; the inevitable feature of the human condition of being and acting in the world is not particularly helped by the theoretical establishment of equal freedom spheres.[197]

I do not anticipate too much when I affirm here that in the end, the state of public right will guarantee what more specifically is mine or yours; at this stage of the process, however, we are very much in the same quandary as the antagonistic debate between natural rights advocates and legal positivists: how can we obtain a rightful legal order without, in principle, either granting everyone a right to constantly resist any rights claim prior to the realisation of the rightful condition itself, or else granting any physical ruler the final word in these matters? In such a situation, how is it possible to rightfully distinguish between different rights claims to external objects in this world, a task that is necessary if we are to act in a rightful manner at all? The innate right to freedom cannot do this. As I emphasised above,[198] it is impossible to establish a rightful condition overnight; so how do we settle the specifics of different rights claims before the realisation of the civil condition? This dilemma of distributive justice will find a practical solution in the state of public right, but in the meantime, in the part on private right, Kant develops what we can call a transitory stage between the state of nature and the state of public right, where he tries to clarify how rights claims must and can find a way to be clarified at least in a preliminary manner, even prior to the realisation of a civil condition.

Accordingly, the first part of the *Rechtslehre* seeks to establish a coherent model for rights relations. This can be brought into the future state of public right as a formal conceptual model, and it clarifies and, crucially, imposes an obligation on others to adhere to its material specifications of what rightfully can be said to be mine or yours in this condition of merely private right. (This inclusion of material, particular specifications of external objects by no

[196] If anything, they are incompatible with Kant's previous deliberations on legal and political matters. For instance, the definition of private right as the sum of the laws that do not need to be promulgated (to be rightful) must seem most puzzling in light of the principle of right with which the peace essay concluded.
[197] Arthur Ripstein formulates the same point in his presentation of Kant's philosophy of right: "As a principle limiting the actions of separate persons, the Universal Principle of Right is not sufficient to generate any further rights that extend beyond your innate right of humanity in your own person" (Ripstein 2009: 363).
[198] See the prologue on Kant and the natural rights tradition.

means implies a rights model that is materially grounded, as my presentation will show; the model is entirely formal in outlook and justification.) The inadequacy of the state of private right to ultimately constitute a rightful order will in turn promote the state of public right; this is a condition which does not break in absolutist fashion with the former order (so that it would unilaterally cancel and create and authorise all rights relations *ex nihilo*).[199] Rather, it is subordinate to the law of *lex continui*.

Before we begin our investigation, a brief overlook of the structure of the private right part will be helpful. The first two chapters address the question of how to *have* and how to *acquire* something external as one's own. The latter chapter is subdivided into three different classes that can potentially become the objects (*Gegenstände*) of my choice (*Willkür*), and so concern my right to: a) things (*Sachenrecht*); b) another person's choices with regard to the performance of certain deeds (*persönliches Recht*); and finally, c) another person's status in his/her relation to me (*das auf dingliche Art persönliche Recht*). These classes, following the Gregor translation and current secondary literature on Kant, can be described respectively as private property right, contract right and status rights.

Of vital interest to us here are §§1-17 (up to and including the acquisition of things), since it is in the course of these sections that Kant develops the main philosophical arguments for the justification of his rights relations model, a model that is also clearly recognisable in his subsequent discussion of contract and status rights (§§18-30). I will then present §§31-36 only briefly, as I do not believe these sections are imperative for understanding Kant's general line of argument. §§37-40, however, which constitute the third and final chapter of the part, will be devoted more attention, since these reveal and discuss the irreconcilable conflict that is inherent to rights claims in a condition of merely private right (2.4). This, in turn, leads to the strict necessity of a transition to the rightful condition of public right (§§41-42), which is the topic of another subchapter (2.5).

Before this, I will more closely investigate Kant's new conclusions about property and private property relations, conclusions which up to that time, and afterwards, was more or less ignored in theories about the justification of property. As I hope to show, his entirely formal concept of rights relations opens up a theoretical scope for an *intersubjective* understanding and, in due turn, also for a *mediation* not only of a possible justification of property rights, but

[199] This would imply for Kant a moment of complete lawlessness, a state of affairs that under no circumstance can be permitted, an argument that I will return to later.

also of rights claims in general.[200] But before I can set out his complex argument about how it must be possible to rightfully have (2.2) and acquire (2.3) something external as one's own, I must first make some general remarks concerning what is externally mine or yours (2.1).

2.1. Concerning what is externally mine or yours

In the passages on private right, divisions that Kant have drawn earlier, both between the internal and external spheres of freedom and between the concepts of morality and legality, are vital to his approach. He holds private rights – and the distinctively public rights, for that matter – clearly apart from the innate right to freedom, which constitutes the personal realm that also can be called internally mine. Accordingly, what is internally mine (or yours) refers to the inner realm of thoughts, dispositions, wishes, positing of ends, etc. that belongs entirely to the inner faculties of human beings. Due to their location within the individual, these inner faculties have no external aspect. Thereby, the innate right to freedom does not go beyond the spatiotemporal extension of the embodied rational being. This means that our one innate right, for Kant, simply cannot be made the subject of rightful external legislation or even dispute.[201]

From this, it follows that it is by definition impossible to be coerced to have or adopt any one particular moral disposition or, by way of parallel, ethical, political, and/or religious worldview. These aspects belong entirely to the inner realm and therefore to dispositions that cannot consistently be made subject to positive law. This must be the case, not only because it is impossible to verify – and still less, to defend oneself against – other persons' accusations of immorality, heresy, insincerity, etc., but also because the individual's internal realm cannot be made into a legal matter without contradiction. A restriction of someone's internal choice means, by virtue of the reciprocity of all rights, that I allow others to meddle in my personal sphere too; any restriction of someone's choice contradicts *per se* the notion that there exists a moral or legal 'I' who can in fact make a choice. On this view, what is internally mine (or yours) must already in a prior instance be completely independent of other persons' choices (*Willkür*), and must be an internal right of freedom that one cannot abolish, even if one tried

[200] This aspect goes, as we have seen, to the core of the legal positivist rejection of natural rights advocates' claim to a suprapositive concept of right. In the public right part, I will look into Kant's concept of distributive justice and the possible mediation of rights claims within a positive legal order through suprapositive principles of law.

[201] The *exercise* of these faculties, however, which are all important from the ethical perspective Kant puts forward in the *Tugendlehre* too, can, of course, be a legal matter, but that is another question, to which I will return shortly. (However, one can, of course, object – as it has been done – that Kant's strict division between the internal and external elements of the human condition is not entirely unproblematic.)

to do so, or were to consent to such a practice.[202] To use Jean-Paul Sartre's decidedly Kantian claim, one is as a human being sentenced to be free.

Although this innate right to freedom regarding the inalienable independence of the inner realm of all moral persons is constitutive not only of morality and the moral-ethical side of Kant's practical philosophy, but also of the realm of right, this does not get us very far with regard to the external world. We still lack a guarantee for the adherence to reciprocal, rightful claims and actions in the external world. All we have seen is that, for Kant, there can be no pure moral or traditional natural rights solution to the difficulty, because (as we recall from his unambiguous critique of Hufeland and the natural rights tradition that stems from Wulff), to solve the moral uncertainty of our external relations, either by granting a popular right to resistance (cf. a moral reading of natural right) or by giving the state authority a coercive right to establish certain moral standards or ideals is more than one step too far.

Nevertheless, we cannot avoid being and acting in the world, and the duty to do so in a rightful manner remains the highest of all imperatives – as Kant infamously insists, if "die Gerechtigkeit untergeht, so hat es keinen Wert mehr, daß Menschen auf Erden leben" (6:332). So how does Kant avoid the shortcomings of both traditional natural rights theory and legal positivism?

Here, the private right part of the *Rechtslehre* is pivotal. Kant sees the necessity to clarify rights relations prior to the actual realisation of a perfectly rightful civil condition. It must be possible to distinguish criteria for what is externally mine or yours even before a state of public right is actually established. Both moral philosophy and natural rights theory were obliged to have recourse to pre-state moral-ethical criteria in order not to descend into the pitfalls of legal positivism where the *de facto* head of state had the final word after all. What Kant instead does, is to call for a normative clarification and justification of rights relations that are not grounded in morality *per se,* which in its essence concerns an exclusively internal relation. In contradistinction to such an approach, he regards rights claims as concerned only with mankind's external relations. (Consider here also his reference to physics in §E of the

[202] To use an example from Ripstein (2009): no matter how willingly the participants may engage in gladiatorial fights to the death, this is something to which they cannot give their rational consent. As with slavery, the realisation of the purpose of the activity (death, the rejection of individual legal status) negates the requirement for giving such consent in the first place. (Again, such *normative* arguments and positions are, of course, not proven false by *factual* counterexamples.) This is also applicable to the subject in question here. Moreover, it can be noted that *attempts* by *others* to affect, control, or forcefully change one's choice are likewise a matter of legal concern. Precisely because what is internally mine is mine and therefore irretrievably not yours, any attempt to alter this fact of nature is a violation of my natural (and to be posited as positive) rights. Finally, this inalienable right to oneself is also already presupposed when we speak of legal (and moral) accountability in the first place; the free will (for Kant: *Willkür*) of the individual is a necessary precondition of this.

Rechtslehre.) Accordingly, the first question that his philosophy of right must answer need not (and cannot) be how to immediately establish a perfectly rightful condition, but rather how to possibly get there from a state of nature.

The question that Kant raises in the part on private right is thus primarily: how can I have physical (enforceable) rights claims that are normatively sound even prior to a condition of public right? And this question of establishing criteria for what must be considered to be right in a non-rightful state of affairs is intrinsically connected to a delineation of what is mine or yours in our external, intersubjective relations – which, as we will see, is the only task of the condition of public right, namely to fully realise our right to freedom. As I remarked in a footnote above, with reference to Ripstein, the universal principle of right is not particularly helpful here. Crucially, I have an innate, inalienable right to what is internally mine (including my bodily integrity), but the exercise of my innate right to freedom still has to be realised in a reciprocal and rightful manner. This calls for the discussion in the private right part, in order to explicate criteria for a rightful exercise of freedom in a condition that may be devoid of, but that nevertheless is on its way to, a state of public right.

The difficulty, with regard to Kant's entire realm of right, has therefore nothing to do with human moral imperfection. In fact, in keeping with his metaphysical project, there are in his view no anthropological or other empirical presuppositions involved at all.[203] Instead, the realm of right 'only' concerns the external exercise of our innate right to freedom, which needs to be delineated and guaranteed by standards of universal right, not of unilateral might or morality *per se.* This is possible because no agent in Kant's realm of right can legitimately intervene in the strictly personal realm of what is internally mine (or yours). A main objective of his legal philosophy is then 'merely', without recourse to the realm of virtue and morality, to delineate what and how something can be externally mine. As we shall see in the next two subchapters, a rightful external exercise of our innate right to freedom implies, for Kant, that we must be able to have and acquire external objects in the world and thus can add these to our personal and exclusive spheres of mine (or yours). If we keep this in mind, I believe the structure and the purpose of the part on private right become more easily comprehensible.

2.2. To have something external as one's own

For Kant, all external objects inhibit the 'mine or yours' structure that I mentioned earlier, in the sense that all physical objects must in principle be able to be (or become) mine according

[203] Kant only 'presupposes' that his rights discussion applies to neither holy (i.e., merely noumenal moral) beings nor to beings without reason or legal personality – something which must be ascribed to all humans (cf. 6:241).

to the same standards that could make them yours. Of course, this does not include embodied moral beings, whose bodily integrity is already in a first instance covered by the innate right to freedom. But for all other objects, it holds that they potentially can be mine (or yours). This is strictly necessary in his view, because every external exercise of one's right to freedom is connected to a potentially exclusive use of external objects for one's own purposes. Hence, I must be able to add something external to my personal sphere of freedom, in order that I may act without potentially being hindered by someone else's use of his or her external freedom; I shall return to this below. Without the existence of private property, I would be dependent upon the moral beneficence of (all) others to act and use objects in this world in a rightful manner. Accordingly, it is evident for Kant that it must be possible for external objects to be had (or acquired) not by no one, nor by everyone, but by someone.

It is with this as a background that Kant makes his first claim in the *Rechtslehre*: "Das *Rechtlich-Meine* (meum iuris) ist dasjenige, womit ich so verbunden bin, daß der Gebrauch, den ein anderer ohne meine Einwilligung von ihm machen möchte, mich lädieren würde. Die subjektive Bedingung der Möglichkeit des Gebrauchs überhaupt ist der *Besitz*" (6:245). In other words, to have something external as my own is to have an exclusive right to the use of it, in the sense that another person would do me wrong (*lädieren*) if he or she were to impose his or her choice upon it without my prior consent. Although, as Kant writes, the subjective condition of any possible use of something external is possession, much of the first sections is devoted to the conditions of rightful possession on a more general note.

For Kant, rightful possession cannot mean only a mere empirical, physical possession of an object; this would imply that anyone who holds on to it is its rightful owner. And this, of course, is nothing more than is offered by the state of nature, where every claim to possession is continuously open to contestation and endures only as the right of the stronger. It must also be possible to have external objects as one's own, even when one is not in physical possession of them. He therefore makes a distinction between the sensible and the intelligible possession of external objects, and it is the latter understanding that must be closer examined, since this constitutes "ein bloß rechtlicher Besitz" (ibid.), a merely rightful possession.

As Kersting (2007: 175 ff.) points out, Kant thereby deflects the question of rightful possession from a traditional natural rights reading, where the main concept of distributive justice is focused primarily on how to establish a key or formula to a rightful distribution of possession (as in Locke), to an investigation of the conditions under which rightful possession

is at all possible.[204] Since Kantian rightful relations can be established only to the extent that the intelligible possession of external objects is possible, this problem is accordingly essential, if we are to grasp the overall architecture of his argument. Here, the *lex permissiva* to which he only referred in the peace essay will play a highly significant role. And this is an argument that in part hinges on the architecture of the text itself, as another significant interpretational work has recently pointed out.

The flow and general structure of the argument are more easily understood with the help of Bernd Ludwig's important insight that §2 of the *Rechtslehre*, containing the postulate of practical reason, thematically belongs within §6.[205] With this postulate, Kant establishes by means of the *via negativa* the condition under which all external objects can potentially be an object of my or your choice, and therefore be mine or yours. It is self-contradictory, he writes, to claim that any external object cannot in principle be legally mine, since this would amount to an admission that an object can remain unowned in perpetuity, that it is "*an sich* (objektiv) *herrenlos*" (6:246).[206] But such an admission would also entail that "die Freiheit sich selbst des Gebrauchs ihrer Willkür in Ansehung eines Gegenstandes derselben berauben". Clearly, this runs counter to the ideas of freedom itself and of law-giving practical reason. Kant goes on to conclude: "– Also ist es eine Voraussetzung a priori der praktischen Vernunft, einen jeden Gegenstand meiner Willkür als objektiv-mögliches Mein oder Dein anzusehen und zu behandeln" (ibid.).

Kant then identifies this postulate as precisely the permissive law of which he wanted to make natural rights advocates aware in an earlier passage.[207] Despite reason's demand that all practical norms should have a universal character, if they are to be laws, it must somehow be possible in the doctrine of right – this too in sharp contradiction to the domains of morality

[204] I return below to the critique of Locke's rights conception of private property relations. (Also, compare the position taken by Kant as a fundamental critique of *Naturrecht per se*, e.g. his reflexive critique of possession in general, not whether this or that particular physical possession is rightful. I will return below to this aspect too.)
[205] By placing it here, it is possible to develop the synthetic a priori proposition of right, which was sought in the preceding section; I will return to this shortly. (Reasons why this misplacement occured in the original would be pure speculation, but for the full argument and considerations made in rearranging the text, see Ludwig (2005).)
[206] Kant's full formulation of the postulate is this: "Es ist möglich, einen jeden äußern Gegenstand meiner Willkür als das Meine zu haben; d. i.: eine Maxime, nach welcher, wenn sie Gesetz würde, ein Gegenstand der Willkür *an sich* (objektiv) *herrenlos* (res nullius) werden müßte, ist rechtswidrig" (ibid.). (For this to be the case, it would require a universal exclusion from an object being exercised by a particular will that consequently must be regarded as constituting an owner of the object, namely by being able to subjectively impose his or her will against any other as law.)
[207] "Man kann dieses Postulat ein Erlaubnisgesetz (lex permissiva) der praktischen Vernunft nennen, was uns die Befugnis gibt, die wir aus bloßen Begriffen vom Rechte überhaupt nicht herausbringen könnten; nämlich allen andern eine Verbindlichkeit aufzulegen, die sie sonst nicht hätten, sich des Gebrauchs gewisser Gegenstände unserer Willkür zu enthalten, weil wir zuerst sie in unseren Besitz genommen haben. Die Vernunft will, daß dieses als Grundsatz gelte, und das zwar als *praktische* Vernunft, die sich durch dieses ihr Postulat a priori erweitert" (6:247).

and ethics – to establish legal criteria for particular actions without giving up the universalist position. Nevertheless, a *permissive* law seems, according to his own standards, to be a self-contradition. As Kant emphasised in the peace essay, one cannot have a *law* and nevertheless admit that there are exceptions (i.e., permissions) 1, 2, and 3 to it. But because the realm of right exclusively addresses external actions and this only in the shape of either prohibitions or commands (*Verbote*, *Gebote*) and every other action is permitted,[208] it now seems more than slightly strange when Kant introduces the concept of a permissive law. After all, what one is permitted to do by law is quite simply allowed, and needs no further specification in juridical terms. Why, then, does he insist on the inclusion of a *lex permissiva* in any doctrine of right?

As Kersting correctly emphasises in this context, what Kant builds into his theoretical framework is certainly not a permissive law for a head of state to rule by decree or to declare a state of emergency due to any set of 'exceptional' circumstances.[209] Nonetheless, Kant now brings in the concept of a permissive law as fundamental to his entire private right argument, which is meant to provide the basis for his overall legal framework. The reasons for this move have to be further examined.

Once again, the question of obligation is pivotal. Whereas natural rights advocates were ultimately unable to discern between different claims to norm adherence prior to the establishment of the morally acceptable state, and legal positivists would have to accept any juridical statute within the existing state order as legitimate and therefore binding, Kant holds that it must be possible philosophically to vindicate legal and/or political obligations in a non-perfect state of positive law. But as I noted earlier, traditional natural rights advocates could not give their approval to such an approach, since for them, this would amount to nothing but legal positivism, and a principle of right is not in any sense to be derived from, or identified with, an existing legal order. Although Kant is in complete agreement with this view, he is nonetheless quite clear about the necessity for legal obligations to be able to bind the choice of man as if these were universal laws, even when they are positively instances of particular choices and interests. In short: it must be possible somehow to clarify legal claims to what is

[208] This in line with *inter alia* Weber's understanding of modern, positive law, and in complete contradistinction to any pre-modern understanding of right that executes supposedly lawful power in terms of good and evil. One need not go further than to innumerable historical testimonies (especially from the twentieth century) to be warned against the fatal mix-ups such a moral/ethical/religious, in short, value-oriented reading of the realm of right entails, a reading that today finds no clearer (or lesser) expression than in the global 'war on terror'.

[209] On the contrary, Kant's knowledge of the Prussian legal system (as well as others) made him quite aware of the dangers that lurked in such conceptions of state power, cf. Kersting (2007: 195): "Offensichtlich sah Kant in der gesetzgeberischen Praxis der ausnehmenden Erlaubnisgesetze die Gefahr einer unkontrollierten positiv-rechtlicher Verpflichtungen angelegt, die die Rechtssicherheit zu beeinträchtigen droht". On this point and the vast distance between Kant's concept of sovereignty and, for instance, Carl Schmitt's description of the same, especially in relation with 'exceptional' circumstances, see Maus (1994) and below.

mine or yours prior to a lawful, civil condition. Otherwise, this public state can never arise, since this is not the work of one instant, but requires regular reform of a *lex continui*.

To untangle this knot, we must look at the *lex permissiva* in connection with the rest of the sections of the first chapter on private right. Although the earth belongs to mankind as an innate possession in common (*Gemein-/Gesamtbesitz*),[210] it is the postulate of practical reason (*lex permissiva*) that prevents external objects of this world from being unowned in perpetuity and therefore never rightfully used. (Otherwise, all use of objects would be based indefinitely on might, not on criteria of right.) The solution to the difficulty of how something external can be mine or yours depends on the possibility of intelligible possession, and thereby on *synthetic a priori* propositions of right.[211] Although all propositions concerning right as laws of reason are necessarily *a priori,* it is only synthetic *a priori* propositions that go beyond a mere physical possession of external objects,[212] and this will now be made possible by the postulate of practical reason.

To use Kant's own example to make a complex argument more tangible: the claim that 'the apple that I hold in my hand is mine' is obviously true as an *a priori* analytic proposition about right, insofar as 'mine' only refers to my physically holding the apple. Another person would then wrong me if he or she were to wrest the apple from my hand, but this is a violation of my bodily integrity, since the apple is an extension of my body, so to speak. But the claim to the apple must also be true in another sense, namely, when I am not in physical possession of it, and this is what is meant by intelligible possession: another person can wrong me with an arbitrary, unapproved use of the apple despite the fact that I do not physically control it.

In order to deduce this intelligible concept, Kant couples the *lex permissiva* (that is, the impossibility of unownable objects) with man's innate possession of the earth in common, and applies this to his reflexive critique of possession in general (and not only of its particular

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[210] Cf. §6 on the deduction of the concept of a *possessio noumenon*. Although this point of the world as common possession is perhaps not highlighted in Kant's text itself very often, we must remember that this is an implicit precondition of the sheer possibility of being wronged in the first place. If we as individuals were not in some sort of original possession of the earth in common already from the outset, it would not be an instance of injustice if another person's particular will laid claim to a particular object thereof. However, as we will see, there are important criteria here for what and how such claims can be made.

[211] Cf. the opening passage of §6: "Die Frage: wie ist ein äußeres Mein und Dein möglich? löst sich (...) in diejenige auf: wie ist ein bloß rechtlicher (intelligibler) Besitz möglich? und diese wiederum in die dritte: wie ist ein synthetischer Rechtssatz a priori möglich?" (6:249). This is then, with the enlightening and invaluable help of Ludwig (and Brandt), made possible exactly by the postulate of practical reason now placed within §6.

[212] We can also relate the normative necessity of this contention to our earlier discussion between natural rights theory and legal positivism. Whereas traditional natural rights advocates set up an ideal set of conditions for rightful possession and deemed them superior to any physical state of affairs, legal positivists would only admit that the latter state was able to consistently bear a rights claim. But in doing so, all extra-positive (i.e., natural) normativity automatically disappears. Kant attempts to bridge this gap by showing how both claims, the ideal and the real, must be considered true, but, naturally, in different senses, as we will see.

distribution).[213] Accordingly, (and this is the permissive law *in nuce*), no-one can legitimately prevent me from having an object (e.g. an apple, a piece of land) as a rightful possession in my anticipation of a civil condition. This is undoubtedly an instance of arbitrary, contingent choice, but it need not be a unilateral (*eigenmächtig*) act that does not impose any obligation upon others. Precisely because it is a precondition for a future rightful order, one would be in one's right to resist other, later claims to the already possessed object:

> Auf solche Weise ist z. B. die Besitzung eines absonderlichen Bodens ein Akt der Privatwillkür, ohne doch *eigenmächtig* zu sein. Der Besitzer fundiert sich auf dem angebornen *Gemeinbesitze* des Erdbodens und dem diesem a priori entsprechenden allgemeinen Willen eines erlaubten *Privatbesitzes* auf demselben (weil ledige Sachen sonst an sich und nach einem Gesetze zu herrenlosen Dingen gemacht werden würden) und erwirbt durch die erste Besitzung ursprünglich einen bestimmten Boden, indem er jedem andern mit Recht (iure) widersteht, der ihn im Privatgebrauch desselben hindern würde, obzwar als im natürlichen Zustande nicht von rechtswegen (de iure), weil in demselben noch kein öffentliches Gesetz existiert (6:250).[214]

I must at once emphasise the point made by Kant in the last sentence of this passage, namely that this in itself does not constitute any form of *public* law. It is an instance of private right that must be *permitted* – although it is not entirely rightful – because the guarantee of external 'mine' or 'yours' that the civil condition in due course will instate makes no sense if there is no 'mine' or 'yours' to safeguard or reciprocally recognise in the first place.[215] Until a public authority gives assurance of this, private persons must be permitted to possess land (as well as other objects of one's choice). Otherwise, the civil condition could come about only as an instant revolution that also was instantly rightful, as if by one stroke of moral magic.[216]

However, another important distinction in his overall legal framework affirms that any such possession is merely *provisional*; it is not *conclusively* valid until the civil condition is

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[213] Cf. Kersting's consideration referred to above.

[214] And therefore neither needs to be fully promulgated, cf. Kant's definition of the private right part.

[215] Any criticism of this point for being circular misses the entire point of Kant's construction: the postulate of practical reason coupled with the idea of the earth as a possession in common must necessarily yield such a process, where the factual dimension of private claims is consistently confronted by the normative claims made from a universalist position of right, understood as reform procedures of the current state of affairs. Had Kant not introduced the subsequent distinction (to which we now turn) between provisional and conclusive (*peremptorisch*) possession, let alone between private and public right – i.e., that there were neither criteria for *conclusive* possession nor a specific *public* dimension to right – then the criticism would, of course, have been vindicated. But as we will see, this is far from the case in Kant's theoretical construct.

[216] Compare this not only to his insistence on reform as the correct procedure in the realm of law and politics (and not in the moral sphere), but also to his later comment in §44 on the transition from private to public right, which must be read as a critique of the natural rights advocates who cannot justify the normative obligation to an imperfect legal order: "Wollte man vor Eintretung in den bürgerlichen Zustand gar keine Erwerbung, auch nicht einmal provisorisch für rechtlich erkennen, so würde jener selbst unmöglich sein. Denn der Form nach enthalten die Gesetze über das Mein und Dein im Naturzustande ebendasselbe, was die im bürgerlichen vorschreiben, so fern dieser bloß nach reinen Vernunftbegriffen gedacht wird: nur daß im letzteren die Bedingungen angegeben werden, unter denen jene zur Ausübung (der distributiven Gerechtigkeit gemäß) gelangen. – Es würde also, wenn es im Naturzustande auch nicht *provisorisch* ein äußeres Mein und Dein gäbe, auch keine Rechtspflichten in Ansehung desselben, mithin auch kein Gebot geben, aus jenem Zustande herauszugehen" (6:312 f.).

established. This follows since the unilateral act which is first granted by the *lex permissiva* cannot as such be a universal and thereby possibly conclusive law. Thanks to the reciprocity of any universal law, the obligation of others to refrain from taking what is provisionally mine is also an obligation on my part to refrain from taking what any other person claims to be his or hers (provisionally). But, as we recall from the formulation of the universal law of right, it would be foolish of me to make an obligation on my part without obtaining the same promise from the other; nor is this required, from a legal perspective, by pure practical reason. Kant is in this context clear on the point that there is an implicit permission to refuse to accept another person's even preliminary claim to an object, if he or she refuses the validity of other persons' equal right to other objects.[217]

The reciprocal assurance that one will refrain from taking what is not mine (or yours) is possible, in Kant's view, only in a civil union "gemäß der Idee eines möglichen vereinigten *Willens*" (6:258), and this is in fact precisely what is guaranteed therein.[218] Correspondingly, it is only under "ein jeden anderen verbindender, mithin kollektiv-allgemeiner (gemeinsamer) und machthabender Wille" (6:256), i.e., in the civil condition, that juridical obligations can be conclusively valid.[219] For his final formulation, we must proceed to the second part of the *Rechtslehre* and, immediately before this, the necessity of a transition from a state of private to public right. In the private right part, however, he 'merely' sets out to establish the criteria for rightfully having something external as one's own even before a civil condition, thereby making the subsequent transition feasible at all.

The distinctions that Kant have made over the first nine sections can be employed to summarise his main train of thought thus far. On the one hand, it must be possible in principle for any object of my choice to be mine; consequently, in the state of nature, through the *lex permissiva,* I can lay claim to and rightfully possess any object in the world (insofar as the claim has not already been made by another). On the other hand, this possession is rightful

[217] Cf. his comment in §8: "Ich bin also nicht verbunden, das äußere Seine des Anderen unangetastet zu lassen, wenn mich nicht jeder Andere dagegen auch sicher stellt, er werde in Ansehung des Meinigen sich nach ebendemselben Prinzip verhalten" (6:255 f.).

[218] This is by no means to say that with the transition to a state of public law, all property and power structures are settled once and for all. On the contrary, it is only now that it is possible to have and acquire them by means that are not violent in nature, namely through political reforms of distributive justice. Since this discussion belongs to the public right part, I will return there to this vital and often underemphasised feature of his legal philosophy.

[219] A preliminary justification of this view is given in §8; for the full argument we must wait until the part on public right. At this point, Kant's insistence on the following natural right principle that holds in the state of nature should be emphasised: "Der, welcher nach einer Maxime verfährt, nach der es unmöglich wird, einen Gegenstand meiner Willkür als das Meine zu haben, lädiert mich" (6:256). In other words, a flat-out refusal to let one's rights claims be subject to a common lawgiving authority is a wrong (*Unrecht*) that one rightfully is allowed to resist in the state of nature (or, perhaps better, in a state of mere private right).

only as an anticipation of a civil condition of universal laws, that is, it is only *provisionally* rightful, since the earth (and its objects) belongs to everyone qua common possession, not to one particular will. Although the external objects that I have laid claim to prior to a state of public law are not conclusively mine, this form of preliminary possession is at least valid, and – this is the important point – *imposes an obligation*, albeit provisional, upon others to regard this piece of land (or any other object of my choice) as mine. This form of possession through a unilateral act is not rightful *per se,* but qua "physischer Besitz, der die rechtliche *Präsumtion* für sich hat, ihn, durch Vereinigung mit dem Willen aller in einer öffentlichen Gesetzgebung, zu einem rechtlichen zu machen, (…) gilt in der Erwartung *komparativ* für einen rechtlichen" (6:257).[220]

2.3. To acquire something external as one's own

After the first chapter of the private right part has clarified the conditions under which I can have external objects of my choice as my own, the second chapter proceeds to clarify the way in which I can legitimately acquire these objects. This chapter is the most extensive in the private right part, containing twenty-six sections. It investigates not only the set of conditions under which I can consistently claim external objects as my own, but also the possible right to the more specific acquisition of them. The distinction between provisional and conclusive is maintained here as well – there can be conclusive acquisition only in a civil condition – and the application of the postulate of practical reason (*lex permissiva*) allows a form of rightful preliminary acquisition here too.

Although the consequences of this approach have been the subject of considerable debate in Kant scholarship, Kant underlines that acquisition of an external object can occur only by taking unilateral control of it.[221] The principle of external acquisition is formulated in this way: "Das Prinzip der äußeren Erwerbung ist nun: Was ich (nach dem Gesetz der äußeren

[220] In other words, and as Kant insisted in the peace essay as well: any legal order is (comparatively) better than none, and is to be obeyed. This might seem to draw him more in the direction of the legal positivist camp, but as Langer so elegantly shows, this first impression of a positivist strain in his theory ("als ob Kant damit hinter die Naturrechtstheorie des 18. Jahrhunderts zurückfiele") is decidedly overcome through his exposure of all presently existing legal orders as mere fact; the normative dimension is entirely found in the idea of the republic and its international counterpart, and from there, through the public use of reason and legal reforms, channelled or mediated into the factual dimension of positive law. See Langer (1986: 56 ff.) and my discussion of this above and below.

[221] See §10 (cf. 6:258 f.). As Kant formulates it: "Nichts Äußeres ist ursprünglich mein; wohl aber kann es ursprünglich, d. i. ohne es von dem Seinen irgend eines Anderen abzuleiten, erworben sein" (6:258). If this were not so, one would (empirically) already have a pact or contract of some sort, which in its turn (in order for it in any sense to be more binding than a unilateral will) presupposes the existence of rightful possession, which is precisely what is lacking at this stage: "[Die Bemächtigung] ist als ursprünglich auch nur die Folge von einseitiger Willkür; denn wäre dazu eine doppelseitige erforderlich, so würde sie von dem Vertrag zweier (oder mehrerer) Personen, folglich von dem Seinen Anderer abgeleitet sein" (6:259).

Freiheit)[222] in meine *Gewalt* bringe, und wovon, als Objekt meiner Willkür, Gebrauch zu machen ich (nach dem Postulat der praktischen Vernunft) das Vermögen habe, endlich, was ich (gemäß der Idee eines möglichen vereinigten *Willens*) will, es solle mein sein, das ist mein" (6:258). In Kant's view, therefore, as long as I do not contradict in my action the law of external freedom, the postulate of practical reason, or the idea of a possible united legislative will, I can rightfully acquire an external object simply by taking control of it.[223]

It is essential to note that when Kant says here that original acquisition is permitted (and theoretically required) in order to bring about a civil condition, he avoids the Humean stumbling block[224] of having to prove this original acquisition (or, for that matter, original community, original contract, etc.) empirically in order for it to have practical implications. Kant underlines that it is 'only' the idea of a common, original (*ursprünglich*) community that denotes the normative component and that already in a first instance has made it possible at all for another person to wrong me by laying claim to something external. It must also be possible that the object could become mine (and then also *be* mine in a certain sense, namely qua intelligible *Gemeinbesitz*) for any wrongdoing to be perpetrated against me or you.

For Kant, it is neither possible nor necessary to presuppose this kind of possession as a matter of empirical fact.[225] Rather, his main task is to get out of the blind alley (in normative terms) that is offered by any understanding of private right that centres primarily on physical-empirical possession or acquisition. In Kant's construct, the idea of original acquisition (or of an original community, contract, etc.) stands in contradistinction to the empirically verifiable initial (*uranfänglich*) acquisition (or community, contract, etc.).[226] Consequently, Kant is clear on the point that the first occupation is not identical with original occupation.[227] (Accordingly, he can neither in this regard be taken as an apologist for colonialism.)[228] The first occupation

[222] What is meant here must be the universal principle of right (cf. 6:230 and my discussion above).
[223] As he formulates it in his preparatory notes: everyone has an equal right to all objects in the world; but since not everyone can possess one object at the same time, someone has to have the right to each particular object (although this person, of course, does not originally have any 'more' right to it than others). The question is then simply who can make this rightful claim first: "den Unterschied macht blos die *priorität* der Zeit" (23:353).
[224] For Hume's criticism of earlier social contract theory tradition on this point, see for instance his essay "Of the Original Contract", cf. Hume (1987 [1752]).
[225] Langer is particularly clear on this point (cf. our references above to her Kant interpretation).
[226] Whereas the former ideas of original acquisition, community, contract, etc. are based on normative principles, the latter concepts of a so-called initial character are based only on historical or empirical facts (cf. 6:258).
[227] Cf (6:259): "– Indessen ist die *erste* Erwerbung doch darum sofort nicht die *ursprüngliche*".
[228] Schopenhauer, in his harsh critique of Kant's *Rechtslehre* in general, even described this aspect of his theory as nothing else than *Faustrecht*, cf. Kersting (2007: 214 f.). This must be rejected, not only on the basis of the subsequent public right discussion, but also from several explicit rejections of this in the private right part. See, for instance, Kant's dismissal of the colonial settlers' activity as referring to any rightful acquisition of land, because it rests merely on the continued, unilateral presence of the settlers on the surface: "Von dem Besitz (possessio) ist noch der *Sitz* (sedes), und von der Besitznehmung des Bodens in der Absicht ihn dereinst zu erwerben ist noch die *Niederlassung*, Ansiedelung (incolatus), unterschieden, welche ein fortdauernder

is justified exclusively as an anticipation of a future legal order and of what he prefers to call its 'omnilateral' (*allseitig*) will.

Consequently, there is no carte blanche here for the stronger power to mould property and power structures after its own will. The principle of external acquisition already mentions several criteria that will most dedicedly be breached by any merely uni- or bilateral will; the necessity of acquisition in correspondence with the idea of a possible united will might be the strongest and most pregnant articulation of this insight. As Kant also stresses, one must also apprehend, declare, and finally appropriate[229] external objects according to the the latter idea, in order for any acquisition to be conclusively rightful. This is attained only in the condition of public right, and as we will see, there is a supreme legal obligation to enter this condition. The state of nature or mere private right has to be overcome – *exeundum esse e statu naturali*. But, crucially, this is possible only if my external freedom can be used in a rightful way even prior to the transition to public law, through a use of external objects of my choice that can rightfully be had and acquired as mine (or yours) in a state of mere private right. Kant argues that he makes an exhaustive classification of the private right to objects when he divides these into three different categories: a) the right to a thing; b) contract right, and; c) status rights.

a) On the right to a thing

The first of Kant's three classes of external objects is the right to a thing (*Sachenrecht*), which I will also refer to as private property right.[230] This right is central to his conception of how it must be possible for us to be in the world and rightfully interact with external objects, and it has important consequences with regard to his conception of rights in general. To have a right to a thing means that I have a right, against any other mere physical possessor of this thing, to rightfully exclude him or her from their arbitrary, unapproved use of it (cf. Kant's nominal definition).[231] Fundamental to his conception is that the rights relation cannot be conceived as

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Privatbesitz eines Platzes ist, der von der Gegenwart des Subjekts auf demselben abhängt. Von einer Niederlassung als einem zweiten rechtlichen Akt, der auf die Besitznehmung folgen, oder auch ganz unterbleiben kann, ist hier nicht die Rede: weil sie kein ursprünglicher, sondern von der Beistimmung Anderer abgeleiteter Besitz sein würde" (6:251). For additional specific repudiation of any colonial exploitation, see also §15, as well as my discussion in II.1.3 of Kant's dimension of cosmopolitan law.

[229] See the three aspects (*Momente*) of original acquisition (cf. 6:258 f.). But one must remember that these are only empirical aspects, and constitute no right in themselves, cf. Kersting (2007: 214): "Der Nachweis, daß Besitznehmung, Deklaration und Inhabung, allesamt empirische Handlungen, kein Recht konstituieren können und nur den hinsichtlich seiner rechtlichen Sanktionierung auf die Zueignung durch die vereinigte Willkür angewiesenen privaten Verfügungsbereich öffentlich kenntlich machen, ist das Herzstück der Eigentumstheorie Kants". See also Kant's insistment on this point in §10 (cf. 6:259).

[230] Despite being not entirely precise (see below), this is the most commonly used English term for *Sachenrecht*.

[231] As stated in the opening lines of §11: "Die gewöhnliche Erklärung des *Rechts in einer Sache* (ius reale, ius in re): 'es sei das Recht gegen jeden Besitzer derselben', ist eine richtige Nominaldefinition" (6:260).

a direct link between the subject and the object; this is merely an empirical, spatiotemporal fact that says nothing about the right to the possession of the object. A key aspect of Kant's rights conception is the complete rejection of any *immediate* rights claim to a thing – on this, he agrees with natural rights advocates like Grotius and Pufendorf. This rejection stems from a view of property relations as justifiable only insofar as they are intersubjective in nature; his deduction here will stake out a new course. In its final form, as we will see, this view is in distinct opposition to the labour-oriented theories of the justification of property that was held by many thinkers; John Locke must be said to be its best known proponent.

For Kant, it is clear that the legal obligation to exclude someone from using an object cannot be conceived of in a relation between the subject and the object *per se.* To take a well-known example from the world of literature: it would be meaningless, in Kant's eyes, to claim that Robinson Crusoe could have or acquire things *as his own* on the deserted island, for the simple reason that, as Kant puts it: "es gar kein Verhältnis der Verbindlichkeit gibt" (6:261). As long as the island is deserted by all but one person, there is no-one else who has to be restrained from any arbitrary use of objects. Accordingly, there is no rights relation, since this relation cannot be established between persons and things. It is only with the arrival of Man Friday that a history of property relations begins. From this standpoint, property rights cannot be justified as immediate rights claims to an external object of my choice, but must instead be considered in terms of an obligation between persons (i.e., subjects) concerning the use of things (i.e., objects).

Kant's intersubjective understanding of property relations implies an inherent criticism of all labour-oriented property rights theories for providing an inadequate justification of their own position. The former theory tries to address this from another point of view, by turning the question of rightful acquisition (and possession) into a question of how the mediation of property claims is to be sorted out in principle. A number of preliminary criteria have already been mentioned with regard to a state of mere private right, but for a complete and conclusive account, we must wait until he develops this in the public right part. However, his substantial disagreement with the labour-theory tradition about how this justifies its own presuppositions can and should be further clarified at this stage of the investigation.

The labour-oriented theory not only had its powerful proponent in Locke. It was by far the dominant interpretation of the justification of property and property rights from Aristotle up to Kant's own days and also beyond. In its roots, it is identical "bei dem jungen Fichte und den frühen Kantianern, bei Hegel und Schopenhauer (...): Ein Subjekt erwirbt ein Objekt als Eigentum, indem es (...) das Objekt zu einem Teil seiner selbst macht" (Kersting 2007: 224

f.). This materialistic mystification of labour[232] as an instance of mythical animation takes a decisive and fateful path back into European history and its history of ideas with Marx's reading of Hegel (on industrialist-capitalist premises), without much attention to Kant and his new-found deduction. Indeed, Kant himself seemed to hold a labour-theory model of property rights far into the preparatory work for the *Metaphysik der Sitten*, or at least in his university lectures on natural right.[233] With the exception of a few attentive readers in his own time, such as Fichte, this rather late change of mind has mainly passed unnoticed in later scholarship: "Kants Besitz- und Eigentumstheorie hat weder in der philosophischen Kant-Forschung noch in der vorwiegend juristischen Naturrechtsgeschichtsschreibung die Aufmerksamket erhalten, die ihr zusteht. Nur wenige haben bisher erkannt, daß Kant mit seiner Eigentumsbegründung eine letzte philosophische Großtat gelungen ist" (Kersting 2007: 178).

Kersting convincingly argues that Kant's final view of the justification of possession and property can be understood only in contradistinction to any labour-oriented theory, and far surpasses the latter in quality and scope. In its inability to grasp property relations as an intersubjective process of recognition, the labour-theory tradition remains bound within the empirical and/or unilateral claim to external objects/things through occupation or labour. For Kant, on the other hand, any development of land (or other things) has only a token value and says absolutely nothing about the right or justification of this acquisition of property. On this point, too, he is unequivocal:

> [I]st die Bearbeitung des Bodens (Bebauung, Beackerung, Entwässerung u. dergl.) zur Erwerbung desselben notwendig? Nein! denn, da diese Formen (der Spezifizierung) nur Akzidenzen sind, so machen sie kein Objekt eines unmittelbaren Besitzes aus und können zu dem des Subjekts nur gehören, so fern die Substanz vorher als das Seine desselben anerkannt ist. Die Bearbeitung ist, wenn es auf die Frage von der ersten Erwerbung ankommt, nichts weiter als ein äußeres Zeichen der Besitznehmung, welches man durch viele andere, die weniger Mühe kosten, ersetzen kann (6:265).[234]

[232] I allude here to Kersting's fine description of Kant's property theory as "Entmystifizierung der Arbeit" (ibid.).
[233] On this point, see Kersting (2007: 177 ff.), who also refers to an exchange of letters between Friedrich Schiller and Johann Benjamin Erhard in late October 1794 that more than indicates a change (or even several changes) of approach from Kant close in time to the publication of his *Rechtslehre*. Kersting here quotes Schiller's brief passage on this matter: "Die Ableitung des Eigentumsrechts ist jetzt ein Punkt, der sehr viele denkende Köpfe beschäftigt, und von Kanten selbst, höre ich, sollen wir in seiner Metaphysik der Sitten etwas darüber zu erwarten haben. Zugleich höre ich, daß er mit seinen Ideen darüber nicht mehr zufrieden sei, und deswegen die Herausgabe unterlassen habe" (ibid.). (Another important example of these changes can be found in Kant's frequent references to schematism in the preparatory works, something which is entirely absent in the *Rechtslehre*. As Ludwig points out regarding the possibility of schemas relating to the concept of possession, this view is decidedly rejected in the 1797 text, with the establishment of the postulate of practical reason and the theoretical division between possession and acquisition, cf. Ludwig (2005: 121)).
[234] Note that Kant here does not simply ask if development of land is essential or sufficient (*hinreichend*) for acquisition, but if it is at all necessary (*notwendig*) in order to constitute such a right.

As this passage clearly states, a thing belongs to a subject only insofar as the substance is already recognised as his or hers. One obvious example of the advantage of this approach vis-à-vis the labour-theory model would be that no matter how much a person alters an object or forms it in his own image, it does not thereby become any more his or hers. (And it would have to be handed back, if it were not his or hers in the first place.) No conclusive right or claim to a thing can be established in this way, nor would a prolonged period of possession or the degree of labour invested change this. The substantial possession that such a presumed right yields is, in Kantian terms, nothing more than the effect of purely accidental, empirical facts that stem from the use of power in a non-rightful manner. I need scarcely add that for Kant, this cannot generate any normative justification of the possession itself. It is a mere fact.

Adversaries might respond by using Kant's *lex permissiva* and the preliminary right of *prima occupatio* against him on this point, but that would be to completely ignore not only the inconclusive character of any possession permitted by Kant through the postulate of practical reason, but also his insistence on the earth (because of its spherical surface) as a possession in common, in accordance with the idea of a possible united will. At this late stage in his works, he understands property right relations exclusively as obligations between subjects regarding objects, and all labour spent on these is simply wasted if one has acquired them illegitimately prior to any adaptation.[235] The transformation of an object does not constitute a binding legal obligation between the object and the labourer, because the claim is not put forward against any other possible arbitrary use of it, but only vis-à-vis the object itself. But, of course, the object cannot make such a promise. Just as Robinson Crusoe could not have private property rights while he was alone on his island, so too it is impossible to establish an obligating right in such a way.

> Daß die erste Bearbeitung, Begränzung, oder überhaupt *Formgebung* eines Bodens keinen Titel der Erwerbung desselben, d. i. der Besitz des Akzidens nicht einen Grund des rechtlichen Besitzes der Substanz abgeben könne, sondern vielmehr umgekehrt das Mein und Dein nach der Regel (accessorium sequitur suum principale) aus dem Eigentum[236] der Substanz gefolgert

[235] Let me make it clear that this is not to say that I have no rights claim to the object. Like Kant, I will return to the question whether, for instance, a person who in good faith has bought a stolen horse can nevertheless be regarded as a new owner, or at least be compensated for the effort put into feeding and training the horse while not knowing that the horse was stolen goods. Kant's point is rather that the justification of the rights claim does not lie in the aspect of transforming an object, but in an exclusively intersubjective relation.

[236] I should note that this is Kant's first mention of property in the *Rechtslehre* at all (in the last section on *Sachenrecht*, §17); everything up to this point has only been *Besitz*, possession. As stressed by Kersting (2007: 267) as well, without the realisation of the conditions necessary to have something external as peremptorily mine or yours, i.e., the establishment of the civil condition, there is for Kant no property. Kersting makes references to Kant's *Nachlass* to further warrant this view: "Es ist kein Recht oder Eigenthum ohne Gesetz. (...) Also fängt alles Eigentumsrecht nur in bürgerlicher Gesellschaft an [19:482]". (Therefore, it would be somewhat premature to consequently translate *Sachenrecht* into 'property right' when the term 'property' does not figure until this late in the section sequence and also has another, specific meaning, namely *Eigentum*, as opposed to *Besitz*.)

> werden müsse, und daß der, welcher an einen Boden, der nicht schon vorher der seine war, Fleiß verwendet, seine Mühe und Arbeit gegen den Ersteren verloren hat, ist für sich selbst so klar, daß man jene so alte und noch weit und breit herrschende Meinung schwerlich einer anderen Ursache zuschreiben kann, als der ingeheim obwaltenden Täuschung, Sachen zu personifizieren und, gleich als ob jemand sie sich durch an sie verwandte Arbeit verbindlich machen könne, keinem Anderen als ihm zu Diensten zu stehen, *unmittelbar* gegen sie sich ein Recht zu denken; denn wahrscheinlicherweise würde man auch nicht so leichten Fußes über die natürliche Frage (...) weggeglitten sein: 'wie ist ein Recht in einer Sache möglich?' Denn das Recht gegen einen jeden Besitzer einer Sache bedeutet nur die Befugnis der besonderen Willkür zum Gebrauch eines Objekts, so fern sie als im synthetisch-allgemeinen Willen enthalten, und mit dem Gesetz desselben zusammenstimmend gedacht werden kann (6:268 f.).

Kant's principal objection to a labour-oriented property right model of a Lockean kind is hence that it mistakenly approaches the entire question of rightful property relations from a subject-object dimension instead of conceiving this as an intersubjective process of reciprocal recognition. In this way, the theory can only indicate a certain bond to things through labour (or occupation); however, it cannot justify the obligation it should impose on others as a claim to an exclusive use of things. In short: for Kant, the right to a thing is an obligation between me and all others to exclude them from my rightful use of it, not, as in the labour-oriented theory, a relation between me and the object itself. Besides this, such a theory does not seem to offer a viable path in terms of a justification of the property claims themselves that goes far enough beyond the sheer physical possession of things.[237] Consequently, it can offer no great hope regarding a rightful mediation between conflicting property claims.[238]

From a Kantian legal perspective, it is irrelevant whether the possession of a thing and a subsequent rights claim to it took place through hard, honest labour or not; this still does not explain why it constitutes a right to this thing. We have still not got hold of the justification that is required, and Kant's view is that this approach cannot supply us with any justification. For Kant, a labour-oriented theory does not generate any legitimate right to private property, because it understands these relations as immediate relations between subjects and objects, which are validated by the effort put in. But (to quote Kersting's summary of Kant's point): "Okkupation und Arbeit sind für Kant bar jeder rechtlichen Eigenbedeutung. Sie besitzen nur

[237] This delimits the theory to the provisional dimension that we find in Kant, without conclusively solving the problem of mediating claims to property (or even to rights in general). Not surprisingly, there is no fundamental argument to leave the state of nature to be found in Locke, because all the unfortunate empirical consequences that arise from this view can for him (in principle) be solved as a matter of private right, whereas this is not possible for Kant. On Locke's and Kant's concepts of political obligations as respectively voluntarist and non-voluntarist in nature and the important implications of this, see Varden (2008).

[238] Following the interpretation by Nozick (2008 [1974]), the Lockean Proviso, which meant to constitute – or rather compensate for the lack of – a distinction between rightful and unrightful claims to (excessive) property, seems here only to endanger the concept of private property itself, since it does not signify who or what can be authorised to enforce these claims in a rightful manner. To use Kant's expression, the private persons still remain judges in their own causes.

Zeichencharakter; mit ihnen beginnt das äußere Recht als ein bestimmtes, sie begründen es aber nicht" (Kersting 2007: 228).[239]

This insight allows us to draw another conclusion regarding Kant's approach. Even in the private realm, rights relations must be understood as intersubjective *per se*; they specify an intersubjective obligation between persons, not the imposition of subjective wills on objects. The latter approach can only begin property as a matter of fact, not normatively ground it. The theory of private property, we might say, does not belong to natural science. The justification of property rights (and all other rights) is an entirely normative endeavour and must be dealt with in purely intersubjective terms. Although we must wait for the public right part to get to know Kant's final position, he has already at this stage laid the foundations for a conception of rights that at least points beyond the mere subjective power of any unilateral will.

Let us sum up the right to a thing in terms of acquisition. For Kant, as with the right to have external objects as one's own, this right too must be conceived as a particular instance that is permitted through *lex permissiva* as an anticipation of universal principles of a future legal order. (Thus, it is linked to a number of criteria of its justifiability.) Kant then explicates the original acquisition that this approach renders "aus den Prinzipien der reinen rechtlich-praktischen Vernunft", which in turn will include the entire legal framework of his construct. We have at this point, in §17, arrived at what must be seen as a preliminary conclusion with regard to his concept of right in our external relations and how this is related to the concept of intelligible possession. For once we have abstracted all empirical (i.e., accidental or arbitrary) conditions from possession itself, the concept of intelligible possession proves to be "nichts anders als das Verhältnis einer Person zu *Personen*, diese alle durch den *Willen* der ersteren, so fern er dem Axiom der äußeren Freiheit, dem *Postulat* des Vermögens und der allgemeinen *Gesetzgebung* des a priori als vereinigt gedachten Willens gemäß ist" (6:268).

In light of these remarks on the opening sections of Kant's *Rechtslehre*, we see that the concept of intelligible possession of external objects now reveals itself as the intersubjective recognition of rights relations.[240] In his view, what is rightfully mine or yours must therefore

[239] In order to do justice to Locke on this point, I should stress that his own formulations regarding labour theory do not necessarily contradict Kersting's quotation here entirely. Locke himself does not say much more than that my labour, by "removing [the objects] out of that common state they were in, hath *fixed* my *Property* in them", also that this "*begins the Property*" (*Second Treatise on Government*, §28). In this sense, there is still no claim to conclusive possession in Locke. But he still leaves out a principled account of a mediation of rights and property claims as well as a strict necessity to enter civil society (only through and within which this mediation can take place). With Kersting, we can therefore conclude that Locke's theory is not void of criteria for the beginning of rightful property relations, but it seems to come up short when it deals with their justification (*Begründung*). The lack of an intersubjective theory of property relations can only underscore this concern.

[240] As also emphasised by Langer (1986: 148): "Das intelligible ist eigentlich ein *intersubjektives* Verhältnis".

be understood as an exclusively intersubjective relationship ("das Verhältniß einer Person zu *Personen*") that must be united under three distinct features of right: the principle of right, the *lex permissiva*, and the lawgiving of the will of all, which in turn is attainable only in the civil condition of public right. As we look further into the line of argument of the *Rechtslehre*, we will see how this understanding of rights relations runs through the entire work. At this point, we can round off our reflections on the right to a thing, and move on to present a brief sketch of the contractual figure he establishes in the next section.

b) On contract right

In addition to the possession of things, it is also possible and necessary to be able to acquire (and have) the possession of another's choice as externally mine or yours. In doing so, I can rightfully determine the causality of another person's choice regarding a performance of this or that deed, but this, of course, is subject to certain criteria that Kant goes on to develop in §§18-21 on contract right.[241] But whereas it can be rightful to have more than one particular right towards a person in his or her performance of a deed (say, as an employee of mine) and accordingly to possess private rights regarding his or her causality in relation to any definite number of actions; the right to have and acquire these rights is still, as the first paragraph of §18 makes clear, to be traced back to a single concept of contract right (*persönliches Recht*). Kant describes this concept as "der Inbegriff (das System) der Gesetze (...) nach welchen ich in diesem Besitz sein kann" (6:271). Once again, the reference to the sum of the (rational, not positive) laws required for the freedom to be in accordance with the same freedom of every other person points to a totality of conditions that must be fulfilled.[242]

Contract right enables me to have a right to something external which actually belongs to another person. This person has, of course, an innate right to freedom and to a choice of his or her own, and can accordingly not be treated as a thing. Nonetheless, I can have a right to the performance of a certain deed by another person, if there exists a mutual agreement in this regard. The formal expression of this is a contract, which Kant defines in the following terms: "[d]er Akt der vereinigten Willkür zweier Personen, wodurch überhaupt das Seine des einen auf den anderen übergeht" (ibid). It is not enough to have two particular wills – those of the promisor and the promisee – who both want a certain transaction to change hands (e.g. wages

[241] This translation too (of the original term "persönliches Recht") is somewhat imprecise, but probably the best alternative. The already established Anglophone legal term 'personal right' (which connotes rights to one's own body) is definitely not what Kant has in mind here.

[242] Kant thereby implicitly refers to preconditions such as intelligible possession and acquisition (in this case by contract). According to the principles of freedom, this is possible only under the idea of the *a priori* united will of all, etc.

for labour). This transfer must also go through the united will of both and, since it cannot at any time be or become the possession of neither of them, it must take place simultaneously.[243] For this, the contract is required, because in legal terms (as a purely intellectual relation) this is the only possible way for two particular wills to constitute one continuous, united will with relation to external objects that are not mere things. Only a contract can turn a promise into an obtainable, reciprocal obligation, whereas an unassisted moral will in its exclusively unilateral ability to keep promises does not and cannot solve this intersubjective matter on its own.[244]

As Kant highlights, it is vital that this external object which comes into my possession through a contract is not the performance of the deed itself (for this is, of course, dependent upon empirical features and therefore may or may not occur; *and* it would also constitute a right to the person itself); instead, it is the *promise* of the performance: "– Durch den Vertrag also erwerbe ich das Versprechen eines anderen (nicht das Versprochene), und doch kommt etwas zu meiner äußeren Habe hinzu; ich bin *vermögender* (locupletior) geworden durch Erwerbung einer aktiven Obligation auf die Freiheit und das Vermögen des anderen" (6:274). This is also what can be compensated in case of a unilaterally broken contract,[245] namely the equivalent of the promise rather than that which is promised as such (which, for any number of reasons, it may or may not be possible to perform).[246] Once again, we see that for Kant, the rights relation as such is of a purely intelligible kind.

c) On status rights

I have now briefly examined the basic rights structure in Kant with regard to the acquisition of things and the deeds of another person. But he also introduces a third class of something

[243] In a specific sense it belongs to both of them at one particular moment. (In §20, Kant compares this with the thrown stone that at the top of its apex can be said to rise and fall simultaneously – think here also of the custom of shaking hands when entering a contract to construe one, united will of both for one specific moment in time.)
[244] See in this regard Kant's rather sarcastic remark made in the direction of natural rights advocates (Kant here refers to Moses Mendelssohn) who hold that the legal obligation of respecting a contract stems directly from a singular (unilateral) moral duty to keep one's promises: "Die Frage war: warum soll ich mein Versprechen halten? Denn daß ich es soll, begreift ein jeder von selbst" (6:273). (Otherwise, it would not be a promise.) The reciprocal obligation that makes it a legitimate coercive right, however, must be rooted in the contract and its principles. (In the introductory parts, Kant also made it clear that the duty to always keep one's promises is a specific legal duty, not one of virtue: "Es ist keine Tugendpflicht, sein Versprechen zu halten, sondern eine Rechtspflicht, zu deren Leistung man gezwungen werden kann. Aber es ist doch eine tugendhafte Handlung (Beweis der Tugend), es auch da zu tun, wo kein Zwang *besorgt* werden darf". Also: "nicht in der Ethik, sondern im Ius liegt die Gesetzgebung, daß angenommene Versprechen gehalten werden müssen" (6:220).)
[245] Entering a contract that includes intentionally false information (i.e., lying) also amounts to a unilaterally broken contract, since there is a hidden will (so to speak) included in the 'agreement' between two wills. Honest contracts are thus a presupposition for Kant and are entailed in the concept of contracts in the first place. (Although lying as such does not necessarily imply that there has been a violation of one's rights, it most certainly implies a rights violation in the case of the agreement of a contract.)
[246] As, for instance, in the case of a certain painting you commissioned, but which I could not finish in time.

external that I can acquire as my own, namely a right to persons that is akin to the right to a thing. (Of course, there can be no fourth category of a right to things that is akin to the right to a person.) It must also be possible, Kant argues, to have a right to persons as a thing, but still to use him or her in a way that is not irreconcilable with the innate right of freedom. Without the last qualification, the person would be a slave or a serf (and, consequently, a thing under *Sachenrecht*). To this class belong what we can call status rights, i.e., marriage right, parental right, and the right of the head of a household.

For Kant, these three titles enable me to use other persons as things in their capacity of being my spouse, children, or servant in a manner that does not conflict with their inalienable rights as human beings. I shall not here go into a detailed account of his arguments or of the subsequent critique that has been directed against his views over the years; nonetheless, a few remarks on the reasons that lie behind his inclusion of a third rights category should be made.

Kant's general argument on these rights is perhaps most easily accessible through the title 'parental right'. Parents, who "eine Person ohne ihre Einwilligung auf die Welt gesetzt und eigenmächtig in sie herüber gebracht haben" (6:281), have a duty to preserve and care for the child until the point in time when the child is able to do so him- or herself. Children have thus an immediate right to this, as persons – they are not products that parents can dispose of or treat as if they were their own property. Kant explicitly refers to children as *Weltbürger* whose condition is not indifferent to the concept of rights (cf. §28). This duty means that the parents correspondingly have a right "zur Handhabung und Bildung des Kindes" (ibid.) and to raise him or her in a pragmatically and morally proper way. Children belong to their parents, and since they are not yet fully developed, emancipated persons, the parents have a legal right (and duty) to exercise their possession over their children (e.g., to force them back if they run away), although they can never possess them as property. Parental right is in this way neither a right to a person's deeds (as in contract right) nor a right to a thing (*Sachenrecht*), but a right to a person that is akin to a thing.

The same idea applies to entitlements vis-à-vis a spouse or servant(s), even if features of Kant's rationale for every aspect of the relationsips may seem outdated. The first title of marriage right rests on the questionable assumption that any sexual activity implies treating another person and/or yourself as a mere means and hence requires a marital promise, in order for the right of humanity to be restored. Leaving that assumption aside, the marriage right in itself is a fully equal and reciprocal[247] vow of fidelity between two adult persons.[248] Marriage

[247] Admittedly, it is described in the introductory §23 as the man's acquisition of a wife. In the specfic sections on marriage right, however, the two parties are entirely equal in rights and duties to one another.

then allows an estranged husband or wife (as in the case of runaway children, which is in turn an analogy to fleeing domestic animals) to bring back the unfaithful spouse with the law in hand, as if he or she were a retrievable thing. His main argument seems to be that marriage not only permits a rightful, exclusive use of another person with regard to sexual activites – it also assures that any possible disagreements between the two (e.g. on questions of economic support, fidelity, etc.) can be solved through means of right rather than mere might, which, of course, is a strict normative obligation.[249]

Kant has thereby introduced a third category which should exhaust all possible rights relations that are attainable through acquisition. This third category of status rights establishes rightful relations within the domestic society (or household) in a way that still preserves the personal, innate right of the human beings therein. The inclusion may seem trivial now, but this was not so at that time: Kant himself seems to have considered it a major achievement of his work to have elaborated and delineated this category more precisely,[250] since it establishes rights to other persons in a manner that still does not violate the innate and inalienable "Recht der Menschheit in unserer eigenen Person". For Kant, to have such status rights with regard to other persons constitutes "das *allerpersönlichste* [Recht]" (6:276 f.);[251] it cannot be handed over to someone else as if it were a thing.

2.4. The irreconcilable conflict inherent to private right

In addition to Kant's discussion of the three different classes of objects, chapter II of the private right part contains remarks on contractual rights and ideal acquisition. The remarks on contractual rights are expressed in §31,[252] a section that goes on to explicate definitions of

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[248] Although I shall not discuss this further here, Kant's attempt to exclude homosexual marriage with his ad hoc division between the natural and unnatural use of another's sexual organs and capacities must be said to be rather unconvincing. On a more positive note, it should be added that when marriage is grounded in an exclusive right to another person's sexual activities, it can be argued that Kant actually opens the door to homosexual matrimony and also discards infertility (among other things) as a rightful ground for divorce.

[249] I will not go into further detail in relation to the right of the household (to acquire servants as its rightful possession of a person akin to a thing). I mention only that the same model is applied here: a person may be used as a thing (but not used up) qua servant under a contract – but not a lifelong contract, which would be serfdom – to form a hierarchical, but still rightful society of persons of equal human worth. As above, a runaway servant can be forced back to his or her superior.

[250] In the appendix to the *Rechtslehre*, he sets out to defend this "neues Phänomen am juristischen Himmel", ultimately describing it as a "neu hinzukommenden Rechtstitel (...) in der natürlichen Gesetzlehre, der doch stillschweigend immer im Gebrauch gewesen ist" (6:358 ff.).

[251] One might add here that this calls for what Kant dubs "ein natürliches Erlaubnisgesetz" (ibid.), something which is not identical with the *lex permissiva* as such and therefore constitutes another concept to be explicated. But as my presentation of this section will be only brief, I will not expand on this point, only register it as that which Kant believes enables rightful household relations even prior to a civil condition, quite similar to the need for the *lex permissiva* to initiate the transition from a mere state of nature to a state of mere private right.

[252] For a thorough presentation of Kant's table of contracts listed here, see Byrd & Hruschka (2010: 245 ff.).

what money[253] and books are; the presentation of the latter also gives an account of the right to intellectual property (cf. 6:289 f.). I will not discuss these aspects in detail here, and I will also leave out further deliberations on §§32-35, an episodic chapter that deals with his three possible kinds of ideal acquisition (prolonged possession, inheritance, and a good reputation) as well as their respective rights (cf. 6:291 ff.). Naturally, these sections may be of interest to scholars who work intimately with such objects of study or related questions; nevertheless, in my view, they are not particularly relevant to the general structure and line of argument in the *Rechtslehre*, and can accordingly be omitted here.

§§36-40, which make up chapter III, are however far more important and deserve due attention. The chapter is given the English title: "On acquisition that is dependent subjectively upon the decision of a public court of justice" (Kant 2009: 443) and is concerned *inter alia* with the specific problem of how two different persons can have natural rights claims that are entirely *a priori,* yet can still be mutually exclusive. The verdict that is required to solve the rights disagreement in such cases can moreover turn out differently, depending on whether one considers the disagreement from the perspective of private or of public right (cf. 6:297).

In this chapter, Kant not only reveals the strict normative necessity of a public court of law to settle such disputes (public right hence trumps private right); he also points to the fact that there is an inherent and irreconcilable conflict in any condition of mere private right that can be overcome only by a state of public right. This conflict has been reconstructed in an excellent and highly instructive manner by Arthur Ripstein (2010), who has identified three so-called inherent structural defects of the state of nature (or mere private right) that can be seen to entail the *a priori* necessity of leaving this sorry state of affairs. I will turn to the specifics of his analysis once I have presented a brief sketch of the relevant sections.

Kant singles out four cases that share the curious circumstance that it is possible for each of two parties to have an entirely rightful rights claim that is nevertheless irreconcilable with the other person's claim.[254] The cases relate to contracts to donate a gift (§37), contracts to lend a thing (§38), the recovery of lost objects (§39), and, finally, the acquisition of oaths (§40). For Kant, all four sections involve rights relations that go against the innate or private right to freedom of both parties.

[253] Kant subscribes to Achenwall's definition of money as a thing that can be used only by being alienated (cf. 6:286). This is the exact opposite of what human beings are, namely persons (who cannot be alienated).
[254] Of course, the problem with these cases is not the same as with the acquisition of external objects as such – as we recall, although everyone has an equal, original right to the same object, the first person to acquire it is, for Kant, the rightful owner (cf. "den Unterschied macht blos die *priorität* der Zeit" (23:353)).

In §37, Kant discusses the case of someone who agrees to donate a gift, but who has a change of heart before the donation is made. §38 concerns the legal responsibility for merely borrowed objects that, through causes which are beyond the borrower's reasonable control, cannot be returned in the same shape as they were lent. The next section then visits a case and question already touched upon above, regarding the difference between Kant's and Locke's justifications of property: who is the rightful owner of an object that is stolen and then is later bought by a third and innocent party?[255] Lastly, §40 deals with the rational basis of oaths: how can someone rightfully demand that I swear in a court of law by a religious text (or another token), when such a confession is surely contrary to the innate right to freedom, and *inter alia* to religious beliefs (cf. 6:304)? Moreover, what is it here that guarantees that the mere words of other persons (through an oath) can impose legal limitations on my sphere of freedom?

Since the last section takes up a question that goes somewhat beyond the aspects that are the primary focus of debate in the other three, I will begin with some general observations on §§37-39. In all these cases, both parties have *a priori* rights that are violated. The person who promises to donate a gift free of charge has thereby handed to someone else the right to something that was his or hers, and this other person should now have the rightful possession of this object. Nonetheless, the mere promise of a gift does not, in Kant's view, render a use of force to make him or her stick to this promise rightful in a state of nature – since that would in turn be against the innate right to freedom (cf. 6:298). Similarly, in the case of the loan of objects that are damaged during the loan period (through no direct fault of the borrower), the owner is deprived of something that is his or hers and should be compensated. Nevertheless, without a contract that specifies the conditions of the borrower's juridical responsibility, this person too is deprived of something that is his or hers if, as in Kant's example, a stolen jacket has to be compensated by the borrower.

The points in question here are not, as Byrd & Hruschka (2010: 221) wrongly assume with regard to §37, identical to the equity case that Kant had placed outside the *Rechtslehre* proper. In that case, one party evidently had the right on his or her side, even though the other party could rightfully feel aggrieved (as when, for instance, a currency was grossly devaluated during a contract period). In the cases of §§37-40, however, the main problem is, as I have emphasised, that *both* parties clearly have their rights violated. Kant even underlines that the verdict turns out differently in a mere private right condition from what it does in a state of public right. Whereas the promisor cannot be rightfully coerced in the former condition, he or

[255] See above, I.2.3.a).

she can and must be made to uphold the promise in the latter (unless reservations were made in the first place, cf. 6:298). So, too, in §38: in a state of mere private right, the owner of the jacket has a right to compensation from the borrower; but without an explicit prior agreement in this regard, a public court of law cannot make the latter liable to damages or losses that are not directly attributable to this person (cf. 6:299 f.).

The notable case of the recovery of lost objects in §39 confirms the same point. Kant insists here that if I "ganz rechtlich verfahre" (6:301) and innocently buy a stolen horse (e.g. on a public, "durchs Polizeigesetz geordnetem Markt" (6:303)), the previous owner cannot lay a rightful claim to repossess the horse anymore. Without doubt, the latter has his or her right to the horse violated by the thief and can, in a state of mere private right, qua first possessor demand the horse back from me. (I then lose my money.) In a state of public law, however, I cannot as an innocent buyer of an object be required to trace the object's entire property history in order to establish my right to it. The verdict of the public court must therefore go in my favour, even though the previous owner certainly has his or her rights violated (although neither by me nor by the public condition as such).[256]

Lastly, the case of acquisition of oaths takes up the question: "worauf gründet man die Verbindlichkeit, die jemand vor Gericht haben soll, eines Anderen Eid als zu Recht gültigen Beweisgrund der Wahrheit seines Vorgebens anzunehmen, der allem Hader ein Ende mache" (6:304). The oath demanded in court proceedings breaks a number of natural rights. To begin with, there cannot be a coercible right to the truth, as if someone were omniscient, and another person had the right to demand it from that being.[257] Another aspect concerns the question of what binds me, in a juridical sense, to believe that another person speaks the truth (simply by swearing), and how these words can impose juridical obligations and limitations on the use of my freedom. Yet another thing is that Kant evidently also regards a coercive right to make someone swear as "an sich unrecht" (ibid.), since at least the latter obligations intervene in the strictly private realm of personal convictions and incentives. From the perspective of mere private right, none of these problems can be overcome.

Nonetheless, the public court of law is allowed to acquire legal guarantees by oaths, in order to ensure that right can be fulfilled. Thus, it may "als ein Notmittel (in casu necessitatis)

[256] When we briefly visited this example above, with regard to the justification of property, we saw how Kant's inter-subjective grounding of property relations differed from the subject-object relation of, for instance, Locke's theory. Here, we must repeat Kant's main point that no matter how much the previous or later owner of the horse trains or develops the animal, this has not the slightest importance for the question of ownership *per se* (although it might, of course, enter into the question of compensation).

[257] Neither can there be a coercive right to another person's truthfulness, cf. his discussion thereof in the essay on a supposed right to lie (cf. 8:425 ff.). I will touch upon further implications of this position below.

zum Behuf des rechtlichen Verfahrens" presuppose a certain religious conviction on the part of witnesses (or at least state officials), in order to make them swear on something beyond the authority of the legal dimension itself[258] as a means to demand and get to the truth in juridical matters. However, Kant finds it very difficult to grant this right, and describes it as a wrong even in a public condition: "– Die gesetzgebende Gewalt handelt aber im Grunde unrecht, diese Befugnis der richterlichen zu erteilen: weil selbst im bürgerlichen Zustande ein Zwang zu Eidesleistungen der unverlierbaren menschlichen Freiheit zuwider ist" (6:304 f.). Despite his profound reservations, Kant nevertheless holds it to be necessary, in order to prevent truth and right from diverging from one another.

All these cases point to a quintessential feature of Kant's philosophy of right: private individuals simply cannot get it right on their own. In his great interpretation, Ripstein tries to set out in detail the deficiencies of the Kantian condition of mere private right. He proposes that its impossibility with regard to providing a conclusive guarantee for rightful relations can in fact be categorised as three inherent defects of all states of nature. On his reading, one has the irresolvable problems a) of *unilateral choice* and hence also lack of authorisation; b) of a lack of consistent, equal enforcement of rights claims and thereby of their *assurance*, and; c) of *indeterminacy* with regard to the possible disagreement about rights in their particular application (cf. Ripstein 2009: 145 ff.).[259] These three defects correspond to different aspects of what I have frequently called the lack of an actual rights guarantee. I have repeatedly underlined both the need for such a guarantee, and how neither moral philosophy nor mere private (or natural) right are in a position to overcome these problems in a consistent manner. With Ripstein, I am convinced that Kant's emphasis on the peculiarities and necessity of a condition of public law can hardly be overestimated.

I agree with Ripstein's suggestion that the problems of all conditions of mere private right can be broken down to three distinct features, all of which, as we have seen, are present in Kant's discussion of the private right part. Our actions in such a state of affairs are based merely on our unilateral choice; they fail to give reciprocal assurance of their validity, and it is impossible to fully delineate or determine them without a public authority. Kant's inclusion of a *lex permissiva* attempts to circumvent these profound problems. But this order of things still amounts to a condition that does not live up to the normative standards that permitted the

[258] Otherwise, the oath would be self-referential and have no practical implications beyond positive law.
[259] I will not present here his entire line of argument; I refer rather to his own work. There, he also makes an argument for this tripartite structure's correspondence with the three branches of government (cf. ibid., 173 ff.), referring respectively to the legislative, executive, and judicial authority. This is a novel and to my mind correct claim, but, as we will see in the discussion of Kant's principle of separation of powers in I.3.2, there is also more to this equation than can be deduced from the deficiencies of the condition of mere private right.

merely unilateral acquisition of external objects in the first place. Granted, it is a condition that anticipates a rightful condition (and is allowed to do so by force). Nevertheless, it rests on factual might more than rational right and, at least in the cases of §§37-40, it cannot determine the lawful limits for a unilateral use of external freedom without violating the natural rights of man in the process. For Kant, rights have, per definition, to be guaranteed by an omnilateral, not a unilateral will; moreover, an independent public authority, not a private person has to provide assurance for these claims and, likewise, a distinctively public institution of law has, finally, to mediate and settle disagreements about private rights claims in a way that is both conclusive and entirely impartial.[260]

Ripstein is correct to emphasise that the problems of the state of nature are not merely contingent, accidental, or due to certain features of human nature (except the fact that we are embodied rational beings); on the contrary, the problems are inherent to the condition as such. Cavallar (1999: 118 f.) underlines the same point when he writes that Kant does not prescribe a transition to a state of public right because he inherits Hobbes' pessimistic anthropology or, like Locke, thinks it is the pragmatically correct choice. Kant's call to leave the state of mere private right is not based on anthropology or an account of evil;[261] instead, it follows directly from the structure of the state of nature itself. Admittedly, Ripstein does not provide an exact quotation from Kant that could conclusively underpin his argument that the problems are of exactly the three kinds that he indicates;[262] but I believe that his emphasis that these defects are structural in nature, and that it is impossible for private individuals to get things right, is entirely warranted. This leads us to the *a priori* necessity of a transition from a state of mere private right to the perfectly rightful condition of public law and justice, where each person is conclusively granted what belongs to him or her. I shall discuss this in the next subchapter.

2.5. The necessary transition to a condition of public right

With the private right part, Kant establishes the criteria under which I can rightfully have and acquire something external as my own even prior to a condition of public right. But, although

[260] For more on Ripstein's argument and presentation, see ibid.: 145 ff.
[261] It is thus not necessary, as for instance Byrd & Hruschka (2008: 615 ff.) do, to include deliberations on man's badness, weakness, and/or evil to establish the Kantian necessity to leave the state of nature.
[262] However, I suggest he could have quoted Kant's essay on cosmopolitanism from 1784, whose fifth thesis conveys the same point that Ripstein makes: "Das größte Problem für die Menschengattung, zu dessen Auflösung die Natur ihn zwingt, ist die Erreichung einer allgemein das Recht verwaltenden bürgerlichen Gesellschaft", a society that is characterised by the largest possible amount of freedom. The task of civil society is then precisely to establish "die genauste Bestimmung und Sicherung der Grenzen dieser Freiheit" (8:22). This last part corresponds in my view exactly to Ripstein's three structural defects: the lack of freedom as something else than mere unilateral choice, as well as a lack of determination and assurance of this freedom.

there may be rightful private rights in such a state of affairs, Kant insists that all private rights are only provisional here. After the clarification of these rights and the rights relations therein, he explicates a transition from what is mine and yours in the state of nature to what he refers to as mine and yours in a rightful condition generally. His own case for the necessity of this transition is presented in the sections directly preceding the subsequent discussion of public right, and forms a preamble to this part.[263] As will become evident from the arguments that are presented in these sections, and as I have indicated above, the condition of private right in the state of nature brings inevitably with it an *a priori* Kantian legal obligation to leave this condition for a state of public law, where all rights hold conclusively.

There are a number of reasons for the necessity of this transition. I have already shown how Ripstein conceptualises these in the shape of three inherent structural defects that pertain to all conditions that are devoid of public authority. This is reminiscent of an argument by Ludwig, who underlines the opening passage in §41 where Kant describes the civil condition "unter denen allein jeder seines Rechts teilhaftig werden kann" as constituting the only form of justice, namely a distinctively public form of justice by law, which "nach Gesetzen in *die beschützende* (iustitia tutatrix), *die wechselseitig erwerbende* (iustitia commutativa) und *die austeilende Gerechtigkeit* (iustitia distributiva) eingeteilt werden kann" (6:305 f.).[264]

This is not to say that the content of private right, or the rights model developed in that part as such, changes with a transition to a state of public right; the latter move is not required in that regard.[265] As Kant unequivocally insists, the state of public right "enthält nicht mehr oder andere Pflichten der Menschen unter sich, als in jenem gedacht werden können; die Materie des Privatrechts ist eben dieselbe in beiden" (6:306). What public right adds to the condition of private right is, rather, "die rechtliche Form [des menschlichen] Beisammenseins (Verfassung)" (ibid.), i.e., a state constitution. And these laws of the rightful form of human

[263] The sections in question are §§41-42. Ludwig suggests that also the two first sections of the part on public right (§§43-44) topically belong to this transitory stage and accordingly places the four sections together as a general preamble to the following sections on *Staatsrecht*, *Völkerrecht*, and *Weltbürgerrecht* in the part on public right. Although the four sections are related, I would rather suggest that the transition should not be placed within the public right part as such, since the demand for the transition, and thus to leave the state of private right, stems from the deficiencies of this condition, deficiencies that one is already aware of at this stage. This is no major objection against Ludwig's proposal; a transition belongs by definition neither entirely to the state preceding it nor to that following it. (Again, on transitions in Kant's practical philosophy, see Schönecker (2009).)

[264] Like Ripstein, Ludwig too sees here a symmetrical relation to the different branches of government, and goes on to couple these to the three chapters of the part on private right. Byrd & Hruschka (2010) make a similar claim. But both these latter interpretations fail in my view to take into account that these three divisions of the form of public right (cf. *iustitia tutatrix*, *iustitia commutativa*, and *iustitia distributiva*) 'only' clarify what is *recht*, *rechtlich*, and *Rechtens* (cf. 6:306) from a perspective of private right; I believe they are insufficient when it comes to clarifing the distinctively public aspect of right and to answering the superior question *Was ist Recht?*

[265] As we remember from the table of division, the only difference between the two conditions was whether the sum of the laws contained in them had to be promulgated or not (in order to be rightful), cf. 6:210.

association, in contrast to the material content of private right (and the formal rights relations in such a state), cannot be conceived as rightful as a result of private (unilateral or bilateral) actions, but must from the very outset be of a specific and exclusively public nature.

I will shortly return to the reasons for Kant's view on this essential point and to its consequences. At this stage, it is important to note his emphasis that no social formations can lay claim to this feature. As we have seen in the prologue, he criticises Achenwall's natural rights doctrine for mistakenly identifying the social condition as the opposition to the state of nature. Just as morality is unable to give a guarantee for rightful actions in our intersubjective relations, so too are all social conditions ultimately unhelpful in this regard. The problem is overcome only in a civil condition (*status civilis*), since societies as such do not know and cannot explicate a fully rightful hierarchical structure. Kant therefore describes both the state of nature and all social conditions as states of private right where everyone, in the well-known formulation, does "*was ihm recht und gut dünkt*" (6:312), whereas in the third, civil condition one recognises a sovereign power that is authorised to rule with rightful force.

By means of this separation of the civil from all social conditions, Kant not only follows up his earlier critique of the natural rights tradition. In §41, he also focuses on another aspect with regard to the peculiarities of the realm of right. Although we can speak of a civil society (*bürgerliche Gesellschaft*), the civil union (*unio civilis*, i.e., the state) as such must not be understood merely as a society, since it establishes a hierarchical relationship: "zwischen dem *Befehlshaber* (imperans) und dem *Untertan* (subditus) ist keine Mitgenossenschaft; sie sind nicht Gesellen, sondern einander *untergeordnet*, nicht *beigeordnet*". He makes the point that: "[j]ener Verein ist also nicht sowohl als *macht* vielmehr eine Gesellschaft" (6:306 f.).

This last comment is by no means trivial. Kant holds that the civil union – whose main constituents I shall examine later – is not identical with civil society as such[266] (or with any other form of social union), and that the civil union must be said to have a prominent role in the establishment of an equal society, rather than *vice versa*. This is because the hierarchical structure of the state also leads to a crucial, countervailing effect on society in general. Human beings, he points out, insofar as they "sich einander beiordnen, müssen sich eben deshalb untereinander als gleich ansehen, so fern sie unter gemeinsamen Gesetzen stehen" (6:307).[267]

[266] In the prologue, I briefly criticised Gilje for slightly overlooking this; but contemporary political science studies of civil society and its democratic implications should also pay attention to this feature in Kant.
[267] Both these claims – the nonidenticality of civil union and civil society and the countervailing, constitutive effect of civil union on society in general – will resurface in different forms throughout the text. The first claim will aid our understanding of what I shall refer to later as institutionalised and non-institutionalised political autonomy in the realm of public right; the second is yet another example of how Kant certainly does not make legality play second fiddle to morality in terms of a realisation of the principles of practical philosophy.

Moreover, such a reading corresponds to a central remark in the peace essay: it is the political act of uniting a general will to form a state constitution "wodurch die Menge ein Volk wird" (8:352). Hence, it is only in the political realm under the rule of law that we have a people (cf. §45), i.e., autonomous individuals as well as an autonomous political community. Outside the rule of law, we have only a multitude – a mass devoid of both private and public autonomy.

After pointing out this difference between his approach and that of Achenwall in §41, Kant introduces another postulate in the next section, namely the postulate of public right; this grounds the necessity of a transition from private to public right. Whereas the *lex permissiva* (i.e., the postulate of practical reason) made it clear that no one can rightfully prevent me from having and acquiring something external as my own (unless someone else has already made the same claim), the postulate of public right on its part declares, in a close parallel to the concluding line of argument in Kant's general division of duties of right, following Ulpian: "du sollst, im Verhältnisse eines unvermeidlichen Nebeneinanderseins mit allen anderen, aus jenem [Naturzustand] heraus, in einen rechtlichen Zustand, d. i. den einer austeilenden Gerechtigkeit, übergehen". And Kant proceeds with regard to the *a priori* legal obligation that this postulate entails: "– Der Grund davon läßt sich analytisch aus dem Begriffe des *Rechts*, im äußeren Verhältnis, im Gegensatz der *Gewalt* (violentia) entwickeln." (6:307).

The *lex permissiva* allows one to unilaterally have and acquire something external as one's own (through force), but the obligation for others to then refrain from their rights claims (which in principle are equal) to the same object(s) does not hold unless the one in possession is prepared to give a reciprocal assurance with regard to what does not belong to him or her. For what can impose a conclusive obligation upon others in their actual exercise of external freedom, if the obligation is simultaneously rejected, in principle, as an obligation that binds one's own actions too? The self-contradictory nature of such a maxim must allow every other person to resist it, and this also reveals the fundamental structure of the state of nature: it is only might that upholds every form of possession or acquisition, which continues to exist only as the right of the stronger.

In this context, Kant makes an important legal distinction between material and formal wrongs. The individuals (or, at the intenational level, states) themselves do not do each other wrong in this state of nature; it is as if there were a tacit consent that different rights claims are settled through any available means of force. But if moral persons remain in this state of lawless freedom, they are rejecting the idea or concept of right itself as a matter of principle. Kant elegantly formulates the main point: they may not do each other any material wrong, but

since they persist in solving their differences through might rather than right, they nonetheless do each other formally wrong. He describes this as doing wrong in the highest degree:

> Bei dem Vorsatze, in diesem Zustande äußerlich gesetzloser Freiheit zu sein und zu bleiben, tun sie einander auch gar nicht unrecht, wenn sie sich untereinander befehden; denn was dem Einen gilt, das gilt auch wechselseitig dem Anderen, gleich als durch eine Übereinkunft (...): aber überhaupt tun sie im höchsten Grade daran unrecht in einem Zustande sein und bleiben zu wollen, der kein rechtlicher ist, d. i. in dem Niemand des Seinen wider Gewalttätigkeit sicher ist (6:307 f.).[268]

The exclusively material, empirical perspective on right and rights relations seems doomed to perpetually run from one side to the other, to assist justice in tipping the scales back to centre. From the formal point of view it is also self-evident, as Kant stresses, that there can be no requirement to wait for actual wrongs to take place before one may act against the one who refuses to enter a civil condition. It is neither "eine traurige Erfahrung" nor "die wirkliche Feindseligkeit" (6:307) that teaches us the necessity of the transition from private to public right. In other words, as Kant emphasises in §44, it is no fact ("nicht etwa ein Faktum") that causes the necessity of this transition; this lies, rather, "a priori in der Vernunftidee eines solchen (nicht-rechtlichen) Zustandes, daß, bevor ein öffentlich gesetzlicher Zustand errichtet worden, vereinzelte Menschen, Völker und Staaten niemals vor Gewalttätigkeit gegen einander sicher sein können" (6:312). This entails that, regardless of the moral, ethical, social, or religious union of private persons ("sie mögen auch so gutartig und rechtliebend gedacht werden, wie man will" (ibid.)), there remains an *a priori* legal obligation to leave this state of unbound freedom for a civil condition of public right, "in welcher Jedem das Seine erhalten werden kann (*suum cuique tribue*)" (6:237).

Kant reveals that the material, physical pieces of possession one may have and acquire in the state of private right, however provisionally rightful they may be in an anticipation of a condition of public right, rely essentially on violence. The validity of any prolonged affiliation with the current possessor is based only on the correspondence of this possession with a future rightful order through which it is conclusively guaranteed. As I have pointed out earlier, in §17, at the end of the sections on *Sachenrecht* (in which his rights model was grounded), Kant describes unilateral acquisition as provisionally rightful, insofar as it corresponds with the key

[268] Kant adds the following example in a note to this passage: "Dieser Unterschied zwischen dem, was bloß formaliter, und dem, was auch materialiter unrecht ist, hat in der Rechtslehre mannigfaltigen Gebrauch. Der Feind, der, statt seine Kapitulation mit der Besatzung einer belagerten Festung ehrlich zu vollziehen, sie bei dieser ihrem Auszuge mißhandelt, oder sonst diesen Vertrag bricht, kann nicht über Unrecht klagen, wenn sein Gegner bei Gelegenheit ihm denselben Streich spielt. Aber sie tun überhaupt im höchsten Grade unrecht, weil sie dem Begriff des Rechts selber alle Gültigkeit nehmen und alles der wilden Gewalt gleichsam gesetzmäßig überliefern und so das Recht der Menschen überhaupt umstürzen" (6:307).

concept of intelligible possession. As we have seen, this concept is a rights relation that forms an intersubjective relationship grounded in the three criteria of the universal principle of right, the *lex permissiva*, and the legislation of the will of all, conceived as united *a priori,* where the last of these is attainable only in the civil condition of public right. In the discussions thus far, I have examined the development of the former two constituents in Kant's *Rechtslehre*, and I shall take up the aspect of the universal legislative will in the next chapter.[269]

Before I do so, it will be helpful to sum up some of the main consequences of Kant's part on private right and the necessity of a transition to a condition of public right: the merely formally-orientated features of his civil society as well as its distinctively public character set it apart from all other societal formations. Moreover, in the same way as the state of public right does not contain any additional or different duties for human beings with regard to the matter of private right (for this, as we have seen, is the same in both), other societies, too, can be rightful in the state of nature – Kant's own account includes at least the three I have listed above, i.e., conjugal, paternal, and domestic.

Another important difference that separates civil society from the latter three is that there exists no *a priori* duty to enter any of them. One does not in any sense violate the innate right of freedom by choosing to remain without spouse, children, and/or servants throughout one's life. Kant's delineation of these societal formations merely explicates which laws of private right reason commands of us *if* we were to enter such household relations. One does, however, act completely against the innate right of freedom if one absolutely refuses to enter a civil condition.[270] Consequently, there is an *a priori* obligation to enter such a condition of distributive justice (cf. the postulate of public right). The reciprocity of any law means that, if this condition is in fact being established (or already exists), others can rightfully demand that you either obey its laws and authorities or that you leave the premises.[271]

However, the role of the state of private right is not exhausted by the necessity of a transition from this state to public right. On the contrary, private right promotes the need for a

[269] Nevertheless, it can already at this stage be affirmed with Kant (and Hegel) that, in purely normative terms, the rights claimed in the condition of mere private right are justified precisely and exclusively as the anticipation of a future rightful order under the public and universal legislative will of all. Without this latter aspect, the first acquisition is merely the factual *uranfängliche* (primitive) and not the normative *ursprüngliche* (original, cf. e.g. 6:259). In short: no private rights can be held as rightful without reference to a future public condition.
[270] Cf. Kant's comment in §41: "es kann auch im Naturzustande rechtmäßige Gesellschaften (z. B. eheliche, väterliche, häusliche überhaupt und andere beliebige mehr) geben, von denen kein Gesetz a priori gilt: 'Du sollst in diesen Zustand treten', wie es wohl vom *rechtlichen* Zustande gesagt werden kann, daß alle Menschen, die mit einander (auch unwillkürlich) in Rechtsverhältnisse kommen können, in diesen Zustand treten *sollen*" (6:306).
[271] On this understanding of an enforceable duty to leave the state of nature as Kant's non-voluntary ideal of political obligations, as opposed (for instance) to a Lockean voluntarist ideal of the same, see Varden (2008).

civil condition. Both the matter of private right and the intersubjective rights model developed there remain the same; initially, it is 'only' the formal state of affairs that changes. In its lack of public authority, the state of mere private right is a condition that is identical in principle with the lawless state of nature: adherence to, and assurance of rights claims, remain nothing more than the highly fluctuant and subjective right of the stronger. But in contrast to the state of nature, the state of mere private right prepares the ground for the future establishment of a rightful order in its anticipation of this condition. Accordingly, as a matter of fact, the state of private right with its postulate of practical reason (*lex permissiva*) reveals itself as a necessary, transitory stage of preliminary or provisional (i.e., still inconclusive) right, situated between a pure state of nature and the state of public right. Nevertheless, normatively speaking, it is only justified in light of its anticipation of the latter condition of public and conclusive right.

As Ripstein puts it, the state of mere private right may establish rightful relations of private right, but the condition itself is nonetheless normatively flawed. Actions in that state are grounded only in unilateralism, they fail to provide assurance of their reciprocal validity, and they are also indeterminate with regard to a possible disagreement about their particular application. Ripstein correctly states that these are structural defects that individuals in the state of nature cannot correct. Confronted with the reciprocity that is established by reason, if any rights claim towards the Other is be lawful, the provisional rightful order of private right recognises that it ultimately fails to rely on means of right rather than might. In its inadequacy to overcome its own structural defects, it promotes the postulate of public right: you ought to enter the civil condition of the rule of law.

3. Public right and its legal structures

For Kant, the rule of law is strictly necessary, and is required by practical reason to provide the only normative framework within which rights claims can be posited, enforced, as well as determined according to universal laws of freedom. As he points out in §44, without a state of public right, there is not necessarily a state of injustice; nevertheless, we are in a state that is devoid of justice, "ein Zustand der *Rechtlosigkeit*" (6:312). Qua embodied beings who occupy a place within the time-space continuum, we are bound to intervene in the freedom spheres of others as soon as we exercise our external freedom; but Kant holds that we qua rational beings nevertheless can solve the structural normative problems inherent to any mere subjective use of freedom. However, as I have emphasised in the previous chapters, morality cannot solve this, nor can private right. In the last chapter, I investigated the form of private right regarding reciprocal rightful relations, and my conclusion was that the provisional right established here was in need of a specific condition of public right – the rule of law – in which particular rights claims could be conclusively upheld.

For our further deliberations, it is imperative to keep in mind Kant's insistence that the state of public right does not differ from the state of private right in terms of the structure of what is mine or yours. The form of what can be mine or yours is still related to the three facets of private right – private property right, contract right, and status rights. It is, as the following quotation indicates, another feature that is central to the specific public character of the civil condition of public right: "Denn der Form nach enthalten die Gesetze über das Mein und Dein im Naturzustande ebendasselbe, was die im bürgerlichen vorschreiben, so fern dieser bloß nach reinen Vernunftbegriffen gedacht wird: nur daß im letzteren die Bedingungen angegeben werden, unter denen jene zur Ausübung (der distributiven Gerechtigkeit gemäß) gelangen." (6:312 f.).[272] Public right thus (to cite the English translation) "provides the conditions under which these laws are put into effect" (Kant 2009: 456). It is thus indubitable that he does not overlook the aspect of distributive justice; on the contrary, it plays a pivotal role in his entire discussion. However, the task of his public right investigation is not to implement distributive (or, for that sake, redistributive) justice as concrete measures or direct policies, but – as the focus of the sections and remarks in the public right part shows – to designate the conditions under which distributive justice can legitimately be exercised.

I have already alluded to one definition of public right in its distinction from private right, as this was indicated in the table of division. Unlike the latter, the sum of the laws

[272] This corresponds to the main claim of the passage in §41, already quoted, about how the duties and material of private right as such are the same in the condition of public right.

contained in public right has to be promulgated in order to be rightful. In its more elaborate version in §43, Kant defines public right as "[d]er Inbegriff der Gesetze, die einer allgemeinen Bekanntmachung bedürfen, um einen rechtlichen Zustand hervorzubringen". This is, in turn, equivalent to "ein System von Gesetzen für ein Volk, d. i. eine Menge von Menschen, oder für eine Menge von Völkern, die, im wechselseitigen Einflusse gegen einander stehend, des rechtlichen Zustandes unter einem sie vereinigenden Willen, einer *Verfassung* (constitutio), bedürfen, um dessen, was Rechtens ist, teilhaftig zu werden" (6:311). Accordingly, the people – or, in its international dimension which I will return to in part II, a multitude of peoples – is in need of a system of laws (a constitution) in order to take part in what is or can be laid down as right. Ultimately, as we will see, this constitution must at the state level be republican. A particular interest of this chapter will be to investigate the principles of this pure republic that he describes (with regard to state law) as "der letzte Zweck des öffentlichen Rechts" (6:341).

The internal relationship between the three constitutents of the legal framework[273] that Kant establishes to ground a consistent model of rightful relations both within and beyond the singular nation-states will accordingly have to be explored further in part II. The object here is to clarify the internal relationship of the central constituents of *Staatsrecht* as such – the rule of law within the state. In this context, it will become evident that also the principles of public right are grounded exclusively in the concept of freedom. Consequently, the sections of public right are in their entirety devoted to the question of how external freedom can be exercised in a conclusively rightful manner. For Kant, as we will see, this is only possible under the rule of law of the sovereign state. This is characterised by a threefold public authority that possesses supreme legislative, executive, and judicial competences to grant each individual both private and public autonomy according to a universal law of freedom. What this legal construct more precisely entails, will become clearer during the course of my investigation.

I shall begin with a brief overview of the pure principles of right that Kant assigns to the civil condition. His approach is characterised by the emphasis on almost entirely formal, structural aspects of the rule of law. Central to the discussion here are the normative concept of sovereignty and the contractual model he develops in his model for the legitimate rule of law (3.1). His purely structural approach becomes increasingly evident in the next subchapter on the principles of *Staatsrecht.* All the remaining sections of the public right are primarily devoted to meticulous deliberations on the *trias politica* of the rule of law, something which we today would regard as a principle of the separation of powers (3.2). The discussion will

[273] These are, of course and as referred to earlier, the three dimensions of *Staats-*, *Völker-*, and *Weltbürgerrecht*, all of which are required to fully realise the legal framework and thereby also the innate right to freedom.

show how his philosophy of right is exactly that, a philosophy of right, not a political theory, since it crucially 'only' designates the structures and procedures of rightful rule of law, rather than the actual content of laws. This procedural understanding of public right will be further explored in an examination of what the republic (with its representative system of the people), which he explicitly holds to be the only rightful constitution, can be said to contain (3.3).

Although (or perhaps because) the pure republic Kant envisions may seem to be of an exclusively formal character, there is also a need to consider another feature that he discusses at length, namely the role of and the right to a public (and private) use of reason within the civil union (3.4). Despite the autonomy of the citizens of a republic to posit those reasonable statutory laws that they want, there are also, as we will see from his General Remark, a few specific rights and duties that all states have an *a priori* obligation to guarantee (3.5). Finally, I consider his argument for the necessity of including a twofold dimension of international law, to complement state law by completing the threefold juridical framework of public right (3.6).

In the process, I will argue both for and against common strands in the contemporary Kant debate. I seek to underpin the fairly uncontroversial reading that his condition of public right is necessary in order to realise both the private and the public rights of all individuals, and that these rights follow entirely from the concept of and innate right to freedom. Against a majority of Kant interpreters (e.g. Flikschuh, Kersting), however, I will defend Kant's realm of public right as laying the ground for a republican rule of law that is inherently democratic (in a contemporary understanding of the term). It is not merely based in the universalisation of law and rights claims – which thus can be conducted by the absolute monarch in the manner of a thought-experiment – but requires a reform process towards a republic where the subjects of law also must be the authors of law, as citizens, in order to establish a truly republican and also democratic state. This account of public autonomy through self-legislation as inherent to Kant's theory has in my view been woefully neglected in most secondary literature.

Before I inquire further into Kant's own writings, some remarks regarding the general textual approach are in place, especially with regard to the sections on state law (*Staatsrecht*) in the public right part of the *Rechtslehre*. As I have stated, a certain change or development is detectable in his works and suggests that his final and most coherent position on the subject is presented in this book. Consequently, it is these sections that constitute the main basis of the investigation. This is not to say that previous publications will not be referred to, only that where arguments or views can be shown to differ from one text to another, reasons will be given for why the stance he takes in 1797 should be considered as his most coherent and also

as his 'official' position. Previous texts as well as his extensive preparatory notes (including those for the *Rechtslehre* itself) will be included where I find it appropriate, to supplement the rich and highly detailed, but not always fully comprehensive reflections in the *Rechtslehre* sections. For instance, as we have seen Langer point out, the contractual model that underlies vital parts of the discussion in the *Rechtslehre* is developed chiefly in the 1793 *Gemeinspruch* essay. Therefore, we must summarily revisit this model in the first subchapter. But, as I shall show in what follows, the key to Kant's philosophy of right is found in his *Rechtslehre*, and the main emphasis will in due course be on §§45-52, although not necessarily in this order.[274]

3.1. Legitimate rule of law and the concept of sovereignty

The model of the original contract, or rather its idea, stands at the centre of Kant's philosophy of right. One can perhaps argue that, in view of its few textual appearances in the *Rechtslehre,* it is not as important as it was in the *Gemeinspruch* essay. Nevertheless, it is to the original contract and its spirit that he refers in §52, the last section of the public right part (cf. 6:340), in order to ground the legal obligation to move towards rightful relations, whether in a state of nature or in a state of law. As we will see, the contractual model is also in his final approach intrinsically linked to the basic, normative constituents of the republic. I have already referred above to the role of the original contract in the *Gemeinspruch* essay and to how Langer sees the true innovation and substantial progress of Kant's political philosophy in this text.[275] The importance and peculiarity of the original contract is certainly highlighted by Kant himself:

> Unter allen Verträgen, wodurch eine Menge von Menschen sich zu einer Gesellschaft verbindet (pactum sociale), ist der Vertrag der Errichtung einer *bürgerlichen Verfassung* unter ihnen (pactum unionis civilis) von so eigentümlicher Art, daß, ob er zwar in Ansehung der *Ausführung* vieles mit jedem anderen (der eben sowohl auf irgend einen beliebigen gemeinschaftlich zu befördernden Zweck gerichtet ist) gemein hat, er sich doch im Prinzip seiner Stiftung (constitutionis civilis) von allen anderen wesentlich unterscheidet. Verbindung vieler zu irgend einem (gemeinsamen) Zwecke (den alle *haben*) ist in allen Gesellschaftsverträgen anzutreffen; aber Verbindung derselben, die an sich selbst Zweck ist (den ein jeder haben *soll*), mithin die in einem jeden äußeren Verhältnisse der Menschen überhaupt, welche nicht umhin können in wechselseitigen Einfluß auf einander zu geraten, unbedingte und erste Pflicht ist: eine solche ist nur in einer Gesellschaft, so fern sie sich im bürgerlichen Zustande befindet, d. i. ein gemeines Wesen ausmacht, anzutreffen. Der Zweck nun, der in solchem äußern Verhältnis an

[274] This is done not only for presentational purposes, but also because of obvious incoherencies in the original text. Bernd Ludwig is in my opinion quite correct in his rearrangement of the public right part; the chronology and thereby the reading of the sections flows much better with his suggestion to restructure them as follows: 45, 48, 46, 49 (which again should be internally divided between the second and third paragraph to form two separate sections), 47, 51, 52. (For his arguments for this rearrangement, see Ludwig (2005: 75 ff.).) His proposal to turn §50 into an additional remark F in the *Allgemeine Anmerkung* and place this in its entirety after §52 is also quite sensible. I will briefly return in later passages and footnotes to the advantages of a restructuring of the chronology of Kant's text. For my references to the text in this dissertation, however, I will still use the original numbering (e.g. §48 is still §48 even if Ludwig renumbers it §46 in his rearrangement of the sections).

[275] Cf. section 2.3.b) of the prologue.

> sich selbst Pflicht und selbst die oberste formale Bedingung (conditio sine qua non) aller übrigen äußeren Pflicht ist, ist das *Recht* der Menschen *unter öffentlichen Zwangsgesetzen*, durch welche jedem das Seine bestimmt und gegen jedes anderen Eingriff gesichert werden kann (8:289).

This passage nicely sums up his main line of argument thus far with regard to the strict duty and necessity of entering a civil condition, which in turn (in its idea) is based on the said contract. But it also points to a dual feature within the model that will be elaborated primarily in the *Rechtslehre*, rather than in the *Gemeinspruch* essay. In its execution (*Ausführung*),[276] as Kant writes, the original contract has much in common with other contractual social models; the difference lies first and foremost in the principle of its institution (*Prinzip seiner Stiftung*). This dual feature will later be interpreted as a tension inherent to the legal institutional order *per se* (something which agrees with the predominantly structural approach of the *Rechtslehre* sections), whereas the 1793 discussion of the original contract to a much larger degree takes on an individualistic direction or, at least, cannot be said to satisfactorily elucidate the internal construct of the civil condition.[277] The discussion in the *Gemeinspruch* is, nonetheless, also of great significance, and I will examine its rudimentary features (as well as parts of the peace essay) in this subchapter.

I have already pointed to Langer's claim that one of the fundamental insights of Kant (and of Rousseau) is that the concept of a contract itself rules out the possibility of an *ex ante* hierarchy between the obligators; as legal persons, the subjects of law must be of equal right to those whom the contract instates as their masters. It is the contract itself that constitutes the juridical hierarchy (and the rightfulness of all other rights claims); this does not and cannot be antecedent to entering the contract. But, as I have emphasised above, it is neither possible nor necessary to prove this as a fact, and on this point, Kant (as well as Rousseau and Fichte) will depart from traditional natural rights doctrine. The normative concept of the original contract grants the validity of the actually existing legal order, but merely as the precondition for a *de facto* realisation of its own normative principles through legal reform, not through revolution.

Considered in this way, the fact of the legal order reveals itself as exactly that, i.e., a fact. But the existing legal order is nonetheless of indispensable normative value, so to speak, because it is the substance in which the gradual process of normative reform can be realised in the first place. As I also underlined in the prologue, an exclusively moral reading of *Recht* cannot grant this 'normative value' to the factual dimension. And contrary to the opinion of a

[276] Gregor's translation here reads 'application', which downplays the inherent reference to the executive power.
[277] My discussion of this, as announced in the introduction to this chapter, will be made in I.3.2 and I.3.3.

number of Kant scholars,[278] this morally independent character of *Recht* is not problematic with regard to his moral or his legal philosophy. It is precisely this that keeps the two spheres autonomous, and thereby both theoretically and normatively coherent.

Kant's endeavours with regard to a practical realisation of theoretical principles hence take the shape of a reform process of *de facto* given conditions.[279] Any concern one might have with reference to the 'metaphysical' character of his philosophy of right can, I suggest, be alleviated in this way, since it 'only' seeks to realise normative principles that are and must be distinguished from the mere factual conditions at the level of theory.

Compare here, for instance, Kant's footnote claim in the preface to the *Tugendlehre* that one who is versed in practical philosophy (*ein der praktischen Philosophie Kundiger*) is not thereby automatically a practical philosopher: "Der letztere ist derjenige, welcher sich den *Vernunftendzweck* zum Grundsatz seiner *Handlungen* macht, indem er damit zugleich das dazu nötige Wissen verbindet: welches (…) aufs Tun abgezweckt ist" (6:375).[280] Once again, we recognise that Kant regards practical philosophy as a theory of rational action, not just of rational principles – although, of course, these principles must be properly delineated before it is possible to act in accordance with them. And in relation to the realm of right, they appear to be located in a specific construct of a distinctively public form of *Recht* or the rule of law – a legal construct that in time will reveal itself as a pure republic, based in the original contract.

We will see below that Kant achieves this only in the *Rechtslehre*. Nevertheless, the basic structural framework of *Recht* is far from absent in the *Gemeinspruch* essay (or in the peace essay). It is certainly present in a form that is not too different from its final formulation

[278] As I have emphasised above, most commentators who belong to the so-called derivationist position must be said to fall into this category.

[279] See here also Plato's conception of justice as distinctly 'anti-metaphysical' in book IV of the *Republic*, where Glaucon and Plato precisely in their search for justice suddenly realise that it has been "rolling around at our feet from the very beginning, and we didn't see it, which was ridiculous of us. Just as people sometimes search for the very thing they are holding in their hands, so we didn't look in the right direction but gazed off into the distance" (432d-e). This means that, for Plato and for Kant, justice is not allocated to a metaphysical realm as such. Justice is found and realised in the search for it, in the practical realisation of normative principles within this already given set of factual conditions, in the movement towards the republic that is to be attained.

[280] On the basis of the rest of the footnote, one can perhaps argue that one becomes a true practical philosopher only in the realm of ethics, since there exists only here is a strict necessity to make "den *Vernunftendzweck* zum Grundsatz seiner *Handlungen*". This is in one sense correct, of course, but to turn this into an argument for any superiority of ethics over legality is incorrect for at least two reasons. First, as I argue in this thesis, Kant seems to claim that a full realisation of the moral law in terms of morality (or ethics) cannot be expected without a rule of law within which ethical obligations can be actually realised. (Again, I do not claim that this makes legality superior to morality, but rather that they must be considered equal and complementary in the way indicated above.) Second, Kant makes it perfectly clear in the footnote that legal obligations, contrary to ethical ones, can be fully accounted for at the level of theory. For Kant, right (but not ethics) can "bis zu den subtilsten Fäden der Metaphysik ausgesponnen werden"; moreover, "auf der Wage der Gerechtigkeit [kann] das *Mein* und *Dein* nach dem Prinzip der Gleichheit der Wirkung und Gegenwirkung genau bestimmt werden und [muß] darum der mathematischen Abgemessenheit analog sein" (ibid.).

four years later. And in contrast to the peace essay, there are even preliminary definitions of both *Recht* as such and of public right, neither of which deviates much from the definitions Kant makes in the *Rechtslehre*.[281] But a thorough explication of the central constituents of *Recht* is not found in this essay; in particular, the lack of specification regarding the internal relationship between the legal structures themselves[282] and between legality and morality is striking. To revisit my criticism of Busch's too hasty conclusion about the stability of Kant's philosophy of right during his writing career: in view of the fact that central concepts such as legality, property (or even private right in general), sovereignty, separation of powers, etc. are not properly designated before the *Rechtslehre*, one can hardly be satisfied with any reading of Kant's legal and political philosophy that fails to make an in-depth analysis of his last major remarks on this topic.

Nonetheless, the *Gemeinspruch* essay indicates the first clear shift in Kant away from a primarily moral reading of the political domain, and it prepares considerable ground for later deliberations in the peace essay and the *Rechtslehre*. As I have already noted above, he rejects here *inter alia*: a) the possibility of an actual right to resistance to what are perceived as unjust state laws (a right that natural rights proponents at the time often attempted to justify); b) the consistency of any attempt to bring the principle of happiness in by the backdoor of a legal argument; c) Hobbes' positivist interpretation of the rights of the people against the right of the head of state, and his overall concern; d) the claim that what holds true in theory has no practical implications. Despite their inconclusive manner, his further remarks in the chapter on state law, most of them linked directly to the contractual model itself, nevertheless make highly interesting reading, especially with regard to their indication of the further direction of Kant's line of thought.

To take only one example: the three above-mentioned features of the civil condition that Kant holds to be *a priori* principles of it – freedom, equality, and independence – are vital to his discussion of the legitimacy of the rule of law and consequently appear more or less[283] unchanged in his later writings too, as fundamental to the rightfulness of legislation and state

[281] These are: "*Recht* ist die Einschränkung der Freiheit eines jeden auf die Bedingung ihrer Zusammenstimmung mit der Freiheit von jedermann, in so fern diese nach einem allgemeinen Gesetze möglich ist; und das *öffentliche Recht* ist der Inbegriff der *äußeren Gesetze*, welche eine solche durchgängige Zusammenstimmung möglich machen" (8:289 f.).

[282] This relates both to the internal state construct and the three dimensions of law in the overall legal framework. I shall return in part II of this thesis to the lack of differentiation between *Völkerrecht* and *Weltbürgerrecht*.

[283] As we have seen, the crucial point is that freedom is assigned the role of the only innate right of man in the introduction to the *Rechtslehre*, whereas equality and (in)dependence necessarily follow from the supreme right of freedom, cf. my discussion in subchapter I.1.2. The three principles are accordingly upheld, but there is a certain hierarchical understanding of them that prevails in the last and most important work on the topic.

action. More important, however, is the admission that any right or rights claim with regard to something external in the world is in need of positivation under the coercive laws of the state, in order to be consistently and rightfully upheld. Kant makes this unmistakably clear: "– Alles Recht hängt nämlich von Gesetzen ab" (8:294).

Thus, rights and rights claims can and necessarily must be united under one sovereign public will of universal legislation, in order to be rightfully realised; and an existing, *de facto* juridical order is the only legitimate vehicle for the effectuation of these laws (hence Kant's rejection of any right to popular resistance in natural rights theory) as well as their possible rightful reformulation (hence his later rejection also of Hobbes' positivistic approach). Kant is adamant on these points: there simply are no *de facto* rights in a state of nature in which also all moral, ethical, and/or social relations find themselves. Yet there can be no right, under the state of law, to resist the head of state. This seemingly positivist reading of rights and rightful relations is then countered by his response to Hobbes that the people does have its inalienable rights against the head of state (although they cannot be of a physical-coercive kind).

A clarification of this latter, apparently paradoxical claim is not given in its entirety in the *Gemeinspruch* essay, and we have to wait for the discussion of public right four years later before Kant gives a more elaborate account. There is still, at this point, a clearly recognisable shift of perspective towards the legal preconditions of rightful relations in the external world, and in particular, one aspect of the rightfulness or legitimacy of the legal order is highlighted. In connection with his critique of Hobbes, Kant discusses the relationship between the subject of law and the head of state, and subsequently singles out the onesidedness of Hobbes's conception of this relationship as the primary normative shortcoming of his theory. Although Kant is adamant about the inalienable rights of the subjects of law (i.e., the people) against the head of state, it is as yet not entirely clear what, more precisely, these inalienable rights of the people are. He correctly reiterates that they cannot be coercive in character, since this would undermine the legal relationship of subjects of law towards the supreme power of the state, which is no longer sovereign if the people (or anyone else) be granted a right to use coercion against it.[284] But any further explication about what these rights might be still remains rather vague and inconclusive.

A first attempt to delineate the nature of these inalienable rights suggests that a right to a public use of reason must be allowed in some manner, since it cannot be expected or

[284] For this, as we saw in the chapter on the natural rights proponents' call for such a statute, would in principle be "ein *öffentlich konstituierte* Gegenmacht" (8:303), a construct that again would need a third party to decide on whose side right lies between the designated head of state and the people. Kant applies this state of affairs to the much celebrated English constitution of 1688, which he clearly thought was despotic (ibid.; 19:605 f.).

admitted that the *de facto* head of state could never err or be ignorant in some single instance. As long as one respects and honours the state constitution within which one lives, it must be permissible to publicly voice one's opinion in relation to the perceived injustice of the ruler's arrangements (*Verfügungen*) towards the commonwealth (*das allgemeine Wesen*). Kant seems to subscribe to Hume's remark that revolutions are never initiated only as a result of people reading books, when he makes a differentiation between written and spoken words to instate "*die Freiheit der Feder* [als] das einzige Palladium der Volksrechte" (8:304).[285] This right of the people to publicly assess the arrangements of the supreme power also leads to Kant's first postulation of a universal principle for the assessment of the validity of what is laid down as law: "*Was ein Volk über sich selbst nicht beschließen kann, das kann der Gesetzgeber auch nicht über das Volk beschließen*" (ibid.).

This intentionally anti-paternalistic formulation[286] is nevertheless still not connected to the overall theory of right (nor can it be said to immediately follow merely from the freedom of the pen as the safeguard of the people's rights). It is, as Kant himself also admits, a purely negative principle for the possible assessment of rightful legislation, a principle that is further and positively developed in the peace essay and, above all, in the *Rechtslehre*, along with a fully elaborated, comprehensive doctrine of right. At this time, however, he has not presented a solution to the problem of how to reconcile this formulation of the people's inalienable right to freedom with the still unilateral will of the *de facto* head of state, who still, with the law in hand, decides on both the implementation and the interpretation of any such legal standards. Nonetheless, some terms have now been brought into play with regard to the rule of law and its arrangements, and we are well-advised to take notice of these. In particular, this concerns those terms that are related to a proper designation and identification of who can lay a rightful claim to be the true sovereign of the state.

Closer attention to the disagreement with Hobbes in the *Gemeinspruch* essay reveals a great (and at least at first sight, quite puzzling) number of terms employed to designate the sovereign ruler or head of state. It is not always immediately clear from the text what exactly

[285] This exact formulation is not repeated in later publications, but it clearly highlights the role and importance of a public use of reason in Kant's general argument on political philosophy, as we also will see in what follows.
[286] Perhaps it accords with the development of Kant's philosophy of right that even if it is intentionally formulated as an anti-paternalistic principle, it still can be argued that it in fact still is paternalistic. As we will see again below, the purely negative character of the *Gemeinspruch* formulation prevents a proper, formal-legal exclusion of rulers, merely applying this principle to political practice, and thereby does not rule out a paternalistic legal system. Maus, in an earlier article re-printed in the 1994 work, admits that this formulation presents the "antidemokratische Konsequenz (...) dieser obrigkeitsstaatlichen Konzession" (1994: 332) in Kant. This view is, however, not upheld in the main text and cannot be seen to be her final view of Kant (nor his own conclusive position).

Kant has in mind. (In addition, as Langer (1986: 69) points out in her examination, he seems to vary the terminology in the essay (and in the general remark of the *Rechtslehre*), depending on whether his discussion is related to the illegitimate contract figure of *pactum subiectionis* or to the original contract that he himself proposes.) In addressing the relationship between the people as subject of law (*Untertan*) and its ruler in the 1793 essay, Kant uses no less than sixteen different terms for the latter.[287]

It would, however, be wrong to attribute the sheer quantity of different expressions used for the ruler of the state to terminological negligence on the part of Kant. Although his vocabulary is not entirely unambiguous at this stage, there are nonetheless clear indications of subtle differences at work. I cannot speculate here whether this ambiguity stems from a not yet fully fledged theory (and perhaps also from a legitimate fear of censorship),[288] but at any rate, a crucial distinction is being drawn between the different state offices, a distinction most noticeably present in the relationship between the legislative and the executive branches that he starts to investigate. For instance, the term *Staatsoberhaupt*[289] seems to be exclusively reserved for the executive power of the state, qua "Vollzieher" (8:292) of public law, through which "aller rechtliche Zwang allein ausgeübt werden kann" (8:291). Accordingly, the head of state is excepted (*ausgenommen*) from the role of subject of law that befalls everyone else.

But although physical coercion cannot rightfully be imposed upon the executive state office, Kant does not identify this with state sovereignty. He already reserves this term in the *Gemeinspruch* essay for the supreme legislative authority, since it is the legislature that lays down the laws which bind the action of the state government and administration in the next instance. The sovereign is, as he puts it in a highly remarkable footnote on the constitutional order of the aristocratic city-state Venice, "gleichsam unsichtbar; er ist das personifizierte Gesetz selbst, nicht Agent [that is, legislator and not the acting, executive head of public administration]" (8:294). So whereas it is the executive office that preserves the legal order in its sole capacity as the authorised enforcer of any legitimate use of coercion in each particular

[287] These are, in chronological order: *Regierung*, *Beherrscher*, *Oberhaupt*, *Schöpfer/Erhalter des gemeinen Wesens*, *Staatsoberhaupt*, *Oberhaupt der Staatsverwaltung*, *Souverän*, *gnädiger Herr*, *Gesetzgeber*, *oberste gesetzgebende Macht*, *Ober*, *Oberherr*, *Landesherr*, *Monarch*, *oberster Befehlshaber*, *die oberste Gesetzgebung*. (This omits the much-discussed *Despot* and *Tyrann*, terms that are used rather with reference to the structural arrangements of the constitution itself, and are not a description of the state office(s) as such.)

[288] Cf. my remarks on that issue in the introduction.

[289] As in Gregor's translation, I will from now on consistently use the term 'head of state' for the executive, or, which amounts to the same, the despotic sovereign power in Kant's legal framework. When it is unclear whether he speaks of legislative or executive power (or even both), I will employ the term 'supreme power of the state'.

violation of the public laws, sovereignty seems at this stage to be located in the quasi-invisible legislative power to posit universal laws.[290]

But to whom, more precisely, does the legislative power of the state rightfully belong? This is not perfectly clear in the 1793 essay. (I will come back to this in the next subchapter, with a discussion of some key formulations.) At first glance, it may appear that the entirely negatively worded definition of the universal principle of the people's right to publicly assess the validity of legal norms through the freedom of the pen turns the whole legislative process in Kant into a potential thought-experiment. This is indeed a common interpretation of the perceived lack of a democratic foundation of his theory;[291] on this reading, the *de facto* sovereign is in his or her perfect right to carry on the performance of the state office(s), at least as long as the laws *could* have been given by the people. The decisive factor for the legitimacy of the rule of law is then that these laws must be posited *as if* an enlightened public sphere of responsible citizens could have given them its support; it is not necessary that this should be the actual case. Although I will later attempt to demonstrate that such a line of argument cannot be taken to be Kant's final formulation of his realm of right, it is admittedly not without some merit and textual support, *inter alia* because the main and hence also most fundamental strain in his theory is not related to the people's *de facto* consent to the laws, but rather to the separation of the two branches.

The discussion of the internal relationship between the legislative and executive of the state takes on a more prominent place in the elucidation of the basic republican principles advocated in the peace essay. The well-known division between a republican and a despotic form of government (*Form der Regierung*, *Regierungsart*) is in its entirety related to the key question whether the state knows this distinction as a matter of principle: "Der *Republikanism* ist das Staatsprinzip der Absonderung der ausführenden Gewalt (der Regierung) von der gesetzgebenden; der Despotism ist das der eigenmächtigen Vollziehung des Staats von Gesetzen, die er selbst gegeben hat, mithin der öffentliche Wille, sofern er von dem Regenten als sein Privatwille gehandhabt wird" (8:352).

It is also in this context that Kant brands democracy in the real sense of the term ("im eigentlichen Verstande des Worts") as a necessarily despotic form of government, since in this system the people would possess both legislative and executive authority. It is, I believe,

[290] This indication of the universal and the particular as a possible means to conceptually separate the two branches will be further developed in the next subchapter, where we consider their final formulations in the *Rechtslehre*. (In the following, the term "sovereign" is accordingly reserved for the legislative power, although "sovereignty" can be used for the entire (or parts of the) state apparatus in its capacity as supreme state power.)
[291] Even Kersting, whose 1984 analysis I have subscribed to on other key points, is a proponent of this view in a later article (cf. Kersting 1992). This must also be said to be the position taken by Habermas (1998); see below.

premature to interpret this latter statement as proof of the irreconcilability of his philosophical thought with a present understanding of democracy; and as I will argue in later reflections on this topic, it is well wide of the mark.[292] Kant's insistence on making a conceptual disjunction between democracy and the republic (with a representative system of the people), which he regards as the only state model consistent with right is, as the next paragraph clearly reveals, initiated in order to distance his own republican model from the only democracies the world had seen at the time, namely the ancient, non-representative Greek democracies.[293]

In addition to these functional criteria for the form of government that Kant introduces in the first definitive article of the peace essay, we also have the more pragmatic question of how many physical persons, to quote Gregor's translation, "possess sovereign power". This corresponds to the form of sovereignty (*Form der Beherrschung*, *Staatsform*), and can be one (autocracy), some (aristocracy), or all (democracy). Kant underlines that the question of how many persons form the top of the state hierarchy is not decisive for the legitimacy of the rule of law; it remains up to each state to adopt, according to contingent factors, the form that is most conducive to the promotion of rightful relations. This slight arbitrariness is certainly not the case with the choice of form of government: "Es ist aber an der Regierungsart dem Volk ohne alle Vergleichung mehr gelegen, als an der Staatsform (wiewohl auch auf dieser ihre mehrere oder mindere Angemessenheit zu jenem Zwecke sehr viel ankommt)" (8:353).

I return below to the various advantages and disadvantages that Kant still attaches to the three different state forms, but at this stage of the presentation we must look at other, more pressing questions. I have already referred to the vast number of terms that he uses for the supreme power of the state; we have seen that although the agency of this power is located in the executive, state sovereignty is still identified with the role of the legislator. One must therefore be very careful about laying too much emphasis on the term "sovereign" as this appears in the English translation. When the translation speaks of the "form of sovereignty" regarding the number of physical persons who "possess sovereign power" (Kant 2009: 324), it obscures vital nuances in Kant's terminology, since it is not clear to which state power it actually refers. As I have noted, Kant uses "Form der *Beherrschung*", "Staatsform", as well as "Staatsverfassung" for what the translation refers to as "form of sovereignty"; furthermore, to

[292] On the contrary, I will argue that Kant's republic in fact supersedes current democracies in a normative sense.
[293] The passage reads as follows: "Keine der alten sogenannten Republiken hat dieses [repräsentative System] gekannt, und sie mußten sich darüber auch schlechterdings in dem Despotism auflösen" (8:353). Admittedly, Kant refers to these as so-called republics, not democracies, but it is obvious from the discussion that he thinks of these as democracies without a representative system, i.e., that the citizens perform both the legislative and the executive functions of the state, which thereby turns despotic. On his reference to the political system of (some) Greek city-states as inherently despotic in this sense, see also his remark on this passage in the preparatory notes to the peace essay: "– Die Griechen kannten nicht das repräsentative System" (23:167).

"possess sovereign power" is in the original: "die Herrschergewalt besitzen" (8:352 – this is thus yet another new term related to the supreme power of the state).

None of these terms is necessarily linked to what Kant elsewhere refers to as sovereign power or sovereignty as such. We must correspondingly wait before drawing any conclusions regarding the details of the structural framework that Kant proposes for the legitimate rule of law, until the legal principles that are outlined in the *Rechtslehre* have been further examined. The rather short and limited presentations in the *Gemeinspruch* and peace essay that I have referred to in this subchapter are indeed instructive, but they are by no means sufficient for a proper understanding of his realm of right and its principles of state law.[294] As will become apparent when I now turn to their subsequent formulation in §§45-52 of the *Rechtslehre*, the remarks in earlier works make proper sense only in light of the more systematised sections of 1797.

3.2. The principles of *Staatsrecht*

Kant's principles of *Staatsrecht* relate almost in their entirety to the internal, legal relationship between various necessary and necessarily institutionalised state powers. These principles do not impose a specific rights conception on the legal subjects, but instead delineate and allocate the authority of the people and the different state institutions to posit, apply, and enforce the natural and statutory laws and rights of man in an autonomous political community. As I shall show in what follows, Kant's conception of both legal norms and the republic that guarantees and grants these will reveal his highly complex, but rich, modern, and democratic philosophy of right. If this reading is correct, we must regard and accordingly endorse his reflections as a profoundly important and inspirational contribution to normative theory about democracy, political theory, and the rule of law both within and beyond each separate state.

I will here disagree to some extent with prominent interpreters of Kant's *Rechtslehre* such as Bernd Ludwig and Wolfgang Kersting,[295] since I consider the principles of public law

[294] As Kant concludes in the chapter on state law in the *Gemeinspruch* essay (which primarily addresses the contradiction entailed by according theoretical coherence but no practical consequence to a doctrine of practical philosophy): in order to know what is right, there must be developed a complete theory of its *a priori* principles. Whether or not it is possible to elaborate this is left to the rational construction of such a theory, not the limited remarks of the *Gemeinspruch* (and peace) essay: "Gibt es aber in der Vernunft so etwas, als sich durch das Wort *Staatsrecht* ausdrücken läßt; und hat dieser Begriff für Menschen, die im Antagonism ihrer Freiheit gegen einander stehen, verbindende Kraft, mithin objektive (praktische) Realität, ohne daß auf das Wohl- oder Übelbefinden, das ihnen daraus entspringen mag, noch hingesehen werden darf (wovon die Kenntnis bloß auf Erfahrung beruht): so gründet es sich auf Prinzipien a priori (denn, was Recht sei, kann nicht Erfahrung lehren); und es gibt eine *Theorie* des Staatsrechts, ohne Einstimmung mit welcher keine Praxis gültig ist" (8:306).

[295] Cf. Ludwig (2005 in particular), Kersting (1992 in particular). In these works, Ludwig and Kersting are more oriented towards the private right part, but they offer a more balanced and accurate presentation in other

not merely as normatively required to protect the aspect of private right from the defects of the state of nature, but as principles that are far from being exhausted by such a reading. The principles have a specific public task – *inter alia* with regard to distributive justice – which clearly goes beyond the more or less exclusively protective role of private right relations that the above scholars' reading can be said to imply at the state level.[296]

My argument is that in his delineation of the internal structural arrangement of the rule of law in the state, Kant addresses the obligations and limits of legitimate state action in a way that cannot be deduced only from the part on private right. Another main (and related) task in the present and the next subchapters is to show that the republican model that Kant endorses in his philosophy of right is inherently democratic, since he ultimately locates sovereignty (i.e., legislative power) in the united will of the people, who thereby have an inalienable right to be the authors of the law with which they then comply as legal subjects. This will contrast strongly with a mainstream interpretation of his political and legal ideal as something that can be realised and exercised as a matter of a thought-experiment.[297] In doing so, I hope to show that the desired realisation of freedom in our external relations is possible for Kant only under coercive law, and that this law must be democratically enacted by the republican state.

The principles of *Staatsrecht* are formulated in eight sections in the public right part of the *Rechtslehre*.[298] Kant's five articles of the General Remark also include instructive further comments on a closer elaboration of the specific rights and duties of the state. These will be treated in a separate sub-chapter (3.5). First, however, we must clarify what the principles of public state law are and how they constitute the backbone of Kant's realm of right. As we will see, they set out to answer the question of the proper legal institutionalisation of a republican constitution that guarantees norms of equal freedom for all.

In the opening §45, Kant starts the discussion with a definition of the state: "Ein Staat (civitas) ist die Vereinigung einer Menge von Menschen unter Rechtsgesetzen" (6:313). Thus, were it not for the state, we could speak only of a multitude of persons. The people is formed

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publications; cf. Ludwig (1999) and Kersting (2007). Nonetheless, I argue on a general basis that they ultimately fail in these writings too to see the peculiarities and full democratic implications of the sections on public right.

[296] It should be obvious that I do not hereby claim that they misunderstand the distinction between private and public right in Kant, only that the peculiarities and full implications of the latter dimension do not sufficiently enter their arguments: on their reading, its chief task remains to protect the individual private rights, not to lay the grounds for true democratic activity and, to speak with Habermas, the co-originality of private and public autonomy (which I argue below is the case). Another interpretation even more slanted towards the realm of private right is found in Byrd & Hruschka (2010), to which I will return below (but mainly in part II).

[297] As referred to above, see, for instance, Flikschuh (2009: 424), Kersting (1992: 355) and Habermas (1998: 130 ff.), neither of whom is otherwise known for an underestimation of the importance of Kant's contributions to the modern rule of law and (at least in the latter case) to democracy theory as well.

[298] If we follow Ludwig's textual rearrangement, we could say nine sections, since he divides §49 on the executive and judicial authority in two (but then places §50 in the General Remark and renames it paragraph F).

only with the formation of the state, and this state is – given the definition – nothing but the union of these individuals under laws of right or freedom. That is all; there are no references to possible means or ends, particular rights or cultures. There is only the union of a multitude of human beings living under the rule of law. But, we must then ask, what are the principles of state law that make this union possible and rightful?

Kant proceeds to argue along the same lines as before. The state can be conceived in its idea if we consider only its form, i.e., its laws in their *a priori* necessity. These practical-rational laws must be held conceptually apart both from the statutory laws that also can be posited in a state and from the natural rights that we already have established as valid (i.e., the innate right to freedom and the rightful claims and relations of private right). The necessary principles of state law are concerned with the form of the legal order, a form that in turn will make it possible to posit, apply, and enforce natural as well as statutory laws in a completely rightful manner. As we shall see, the principles are more or less exclusively related to the question of the internal division of labour within the state (i.e., the separation of powers) and, accordingly, the proper allocation of rightful state and political authority.[299] The task of my discussion here will be to further elaborate these principles.

At first, Kant only postulates the strict necessity of a tripartite juridical structure within the state:

> Ein jeder Staat enthält drei *Gewalten* in sich, d. i. den allgemein vereinigten Willen in dreifacher Person (trias politica): die *Herrschergewalt* (Souveränität) in der des Gesetzgebers, die *vollziehende Gewalt* in der des Regierers (zu Folge dem Gesetz) und die *rechtsprechende* Gewalt (als Zuerkennung des Seinen eines jeden nach dem Gesetz) in der Person des Richters (potestas legislatoria, rectoria et iudiciaria) (ibid.).

As his famous analogy puts it, these three state powers, or perhaps better, state authorities are related to each other "gleich den drei Sätzen in einem praktischen Vernunftschluß: dem Obersatz, der das *Gesetz* jenes Willens, dem Untersatz, der das *Gebot* des Verfahrens nach dem Gesetz, d. i. das Prinzip der Subsumtion unter denselben, und dem Schlußsatz, der den *Rechtsspruch* (die Sentenz) enthält, was im vorkommenden Falle Rechtens ist" (ibid.).

We must wait for Kant's full line of argument regarding the separation of the three state authorities until he examines them in later sections. However, we can already at this time substantiate as a fact the earlier assumption that sovereignty, for Kant, is identified as, and identical with, the legislative authority of the state. As in his moral philosophy, legislation is the key term in its reflective, universal procedure, which holds independently of all empirical,

[299] Although Kant himself never uses the explicit term 'separation of powers' (*Gewaltenteilung*), the discussion in the relevant sections leaves little doubt that this is what he has in mind, cf. the subsequent reflections.

contingent factors. In any attempt to exercise the moral or legal law there might, of course, very well be factual hindrances that prevent a full realisation of the moral or legal action, but this aspect cannot be said to take anything away from the validity of the legislated norm in question, since that would be to adjust and subordinate normative theory to actual practice or reality, a view we have seen Kant vehemently oppose already in the *Gemeinspruch* essay.

But whereas a rightful execution and judgement of the norm in Kant's realm of moral philosophy necessarily has be left to the individual human being to verify (since only he or she, through inward inspection, can confirm whether or not the action was performed out of duty), there is in the realm of right the need for two separate, empirically tangible powers: one to act and possibly coerce in accordance with the universal legislation of the common will in relation to particular cases, and another to lay down the law as well as decide in the case of disagreement between actors (individuals or state agents) on the particular interpretation of the posited law. At this point, we begin to touch upon why the condition of public right must necessarily be conceived as a trifold legal structure.

Before Kant begins to treat the three authorities separately, he gives in §48 a brief but illuminating explanation of how he conceives the relationship between them. We should note how he describes this internal relationship as both horizontal and vertical. In this process, he eschews a checks and balance approach and an interpretation of the principle of a separation of powers that would border on totalitarianism. Kant writes that the three state authorities, qua moral persons, are complementary to, or coordinate with (*beigeordnet*), each other in their internal relationship: "die eine ist das Ergänzungsstück der anderen zur Vollständigkeit (...) der Staatsverfassung" (6:316). This co-dependence might seem to endorse an understanding of the separation of powers as a checks and balance approach that would speak against a strictly hierarchical interpretation of the principle: the authorities are equal to one another, since they together complete and form the constitution of the state: they cannot be assigned a subordinate function to one another in a power hierarchy, with one of them on top.

However, in Kant's insistence on including a vertical component in the relationship as well,[300] he rejects the idea of checks and balances as conducive to a proper institutionalisation

[300] In the end, this separates Kant from, for instance, Montesquieu's merely empirical, non-functional division of powers and, similarly, the US constitutional system of checks and balances. The latter corresponds to what Kant calls a "moderate constitution" (*gemäßigte Staatsverfassung*), which is nothing but a "Klugheitsprinzip" (6:320), i.e., pragmatically introduced to deal with a *de facto* state of affairs that, at the time, cannot be expected to adhere to the ideals of normative theory. (The line of argument here, as we will see, closely resembles his rejection of a (European) balance of power as in any way sufficient for perpetual peace (in Europe or beyond), cf. his likening of such a (later also Metternichean) construct to a "Haus, welches von einem Baumeister so vollkommen nach allen Gesetzen des Gleichgewichts erbauet war, daß, als sich ein Sperling drauf setzte, es

of rightful relations. The relationship also concerns a strict separation with regard to function, so that no authority can "usurp" (ibid.) the designated task of the other. The principle that he sees at work here will become clearer when we look at the different authorities; for the time being, we can provisionally, with reference to the analogy to the practical syllogism, safely instate the legislative power at the top of the hierarchy, since the execution and evaluation of legal norms proceed only from the major and general premise as applied to particular cases.

In accordance with the concept of sovereignty and the legal impossibility of any form of a right to resist the authorities (since the person who is in his or her right to do so would in reality be the true sovereign or authority on that particular field), Kant goes on to postulate the ideal position (or dignity) and function of the three state authorities: "Von diesen Gewalten, in ihrer Würde betrachtet, wird es heißen: der Wille des Gesetzgebers (...) in Ansehung dessen, was das äußere Mein und Dein betrifft, ist untadelig (irreprehensibel), das Ausführungs-Vermögen des Oberbefehlshabers (...) unwiderstehlich (irresistibel) und der Rechtsspruch des obersten Richters (...) unabänderlich (inappellabel)" (ibid.). Insofar as they remain true to the principles that govern them, the empirical legislator, executive and judiciary accordingly do right (or at least no wrong) in keeping their office; and no actor can in any case legitimately claim a right to overrule the authority in question. Otherwise, to repeat a basic point, this actor would be the sovereign (or there would be anarchy and no rule of law at all).

But what, more precisely, are the specific functions of the three authorities of the state, which, as we have now seen, are both horizontally and vertically aligned? And how and by whom can these powers be rightfully possessed and exercised? Kant discusses these questions (and others) in the *Staatsrecht* sections which address the legislative, executive, and judicial authorities.

a) The legislative authority

The legislative authority is without doubt the supreme power in Kant's state model. It is this authority that lays down the law (or, if one will, the premises) in accordance with which the state apparatus is bound to act. In the section about the lawgiving authority, it is immediately clear to whom he assigns this task. The opening line of §46 is as follows: "Die gesetzgebende Gewalt kann nur dem vereinigten Willen des Volkes zukommen. Denn da von ihr alles Recht ausgehen soll, so muß sie durch ihr Gesetz schlechterdings niemand unrecht tun *können*. Nun ist es, wenn jemand etwas gegen einen *anderen* verfügt, immer möglich, daß er ihm dadurch

sofort einfiel" (8:312), since it rests on empirical and thus contingent factors, instead of on principles of pure practical reason.)

unrecht tue, nie aber in dem, was er über sich selbst beschließt (denn volenti non fit iniuria)" (6:313). This formulation brings into play a number of important aspects of right.

Most vital is perhaps the definition of *Recht* as the impossibility of wronging anyone (*niemand unrecht tun* können).[301] This description does not, of course, guarantee that the *de facto* civil condition never can or will entail any kind of injustice or even abuse of state power – his model may be an ideal, but it is no chimera.[302] For Kant, the existence of injustice is always possible in legal orders, so the difficulty is therefore not primarily to constuct a perfect constitution in terms of immaculate laws and their flawless application, but rather to build a juridical framework within which any injustice is not the result of someone's direct exercise of external freedom, but something that can be attributed to the one who is wronged or, better, that can be rectified in a rightful manner, i.e., through exclusively legal, non-violent means.

This is possible only if each and every one can be seen to be the actual author of, or at least a consenting party to, the laws in accordance with which the state is governed. And this requires that the irreprehensible and sovereign legislative authority is nothing other than "der übereinstimmende und vereinigte Wille aller, so fern ein jeder über alle und alle über einen jeden ebendasselbe beschließen, mithin [kann] nur der allgemein vereinigte Volkswille gesetzgebend sein" (6:313 f.). If the legislative authority were to be located in one particular will, however omniscient and benevolent that might be, it would always be possible for injustice to be done, since actions are performed irrespective of the personal and inalienable autonomy of a concerned party. Indeed, Kant seems to hold that any ascription of legislative authority to anyone but the united and concurring will of the people would necessarily be unjust. Public laws and statutes, however pragmatically or morally correct and beneficiary they may be in their contents, are always an instance of injustice if they are formed by a particular will: they must stem from the united, lawgiving will of the people.

Naturally, this is not to say that any law that is posited by the actual sovereign will of the people, however united and concurring it is, constitutes a rightful law for Kant – he is not a legal positivist in this sense. The localisation of the sovereign authority of the state in the united legislative will of the people is still, and will always be, a rational normative principle, in accordance with which all empirically posited and enacted laws must be assessed. But this

[301] As Brunkhorst (2011: 335) says, with a reference to Maus, it would be tautological to define *Recht* (or justice) merely as the conceptual opposite of *Unrecht* (or injustice) – accordingly, it cannot be said that *Recht* is the impossibility of being allowed to wrong someone (*niemand unrecht tun dürfen*). It is rather, as I will show below, the inability to put the blame of one's misfortunes on an unequal allocation of rights to exercise one's external freedom. See also Kant's footnote in (8:350), to which I will return.

[302] Cf. his own critique of the relationship between ancient political ideals and their political prescriptions: "Die Alten hatten alle den fehler, daß sie aus ihren idealen Chimären machten. Die Stoiker aus ihrem Weisen, der als ein ideal richtig war, aber als eine wirkliche Vorschrift des Menschlichen Verhaltens thörigt" (19:96, R. 6584)).

in turn is not to say, as Kersting rather surprisingly does, that the "democratic formation of the will (...) can be simulated and replaced by the thought-experiment of universalizability" (Kersting 1992: 355). As we have seen, he certainly makes a correct point in the sense that the people cannot forcefully oust a *de facto* head of state simply because the legislative procedure at the time being is not completely developed or institutionalised and Kant would, of course, agree with Kersting's affirmation that it is "possible for nondemocratic rulers to provide just laws without having to give up power" (ibid.). Nonetheless, this is to clearly circumvent the essential aspect of the merely provisional character that Kant ascribes to all solely empirical private property or pre-republican political power.

As I have shown in my discussion of Kant's part on private right, it is necessarily permissible on a temporary basis to have and acquire external objects even prior to a *de facto* conclusive realisation of the civil condition (but, again, only insofar as possession can be united with the demands of a future state of public right). This also applies to the possession of political power, an aspect that I will address further in the reflections on Kant's executive authority: a *de facto*, non-republican ruler of the state can use the test of the universalisability of legal decisions to check their provisional legitimacy. But to claim, as Kersting's comment suggests, that such a head of state is in perfect correspondence with Kant's basic principles of *Staatsrecht,* must be considered well wide of the mark.

It is true that the postulation of a negative principle of legitimacy in the *Gemeinspruch* essay and the so-called transcendental formula of public right in the peace essay may be interpreted along the lines Kersting proposes; but (perhaps) the transcendental and affirmative principle of public right and (certainly) the elaboration of the principle of sovereignty along with other principles of state law in the *Rechtslehre* leave little doubt that Kant locates the normative dimension of sovereignty elsewhere. It belongs to the legislative authority, which in turn is located in the sovereign and united and concurring will of the people. Only through the will of all is it possible that no one can be wronged (i.e., through one particular will), since the subjects of law are the same as those who in a prior instance authorised these laws.

One might object (as Kersting presumably would), against such a localisation of state sovereignty, that this conception lays down no formal obstacle to the possibility of democratic excesses, majority rule and the like. Kant, as we shall see in his subsequent reflections, is not only highly aware of such possible instances of injustice; he also addresses them in his legal framework. Nonetheless, he will not and cannot introduce material restraints on the legislative authority without facing a dilemma: just as there cannot be any guarantee that the empirical will of the people does not posit laws that are normatively incorrect, so too it is impossible for

any other empirical state (or, for that matter, suprastate) organ provide such an assurance. The *de facto* will of the people can, of course, lay no conclusive rights claim to the entirely formal principle of sovereignty (that is, supreme legislative authority); but even less is it normatively possible for another state organ or ruler to legitimately do so.

But although the empirical will of the people can lay no conclusive claim to a rightful exercise of sovereignty, it is nonetheless the *de facto* approximation to this ideal that lends any empirical state and state procedure their legitimacy. Langer grasps this important point more precisely than Kersting, when she emphasises that the key to a correct understanding of Kant's legal framework is the continual reform process towards a realisation of the original contract and all other legal principles. As we recall from earlier disucssions, Kant's division between facts and norms exposes all merely empirical states, laws, wills, etc. as based on violence (*Gewalt*) and as analytically opposed to right (*Recht*). They are consistent with right only to the degree that they partake in and seek to realise the idea of the original contract and public law. To use Langer's phrase, the legitimacy of legal orders therefore turns "zu einem unendlichen Prozeß der annähernden Verwirklichung der Idee des Vertrags". In other words: "Die Legitimation der bürgerlichen Gesellschaft wird selbst prozessual" (Langer 1986: 56 f.).

This procedural character of the civil condition shows itself both in the approximation to the pure principles of practical reason[303] that Kant prescribes for all factual states (that is, reform, not revolution) and in the emphasis on institutions and institutional procedures within each state. Compared to Kersting, Langer places much more emphasis on Kant's normative claim that *de facto* states have an obligation to realise the rational legal principles from which they derive their legitimacy; they cannot simply remain content with a provisional realisation of legal principles. This includes not just the anticipation of a legislation based on a possible united, concurring will of the people performed as a thought-experiment (cf. the private right part), but also rational reforms in view of a gradual and *de facto* realisation of this will (cf. the public right part).

To insist on the adequacy of a thought-experiment of rightful state legislation in Kant – like we have seen Flikschuh, Kersting, and even Habermas do – and thereby legitimate any

[303] These are in turn, of course, also procedural in nature. As I already have emphasised, in both Kant's moral and legal philosophy, no particular content of any laws is antecedent to the formal procedure; it is the moral and legal procedure itself that specifies and determines the particular content of laws as an instance of the self-legislation of practical reason. But whereas for Kant, the instance of morality can only be an internal point of view that is localised within the moral individual (since he or she is legislator, executor, and judge of that which constitutes the morality of an action), his legal philosophy has an entirely external perspective on actions. Since it is concerned only with the determination of other persons' rightful use of their external freedom, this calls in the intersubjective realm for a separation of these three aspects of human agency into three institutionally established and functionally separated authorities, i.e., the separation of powers.

de facto head of state insofar as he or she adheres to that principle (which, taken in this sense, is purely pragmatic) is tantamount to making Kant an advocate of some form of paternalistic rule. This he most evidently is not, since he unambiguously describes paternalism as "die am meisten despotische [Regierung(sform)] unter allen", since it amounts to nothing but a praxis that treats citizens as children – "Bürger als Kinder zu behandeln" (6:317). Kant is in fact so uncompromising on this point that it would also be paternalistic in his eyes if the supreme legislative power of a state were to transfer its sovereignty to the people regardless of whether the latter had actually called for (or even wanted) a constitutional reform of this kind.[304] This point is not to be underestimated, since it leads us to an important distinction that has to be drawn within the domain of legislative authority.

It appears that for Kant, as a matter of legal principle, it is still possible for the *de facto* sovereign of the state – i.e., the one that as a matter of fact (according to the constitution) is vested with supreme legislative authority – to wrong the people, in whom (according to the opening line of §46, quoted above) supreme legislative authority still resides. But does not Kant contradict himself here? Does it not now seem that, after he has spent so much time and effort on establishing the necessity of a *de facto* sovereign as the supreme power of the state, this sovereign is, after all, subject to another authority that (according to his own principles) must be the one true sovereign? Kersting (1992) and Ludwig (1999) attempted to resolve this question by holding that the latter authority (of the united legislative will of the people) is only an ideal that the actual sovereign has to act in accordance with – i.e., he must always perform a thought-experiment to check whether the people too (in their idea) could have given their consent to the decision. But, at least at the level of theory, this surely generates a paternalistic account. Is there no other reading of this apparent self-contradiction that allows for another interpretation, one that is more in line with Kant's anti-paternalistic stance?

I argue that such an interpretation exists, provided that we are sufficiently aware of the distinctions that Kant draws in this context. One of these distinctions is not necessarily related to the difference between the ideal and non-ideal, but rather to the difference between facts and norms. His normative position is clear, I believe – the legislative authority of the state can belong only to the united will of the people. Nonetheless, this normative stance still requires a *de facto* state sovereign to give this idea objective practical reality. In the course of time, the

[304] This is not the comment at the end of §52, where Kant criticises Louis XVI's transfer of power to the National Assembly; this paragraph is often taken (and grossly misinterpreted) as an example of supposedly anti-democratic political currents in Kant, a critique that is voiced even by Ludwig (1999: 186). Rather, it is his comment a few paragraphs earlier, that the people themselves can (and should) refuse to accept supreme legislative power unless necessary contingent conditions are in place or available (cf. 6:340). I will return to both these comments later.

de facto state sovereign can, of course, become the united citizenry, but insofar as this is currently not the case (and because of the prohibition on revolution), the *de facto* realisation of the normative principles can only take the shape of a reform process that is normatively grounded in the original contract and the sovereignty of the people, but which always has to take the actual state of affairs (including the present sovereign) as its factual starting point.

I therefore suggest that we draw a vital distinction between the *de facto* sovereign of the state (i.e., state sovereignty) and the entirely normative concept of the united, concurring legislative will of the people (i.e., popular sovereignty). I do not pretend that this distinction is in any way exhausted by its application to this specific context. On the contrary, I will return to it and show how it proves to be most fruitful in other realms of Kant's republican rule of law too.[305] At present, however, I claim that we must distinguish between these two concepts in order to realise that Kant speaks of both in the context of legislative authority, and that he holds them to be strictly necessary. State sovereignty is required in order to constitute a *de facto* sovereign of the state, a sovereign whose legislative will cannot be subject to another *de facto* power (for otherwise, this agent would be the *de facto* sovereign of the state). However, the *de facto* authority of the sovereign is in a first instance located in, and authorised by, the normative concept of popular sovereignty. The united legislative will of the people can also become in reality the sovereign of the state through a change of the constitution, but such a development could still wrong the people; either because (as we have seen above) they do not want such a constitutional change beforehand, or, afterwards, in their particular decisions.[306] Accordingly, there will at all times be a need to uphold the distinction between the factual and the normative expressions of legislative sovereign authority.

Consequently, I argue that Kant's normative, principled argument runs something like this: the normative concept of the original contract demands that all *de facto* states move in the course of time towards a civil condition of public right in which the supreme legislative

[305] It is also recognisable *inter alia* in the distinction, drawn below, between institutionalised and non-institutionalised political authority in all realms of the state, both of which are required for rightful republican rule, as we will see.

[306] As Kant insisted, no *de facto* expression of (state) will is, as such, evidence of its rightfulness. It is always possible that even a unanimous decision may be contrary to the practical-rational principles he sets out to establish. Nevertheless, someone has to be the *de facto* sovereign of the state and, so to speak, act on behalf of the will of all (as grounded in the constitutional procedures), even if this is not in fact the case. (This theoretical problem is, of course, not solved, as is commonly done today, by a constitutional court that is allowed to veto parts of the legislation, a model which thus substitutes the functional separation of powers in Kant for a pragmatic checks and balance approach more akin to Montesquieu's 'principle'. Constitutional courts, too, are surely exposed to the same kind of criticism.) In §52, Kant describes this right to supreme legislative authority as "das allerpersönlichste Recht. Wer es hat, kann nur durch den Gesamtwillen des Volks über das Volk, aber nicht über den Gesamtwillen selbst, der der Urgrund aller öffentlichen Verträge ist, disponieren" (6:342). I will return later to both §52 and the necessity of upholding the distinction between state and popular sovereignty even in a rightful republic.

authority belongs as a matter of principle to the united and concurring will of the people. But this process does not make any immediate claim on either the state institutions or the people; and it can occur only as a reform according to the legal principles that Kant advocates in the *Rechtslehre*. In this manner, the *de facto* state of affairs, not a violent revolution, is recognised as the only rightful point of departure for a continuous process of legal and political reform. For Kant, this is the essential precondition for the realisation of a condition of *Recht*, in which the subjects of law also are the authors of law and it is correspondingly possible that no one may be wronged by the subsequent use of coercion: in their particular actions, the individuals are subject to an application of laws which they themselves, qua citizens, have accepted in a prior instance as valid for all.

In the Kantian state, in other words, the subjects of law are identical with the authors of the same laws, as subjects (*Untertan*) or citizens (*Staatsbürger*), depending on the clearly non-identical aspect of positing common laws and a future application of them to particular cases. I hold that the opening paragraph in §46 provides strong evidence that, for Kant, the people must be both the subjects and the authors of public laws, and thus be in possession of supreme legislative authority (i.e., popular sovereignty) as seen from a normative perspective. From a factual point of view, however, his principle of state sovereignty makes it abundantly clear that the people must abide by the constitution as it is (and, as we will see, they cannot rightfully meddle in the affairs of either the executive or the judicial authority). Nonetheless, the direction of the movement cannot be denied. Taken together, I believe that this theoretical legal construct for the first time provides mankind with a twofold concept of sovereignty that on the one hand grounds its normative dimension in a concept of popular sovereignty, but that on the other hand also recognises the necessity of actual state institutions (state sovereignty), an achievement for which Enlightenment philosophers such as Kant are rarely given sufficient credit.[307] In what follows, I shall underscore and develop this important claim. A brief look at his preparatory notes and unpublished paragraphs in the *Nachlass* can further substantiate this assertion.

The main line of reasoning in Kant's own commentary notes on Achenwall's textbook on natural right, which he used in university lectures, is the same as the one presented here:

[307] Maus (1994; 2011) is in my view one of the few to fully grasp the importance and novelty of this position, although contemporary philosophers and Kant scholars such as Habermas (1998) and Brandt also follow a similar line of argument. I will return to some of the key differences between Maus and Habermas' Kant reading, but I can already confirm that Habermas, as he himself readily admits (cf. Habermas 1998: 153), ultimately holds that Kant's legislative authority fails to be grounded in an autonomous, i.e., fully democratic procedure. He thus ultimately sides with Kersting and Ludwig in their understanding of Kant's republican rule as something which can be fully implemented in the manner of a thought-experiment. More on this below.

the only way to avoid wronging anyone is by locating legislative authority in the united will of the people and insisting on the sovereignty of this legal procedure. In Kant's view, this authority cannot be granted to a particular will, but only to a united, omnilateral will, namely that of the people. Otherwise, the people would have no right against the head of state and we would be back in the Hobbesian thought-figure of a self-defeating and, as we remember from Langer's critique, self-contradictory contract of subordination, a *pactum subiectionis*. On all these points, Kant is unequivocal. In reflection 7742, he writes: "*Summus imperans* muß ein uneingeschränktes Recht und die gäntzliche Gewalt haben. *Summus imperans* kan also vom Volk nicht unterschieden seyn. Denn alsdenn würde dieses gar kein Recht haben" (19:505). Similarly, in reflection 7952, his notes read as follows: "Der Souverain ist der Gesetzgeber, er kan nicht unrecht thun, also ~~muß er~~ ist er das Volk. Er kan nicht administriren, mithin nicht regiren noch richten. Denn die stehen alle unter Gesetzen" (19:563). The state apparatuses of public administration (i.e., the executive and judicial authorities) are clearly bound by the law and are accordingly placed under it. This corresponds to the vertical dimension of the internal relationship between the different state institutions, to which I have already referred.

Again, this is not to say that for Kant, the united and concurring will of the people as an actual will can do no wrong. It most certainly can, and the principle is, of course, a purely rational one. But it is therefore also the regulative principle from which all *de facto* political practice derives its legitimacy, and in accordance with which it must be evaluated. Perhaps the most vital thing to notice in connection with the localisation of sovereignty in the united will of the people is his rejection of the possibility that another power may rightfully interfere in the performance of the specific function of legislation. This is certainly not to advocate any absolutism in state affairs; it is simply to recognise that a formal authorisation of another state power that could limit the united legislative will of the people would necessarily constitute a new (and truly) sovereign will. And in Kant's critique of traditional natural rights theory, we have seen how this leads to an infinite regress. In the end, one will must be the sovereign, and Kant ascribes this to the united and concurring legislative will of the people.[308]

Although Kant himself does not use the term, I believe that his localisation of supreme legislative authority in the state evidently corresponds to what we today refer to as a principle of popular sovereignty (*Volkssouveränität*). In their capacity as citizens, the people constitute

[308] In other words, the rightful restriction of the will of the people cannot mean restricting the function of legislation. It must refer precisely to its application to particular cases, cf. his fundamental critique of ancient despotic democracies and the necessity of a strict separation of powers. I will consider below the two agents of the state, the executive and judicial authority – these apply the common will to particular cases and hence act in the world in a sense that the legislative authority is clearly forbidden to do.

one political community that formulates and posits the individual human rights to which they from then on are subjected or subordinated by the state apparatus. These are the innate right to freedom (from the introduction of the *Rechtslehre*), the private rights relations (from the first half of the work), the principles of *Staatsrecht* (in the public right part), *and* any statutory law which does not contradict the natural, *a priori* recognisable rights of mankind, taken in their distinctively innate, private, and public variants. The latter aspect, i.e., the public exercise of popular sovereignty within the legal arrangements of the sovereign state, is, then, the concrete expression of public freedom by an autonomous political community under the rule of law.

As citizens, the people thereby reciprocally grant themselves rights to freedom; but at the same time, they also confer these on themselves (qua subjects of law or private persons) as coercive laws that the sovereign state is authorised to guarantee. As I have argued above, Kant then couples this principle of popular sovereignty with the principle of state sovereignty in the legislative branch of government too, in order to realise a normative concept of sovereignty within state institutions that already are established. Again, this conception of rightful public relations does not at all make an immediate demand that the *de facto* state sovereign give up his/her/its power to the people. On the contrary, as we have seen, the sovereign might wrong the people in this regard and should certainly not cede power simply because the rule of law is in fact founded on *Gewalt*, rather than on *Recht*. That would be to dissolve the state, and is, of course, tantamount to anarchy. Instead, as I shall emphasise in what follows, Kant places both sides – the people and the actual sovereign – under mediate obligations to reform the state constitution and its laws according to rational legal principles.

It lies in the nature of sovereignty that there cannot be any authority that limits its exercise. This fact does not endanger the private realm; since it is precisely also this fact that has to be presupposed to ensure that no-one (not even the state) can rightfully intervene in my (or your) sphere of freedom. This sphere is constituted and guaranteed as mine (or yours) in the first place by the fact that the sovereign state is entitled to pass legislation with regard to the personal realm (which first then is conclusively mine or yours). Kant does not subscribe to a view that is common today, namely that rights can be fully formulated and even guaranteed outside a necessarily institutionalised condition of public right.[309] And in this condition, it is strictly necessary that there is a designated sovereign on top; in Kant's framework, this is the

[309] This is especially common in debates on international law. I will discuss this further in part II of the thesis.

legislative authority that posits the rights of man which the state apparatus of executive and judiciary is then authorised to apply and enforce in accordance with the letter of the law.[310]

Although it can be said that there is no actual external hindrance to the exercise of sovereignty in this sense, this does not mean that there are no formal limits to its possible employment. There are evidently internal hindrances to what can be legislated: through his establishment of the innate, private, and public rights of man, Kant emphasises aspects of our lives that we as private persons (or even as sovereign citizens) cannot dispose of even if we wanted to. Our own thoughts, morality, religion, etc. as well as the impossibility of enslaving oneself (hence renouncing the freedom of will that is necessary in order to agree upon such a contract in the first place) are aspects of the human volition that are exempt *per se* from rightful external legislation.[311] In addition, thanks to the strict separation of powers, no union of citizens can engage in a particular interpretation and enforcement of the laws to which it submits as subjects. Furthermore, the universal and reciprocal character of legislation, and of laws in general, also implies that one not only must grant every other person the rights one wants to assign to oneself. And finally, we should not forget that Kant holds that *everyone* must be able to give their rational consent, if not to the laws, then to the legal procedures according to which rightful legislation is passed and implemented. In this manner, through its laws and overall legal arrangement, the state constitution that grounds the civil condition guarantees equal freedom spheres for each and every one.[312]

Are there other features that are inherent to Kant's legislative authority (e.g. certain obligations that it has to fulfil or posit)? I will discuss this question in subchapter I.3.5, where I shall show that there are indeed specific rights and duties of a distinctively public character that the legislative authority is obliged to guarantee. However, if we stay for the time being with the entirely formal features of the state and look more closely at the relevant passages on the legislative authority in the *Rechtslehre*, we soon realise that a number of normative legal principles follow from the mere form of his overall framework. Core elements of his juridical structure – i.e., autonomy, universality, the formal authorisation of state institutions, etc. – can

[310] The nature of sovereignty thus presupposes the principle of a strict separation of powers, not some imprecise formulations of pre-state human rights that are not grounded in arrangements of positive law but that nonetheless entitle the use of force in some cases (for Kant, their rightful application presupposes precisely a *de facto* and legally accountable public authority).

[311] Cf. 19:569, R. 7975: "Dem *summo imperanti* (beherrscher, Oberherr) steht nichts frey, worüber selbst der privatwille nicht disponiren kann: (*arbitrium*), z. E. Moralität. Religion zu wählen. Sich selbst verkaufen (*contra Hobbes*). aber es steht ihm alles frey, wo ieder über sein Recht disponiren kann, *e. g.* Auflagen, Strafgesetze, Krieg, Frieden."

[312] For additional reflections on the formal impossibility that particular wills legitimately enforce their claims in Kant's legal framework, see my subsequent discussions of this in the following chapters and subchapters.

be traced back to his concept of sovereignty, understood as the supreme legislative authority belonging to the united will of the people. Also, the three key components and *a priori* pillars of his civil condition to which I have already referred (freedom, equality and (in)dependence), components that had earlier Kant discussed with reference to the state and the civil condition as such, now resurface in the *Rechtslehre* in §46 on the legislative authority (and only in this passage).

As I pointed out in I.1.3, the aspect of freedom took on a superior role as the exclusive pivot of the civil condition in the introduction to the 1797 work, since it also always implied both equal freedom and independence from the free will or choice (*Willkür*) of every other subject of law (on whom we still are mutually dependent). This superiority of freedom has not changed with the reintroduction of the three components in §46, but this once again highlights the importance of the legislative authority of the state, since the three components appear only as principles in this role, rather than in the particular instances that are governed by the executive and the judiciary. For Kant, the three components are inseparable (*unabtrennlich*) from the function of a united legislative will, and the individual member of a civil condition has to be assigned these, as a (potential) co-legislator to the supreme political will (to which he or she then is subject).

The three *a priori* attributes of the citizen in his role as co-author of the laws of the civil condition to which he belongs are described by Kant as follows:

> [Erstens] gesetzliche *Freiheit*, keinem anderen Gesetz zu gehorchen, als zu welchem er seine Beistimmung gegeben hat;[313] [zweitens] bürgerliche *Gleichheit*, keinen Oberen im *Volk* in Ansehung seiner zu erkennen, als nur einen solchen, den er eben so rechtlich zu verbinden das moralische Vermögen hat, als dieser ihn verbinden kann; drittens das Attribut der bürgerlichen *Selbstständigkeit*, seine Existenz und Erhaltung nicht der Willkür eines Anderen im Volke, sondern seinen eigenen Rechten und Kräften als Glied des gemeinen Wesens verdanken zu können, folglich die bürgerliche Persönlichkeit, in Rechtsangelegenheiten durch keinen anderen vorgestellt werden zu dürfen (6:314).

This passage and my discussion above make the first attribution of lawful freedom self-explanatory. The second attribution of civil equality does not relate, as we can see, to any

[313] I should note here the lack of a reference to replacing the legislative process with a thought-experiment (for otherwise, he would have had to write *hätte geben können*). This point is also made by Eberl & Niesen (2011: 215), who aptly demonstrate how Kant employs a subjunctive mood (*könnte*) in this context in the *Gemeinspruch* essay (cf. 8:297), but, tellingly, shifts to the indicative (*habe geben können*) in the peace essay (cf. 8:350), and is even more unequivocal in this *Rechtslehre* passage. He can thus be seen to go beyond Habermas in terms of the democratic character of the definition of the legislative procedure (although Habermas claims to eclipse Kant in the exact same regard, cf. Habermas (1998: 130 ff.).) (I will briefly discuss the similarities and dissimilarities between the two philosophies of right at the state level in I.3.3, where I will return to Habermas' allegation that Kant's theory is ultimately founded on moral-ethical presuppositions. For a helpful synopsis of the first point, see Maus (2002); for the degrees of correspondence between the two approaches at the international level, see II.2.2.b).)

material equality in the state, but to the equality of all in terms of the reciprocity of legal and political obligations: no-one stands above the law. The third attribution of civil independence establishes a criterion of the qualification for being a citizen, i.e., for being a rightful part of the legislature and hence being able to vote: one must be independent of every other person's *Willkür*. This last point is fairly straightforward: if you are dependent upon another person's will or choice for sustenance, this prevents you from forming an independent will, since the other person can be said to influence your judgement, which is not completely free. For Kant, this means that you cannot participate in the legislative procedures as such. Rather, you are regarded as a so-called passive citizen, in contradistinction to an empowered active citizen.

The remainder of the section proceeds with an indented argument on this last and most controversial issue. I will not examine here the niceties of the critique that has been raised by *inter alia* Marxist and feminist theory against Kant on this point, namely that he subscribes to a liberal-capitalist, bourgeois, and/or paternalistic theorem that makes private property based on male household dominance a precondition for participatory political rights. Such concerns, however, can be assuaged by at least three aspects that stand out in Kant's two paragraphs on the subject: 1) his own difficulties in drawing a justifiable line between being independent or not independent of another's will;[314] 2) the unambiguous acknowledgment that no one can be prevented from working one's way up from a passive to an active position and thus attaining full citizenship; and, finally, 3) the equally clear insistence that the inequality between passive and active citizens does not at all relate to their freedom and equality as human beings, only to their potential participation in the *de facto* institutionalised legislative process (cf. 6:315).

Admittedly, Kant's particular delineation can be criticised as a possible subscription to the widespread view of bourgeois society that set out to open the political realm to everyone by turning them into private property owners (and hence as an apologetic acceptance of the status quo with regard to political participatory rights, too). But one should at the same time recognise that his argument for this view is entirely related to the aspect of being independent of another person's *Willkür,* so that one can represent oneself as a juridical person. Freedom (understood as being independent of the choice of others) is thus a precondition for having what he calls a civil personality and therefore being entitled to vote. His infamous exclusion

[314] For instance, on his view, the Indian blacksmith is merely a passive citizen and not able to vote, whereas the European blacksmith is an active citizen, since only the latter "die Produkte aus dieser Arbeit als Ware öffentlich feil stellen kann" (6:314 f.), although he clearly has problems in maintaining a consistent line here and must limit himself to examples. As he had admitted in the *Gemeinspruch* essay when similarly separating the citizenry status of the barber from the wig-maker: "– Es ist, ich gestehe es, etwas schwer die Erfordernis zu bestimmen, um auf den Stand eines Menschen, der sein eigener Herr ist, Anspruch machen zu können" (8:295). Here, Kant also described the active and the passive citizen respectively as *Bürger* and *Schutzgenosse* (cf. 8:294).

of women in this regard (cf. 6:314) must, in my view, be read in light of their lack of legal independence in eighteenth-century society,[315] and should not be related to a Kantian attitude to women's nature as such. An argument of the latter kind is not found in the *Rechtslehre*, whose main argument on this point is rather that no rightful constitution can be such that it *a priori* excludes a person from the political status of active citizen.

After these notes on Kant's reflections in §46 on sovereignty as located in the supreme legislative authority, we can now move on to the two agents of the state that are subordinated to the laws given by the united and concurring will of the people. I will return to the further details of the role and representation of the legislature and to its place in his overall juridical framework when I have more clearly delineated its relationship to the administrative part(s) of the state apparatus, as this is described in the *Rechtslehre*, above all in §49. I commence with the subject of its opening two paragraphs, namely the executive authority of the state.

b) The executive authority

Despite the sometimes vast differences between their respective formulations of the principle of a separation of powers, one feature was vital for Montesquieu, Locke, Rousseau, Kant, and Fichte: they all agreed on the strict necessity of separating the legislative authority from the executive authority. In the peace essay, as we have seen, Kant had identified the lack of such a structural legal arrangement as despotic *per se*: "der Despotism ist das [Staatsprinzip] der eigenmächtigen Vollziehung des Staats von Gesetzen, die er selbst gegeben hat, mithin der öffentliche Wille, sofern er von dem Regenten als sein Privatwille gehandhabt wird" (8:352). This is upheld in the *Rechtslehre*: "Eine Regierung, die zugleich gesetzgebend wäre, würde *despotisch* zu nennen sein" (6:316). In other words, if a state does not know and exercise a fundamental disjunction between the lawgiver and "diejenige (moralische oder physische) Person, welcher die ausübende Gewalt zukommt" (ibid.), then it is for Kant a despotic state regardless of the material rights it grants, since the public, universal legislative will coincides with the private, particular executive will of the ruler of the state (*Regent*; *Agent des Staats*). Insofar as the latter state of affairs is a reality, the rule of law would be the moral beneficence of the ruler, and nothing else. Nevertheless, insofar as these arrangements are legally codified (and followed), there is a despotic state. If neither this is the case, there is no rule of law at all.

[315] The same non-inclusion of some subjects of law is, of course, definitely present in the contemporary rule of law too, with *inter alia* minors in the position of passive citizens or *Schutzgenossen* who nonetheless are subjected to (and in most countries and cases even punished by) laws that they have not consented to. The main question in this context, I suggest, is where this particular boundary line should be drawn. This is a political decision, not the task of a metaphysics of morals to clarify once and for all, which I think is also a point for Kant.

It follows that while the executive authority is clearly bound by and subject to the laws, it also realises the public will by applying it to particular cases. This dual understanding of the legal role of the ruler of the state corresponds to the vertical and the horizontal internal relationships of the state structure to which I have referred above. On the one hand, as its name suggests, the executive power is the authority that executes and implements the public will, and is therefore granted the monopoly of violence to coerce anyone who sets out to force through his or her particular will. The executive power has, in Kant's description, the supreme capacity "dem Gesetze gemäß zu zwingen" (6:317). On the other hand – in line with the judicial power – it is obliged to act only in accordance with the laws given by the sovereign, which in turn is the only one that cannot be subjected to laws.[316] In this sense, the legislative sovereign, in contradistinction to both the executive and the judicial authorities, cannot do wrong (*Unrecht*), since there can be no authority above it.[317]

In short, the executive authority is thus the sole proprietor of the right to use coercion (and is accordingly described in §48 as "irreprehensibel" (6:316)). Still, it is at the same time subject to the laws given by the sovereign legislator. Since it is possible for this reason for the executive power to do wrong (but not to be coerced in this particular regard), there may be the additional need for a third authority, the judicial, to lay down what is right in singular cases (*Rechtens*). But before we can look at the judiciary in section I.3.2.c), we must examine more closely the complex relationship between legislator and executive.

If we speak here in terms of actual historical events, the development of the rule of law and rights to freedom can perhaps best be described as the gradually successful efforts to lay the Leviathan in chains.[318] Instead of an absolute, undifferentiated state power, where what we today would characterise as legislative, executive, and judicial authority are all located in one, particular will (e.g. absolute monarchy), any real legal progress is suspended in the eyes of the Enlightenment political philosophers until this kind of arbitrary exercise of power finds restrictions in common legislation or, finally, even a state's constitution. A central element in Kant's philosophy of right is precisely the strong emphasis on this binding of the executive power through a differentiation between the lawgiver and the ruler of the state. He does not hide the fact that most, if not all actual states come into being under despotic rulers (cf. the

[316] Cf. 19:572, R. 7984: "Die Regirung und der Richter sind verbunden, nach Gesetzen zu regiren und zu sprechen. Daher sind sie unter den Gesetzen, also kann der souverain weder regiren noch richten".
[317] Cf. 19:498, R. 7713: "Es muß eine uneingeschränkte oberste Gewalt seyn: souverainität. Nur der Gemeinschaftliche Wille kann diese oberste Gewalt haben. Er kann nicht unrecht thun. Aber die execution ist nicht vom Gemeinschaftlichen Willen. Also kan diese Unrecht thun".
[318] This corresponds to Rousseau's (and Kant's) civil project. The Leviathan here, of course, means the arbitrary exercise of power that Kant attributes to despotic states, where the executive and legislative authorities coincide.

reference to *Gewalt vor Recht*).[319] Indeed, he argues that this legal arrangement is reconcilable with freedom and right (in a provisional sense). As long as internal or external forces threaten to topple the current regime, it is the pragmatically correct choice.[320]

But for a conclusive and full realisation of the *a priori* principles of right,[321] Kant most certainly prescribes a route that separates through reform the legislative branch of government from the executive. To the former he assigns not only the sovereign right to all legislation, but also the authorisation of the latter to use coercion to uphold the civil condition in the way that the sovereign has laid down in the constitution or common legislation. A ruler or government that holds itself to be authorised to go beyond the letter of the law, as posited by the sovereign legislator, is a lawgiving executive authority and hence despotic. Instead, the executive power must only fulfil and complement the legislative will in actual, particular cases. As we will see, it is in a republic also subject to the positive laws, so that its scope of action is limited to what it is authorised and, importantly, obliged to do by law.

So whereas the normativity of the legal system is ascribed to the legislative genesis of freedom rights, the executive – and judicial – authority is limited to what we might call the merely factual implementation of these laws. A rather instructive parallel can be drawn here to Kant's moral philosophy: the demands of pure practical reason are met only insofar as the empirical will, in its particular action, is entirely decided by the moral/legal law. Normativity is for Kant found, not in the factual execution (or judgement) of a moral/legal action, but in its correspondence with the universal legislation of morality/legality. Hence, the exercise of the law refers to a merely factual dimension, whereas the normative element is entirely located in the legislative activity and its purely formal procedure of morality or legality. But unlike the realm of morality, where it was impossible for a moral agent to know if the action was truly moral (and thereby free, since the criterion for normativity lies in the internal correspondence with the law), it is possible in the realm of right, thanks to the separation of powers (and thus of legal agents) to both know and exercise true legality and freedom. Insofar as the subjects of

[319] Again, this is only true in terms of facts and an actual realisation of right; not, of course, in a normative sense.
[320] This is because of his claim that the actual unity of the particular wills is more easily upheld under dictatorships, cf. e.g. §51, as well as his clear affirmation in the peace essay: "Was aber das äußere Staatenverhältnis betrifft, so kann von einem Staat nicht verlangt werden, daß er seine, obgleich despotische, Verfassung (die aber doch die stärkere in Beziehung auf äußere Feinde ist) ablegen solle, so lange er Gefahr läuft, von andern Staaten sofort verschlungen zu werden; mithin muß bei jenem Vorsatz doch auch die Verzögerung der Ausführung bis zu besserer Zeitgelegenheit erlaubt sein" (8:373) – something which is explicitly described in the supplementary footnote as a permissive law of reason. This aspect will also be further investigated in part II on international law; I return to the important details of §51 below.
[321] In my discussions of the private right part, I have established that the preliminary possession of something external is permitted for Kant in a state of nature, but that it is, as such, still only a factual possession. It is rightful only to the degree that it corresponds with rightful relations in a possible future civil condition in which it can be owned conclusively. We now see how this mode of justification also applies to political power.

law were the authors of the same laws (qua citizens) in a prior instance, we can indeed speak in our intersubjective relations of autonomous and thus free (external) human actions, and this claim is also empirically verifiable. This achievement by Kant is not to be underestimated.[322]

The legitimacy of the actions of the executive (and judicial) branch, as such, is hence measured exclusively by their correspondence with the laws as explicated by the legislative procedure of the state. Kant openly describes the executive (and judicial) power as a machine or automaton[323] – it must only implement what it is told to do, and can operate only within its bounds, as posited by the legislature. Otherwise, it would be self-programming, and would only cause heteronomy in the system. The argument here is obviously not that the *de facto* historical state with its still not fully separated legislative and executive branch has no binding force, nor that it does not obligate the subjects of law to adhere to its legal decisions. As we have seen earlier, Kant subscribes to all of this in his rejection of revolutionary natural right doctrine. But, as Langer points out, he reveals the *de facto* historical state of affairs to be mere fact. All normativity comes into the picture via the legislative authority, which is separated from the only factually empowered state apparatus and lays down the laws for this apparatus. For Kant, all parties have a political obligation to move towards the normative ideal of the republic, a movement that can solely take the rightful shape of a rational reform process with the lawful removal of all factual hindrances of one's freedom as its goal.[324]

This difference between the factual and normative domains is also found in Kant's legal framework. The reform through principles, of which Langer speaks, is related to the original contract (*ursprünglicher Vertrag*) that Kant advocates as the reform ideal. Again, this contract cannot and need not be proven as empirical fact; it is a normative idea of practical reason. As we remember from his criticism of Danton, it would likewise be a mistake to demand that the *de facto* state requires an actual contractual agreement in order for its power to be rightful.[325] Like private possession before the establishment of the republic, empirical possession is and must be allowed, but only as a precondition for future rightful relations. Taken by themselves, qua historical possession of either property or power, they are mere fact. In contradistinction to the original contract that normatively grounds possession, Kant labels all factual contracts

[322] In the next subchapter (I.3.3), I shall further discuss the nature of the legal order (the republic) that opens up for, and realises, such autonomy and freedom in human interaction.
[323] Cf. 19:514, R. 7778.
[324] This is explicitly made the subject of discussion in the *Nachlass*: "Alle Herrschaft ist *facto* vsurpirt, *iure* soll sie constitutional seyn. (…) Mit der Zeit wird das imperium constitutional; so lange, ob es gleich nur vsurpirt ist, muß es doch respectirt werden" (19:592, R. 8046). See also the quotation and discussion of this pasage in Maus (1994: 63 f.).
[325] In §13, Kant had already underlined that this cannot be proven (cf. 6:262), since there could always be a prior, still unknown possession that thus could nullify all existing rights claims within a present or future rightful order.

and possession primitive (*uranfänglich*); they concern only the purely empirical description of things. This kind of possession may be a factually correct description of historical events, but it is not normatively correct – and it is only in the latter sphere that we can find the rational arguments that uphold one claim against all others and make it normatively binding as well. Kersting has aptly brought together Kant's train of thought: the idea of the original contract "beginnt keine Geschichte, sondern (…) trägt ein Argument" (Kersting 2007: 273 f.).[326]

It is in light of these notions that we must consider the ostensibly paradoxical claims that we have encountered in Kant's disagreements with Hobbes. The *de facto* historical state develops because the Leviathan – understood as the coercive, executive ruler of the state also endowed with legislative power – has simply usurped power, like the private property owner prior to the transition to a civil condition. Qua usurper, he or she is always wrong, but as anticipation – and, as we remember from Kant's *lex permissiva*, a necessary anticipation – of a future rightful condition, such possession of property or power may still be rightful. And, since I now have shown that Kant locates sovereignty in the united legislative will of the people, the criteria for rightful possession of property as well as political power begin to be explicated. Hence, it is not self-contradictory for him to make such claims as: "Der *Usurpator* hat jederzeit Unrecht, aber das Volk hat kein Recht gegen ihn". This apparently paradoxical statement can be explained as follows: "Denn iener ist im Besitz das Recht zu verwalten und dieses ist das *principium*, woraus alles beurtheilt werden muß von den Unterworfenen" (19:509, R. 7762). On this view, all that the actual ruler of the state (i.e., the executive power) does is to govern or administer law. And in its actual appearance, this factual right depends on the contingently developed standards of the actual sovereign legislative authority, which on normative grounds has to be separated from the executive power.

In other words, the historical, pre-civil-condition Leviathan is not in his or her right in the merely factual exercise of power. Nevertheless, the people (qua subjects, *Unterworfene*) have no right to exercise power in particular actions, i.e., revolt against the authorities, since that would be to perpetuate the state of nature. We here see a correspondence with the so-called distributive unity of the will of all (*die distributive Einheit des Willens aller*) in the peace essay. Even if every subject privately were against a law or the ruler of the state, this would nonetheless still be an insufficient ground for any rightful exercise of resistance. Thus,

[326] Quotation in full: "Uranfänglich und ursprünglich stehen zueinander wie empirisch und rational; das Uranfängliche verweist auf Zeitliches steht in der Zeit als unvordenklicher Beginn einer Zeitreihe. Ursprüngliches verweist auf Grund und Begründendes. Es beginnt keine Geschichte, sondern es trägt ein Argument". Georg Geismann has described the Kantian understanding and meaning of the social contract in a similar fashion: "Dieser Vertrag ist nicht der Seinsgrund, sondern das Rechtsgrund von Herrschaft" (Geismann 1982: 184). (As I only possess a later, unnumbered transcript of the article, the page number may be incorrect.)

it is still unlawful. As a private person, each and every one is under the coercive power of the (most often usurped) executive authority and cannot in any legitimate way force through his or her particular will, even if this were approved of by all privately. It is only by acting as citizens, through the collective unity of the people's legislative will (*die kollektive Einheit des vereinigten Willens*, cf. 8:371), that the executive state power can be contained as a matter of right.

Kant seems to liken the usurper of power with a shopkeeper or, maybe more precisely, an accountant. Despite his or her deficient exercise of power in terms of right, the historical pre-civil-condition despot (or at least ruler) has held the office until a fully rightful condition can finally be established. Since the establishment of a republic is dependent on a long line of contingent factors, it cannot for Kant be expected, far less demanded by right, that the ruler of the state, who is a product of actual historical events, should hold and exercise power as if a perfect civil condition were already realised. Once again, moral perfection or benevolence is not the criterion Kant requires.[327] Indeed, the ruler who exercises sovereign power prior to the establishment of a civil condition must be regarded as one who has the best intentions vis-à-vis the state he or she rules, but also as someone who is left to decide what is pragmatically necessary for the time being. Kant's reference to the shopkeeper or accountant surfaces in his discussion, along with the unambiguous rejection of any possible right to punish the previous ruler or despot after a successful revolution.

His deliberations on this subject are obviously closely related to the ongoing turmoil in France and the decapitation of Louis XVI. No matter how despotic the Ancien Régime might have been, and despite Kant's enthusiasm with regard to the theoretical principles underlying the French Revolution, he describes the formal execution of the king in no uncertain terms: it is an "Umkehrung aller Rechtsbegriffe", like a sin "welche weder in dieser noch in jener Welt vergeben werden kann" (6:321). The reason for this unequivocal condemnation lies precisely in the relationship between legislative and executive authority. In principle, Kant endorsed the demands of the French people for supreme power and sovereignty, but this applies 'only' to supreme legislative authority. As Maus has repeatedly underlined, he advocates a strict, i.e.,

[327] One could almost say the contrary, cf. his further remark in the automaton section referred to above, on the potentially undesirable solution that a morally perfect ruler should lead the way in a morally imperfect state of affairs: "Wehe dem Prinzen, der die Triebfeder oder das Schwungrad wegnimmt, welches alles in Ordnung hält, und sich unternimmt, mit kühner Hand selbst alles zu regiren. Und wenn er Engelweisheit besäße, so ist er vor all das Unglück, was den Staat durch innere Treulosigkeit seiner Diener und durch Unfähigkeit seines Nachfolgers trift, Verandtwortung schuldig" (19:513 f., R. 7778).

fundamental separation of powers.[328] Therefore, if the revolutionaries claim not only a right to sovereignty with regard to the formulation of a constitution and all common legislation, but also a right to take on the role of the executive and use coercion and punishment in particular cases, this is evidently no separation of powers, but only despotism. This is also why he labels democracy, in the strict sense of the word, as necessarily despotic. It makes everyone not only a legislator, but also an executive ruler in particular instances where everyone and everything "Herr sein will" (8:353). In a democracy of this kind, the unity of the people and its general, lawgiving will is broken and particularised as "alle über und allenfalls auch wider Einen (der also nicht mit einstimmt), mithin alle, die doch nicht alle sind, beschließen". This is evidently "ein Widerspruch des allgemeinen Willens mit sich selbst und mit der Freiheit" (8:352).

It is not the regicide itself, but more precisely "[d]ie formale Hinrichtung ist es, was die mit Ideen des Menschenrechts erfüllte Seele mit einem Schaudern ergreift" (ibid.),[329] since here, the mob takes total and undifferentiated control of all power in the state. Naturally, the ruler is in his or her right to use the monopoly of violence to stop the revolutionaries in their tracks, and if the revolution succeeds in ousting the former regime, he must choose either to accept the new regime as factually right, or to fight back as a counter-revolutionist.[330] It is in any case clear in Kant that there exists no right to prosecute the previous ruler if he or she chooses the first option and returns to the role of a 'mere' citizen. The former regime cannot consistently (i.e., by law) be held to account for its supposed crimes – since, in its execution of office, it had the precise task of administrating the law and defining legal and illegal acts as its state of affairs and legislation saw fit. As I have emphasised, Kant certainly regards such a usurped and merely factual exercise of power as an instance of injustice, but the people, as particular wills, have nevertheless no right to revolt or to punish the previous ruler or regime. Kant is explicit also on this point. He brings in the reference to the shopkeeper or accountant, to which I have alluded above: "Der entthronte Monarch (…) kann wegen seiner vorigen Geschäftsführung nicht in Anspruch genommen, noch weniger aber gestraft werden" (6:323).

Of course, this is not to say that nothing can be done against a tyrant ruler in terms of right. It only states, quite unambiguously, that no rightful action against the executive can be

[328] See, for instance, Maus (2001) or her Kantian (and Rousseauian) inspired comment in Maus (2006: 102): "dem Volk (oder seinen Vertretern im Gesetzgebungsorgan) [kommt] alle, aber auch nur die Gesetzgebung zu".
[329] The outright killing of a tyrant ruler has, according to Kant, "wenigstens den Vorwand des *Notrechts* (…) für sich, niemals aber das mindeste Recht ihn, das Oberhaupt, wegen der vorigen Verwaltung zu strafen" (6:321). To borrow a formulation from Maus (1994: 90), a formal execution would be to make the exception a rule.
[330] Kant himself does not specifically comment on whether he grants the overthrown ruler a right to involve foreign powers in such a counter-revolution; he writes that he postpones this discussion to the part on *Völkerrecht*, but he does not explicitly touch upon this there. The most elaborate account of this is accordingly found in the fifth preliminary article of the peace essay – more on this in the next part on international law.

taken as a matter of physical coercion or punishment in particular cases, for this task belongs precisely to the ruler of the state. Otherwise, we would find ourselves in an infinite regress: 'Who should coerce the coercer?'. But it is indubitable that, for Kant, the sovereign legislative authority (and the juridical authority, as we will see) possesses legal means to hinder potential excesses or wrongs in the use of executive power. The point is only that these cannot pertain to the executive function, for that would ruin the internal structure of the rule of law. Consider in this connection the following paragraph in §49, which also clearly demonstrates who Kant holds to be sovereign and how the relationship between the legislative and the executive power is to be understood as a vertical, hierarchical association:

> Der Beherrscher des Volks (der Gesetzgeber) kann also nicht zugleich der Regent sein, denn dieser steht unter dem Gesetz und wird durch dasselbe folglich von einem *anderen*, dem Souverän, verpflichtet. Jener kann diesem auch seine Gewalt nehmen, ihn absetzen, oder seine Verwaltung reformieren, aber ihn nicht *strafen* (und das bedeutet allein der in England gebräuchliche Ausdruck: der König, d. i. die oberste ausübende Gewalt, kann nicht unrecht tun); denn das wäre wiederum ein Akt der ausübenden Gewalt, der zu oberst das Vermögen dem Gesetze gemäß zu zwingen zusteht, die aber doch selbst einem Zwange unterworfen wäre; welches sich widerspricht (6:317).

The supreme legislative authority, that is, the sovereign, is here in no uncertain terms allowed to control the executive and even to remove him or her from office (insofar as there is a possibility in the constitution to rightfully do so), but not to use coercion or punishment in this regard. In the next subchapter, concerning Kant's republic, I shall discuss how this model resembles what we today call a parliamentary system. Before that, however, I shall summarise the role of the executive and, in the next section, specify the task of the judicial authority.

The executive power is responsible for day-to-day governance of the state, and is *inter alia* assigned the right to use coercion and punishment in particular cases, in order to keep the civil condition in conformity with its own laws. In the *Nachlass* notes, Kant also refers to this as an administration according to laws, "die Ausschreibung und Vertheilung der Lasten nach Gesetzen" (19:521, R. 7804), e.g., specification of taxes and military service. Accordingly, the executive authority commands the people (qua subjects of law) through its authorisation to issue "Verordnungen, *Dekrete* (nicht Gesetze)" in particular cases, and makes it possible for anyone to "dem Gesetze gemäß (durch Subsumtion eines Falles unter demselben) etwas erwerben, oder das Seine erhalten kann" (6:316). It is thus the executive authority that secures what is mine and yours in a civil condition as a matter of fact. As we can see, this passage is fully in line with Kant's reference to a practical syllogism and with Ripstein's description of what he calls the problem of assurance, which the executive authority solves.

The executive authority may, ultimately, use its monopoly on the means of coercion to force the subjects of law to conform to the legal order. Depending on the actual formulation and specification of the laws, Kant's executive power will also have some juridical room or latitude[331] for manoeuver, but this legal space will be based on the beneficence, judgement, tradition, etc. of an additionally empowered state apparatus. As he states in the *Nachlass*, the wider this authorisation to use coercion is, the greater the authority (of the executive) is.[332] Even if this solution also creates some arbitrary freedom for the executive (which is precisely what was to be avoided in the first place), it is nonetheless the legislator, as sovereign, who is clearly entitled to decide where these boundaries run. The legislative authority must therefore strike a balance between a juridification of all the actions and duties of the executive office and an authorisation of the latter's own systemic logic of a functional administration and the use of rightful coercion. This is yet another reason why Kant strictly requires the separation of the two branches of government and the sovereignty of the legislative authority.

Regardless of how this balance is struck, the quintessential aspect of the relationship between legislative and executive authority is that they remain separated, and that the former stays sovereign. Any subversion of this relationship, with a lawgiving executive power, would be an *a priori* despotic state, since the particular, private will of the executive would become omnipotent in its own definition of general, public laws, which it then applies as it itself sees fit. This would be despotism, since all law rests on the moral beneficence and self-limitation of the state apparatus. Rather, the executive (and judicial) branch is precisely authorised to exercise certain state functions by the sovereign legislature that posits the legal framework. It is not just the individuals who are normatively obliged to act within the boundaries of this order, but also the state apparatus of the executive (and judiciary).[333] The state apparatus is

[331] According to both the introduction to the *Recthslehre* and a main point of the *Tugendlehre*, this might come as a surprise, since only the realm of ethics has a certain latitude for such arbitrariness (in the choice of means, ends, etc.). For Kant, the "reine Rechtslehre" (6:375) should clarify "mit mathematischer Genauigkeit" (6:233) where, exactly, my external freedom ends and yours begins. (This is also why Kant insists that the *Rechtslehre*, contrary to the *Tugendlehre*, lacks doctrines of both elements and method (cf. 6:411)). Consequently, his pure doctrine of right should leave no latitude for the executive power to itself choose means, ends, whether it should fulfill all its duties, etc. Maus (1994; 2011) is again one of the few who are aware of this point and insist upon it. However, I believe some latitude is required by the systemic logic of the state apparatus, and that, as the quotation in the footnote below implies, it is permitted in Kant's state. But this can only be in terms of its laws qua positive laws (which indeed can be the subject of a method that has its own doctrine, but then only within the field of juridical science (*Rechtswissenschaft*), cf. 6:229, i.e., at the faculty of law, not of philosophy).

[332] Cf. 19:451, R. 7544: "Ie allgemeiner die Befugnis ist andre zu obligiren, je weniger bestimmt und restringirt diese Freyheit der Willkühr ist, desto größer ist die autoritaet".

[333] This radical notion of republican democracy was, as we know, formulated even more sharply by Emmanuel-Joseph Sieyès (2010 [1789]), who held that it would be self-contradictory to claim that the people were subjected to the laws of the land. For Sieyès, only the state apparatus is placed under legal obligation, since the people is free at any time to change the state constitution and legislation as it wants. Kant differs from this position, I

accordingly on the one hand authorised with the right to exercise its function as it sees fit, but has on the other hand also the legal duty to act only within the limits of the law as already defined by the legislature. Otherwise, it would evidently amount to an exercise of a personal and, as we have seen, despotic will. However, the executive authority can also be curbed in a rightful manner not only by the legislature. This will become apparent when I now proceed to the last branch of government in the Kantian state.

In addition to the strict division between legislator and executive, there is also the equally strict necessity of introducing a third authority in the state, namely the judicial power. We must now turn to this branch of government and its function to complete the *trias politica* of the general united will that Kant ascribes to the form of the state, i.e., the state in its idea.

c) The judicial authority

Prior to the publication of the *Rechtslehre*, the judicial power has a rather ambiguous role in Kant's works. If we take into account his affirmations in the first *Critique* and in other texts that all claims to truth (and normativity) must be brought before a court of reason that passes judgement in this regard, it is perhaps somewhat surprising that the court of law takes on such a minor position in his political essays. In fact, the third state power is left out of the equation entirely in the *Gemeinspruch* and the peace essays. In the former, the internal structure of the state is not under consideration, and in the latter, it seems to be subsumed under the function of the executive power, as an aspect of the administration of state law. Kant is not the only Enlightenment philosopher who does not grant the judicial branch an independent position in the state. Locke's commonwealth, for instance, is equipped with a legislative, executive, and federative power (cf. Locke 2009 [1690]: 364 ff.), the last of which is a separate authority exclusively related to international affairs. Fichte, for his part, places an ephorate at the apex of his constitutional model, to mediate between the legislative and the executive branches in the interpretation and promulgation of disputed laws or rights claims (cf. Fichte 1971b [1796]: 15 f.).[334]

The necessity of separating the judicial authority from the executive is therefore first addressed by Kant in the *Rechtslehre*, and even here this is done rather vaguely. The main criteria and argument for a separation of powers still seem to go along the lines of the need for a principled differentiation between the legislation and the application of laws as an aspect of

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believe, only insofar as he is clearer on the dual role of the people as both authors and subjects of law (i.e., respectively fully free and placed under legal obligation at the same time).

[334] For a critique of such a construction, see Maus (2001) and my references to similar constitutions in I.3.3.

a universal (or public) versus a particular (or private) will. The judicial authority pertains also in the 1797 writing to the latter facet of an administration of law, and its discussion is indeed located within §49 on (executive) governance. Ludwig rearranges the text to bracket off the last half of the section, on the court of law and its authorisation to judge and lay down what is *Rechtens,* as a section of its own. This restructuring may play down the close affinity between the two branches of the state apparatus, but it is nevertheless quite instructive, since it makes the tripartite differentiation of the Kantian state of public right clearer.

In any case, after Kant has completed the required separation of the legislative and the executive authority, he justifies the inclusion of a third state power in the very next paragraph: "Endlich kann weder der Staatsherrscher noch der Regierer richten, sondern nur Richter als Magisträte einsetzen" (6:317). Since both individuals and the executive can do wrong in their necessarily particular claims to right (for universal right can be defined only by the sovereign legislative will), we also need a third authority to lay down the law in each singular case:

> [D]er Rechtsspruch (die Sentenz) ist ein einzelner Akt der öffentlichen Gerechtigkeit (iustitiae distributivae) durch einen Staatsverwalter (Richter oder Gerichtshof) auf den Untertan, d. i. einen, der zum Volk gehört, mithin mit keiner Gewalt bekleidet ist, ihm das Seine zuzuerkennen (zu erteilen). Da nun ein jeder im Volk diesem Verhältnisse nach (zur Obrigkeit) bloß passiv ist, so würde eine jede jener beiden Gewalten in dem, was sie über den Untertan im streitigen Falle des Seinen eines jeden beschließen, ihm unrecht tun können (ibid.)

The judge or court allots what is right (in terms of positive law) in disputed, particular cases, either between individuals or between an individual and the state apparatus (that is, the executive as interpreter and administrator of laws). As we see from this passage, the inclusion of this third branch of government not only establishes an individual right to appeal against the particular decisions and decrees of the executive authority, but also underlines the fact that the sovereign cannot rightfully meddle in singular cases, where it may in fact do wrong.[335]

Although there, of course, can be no guarantee that the *de facto* judicial outcome and verdict is the necessarily true and correct interpretation of all the facts and the penal law, the supreme judicial power is, and necessarily must be, the last instance of appeal with regard to particular rights claims. Its function is to establish what positive law is in singular cases (cf. *was Rechtens sei*). Together with the executive, the judiciary establishes what is externally mine (or yours) through a final delineation of our freedom spheres in the case of disputed rights claims (cf. Ripstein's analysis). With regard to the use of coercive punishment that is

[335] Kant also regards such an interference as beneath the dignity of the sovereign: "– Es wäre auch unter der Würde des Staatsoberhaupts, den Richter zu spielen, d. i. sich in die Möglichkeit zu versetzen, Unrecht zu tun und so in den Fall der Appellation (…) zu geraten" (6:317 f.).

granted to the former of the two branches, it is the latter authority of the court that authorises this through the verdict. Before the promulgation of a verdict, the executive authority (and all its administrators – the ministers, magistrates, departments, police power, military, etc.) is not in a hierarchical relationship to the private person who is suspected of having committed a crime – the rights claims of both parties are necessarily equal (although the executive office is authorised to employ a preliminary use of coercion) until the court of law settles the matter and judges in favour of one claim. It is only at this point that the executive authority is granted not a right, but a duty to use its designated means to implement the sentence.

Kant's remarks on the third and final state authority are limited to a single paragraph within §49. One important aspect of his view has not been mentioned either at this stage or in any of his previous deliberations: namely, to whom this right and duty to judge according to public, positive laws are assigned. Although he took a keen interest in philosophical training for jurists, he does certainly not advocate that a well-educated estate of lawyers and judges should be in charge. On the contrary, his remarks in the *Rechtslehre* go in exactly the opposite direction.

The following two comments leave little doubt as to whom Kant assigns the judicial authority: "Das Volk richtet sich selbst durch diejenigen ihrer Mitbürger, welche durch freie Wahl, als Repräsentanten desselben, und zwar für jeden Akt besonders dazu ernannt werden". Moreover; "nur das *Volk* [kann] durch seine von ihm selbst abgeordnete Stellvertreter (die Jury) über jeden in demselben, obwohl nur mittelbar, richten" (6:317). Kant is consequently a strong proponent of a jury system that consists entirely of citizens designated to represent the people in each particular case, in order to interpret and apply the laws they themselves have posited. Had the jury consisted of the entire citizenry (as in parts of ancient Greece), there would have been no representation and accordingly no fundamental separation of powers; the rule of law would be dependent on the virtue of the citizens.[336] This is what is meant by the reference to the indirect (*mittelbar*) judgement of the people through a representative jury that is authorised to pass the sentence of guilty or not guilty, "*schuldig* oder *nichtschuldig*" (ibid.). I should also note here the specific legal character of such a verdict: it deals 'merely' with the

[336] This is, of course, also why Rousseau famously wrote that democracy was a suitable form of government only for a state of gods (or angels), cf. also Kant's comment in the secret article of the peace essay where he rejected a rule by philosopher kings or "königliche (...) Völker" (8:369). But it is equally clear that both philosophers were ardent proponents of republicanism and did not in any sense believe that this critique invalidated that stance. On the contrary, republicanism was the only opposite of a rule of mere morality or virtue. To quote Maus on this point: it is precisely the lack of a separation of powers (and state automaticism, i.e., the mere implementation of laws on the separated parts of judiciary and executive) that requires from the civil community an "illusorich hohen Bedarf (...) an staatsbürgerlicher Tugend" (1994: 194). This is yet another reason for the differentiation between morality and legality in Kant (and in modern democracies, for that matter).

conformity of an action to positive laws that specify which actions are not allowed according to a universal law of freedom.

At this stage, before I further specify Kant's republic as a representative system of the people in which the separation of powers is one necessary condition, I ought first to sum up the internal relationship between the three divided but also united authorities of the state. We have seen that the central component of sovereignty for Kant is located in the supreme legislative authority, which ultimately belongs to the people (qua united citizens), who in turn are subjected to the same laws as private individuals by the executive and judicial power, both of which act as administrators or agents of the state and govern the particular actions and rights claims that are executed. No one can with right resist the execution of office, as this is performed by the respective branch. Otherwise, this branch would be the true authority on the field (but would at the same time contradict Kant's separation of powers and overall juridical arrangement). The three authorities are assigned supreme power with regard to their function: the legislator with regard to (universal) lawgiving, the executive with regard to the particular use of coercion according to law, and the judiciary with regard to any settling of rights claims qua judge in particular cases. No other authority can rightfully absorb the function of another without subverting Kant's internal framework of state law and thereby turning despotic.

Although Kant's delineation of the different authorities may seem clear already on the basis of this description, a number of criteria that either run through or can be developed from his remarks can help us further understand how he conceives of the lines that are drawn as distinct and necessary boundaries between them. The most prominent yardstick is perhaps the difference between the universal and the particular, which signifies the distinction between the giving of laws and the singular application of these by the executive and judiciary. For Kant, as we remember from the peace essay, the lack of such a distinction is despotism *per se*, that is, the personal, arbitrary application of laws that the regent him- or herself has posited – a privately exercised state will. Similarly, a people (who 'only' has sovereign authority with regard to legislation) cannot immediately apply or judge the laws they themselves, actually or ideally, have posited; this too would render the separation null and void. As private persons, they are – along with the executive and judiciary – subject to law, but the latter authorities are not merely authorised, but also obligated to apply and to judge in each particular case according to positive law, in order to uphold the civil condition, so that no one remains judge in his, her, or its own case.

From this understanding of the separation of powers and of the different functions of the three authorities, it follows that all legal normativity is allocated to the legislative branch.

It is the lawgiving procedure that grounds and represents the normative dimension of legal norms, since it requires that the will forming the law be both public and universalisable. The wills of the executive and the judiciary authority are public and rightful only insofar as they remain within the legal framework that is laid down by the legislative power. If the executive and/or judiciary were to go beyond the authority that is vested in them by the constitution and common legislation (as defined by the legislature), they would themselves become *de facto* law-givers who employ their private will in a despotic manner. On this view, the normative dimension of law reveals itself as entirely related to legislation and its procedures, whereas the factual dimension is preserved by the state apparatus of the executive and the judiciary.

Interestingly, this internal structural relationship between Kant's three state authorities does not only follow Ripstein's understanding of the three structural defects of the state of nature. It can also be delineated, I believe, along the lines of a key figure in his theoretical philosophy, i.e., the internal structuring of time by our understanding.[337] The three dimensions of time find their equivalents within the juridical system. A closer analysis will reveal that the judiciary power is oriented towards the past, clarifying in the verdict what acts have actually taken place. The executive is concerned with the present situation here and now, moving within a set of legal norms and procedures to deal with facts as they appear to be and are interpreted at the current stage in time. Finally, the legislative authority is not actually present; instead of acting in this world it is – as Kant puts it – so to speak invisible (*unsichtbar*, cf. 8:294) and rather anticipates posterity by laying down the universal laws in accordance with which all future actions are normatively assessed. In terms of singular instances, the judiciary authority then performs this assessment as a clarification of what *was* permitted according to law, whereas the executive makes clear what *is* permitted according to law. The legislature, on the other hand, states in universal terms what *shall be* permitted according to law (until it itself changes existing statutes or laws and the state apparatus must correspondingly readjust).

Normativity shows itself, on this view (like Kant's generally reformative approach to legal principles) not as rights claims directed to a prior or current state of affairs – these are accessible only as (historical or present) facts – but solely to a future-oriented deliberation[338]

[337] Gerhart Husserl (1955) makes a similar argument, but only with regard to a philosophical-anthropological juxtaposition of types of human character and the three branches of government (but also related to orientation in time). Maus makes the same comparison when she highlights "die zeitliche Ausdifferenzierung von Verfahren im rechtsstaatlichen Instanzenzug" (2011: 184) and considers this necessary for the rule of law as such.

[338] Deliberation, as we know the term from classical rhetoric, is precisely future-oriented and the truly politically oriented speech, whereas – in line with our interpretation – juridical speech concerns a clarification of what has happened, and epideictic speech what is the case here and now (and what actions we must take, given the actual set of circumstances). One can perhaps thus argue that the Greek democracy knew a principle of the separation of powers, a principle contained in language or *logos* itself; however, I cannot pursue this here.

that is open in principle on the question of which laws shall govern and continue to govern our common existence. Normativity is located in the process of legislation that challenges the factual dimension and demands that all future conduct corresponds with the legal norms as posited by the legislature. This analogy between time and the separation of powers may be instructive when it comes to a clarification of the boundaries between the three authorities. Of course, the analogy does not imply that the judiciary and the executive are prior in order to the legislative branch because they temporally precede the latter. In an ontological sense, they have to precede it (cf. *Gewalt vor Recht*), but just as any particular instance necessarily first is future, then present, and finally past, the legal relationship is inverted in the case of singular rights claims. The legislative authority first posits laws that are valid for all particular rights claims from the time of decision until the laws (possibly) are changed again; the executive then moves here and now within the juridical space opened by the laws and legal regulations to interpret and act in each particular case; finally, the judiciary settles the matter with regard to what was the case at one specific point in time (and space).

The impossibility of rightful retrospective legislation can hence be read along the lines of this analogy: the legislature would in such cases turn despotic, since it would overstep the boundaries of its legitimate scope of action – it can only be oriented towards the future and pass laws that are non-retrospective. Similarly, the executive cannot rightfully predate decrees or regulations, but only employ at present decisions that again are appealable to the judiciary to clarify what the facts were at the time in question. As we have seen, Kant's republican theory finds its autonomy and hence its centre in the vital feature of universal legislation and deliberation (both future-oriented), not in a particular application of these laws to the factual dimensions of past and present. Niesen – perhaps inadvertently – employs the analogy of time when he says that Kantian republican action is characterised by being "legislativ im Sinne von allgemein-prospektiv, weder exekutiv-situational noch rechtsprechend-retrospektiv" (Niesen 2001: 578). Again, as he also stresses, this stands in clear contrast to current civil republican conceptions of freedom and legitimate rule, which are thought in terms of self-government, i.e., are oriented towards particular actions here and now. For Kant, as I have insisted upon, this can only correspond to the despotic democracies of antiquity.

Let us sum up the results of this investigation of the separation between the three state powers in the *Rechtslehre*. Despite their crucial differences, they also decisively complement each other, since they constitute a required continuum of actions that unites the legal universe in an exhaustive and consistent manner. The specific normative dimension to this, as I have emphasised, was connected to the process of universal legislation of laws of freedom. But the

autonomy of such a legal system depends in turn on the non-identity of the legislator (i.e., the people) and those who in particular instances act according to or upon this public will (i.e., the subjects of law or the executive and judicial authority). Kant concludes §49 by repeating this and reiterating the central point of the non-identical relationship between realised normative ideals and *de facto* states of happiness or welfare:

> Also sind es drei verschiedene Gewalten (potestas legislatoria, executoria, iudiciaria), wodurch der Staat (civitas) seine Autonomie hat, d. i. sich selbst nach Freiheitsgesetzen bildet und erhält. – In ihrer Vereinigung besteht das *Heil* des Staats (salus reipublicae suprema lex est); worunter man nicht das *Wohl* der Staatsbürger und ihre *Glückseligkeit* verstehen muß; denn die kann vielleicht (wie auch Rousseau behauptet) im Naturzustande, oder auch unter einer despotischen Regierung viel behaglicher und erwünschter ausfallen: sondern den Zustand der größten Übereinstimmung der Verfassung mit Rechtsprinzipien versteht, als nach welchem zu streben uns die Vernunft *durch* einen *kategorischen Imperativ* verbindlich macht (6:318). [339]

Hence, the greatest degree of constitutional correspondence with the practical-rational principles of state law is attainable only in the republic. For Kant, as we will see, this republic must be understood as a representative legal system of the people. Accordingly, the following subchapter intends to further elaborate how the *Rechtslehre* attempts to explicate in more detail the republican form of government referred to in the peace essay. As is the case with most other features of Kant's philosophy of right, I believe the republican state model is more precisely delineated in this work than in any of his earlier writings.

3.3. The republic as a representative system of the people

On the eve of the French Revolution and of Enlightenment political philosophy, the emphasis on the republic as the ideal of all political movements as well as state constitutions can hardly be overerestimated. To quote Reinhart Koselleck on this point: "Die Republik war das τέλος, der Republikanismus das Prinzip der Bewegung".[340] I have frequently highlighted Kant's concept of republicanism as primarily defined by the strict necessity of a separation between the legislative and executive authority. But what, more precisely, does this republican ideal amount to? My intention here is to further outline and discuss the constituents of Kant's republic. As I will argue, the most adequate description of this republic is to conceive of it not only in terms of the separation of powers, but, additionally, as a certain type of representative system of the people. This will be the subject of the following deliberations.

[339] As I have repeatedly emphasised, the imperative cannot be taken as one required by morality, but (in line with Kant's 1797 terminology) as one made necessary and thus obligatory for us by (pure practical) reason.
[340] Quoted in Langer (1986: 119).

I shall begin by clarifying what Kant means by representation. In the last section on the judicial authority, we have seen how he defends a jury system with elected representatives of the people, so that the people at least indirectly judge themselves. But how is representation conceived by Kant with regard to legislative and executive authority? Whereas Rousseau is unyielding on the point that the people can under no circumstances be represented in terms of an actual exercise of their sovereign legislative authority, Kant appears less adamant in this regard (although he too assigns supreme legislative authority to the people). His remarks thus far seem to indicate that the actual exercise of sovereignty can (or even has to) be mediated through a representative system. As yet, however, Kant has not clarified whether this system relates to only the executive branch (like Rousseau), only the legislative branch, or both.

His discussion of representation in the peace essay is helpful as a point of departure. In the last paragraph of the first definitive article, Kant equates all non-representative forms of government with despotism: "Alle Regierungsform nämlich, die nicht *repräsentativ* ist, ist eigentlich eine *Unform*, weil der Gesetzgeber in einer und derselben Person zugleich Vollstrecker seines Willens (...) sein kann" (8:352). Although the paragraph is not entirely unambiguous (as in the *Gemeinspruch* essay, for instance, it is still not quite clear to whom Kant assigns sovereign power), the aspect of representation seems to be fundamental and to be related to a necessarily non-identical relationship between the legislative and the executive power (cf. the rejection of despotism). It must be impossible for the legislator to also be the executive (and vice versa), and this is why he rejects the ancient Greek democracy. I should note that representation here seems to be intrinsically related to the function of executive power. Whereas there is no self-contradiction involved in granting *legislative* authority to the entire population as citizens – who, through the united legislative will, constitute one moral (or juridical) person – it would be self-contradictory to grant the entire population *executive* power as subjects of law. They would then decidedly not be subject to law, but only to their own arbitrary wills in each particular case.

Although these paragraphs are not entirely unequivocal, this reading is consistent with his refutation of ancient democracies, precisely "weil sie eine exekutive Gewalt gründet, da alle über und allenfalls auch wider Einen (der also nicht mit einstimmt), mithin alle, die doch nicht alle sind, beschließen; welches ein Widerspruch des allgemeinen Willens mit sich selbst und mit der Freiheit ist" (ibid.). In this regard, the most crucial aspect of this passage is the reference to the executive power; (ancient) democracies are necessarily excluded as a form of government consistent with right, because they ground an *executive* authority of each and every one that is applicable to each and every case. It is a rule of men, not a rule of law.

In autocracies and aristocracies, on the other hand, it is "doch wenigstens möglich, daß sie eine dem *Geiste* eines repräsentativen Systems gemäße Regierungsart annähmen, wie etwa Friedrich II. wenigstens *sagte*: er sei bloß der oberste Diener des Staats" (ibid.). Kant is aware that it is possible that even these two state constitutions[341] are, or will degenerate into, non-representative, despotic states; but they at least may be consistent with, and can also anticipate the spirit of, a representative system, even if they do not necessarily have one (cf. Prussia in Kant's own time).

In correspondence with Kant's overall reformative approach to the realm of politics, the most vital feature of the state (and its state constitution) is that (or to what degree) it can be said to move towards the required republican constitution. When he appears to favour the opposite end of the state constitutional scale, prior to a full realisation of the republic ideal, this is not primarily due to the empirical fact it is unlikely that non-representative democracies would surrender control to a representative organ with a separation of powers. Rather, it is because such a shift cannot take place as a reform process within the boundaries of existing, positive law, but only through revolution: "– Man kann daher sagen: je kleiner das Personale der Staatsgewalt (die Zahl der Herrscher), je größer dagegen die Repräsentation derselben, desto mehr stimmt die Staatsverfassung zur Möglichkeit des Republikanism, und sie kann hoffen, durch allmähliche Reformen sich dazu endlich zu erheben" (8:353).[342]

Thus, in the peace essay, representation seems first of all related to a differentiation of the executive and the legislative state power, although the paragraphs here are not entirely unambiguous. As I have already noted, it is not clear at this stage whether Kant associates the three forms of the state – autocracy, aristocracy, and democracy – with different versions of the legislative or the executive authority. Furthermore, Kant has not yet properly located sovereignty, or at least has not given a complete account of it.[343] This is not accurately done

[341] One must be aware that Kant's term here, *Staatsverfassungen*, is different from the term 'constitution' (*Verfassung*) used above in the sense of republican constitution, i.e., one with a separation of legislative and executive power. 'State constitution' must here be considered as relating to the other aspect of how many persons constitute the supreme power in the state, i.e., autocracy, aristocracy, or democracy (cf. the forms of the state, 8:352). For Kant, in other words, there is only one rightful constitution, the republican, but possibly two or three rightful state constitutions. This latter question must be answered, and I will accordingly address it shortly.

[342] In the non-representative, despotic state, this side of the constitutional scale is to be preferred – it is for Kant obviously better to be ruled by the despotic will of one than by the despotic wills of several or even all: "der [Despotism ist] unter der Obergewalt eines Einzigen noch der erträglichste unter allen" (8:353).

[343] The peace essay still remains silent in crucial places. Does Kant subscribe to a Rousseauian notion of non-representability of the legislative authority of the people that is already taken for granted, so that the forms of *Beherrschung* merely implement the general united will in particular cases as the supreme executive power? This seems unlikely, *inter alia* because he will present in the *Rechtslehre* a more republican (and even republican-democratic) concept of the citizens' sovereign right to self-legislation and says nothing there to indicate such a notion of a non-representative empirical legislative will. Does he perhaps attach *Form der Beherrschung* precisely to sovereign legislative power, so that representation is related to the empirical legislative will vis-à-vis

before the *Rechtslehre* sections on legislative authority, which assign this to the general united will of the people. Accordingly, I believe that his concept and understanding of representation can be seen to have significantly developed and perhaps even changed in the text written two years later.

When we consider Kant's view of representation, we must bear in mind that whereas in the peace essay, he dealt primarily with a relationship between the institutions themselves (legislative and executive), the *Rechtslehre* discussion also includes a new distinction within the legislative branch. As I shall show, this distinction corresponds largely to the distinction, already drawn, between popular and state sovereignty, and to the distinction between what I shall refer to as non-institutionalised and institutionalised practices of political autonomy and legislative authority. This last distinction does not diverge much from the distinction between popular and state sovereignty, but a clarification of this new conceptual pair might be in place at this stage, before I delve into the niceties of Kant's understanding of representation in §§51 and 52.

In the following, I will use the term 'institutionalised' in relation to political autonomy and legislative authority that are located in the state institutions themselves. Correspondingly, the term 'non-institutionalised' will be employed with reference to the same political practice, as exercised outside of these institutions, i.e., by the people in their capacity as citizens who at the time are *not* authorised to take *de facto* political decisions. Although it is the constitution that for Kant authorises the three state institutions with the sovereign authority to legislate, to administrate (or coerce), as well as to judge, and it thus might seem appropriate to introduce a third term too, 'constitutionalised', in order to draw a further distinction, I will not do so here. This might have helped to avoid a few classifications which may seem counterintuitive, since media, NGOs, universities, etc. are also 'institutions' in a common usage of the term, we must not forget that the perspective here is entirely legal-political.

Therefore, even what we commonly label 'institutions' belong to the non-institutional political realm, since they are separate from the official state structures and legal framework for which the term 'institutionalised' is reserved. The non-institutional, yet politically oriented sphere of private persons deliberating in public[344] is without doubt an indispensable part of what we today call civil society, but as I have stressed, it is not, and should not be, included in

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the ideal of the general united will of all? This is more plausible, but it still rests uneasily with his explicit remark in the same article that democracy is not a viable option because it necessarily grounds an *executive* representative of all, which seems to imply an inherent relationship to the executive power. Again, we must move on to the *Rechtslehre* to find the full account of his philosophy of right.

[344] For the classical sociological study of its rise and structural transformation, see Habermas (1990 [1962]).

(and thus absorbed by) the state institutions. Rather, it is clear that the Kantian public sphere – which I shall explore key constitutents of this public sphere in the next subchapter – mediates precisely between these two dimensions.

The constitutional dimension is on a different level from these two, since this is the sphere that provides the state institutions with the necessary legitimacy in its authorisation of a lawful exercise of state power. Kant's constitutional dimension is accordingly limited to the question of whether there is a (republican) separation of state powers or not, although both the non-institutionalised and the institutionalised realms are influenced by and, of course, depend on, the constitutional dimension, in order to express themselves within a state system in the first place. Subsequently, the constitutional dimension signifies the juridical authorisation to a rightful exercise of political will in the two other dimensions, rather than a third, independent term that must be included in the analysis of his understanding of republican representation as such.[345]

I believe these related distinctions between popular and state sovereignty and between non-institutionalised and institutionalised political practice will help us better grasp what Kant means with his final formulation of a republican rule of law. This, I argue, is best described as a representative system of the people, a system that also normatively supersedes all his earlier accounts of this legal and political ideal.

§§51-52 tell us more specifically the content of Kant's ideal for the realm of right, the republican rule of law. After going through the details of the different, separate functions of the three authorities in the preceding sections, he elaborates in §51 on the internal relationship between the *trias politica* and the one united being to which they stand in relation. He writes: "Die drei Gewalten im Staat (…) sind nur so viel Verhältnisse des vereinigten, a priori aus der Vernunft abstammenden Volkswillens und eine reine Idee von einem Staatsoberhaupt, welche objektive praktische Realität hat" (6:338). This corresponds to a strict separation of powers, in order to give practical reality to the universal legislative will of the people in particular cases too. Nonetheless, the next period suggests that a fundamental feature of representation in the *Rechtslehre* concerns not only the relationship between the legislative, executive, and judicial state powers, but also the relationship between the people's legislative will and its physical representation in the shape of a *de facto* sovereign in the empirical world: "Dieses Oberhaupt (der Souverän) aber ist so fern nur ein (das gesammte Volk vorstellendes) Gedankending, als

[345] This, however, is not to say that this term is not relevant in other contexts. On the contrary, I shall consider in part II on international law how Kant proposes not a constitutionalised, but only an institutionalised (and non-institutionalised) legal framework for worldwide rightful relations.

es noch an einer physischen Person mangelt, welche die höchste Staatsgewalt vorstellt und dieser Idee Wirksamkeit auf den Volkswillen verschafft" (ibid.)

This passage is instructive in several regards. In §46, Kant had already identified the sovereign as the legislative united will of the people in its idea (i.e., popular sovereignty). The question that now beckons is how to bring this idea into practical reality in a way that may not be identical, but is at least non-repressive. (As we remember from §42, Kant develops *Recht* in analytical opposition to *Gewalt*, that is, violence or repression.)[346] The sovereign, as we can see, is, on the one hand, nothing but a thought-entity without a physical person (i.e., state sovereignty) who, on the other hand, represents and gives reality (*Wirksamkeit*) to the original authority that is assigned to the people, i.e., supreme legislative power. This state sovereignty is primarily rooted in a *de facto* exercise of legislative power, but it must also be extended to, and kept functionally separated from, the two other state authorities and their representatives.

This way of framing it emphasises both the strict necessity of a factual dimension of right – the actual ruler must give the rights claims *Wirksamkeit* – and a normative dimension in the self-legislation of the people, which is the idea from which all factual power derives its legitimacy, or, perhaps better, its authority. Kant's expanded understanding of representation is evident in the now unambiguous identification of autocracy, aristocracy, and democracy with *de facto* supreme power in the state. These are described as forms or constitutions of the state (*Staatsform*, *Staatsverfassung*, cf. 6:338 f.) that correspond to the physical person, that is, the institutionalised authority that as a matter of fact realises (and thereby represents) the thought-entity of the people's legislative will, i.e., its non-institutionalised, original authority.

This points to another important clarification that Kant makes in the *Rechtslehre*. As we have seen, he changes here the allocation of the three *a priori* pillars or constituents of the civil condition – freedom, equality, and (in)dependence – from the state of public right as such to a place within the legislative branch of government. The same change (or at least clarification) of the proper allocation happens with regard to the forms of the state as well. In the peace essay, it still remained unclear whether the three different state forms – autocracy, aristocracy, and democracy – referred to the number of actual executives or legislators, but there is little doubt in the *Rechtslehre* that these forms of the state relate to the last, sovereign branch. Therefore, the three forms or constitutions of the state refer to the physical supreme power of the state in its capacity as actual legislator(s), a power that in turn derives its *de facto*

[346] See also Maus (1994: 114): "– Wenn Adorno Kant gegenüber Hegel zugute hielt, daß er das Moment des Nichtidentischen in den Brüchen seines Systems nicht tatsächlich verzeichne, so gilt das auch für Kants Behandlung der Gewalt. Sie ist nicht auf den Begriff zu bringen, sie bleibt außerhalb des Systems. Gewalt ist ein Nichtidentisches".

authority from the normatively speaking superior power of the people's legislative will,[347] a will that remains noumenal at all times.

But this is not to say, as for example Ludwig (1999) seems to claim, that Kant rejects the possibility that the people can also in actual practice be assigned factual state sovereignty, i.e., that the people's legislative will can also become a rightful phenomenal sovereign will. On the contrary, this is indeed possible, as soon as we realise that the three forms of the state are now linked exclusively to the number of actual legislators. Kant can be said to reject a democratic form of the state in the peace essay, but he cannot be said to reject such a form in the *Rechtslehre*.[348] Rather, it is one of three possible articulations of the will of the people both in its idea and in its *de facto* legislative exercise (in a republic). In the *Rechtslehre*, all three state forms are pragmatically rightful (at least to begin with), namely "entweder daß einer im Staate über alle, oder daß einige, die einander gleich sind, vereinigt, über alle andere, oder daß alle zusammen über einen jeden, mithin auch über sich selbst gebieten" (6:338). Once again, they merely designate how many physical persons possess supreme legislative power. But as soon as he starts to elaborate on the specific qualities of each form, we discover that Kant clearly disapproves of one of them from a practical-rational point of view – and this is not the republican-democratic state form.

On the face of it, autocracy seems to be the best solution: "– Man wird leicht gewahr, daß die autokratische Staatsform die *einfachste* sei, nämlich von Einem (dem Könige) zum Volke, mithin wo nur Einer der Gesetzgeber ist" (6:339). Aristocracy is by comparison more complex and difficult, since it requires several persons to first unite as equal legislators (and thus are actual sovereigns) before they constitute their relationship to the people qua subjects of law. For Kant, the democratic state form is in turn "die allerzusammengesetzteste, nämlich den Willen aller zuerst zu vereinigen, um daraus ein Volk, dann den der Staatsbürger, um ein gemeines Wesen zu bilden, und dann diesem gemeinen Wesen den Souverän, der dieser vereinigte Wille selbst ist, vorzusetzen" (ibid.).

[347] Consequently, the forms or constitutions of the state in the *Rechtslehre* are the relationship between so many physical legislators and the legislative will of the people in its idea. Kant explicitly defines the form of the state as the relationship between the former and the latter (cf. 6:338). In a republican form of government, the *de facto* legislative sovereign is set apart from the two other branches of government. In a despotic state, however, there is no such separation, since the *de facto* sovereign actively and directly controls more than one branch of government.

[348] This does not mean that the *Rechtslehre* reading supersedes or is incompatible with the position taken two years earlier. On the contrary, it should be clear that the democracy he rejects in the peace essay is a despotic rule with no separation of powers, and that a republican democracy is no contradiction. Both this assessment and the proper allocation of sovereignty and the state forms in the legislative authority are less ambiguous in 1797.

The crucial point is that Kant's evaluation of the complexity of the different state forms is not at all identical with an evaluation of how they concord with the concept of right. In the next sentence, he quite unambiguously reveals which state form he does not favour: "Was die *Handhabung* des Rechts im Staat betrifft, so ist freilich die einfachste auch zugleich die beste, aber, was das *Recht* selbst anlangt, die gefährlichste fürs Volk in Betracht des Despotismus, zu dem sie so sehr einladet" (ibid.). If it were only a question of implementing right, autocracy would be the best form. But this cannot be recommended with regard to right itself, which is his primary concern throughout his works, since it easily turns into despotism or one-man rule, as a usurpation of – or, perhaps more likely, by – the executive branch as well. Instead, a legislative rule of many or all – that is, aristocracy or democracy – must be considered to be Kant's preference with regard to his overall republican project of making the *de facto* state(s) correspond with the pure principles of right.[349]

The affirmation that his preference goes against an autocratic state form even in a republic that has a fundamental separation of powers is further substantiated by Kant's next comment. It may be the most reasonable maxim, he says, to simplify the relationship between physical legislator and general, united legislative will of the people in its idea as much as possible by having just one person as the sovereign. Yet this would also make "alle im Volk passiv". The consequence would be that there simply are "keine Untertanen als *Staatsbürger*" (ibid.).[350] The only proper citizen here would be the autocrat who on his or her own interprets and gives reality to the mere idea of a general, united will of the people, a people who thereby remain nothing more than subjects of law.

We are left with the aristocratic and the democratic form of the state in a republican constitution as Kant's possible political ideals. But whereas Rousseau advocates a radical and direct democracy in the shape of the people's undivided legislative will that simply cannot be represented, Kant does not make this a criterion for the legitimacy of the legislative procedure and authority. He decisively differs from Rousseau on this point: for Rousseau, the three state

[349] Once again, this does not mean that an autocratic sovereign has an immediate legal obligation to transform the state into an aristocracy or democracy. Let me repeat an important point and quotation: for Kant, the people may be wronged even in these cases: "Denn selbst dann, wenn er sich zu einer Demokratie umzüandern beschlösse, würde er doch dem Volk unrecht tun können, weil es selbst diese Verfassung verabscheuen könnte und eine der zwei übrigen für sich zuträglicher fände" (6:340).

[350] The whole passage reads in the original: "Das Simplifizieren ist zwar im Maschinenwerk [!] der Vereinigung des Volks durch Zwangsgesetze die vernünftige Maxime: wenn nämlich alle im Volk passiv sind und Einem, der über sie ist, gehorchen; aber das gibt keine Untertanen als Staatsbürger". One may be slightly puzzled here by the fact that Kant seemingly labels autocracy as the most reasonable maxim but then makes an apparent claim to the contrary. On my reading, the first claim is pragmatically reasonable, whereas the latter is truly practically reasonable, *inter alia* because he likens the state apparatus to a machine in which function is imperative, employing an allegory that cannot be transferred to the legislative process itself, cf. above and my further discussion below.

forms are related to the *executive* authority and its attempts to represent the non-representative legislative will of the people in particular cases, but in Kant, the forms of the state are, at least in the unambiguous *Rechtslehre* formulations, connected to the *legislative* branch and the idea of a general united will of the people. This legislative, popular will necessarily also demands a physical representation (by a union of several or of all). What he accordingly refers to in his discussions of aristocracy and democracy in the *Rechtslehre* is neither aristocracy in the customary sense of a privileged (or even nepotistic) class of rulers, nor the ancient democracy that he rejected in the peace essay. It is the number of actual persons who constitute the *de facto* legislative union that realises and hence represents the idea of the united, noumenal will of the people; a union of several (aristocracy) or of all (democracy).

Kant does not demonstrate an explicit preference for the one or the other in §51 of the *Rechtslehre*. His clear reluctance vis-à-vis autocracy, thanks to its pacification of the citizens (or, better, mere subjects of law), should perhaps imply that the opposite, i.e., a democratic republic, is his true ideal. Textual remarks elsewhere can be seen to indicate such a reading. After all, the united and concurring legislative will of the people is, as he phrases it in *Der Streit der Fakultäten*, "die ewige Norm für alle bürgerliche Verfassung" and "liegt bei allen Staatsformen zum Grunde" (7:91). All empirical states and republics should move towards this Platonic ideal of the *respublica noumenon* through principled reform, since this results in the largest degree of constitutional correspondence with the rational principles of state law. In his 1798 writing, which includes comments on both the French Revolution and the British constitution, he is even more unequivocal about such a necessarily united and even identical relationship between the authors and the subjects of law. "Die Idee einer mit dem natürlichen Rechte der Menschen zusammenstimmenden Konstitution", Kant writes, is characterised by only one criterion, "daß nämlich die dem Gesetz Gehorchenden auch zugleich, vereinigt, gesetzgebend sein sollen" (7:90 f.).

In my view, this is also the position that is most clearly set out in Kant's late *Nachlass* notes: "Es ist nur ein Begrif von einer volligen reinen Staatsverfassung, nämlich die Idee einer Republik, wo alle Stimmfähig vereinigt die ganze Gewalt haben (…): *Respublica noumenon* oder *phaenomenon*. Die letztere hat drey Formen, aber *respublica noumenon* ist nur eine und dieselbe" (19:609 f.). Although all three empirical forms are consistent with right, it is the last form, democracy (with a republican separation of powers), that comes closest to the ideal. I believe Ludwig (1999: 186 f.) fails to grasp the full consequences of this passage (which also he quotes, cf. ibid.: 175) when he rejects the radical democratic potential in Kant, and rather equates Kant's concept of the people with its *de facto* representatives in parliament in terms of

factual legal expression and with a mere thought-experiment in terms of a normative dimension.

My suggestion is that the position taken in both the *Rechtslehre* and Kant's other late remarks shows that the *respublica noumenon* is the republican state in which the authors and the subjects of law are as a matter of fact identical (but, of course, still play these two non-identical legal or normative roles). Unlike Ludwig, who considers this to be a mere ideal, I hold that this also is one (but not the only possible) actual form of a factual state constitution (cf. *respublica phaenomeon*). It is indeed true that the non-institutionalised, united legislative (i.e., noumenal) will of the people (cf. popular sovereignty) is in need of physical realisation and representation in a *de facto* empirical (i.e., phenomenal) legislative union institutionalised in a state (cf. state sovereignty). But this is not to say, as Ludwig (ibid.: 187) clearly does, that it is normatively impossible to have a *de facto* legislative union of all in Kant.

A *de facto* legislative union of all can certainly be both established and maintained, a fact that cannot be refuted with reference to the republic as a representative system. Ludwig is of the opinion that the people has to have its representatives, but he fails to see, as I will show in greater detail below, that there is no contradiction involved if the entire population were to represent itself in a legislative assembly of all. It might be impractical, but it is certainly not impossible; nor is it impossible in normative terms. Rather, it is this ideal that, for Kant, lends legitimacy to the whole legislative process and that should be approximated.

Subsequently, whereas there can remain little doubt that Kant's ideal is the *respublica noumenon* (a republican constitutional democracy in which authors and subjects of law are identical), there still lingers some uncertainty with regard to which actual institutional model Kant ultimately advocates in the *Rechtslehre*. I believe that further analysis of the work will reveal that his model of choice closely corresponds with what we today would consider a parliamentary system, a model that (in Kant's terminology) draws on both an aristocratic and a democratic form of the republican state.

More specific elaborations of the institutional framework of the republic emerge in the General Remark situated in-between §§49 and 50.[351] Repeating his earlier rejection of natural rights advocates' claim to legitimate rebellion or even resistance against state authority, Kant draws further on his remark in §49, to which I have referred, that the sovereign legislator may in fact legitimately withhold support from the executive authority in order to actually form a concept of rightful resistance within the limits of (positive) law. For Kant, this is both possible

[351] In Ludwig's rearrangement of the text, it is fittingly placed after §52. I will also consider further details of the General Remark in subchapter I.3.5 on the specific rights and duties of a state.

and fully conducive to right in a state with a so-called limited constitution,[352] in which the legislative assembly of the parliament can legally resist the executive power and its ministers.

Kant defines this as passive resistance by the sovereign and something that is allowed (given, of course, that the state constitution contains such a law). This presents us with a viable alternative to the openly unlawful (that is, arbitrary) active resistance by the subjects of the law, who thereby usurp the function of the executive when using coercion in particular cases, something that is already assigned to the executive power. The inauguration of a state constitution where the legislative assembly can resist the executive branch is not only possible and in line with right, but seems also to be recommended by Kant. The executive is an all too human agent that is given all authority to use coercion against other human beings and is, so to speak, bound to be mistaken from time to time. In Kant's view, an independent parliament with a right to resist and withhold its support from the executive authority is the best remedy to hinder injustice and any excesses performed by the one who is granted the monopoly of the use of coercion.

> – In einer Staatsverfassung, die so beschaffen ist, daß das Volk durch seine Repräsentanten (im Parlament) jener [der ausübenden Gewalt] und dem Repräsentanten derselben (dem Minister) gesetzlich *widerstehen* kann – welche dann eine eingeschränkte Verfassung heißt –, ist gleichwohl kein aktiver Widerstand (der willkürlichen Verbindung des Volks die Regierung zu einem gewissen tätigen Verfahren zu zwingen, mithin selbst einen Akt der ausübenden Gewalt zu begehen), sondern nur ein *negativer* Widerstand, d. i. *Weigerung* des Volks (im Parlament), und erlaubt jener in den Forderungen,[353] die sie zur Staatsverwaltung nötig zu haben vorgibt, nicht immer zu willfahren; vielmehr wenn das letztere geschähe, so wäre es ein sicheres Zeichen, daß das Volk verderbt, seine Repräsentanten erkäuflich und das Oberhaupt in der Regierung durch seinen Minister despotisch, dieser selber aber ein Verräter des Volks sei (6:322).[354]

One should once again notice how Kant's republic is not primarily oriented towards a flawless implementation of given norms, but to a procedural conception of right that focuses on the citizens' autonomy through a legislative process that must make it possible to attribute any subsequent injustice to their own selves. This view is seen here *inter alia* in the proposal

[352] It is imperative that this *eingeschränkte Verfassung* is not confused with the *eingeschränkte Staatsverfassung* he mentions in the *Nachlass*: "Mir scheint der Begriff einer eingeschränkten Staatsverfassung einen Wiederspruch zu enthalten: denn sie wäre dann nur ein Theil der Gesetzgebenden Macht" (19:610). In the *Rechtslehre,* this model is labelled a "sogenannte gemäßigte Staatsverfassung", which is an "Unding" and a mere "Klugheitsprinzip" (6:320) that he will not discuss further. For Kant, the last model relates to a limitation of legislative authority and is thus a mere pragmatic checks-and-balance approach to a 'principle' of a separation of powers (and does not belong in a pure doctrine of right), whereas the limited constitution that he discusses relates to a rightful limitiation of the state apparatus, i.e., the executive (and possibly also judicial) power.

[353] Again, all quotations (and most italicisations) are from the Weischedel edition, which here differs from the less coherent "… (im Parlament), erlaubt, jener in den Forderungen …" in the *Akademieausgabe*.

[354] See also his acceptance of this sort of resistance (within the limits of the state constitution) in the *Nachlass*: "Alsdenn ist es aber auch kein Aufruhr, weil der Wiederstand gesetzlich ist" (19:590, R. 8043). In addition, the republican separation of powers also grants the independence of the judicial authority. Independent courts of law thus establish a right also of private individuals to appeal against all particular acts of the executive branch.

not only of a parliamentary model with an independent legislative assembly that is formally empowered also vis-à-vis the executive authority, but also in the remark that a parliament that never opposes the executive branch with regard to its administration reveals a corrupt people with corrupt representatives who are unwilling to confront a treacherous ruler. In other words, the people must keep a critical eye on their representatives in parliament, who in turn must do the same with regard to those who possess executive (and judicial) power.

Further remarks along these lines are made by Kant in his increasingly negative stance towards the British constitutional[355] and institutional system of law. At an earlier stage, he had been largely supportive of this system, but his contempt for it, and his enthusiasm for the principles underlying the French Revolution, become increasingly manifest, as his political thought develops during the 1790s. Although the British model has a two-chamber parliament that in principle could resist the monarch, it is for Kant nonetheless "leicht durchzuschauen" that the British legal model secretly works the other way around; it is in reality the executive monarch who has total control over the legislative parliament. The British king has a *de facto* influence over the people's representatives in the two houses that is "so groß und so unfehlbar (…), daß von gedachten Häusern nichts anderes beschlossen wird, als was Er will und durch seinen Minister anträgt". Consequently, the parliament and its discussions are nothing but a façade; the public debate is considered as "eine lügenhafte Publizität" in what constitutionally ought to be a limited republican aristocracy, but which is in fact (and secretly) the rule of an "*absoluten Monarchen*" (7:90),[356] i.e., a despotic monarchy. Comments in the *Nachlass* notes are even less blunt. On basis of the king's right to veto the claims of both parliament and the

[355] Whether or not the British model, then as now, actually can and should be described as a constitution, given that it has no separate constitutional document, is open to debate and will, of course, not be answered here. It certainly has an institutional framework that is reminiscent of at least a *de facto* constitution, and it is this system Kant refers to – sometimes also explicitly as a constitution, although not always (or even often) in this manner.

[356] A palpable criterion for whether such a constitutional system is limited or absolute in this sense is developed by Kant in the footnote to the passage, and concerns the right – or, perhaps better, authorisation – to declare war: " – Was ist ein *absoluter* Monarch? Es ist derjenige, auf dessen Befehl, wenn er sagt, es soll Krieg sein, sofort Krieg ist. – Was ist dagegen ein eingeschränkter Monarch? Der, welcher vorher das Volk befragen muß, ob Krieg sein solle oder nicht, und sagt das Volk: es soll nicht Krieg sein, so ist kein Krieg. – Denn Krieg ist ein Zustand, in welchem dem Staatsoberhaupte *alle* Staatskräfte zu Gebot stehen müssen. Nun hat der großbritannische Monarch recht viel Kriege geführt, ohne dazu jene Einwilligung zu suchen. Also ist dieser König ein absoluter Monarch, der er zwar der Konstitution nach nicht sein sollte; die er aber immer vorbei gehen kann, weil er eben durch jene Staatskräfte, nämlich daß er alle Ämter und Würden zu vergeben in seiner Macht hat, sich der Beistimmung der Volksrepräsentanten versichert halten kann. Dieses Bestechungssystem muß aber freilich nicht Publizität haben, um zu gelingen. Es bleibt daher unter dem sehr durchsichtigen Schleier des Geheimnisses" (7:90). (In the *Nachlass*, Kant admits a partly contrary view, namely that the English king indeed has a constitutional right to declare war. This makes him, all the same, an absolute monarch, and the main point remains: only if there is a separation of powers and the executive power is limited by the legislative assembly of several or all – e.g. a limited republican aristocracy or democracy with an executive monarch under legislative control – is the people "wahrhaftig frey" (19:606).) More on this criterion and the call for war referendums in part II on international right.

people (most significantly in declarations of war), Kant laments that "die Constitution von Grosbrittanien nicht die eines freyen Volks [ist,] sondern eine politische Maschine [um] den absoluten Willen des Monarchen auszuführen" (19:607).

This damning verdict on the pre-modern British system is sharply contrasted with his praise of the French Revolution, which is described in *Der Streit der Fakultäten* as nothing less than "eine Erfahrung im Menschengeschlechte" that in fact proves (*beweiset*) that humanity is on course to moral progress and perpetual peace. Kant is adamant that it is not the revolution itself that proves this – the revolution "mag gelingen oder scheitern; sie mag mit Elend und Greueltaten dermaßen angefüllt sein" – it is, rather, its public reception that cannot be denied. As much as one (including Kant himself)[357] would have to disagree with the way in which the Revolution was (or was not) conducted, it is nevertheless impossible to disagree with the principles at its heart. These principles evoke in Kant and every other spectator a sympathetic disposition, "die nahe an Enthusiasm grenzt". It is not the political order as such, but "die Denkungsart der Zuschauer" that is forever changed by the French Revolution. Not only its underlying principles, but also the spectators' support is finally voiced publicly ("laut werden"). For Kant, the universality of the legal principles and their generally positive public assessment actually proves nothing less than "einen Charakter des Menschengeschlechts im Ganzen und zugleich (der Uneigennützigkeit wegen) einen moralischen Charakter desselben (…), der das Fortschreiten zum Besseren nicht allein hoffen läßt, sondern selbst schon ein solches[358] ist, so weit das Vermögen desselben für jetzt zureicht" (7:84 f.).

For Kant, the Revolution is not French, but universal. It is, in fact, best described as no revolution at all: "– Diese Begebenheit ist das Phänomen nicht einer Revolution, sondern (wie es Hr. Erhard ausdrückt) der Evolution einer naturrechtlichen Verfassung" (7:87).[359] Every other positive legal order has in this sense been simply a preliminary stage in an evolutionary process of realising the natural right principles of pure practical reason. And the first attempt to realise these principles was made by the republican movement. Understood correctly, the desired republic that may or may not be founded as a result of the events is secondary to the idea and the principles that the French republican movement has now made public, thereby giving them practical reality: "Denn ein solches Phänomen in der Menschengeschichte *vergißt*

[357] Compare, for instance, his admission in the same passages: "ein wohldenkender Mensch [würde] sie, wenn er sie zum zweitenmale unternehmend glücklich auszuführen hoffen könnte, doch das Experiment auf solche Kosten zu machen nie beschließen" (7:85).
[358] The Weischedel edition and the *Akademieausgabe* differ on this word (*solcher*/*solches*, respectively). I have chosen the latter, since I hold it to refer to progress (*Fortschreiten*), not character (*Charakter*).
[359] Although I am unable to trace the origin of the expression, the Herr Erhard to whom he refers is most likely Johann Benjamin Erhard, a political philosopher and friend of Kant.

sich nicht mehr, weil es eine Anlage und ein Vermögen in der menschlichen Natur zum Besseren aufgedeckt hat, dergleichen kein Politiker aus dem bisherigen Laufe der Dinge herausgeklügelt hätte, und welches allein Natur und Freiheit, nach inneren Rechtsprinzipien im Menschengeschlechte vereinigt" (7:88).

In light of this public realisation of the principles of pure practical reason, it is perhaps also easier to comprehend Kant's reflection at the beginning of §51 that the mere idea of a threefold concept of state sovereignty stemming from an *a priori* will of the united people has "objektive praktische Realität" (6:338). That an idea can have objective practical reality may at first seem slightly counterintuitive; we find in this sense a parallel in the description of the moral law as a fact of reason in the second *Critique*. Since the fact of reason is an *a priori* fact, the objective practical reality of the idea of the united legislative will of the people is no hard fact in a strictly empirical sense. Instead, like the moral law qua fact of reason, the idea of the sovereign and united legislative will of all constitutes the one and only rightful basis of legal norms and political action. It has objective practical reality not as eternal norm in accordance with which all empirical state and individual actions are practical-theoretically evaluated, but rather insofar as it is also realised in actual practice. And this was the great achievement of the republican movement of the French Revolution: for the first time, it was attempted to realise the evolution of natural right principles in political practice. In this manner, under a rightful, republican rule of law, an autonomous concept of freedom could finally be realised in our external, intersubjective relations as well.

The evolutionary character of a *de facto* realisation of the principles of rational right necessarily also entails that the state is open for reform. As we have seen, Kant emphasises several times that this cannot be done by the people as subjects of law, for that would be to invert the required hierarchical structure of the state. The sovereign legislator, however, who is also the guarantor of legal norms and relations – in short, of a rule of law – is authorised and even obliged to reform itself in order to gradually correspond with the overall principles or pure practical reason. It is for Kant therefore necessary "daß der Staat sich von Zeit zu Zeit auch selbst reformiere und, statt Revolution Evolution versuchend, zum Besseren beständig fortschreite" (7:93). This may relate primarily to the state constitution itself, but as we will see later, it also concerns both the statutory laws and the administration of justice in general. All of this is a matter of exercising sovereign legislative power in a rightful manner according to the procedures that reason explicates, and it must take place within a legal continuum in order to prevent a nullification of all actual rights claims, however provisional these might be. This is yet another reason why revolution is not permitted. But, as is evident from the following

passage in General Remark A, Kant's prohibition against revolution can be seen to be both upheld and somewhat nuanced: "– Eine Veränderung der (fehlerhaften) Staatsverfassung, die wohl bisweilen nötig sein mag – kann also nur vom Souverän selbst durch *Reform*, aber nicht vom Volk, mithin durch *Revolution* verrichtet werden, und wenn sie geschieht, so kann jene nur die *ausübende Gewalt*, nicht die gesetzgebende treffen" (6:321 f.).

Accordingly, Kant sees revolution or even the slightest attempt of resistance against the sovereign legislator as tantamount to the dissolution of the civil condition *per se*. Such a revolution amounts in reality to the claim that there shall be no law above the private will of the stronger. He sees this as an effort "sein Vaterland *umzubringen*" (6:320), by unilaterally positing a law above the law and asserting that the supreme legislator is not the true sovereign after all, but that another, clandestine principle somehow can rightfully trump the former.

Of great interest is also the last addition to the passage that seems to say that, however unlawful it may be, a revolution against the executive authority is not as strictly prohibited as resistance against the legislative authority. Such an action by the united people is, in short, not equivalent to an abolition of the civil condition; the state depends entirely on the continuum of a legislative sovereign to universally confirm all rights, but it does not similarly depend on the continuum of the particular executive. This is by no means to permit revolution or any other extralegal resistance, but to place sovereignty entirely in the legislative will of the people – primarily (but not exclusively) in its institutional state form, i.e., in its actual representative(s). This passage, unsurprisingly, is immediately followed by the remark (already cited) about the legally rightful possibility of a form of negative resistance against the executive power by the parliament in a limited constitution that can truly represent the people.[360]

Kant's position, as it is developed in the public right part in the *Rechtslehre* suggests, in my view, a modern concept of what we today would call a parliamentary or even radical democracy. To my knowledge, very few scholars seem to fully appreciate the implications of this altered understanding of right in his last major work on practical philosophy. Habermas, for instance, although he comes close to this in his interpretation of Kant's legal philosophy, even holds that there is "eine Unterordnung des Rechts unter die Moral" (Habermas 1998: 153) in this, partly on the basis of a perceived lack of a truly democratic component within the

[360] See also his note in the *Nachlass*: "Das Volk muß durchaus repräsentirt seyn und als ein solches auch nicht allein Recht zum Wiederstande sondern auch Gewalt haben, damit ohne Aufruhr es seine freyheit recuperiren und dem Regenten den Gehorsam versagen könne. Eigentlich muß es so heißen: das Volk muß keinen Augenblik aufhören, ein Ganzes zu machen, denn sonst geschieht alles *per turbas*, d. i. durch usurpirte Gewalt, die auf jemanden nicht rechtlich übertragen werden. Also muß es repräsentirt worden seyn, wenn es sich gesetzlich absondern und wiederstehen kan" (19:591, R. 8046).

Kantian medium of right itself.[361] Other commentators, like Kersting, Ludwig, and Flikschuh (and to some degree Ripstein), do not appear to take sufficient notice of the specifically public and indeed democratic dimension to the legislative process and the threefold republican legal framework.

Consequently, as I have shown, Habermas, Kersting, Flikschuh,[362] and others hold that Kant's legislative process can take the rightful form of a mere thought-experiment. These are telling examples of the standard interpretation of the public right sections of the *Rechtslehre*. Ludwig, whose focus on the vital §§51-52 is certainly praiseworthy, also underestimates the possible democratic foundation of the actual republic. It is true that Kant importantly differs from Rousseau in the important respect that the *de facto* forms of the state are related to the legislative and not the executive authority, but this does not warrant Ludwig's further claim that Kant cannot possibly be taken as a proponent of direct democracy (cf. Ludwig 1999: 186 f.). As I have emphasised, there is for Kant no self-contradiction in a claim that the entire citizenry can (or indeed should) be empowered with the entire legislative power;[363] the people does not have to be represented by an autocrat or by an aristocracy. On the contrary, there is even a strong argument for the claim that democracy might be his preferred form of state.

This is certainly what Ingeborg Maus thinks in her exposition of Kant's philosophy of right in *Zur Aufklärung der Demokratietheorie*. She sees his theory primarily as a rejection of any substantive reading of what right (and freedom) is. As with all his critical philosophy, it is the purely formal, reflective, and procedural character of right that is necessarily the point of departure, since no material value or norm can form a principle or law upon which one must consistently act.[364] Right and, thus, freedom in external relations cannot be anything else than a purely procedural principle of the people's self-legislation as citizens, since on this account, everything else would be paternalism, which (as we recall) is a form of governance that Kant regards as "die am meisten despotische unter allen (Bürger als Kinder zu behandeln)" (6:317). This is why she emphasises the principle of popular sovereignty as fundamental to (and too often overlooked in scholarship on) his legal and political philosophy, and holds him to be an

[361] I will briefly return to this claim and a critique of it in the next subchapter.
[362] In her 2000 account of Kant's political philosophy, she bypasses public right entirely (cf. Flikschuh 2000: 7)
[363] For instance, Kersting must be said to underestimate this democratic legislative component in Kant when he overemphasises the status of the people as subjects of law. He writes in *Wohlgeordnete Freiheit*: "Ein Volk wird ein Volk, indem die Individuen sich gemeinsam einer unwiderstehlichen politischen Autorität unterwerfen" (2007: 281). This is admittedly correct, but only half of the story. It must also be underlined that a people becomes a people with their normative claim to the irreprehensible legislative authority, which belongs to them entirely (in its idea). Both Maus and Langer are much clearer about this final aspect than Kersting (and others).
[364] She accordingly describes Kant's philosophy of right as constituting a decisive shift from a material natural rights understanding to a purely procedural natural rights or *Vernunftrecht* approach (cf. Maus 1994: 10).

ardent advocate of what we today would describe as modern democracy. The *pactum unionis civilis* (i.e., original contract) that Kant introduces as the idea in accordance with which all legal actions and political movements must be normatively evaluated, and towards which they also are obliged to move, is on her reading "wesentlich prozedural: Er enthält nichts anders als das Organisationsprinzip der Demokratie selbst" (Maus 1994: 52).[365]

Maus sees Kant's elaboration of a principle of popular sovereignty in the *Rechtslehre* as evidence of the inherent democratic features of his theory. In constituting the necessity of an identitical relationship between the authors and the subjects of law, the principle grounds all normativity of political domination, i.e., rightful coercion. As I have emphasised above, this identity of universal legislator[366] and particular subject stands at the core of Kant's legal philosophy. Furthermore, it is imperative to recall that any *de facto* and direct exercise of such popular sovereignty can be related to the function of the legislature, and to this only. As Maus sardonically notes, later juridical interpretations of the concept of popular sovereignty would seek to reestablish the people's identity within the realm of executive power, which is coupled with both the monopoly on coercion and the right to take particular measures here and now. This was, for instance, fatefully done by the so-called German conservative revolution, and she quotes Carl Schmitt on their call for an "Identität der Regierenden und der Regierten".[367]

This example once again reveals vast differences between state systems, differences that are entirely related to the legal structures as such. Kant's principle of popular sovereignty stands in diametrical opposition to Schmitt's, since Kant places his within the legislative state authority and Schmitt locates his in the executive. Kant's construct yields, as Maus shows, no carte blanche for the legislator to do as he or she wishes (and who in a certain sense does not act in the state but is rather, in Kant's formulation, the personified law).[368] This stands in clear contrast to Schmitt's executive, who most decidedly acts. It must be said of Kant's republic, which is diametrically opposed to Schmitt's state system, that "[d]er rechtsbegründenden Volkssouveränität korrespondiert die totale Verrechtlichung von Herrschaft" (ibid.: 163). This means in practice that all use of power must be grounded in and authorised by the legislature, which in turn, normatively speaking, can be none other than the citizens who are then subject

[365] Kersting disagrees with this interpretation, but insists nonetheless that: "Kants pactum unionis civilis ist das staatsrechtliche Gegenstück zum kategorischen Imperativ" (2007: 274 f.).
[366] Again, the actual representative(s) of this normative (noumenal) legislative will may take the empirical shape of any number of representatives (one, several, or all). However, contrary to Ludwig (1999: 186), it must be held that it is not the representatives as such, but the state (and its constitution) that constitutes the people, at least as a term that Kant also employs for the sum total of the particular subjects of law.
[367] Quoted in Maus (1994: 200); original quotation in Schmitt (1993 [1928]: 234).
[368] Cf. his *Gemeinspruch* reference to the personified law in the city-state of Venice (cf. 8:294). (For Kant, the sovereign legislator is constrained not physically, but by natural rights of an innate, private, and public kind.)

to the coercive laws. The true revolution of Enlightenment political thought is, as Maus sees it (and I agree), the complete inversion of the juridical structure of political domination from the head of the state apparatus of particular executive power to the basis of civil society and its sovereign right to universal legislation – and Kant is here one of the most avid defenders and most articulate explicators of this legal principle.

Although her interpretation of and emphasis on the vital role of popular sovereignty in Kant is convincing, Maus goes rather too far in the opposite direction. Although it is in my view undisputable that Kant allocates sovereignty in the united legislative will of the people, this does not support Maus' reading that the change of a faulty state and/or its constitution can, normatively speaking, equally well be achieved through revolution as through reform. Her claim that these are "gleichrangig" (Maus 1994: 119) may be defended regarding the *idea* of right, but to declare that thereby "gewinnt normativ die Revolution sogar Vorrang vor einer zu langsamen Reform" (ibid.: 130) overlooks the necessary factual continuum of right that a reform upholds but a revolution breaks. For one thing, any (at least extralegal) assessment that a reform is too slow will always remain subjective;[369] another relevant objection is his explicit endorsement of political and constitutional reforms within the existing juridical framework and his rejection of all revolutions – perhaps with a slight reservation, where these are solely directed against the executive authority. Maus places too much emphasis here on the non-institutionalised form of popular sovereignty in relation to the *de facto* realisation of right – thus making Kant more of a Rousseauian than (despite all their agreements) he actually is.

Nonetheless, I believe that Maus' presentation of Kant's legal and political philosophy is the most coherent in contemporary scholarship. She gives an excellent summary when she concludes that it primarily seeks to answer the basic question "unter welchen Bedingungen der rechtsetzende Wille selber vernünftig sein kann" and that this practical-philosophical endeavour "wird durch eine Naturrechtstheorie beantwortet, die zugleich Souveränitätstheorie ist – und umgekehrt" (ibid.: 161). The demands of reason are met on a purely formal level by Kant's allocation of sovereignty in the united legislative will of the people that *per se* prevents every particular will from having an authoritative voice with regard to political domination; it must be authorised by the entire citizenry through their actual institutional representatives – and we have seen that Kant prefers these to be either some (aristocracy) or all (democracy).[370] Whether he is more positive to the former or latter state form in a republic may be a pertinent

[369] Cf. Ripstein's account of the three structural defects inherent to all conditions devoid of public authority.
[370] I will return in the next subchapter to further demands of reason in its public (and private) political form.

question, but as Maus too insists, another aspect of representation takes this debate to another and more fundamental level in §52.

Again, the key facet of representation in the realm of politics is not how many physical persons actually represent the united legislative will of the people, but rather that they are in fact representatives who are authorised to do so – that is, that the authorisation to represent the people comes in the form of a specific mandate from the latter. In that case, as Kant makes clear in §52, it is not the representatives themselves who constitute the final legal instance and thereby the sovereign of the state. It is the people who authorises the temporary mandate as this is laid down in the constitution and its procedures. On Maus' interpretation of Kant (with which I fully agree on this point), the union of citizens may accordingly choose or vote for other representatives at a later stage; the representatives would be guilty of an unlawful act if they themselves acted contrary to the constitution by prolonging their time in office. I believe it can – against Ludwig's (and others') claim – be shown that in the final version of a *de facto* republic too, Kant's sovereign is not the actual representative(s) in parliament, but those who are represented, namely the united people.

This claim, which may be suprising, is required by Kant with regard to a concept of rational right. In §52, he makes the following assertation: "Alle wahre Republik (...) ist und kann nichts anders sein, als ein *repräsentatives System* des Volks, um im Namen desselben, durch alle Staatsbürger vereinigt, vermittelst ihrer Abgeordneten (Deputierten) ihre Rechte zu besorgen" (6:341). The true republic must be more than merely a system where the people are represented; the system must also be representative in reality, that is, be a legal order in which the *de facto* representatives are precisely recognised by law as the people's representatives, since all legislative authority resides in the people. Although it is not entirely unambiguous, I suggest the next remark can be seen to underline this additional criterion for his republican rule of law, a legal order that in practice grants the people actual sovereignty:

> Sobald aber ein Staatsoberhaupt der Person nach (es mag sein König, Adelstand, oder die ganze Volkszahl, der demokratische Verein) sich auch repräsentieren läßt, so *repräsentiert* das vereinigte Volk nicht bloß den Souverän, sondern es *ist* dieser selbst; denn in ihm (dem Volk) befindet sich ursprünglich die oberste Gewalt, von der alle Rechte der Einzelnen, als bloßer Untertanen (allenfalls als Staatsbeamten),[371] abgeleitet werden müssen, und die nunmehr errichtete Republik hat nun nicht mehr nötig, die Zügel der Regierung aus den Händen zu lassen und sie denen wieder zu übergeben, die sie vorher geführt hatten, und die nun alle neue Anordnungen durch absolute Willkür wieder vernichten könnten (ibid.).

[371] The reason for the inclusion of this parenthesis is neither entirely clear nor further elaborated in the text.

Some aspects of this passage may be confusing. If the immediate starting point for our interpretation of it is the peace essay, we could do worse than assume that Kant still speaks of representation only in terms of the executive power representing the legislative branch. But, as I hope to have shown through my analysis of his changed understanding of representation and of the three forms of the state in §§51 and 52 of the *Rechtslehre*, there is another reading of the passage that sits better with the rest of the sections. Here, as we have seen, the three possible forms of state refer ("der Person nach") to the actual legal person(s) vested with sovereignty. In a republic, the three authorities are separated and the forms of the state refer to the legislative authority and this only; moreover, in this republican context, representation is also understood as the relationship between this actual sovereign and the united legislative will of the people in its idea.

The most consistent and probable interpretation of §52 and of Kant's chapter on *Staatsrecht* is that his republic can indeed go one better than the mere separation of the legislative from the executive (and judicial) power. As soon as the *de facto* legislative sovereign also lets itself be represented (cf. *sich auch repräsentieren läßt*), then the united people is not merely represented, but actually *is* the sovereign (cf. *so* repräsentiert *das vereinigte Volk nicht bloß den Souverän, sondern es* ist *dieser selbst*). If the people is not just assigned their representative(s) in office as mere subjects of law (although there happens to be a republican separation of powers), but also actually can choose its legislative representatives, the people, as citizens, is truly sovereign.[372]

Consequently, the main question for Kant is not whether there actually is a legislative state institution of several or all (or even of one), but whether these representatives are in fact authorised as rightful legislative representatives of the united people. These are, accordingly, for a certain time period the elected representatives of a state institution which not only gives objective practical reality to the people's legislative will, but which is also obligated to control the people's representatives in the two other branches of government (but may not usurp their functions). Therefore, Kant's concept of representation is present in these two state authorities as well. Maus (1994: 192 f.) correctly claims that it extends to all three institutions of the rule of law: to the people's direct representatives in parliament, to the ministers as representatives of the executive, to the entire executive office as (indirect) representatives of the people, and –

[372] As Kant reiterates in the next sentence, it is in the people that supreme authority is originally found, and all rights can be derived from the people. Accordingly, it is only at this stage of the natural right evolution that freedom and a possible use of coercion coincide (cf. 6:340). We can therefore safely conclude that if the union of citizens that chooses its own representatives includes the entire citizenry in such a republic, we have a Kantian republican democracy. If this union does not include the entire people, we have, in Kant's view, a republican aristocracy.

as we have already seen – to the function and system of the judiciary according to which the people indirectly judge themselves. I believe this representative system of the people is Kant's model of choice, and is what we today would call a modern parliamentary system.

I also consider that this interpretation best accords with Kant's deliberations on the "reine Republik" (6:340) in the immediately preceding paragraph. Here, Kant explicitly holds the forms of the state to only be "der Buchstabe (*littera*) der ursprünglichen Gesetzgebung [!] im bürgerlichen Zustande, und sie mögen also bleiben, so lange sie, als zum Maschinenwesen der Staatsverfassung gehörend, durch alte und lange Gewohnheit (also nur subjektiv) für notwendig gehalten werden" (ibid.). However, the letter of the law and the state legislation are 'merely' factual entites and must be held conceptually apart from the original contract and its spirit (*Geist*). He makes it perfectly clear that this latter dimension provides the former with all normative justification and also imposes an obligation on it to reform itself. The *de facto* state must move "ihrer Wirkung nach" – not in one fell swoop, but rather "allmählich und kontinuierlich" – towards the "einzig rechtmäßige Verfassung" of the pure republic. The old empirical or statutory forms of the state, Kant writes, "welche bloß die *Untertänigkeit* des Volks zu bewirken dienten" must now "sich in die ursprüngliche (rationale) auflösen" (ibid.).

I propose that this original and rational state form (cf. *respublica noumenon*) is not just a pure republic with its obligatory strict separation of powers. It includes a democratic form of the state as well, according to which all legislative authority and thereby sovereignty too in actual practice reside in the people. Accordingly, the citizens are in a first instance the authors of all state laws, to which they are then subjected by the state apparatus of executive and judiciary. Contrary to Ludwig (1999), who holds that the people in the *de facto* republic (cf. *respublica phenomenon*) can never attain full sovereignty or exercise any kind of so-called radical or direct democracy, I think they can. The state must reform itself towards the ideal of a pure republic in which the authors and the subjects of law are identical (through authorising their own legislative representatives). It is essential that Kant explicitly writes that the number of actual legislators must finally coincide with the spirit of the original contract "auch dem Buchstaben nach" (6:340). This, then, is in my view his vision of a realised pure republic:

> – Dies ist die einzige bleibende Staatsverfassung, wo das *Gesetz* selbstherrschend ist und an keiner besonderen Person hängt; der letzte Zweck alles öffentlichen Rechts, der Zustand, in welchem allein jedem das Seine *peremtorisch* zugeteilt werden kann; indessen, daß, so lange jene Staatsformen dem Buchstaben nach eben so viel verschiedene mit der obersten Gewalt bekleidete moralische Personen vorstellen sollen, nur ein *provisorisches* inneres Recht, und kein absolut-rechtlicher Zustand, der bürgerlichen Gesellschaft zugestanden werden kann (6:341).

To claim, like Ludwig and most other commentators, that Kant's legal model of a pure republic is a strictly theoretical or noumenal one that cannot be fully realised in practice is, of course, to ascribe to it a merely metaphysical character and insist that what holds in theory does not apply in practice. But his overall practical-philosophical project was surely nothing but a rejection of such claims. It is scarcely necessary to say that Ludwig's critique is entirely correct insofar as it is directed against a Rousseauian radical democracy in which the entire citizenry also has supreme executive power. But to not draw the line between such a despotic democracy and a republican democracy in which the sovereign people chooses its legislative representatives – who in turn control the two other state institutions – is to overlook the vital distinctions that Kant makes in the *Rechtslehre*.

Ludwig tries to support his argument with a reference to the last paragraph of §52 on the serious error of judgement of which Kant accuses Louis XVI (cf. Ludwig 1999: 186). For Kant, the monarch – due to his "Verlegenheit wegen großer Staatsschulden" (6:341) – makes a great mistake when handing his power over to the National Assembly and thus also to the people. However, I believe the issue at stake here is the republican separation of legislative and executive power, not (as Ludwig holds) whether the people actually exercises political authority. Kant is above all concerned that Louis XVI, in his transfer of executive authority as well, ruins any republican system, since the National Assembly now controls two branches of government – its task from then is on not just "Souveränität zu konstituieren, sondern [auch] dieser ihr Geschäfte zu administrieren" (6:341 f.).[373] Consequently, the state rests on nothing but the virtue of the people's representatives, in the sense that, qua factually empowered administrators both of state coercion and of 'law', they always let their universal legislative will get the better of their particular interests. In Kant's view, France was thereafter clearly not a republican, but undoubtedly a despotic state, abandoned to the absolute choice and mere *Gutbefinden* of the National Assembly.[374]

[373] This, of course, is the very definition of despotism. Kant also states that a codification of the monarch's will in a contract that would see his power reinstated once the National Assembly had solved the debt problems is a contract that is "an sich selbst null und nichtig" (6:342). Any attempt by Louis XVI to interpret the situation in that way is therefore clearly self-contradictory. (See also the indented Kant quotation below.)

[374] Again, Kant insists that only in the republic can the "absolute Willkür" (6:341) of a law-giving exeutive power be contained. This is precisely what went wrong in Revolutionary France; Sieyès too was deeply critical of this. "Sieyès disagreed strongly with the Jacobins about how to unify France's sovereign national will. The Jacobins insisted on direct democracy with a universal franchise. As Sieyès warned, and as it in fact turned out, this democracy could only overcome its powerful centrifugal tendencies by appealing to a highly moralized patriotism. Despite the Jacobins' humanitarian ideals, this patriotism became thoroughly militarized in the emergency conditions that confronted revolutionary France. Ultimately, to hold France together, Jacobin democracy had to resort to a nightmarish reign of virtue" (Nakhimovsky 2011: 25).

Let me sum up my understanding of Kant's republic as a representative system of the people: I argue that it is characterised by representation in all three branches of government, but no represesentation is more significant or immediate than that in the legislative authority, which constitutes and contains both state and popular sovereignty. In the representation of the united legislative will of the people, the *de facto* legislator(s) have supreme state power, but cannot control or dispose of the united legislative will itself (and its rational preconditions), nor usurp the specific functions of the state apparatus. In the last passage of the *Staatsrecht* chapter, Kant sums up this hierarchy and the right to sovereign legislation as follows:

> Das Recht der obersten Gesetzgebung im gemeinen Wesen ist kein veräußerliches, sondern das allerpersönlichste Recht. Wer es hat, kann nur durch den Gesamtwillen des Volks über das Volk, aber nicht über den Gesamtwillen selbst, der der Urgrund aller öffentlichen Verträge ist, disponieren. Ein Vertrag, der das Volk verpflichtete, seine Gewalt wiederum zurückzugeben, würde demselben nicht als gesetzgebender Macht zustehen und doch das Volk verbinden, welches nach dem Satze: Niemand kann zweien Herren dienen, ein Widerspruch ist (6:342).[375]

As in his moral philosophy, autonomy and freedom stand at the centre of Kant's legal philosophy. Without this identity between the law-making and law-abiding persons in a state (citizens and subjects of law, respectively), there simply cannot be a consistent, i.e., legitimate rule of law. Only the republic binds the people to a political will that is not heteronomous. For Kant, the people always remains sovereign in the non-institutionalised dimension of popular sovereignty, but still needs an institutionalised legal dimension of state sovereignty to give the united legislative will reality. The right to give practical reality to this will is accordingly an inalienable right of the *de facto* legislative power; nevertheless, the people have an inalienable right to be able to constitute themselves anew, either through election of other representatives or through a reformulation of the constitution itself. Of course, all of this must take place within the laws and constitutional procedures themselves. But it is not only possible to realise such a process: it is also factually realised in the republic with a democratic state form.

In short: Kant's pure republic is not just a system representing the people,[376] but more precisely a representative system of the people in relation to all three state authorities. When both representation and authorisation of all political power and positions are finally completed through the constitutional establishment of the republic with a democratic state form, one can

[375] Identical to the case (and the Kantian impossibility) of a slave contract, the will that is presupposed to form such a contract is nullified through the contract itself (and thus also nullifies the contract).
[376] Cf. Gregor's translation of the "*repräsentatives System* des Volks" (6:341) referred to above as merely a "*system representing* the people" (Kant 2009: 481).

at last claim without contradiction that there is a rule of law, and not of human beings.[377] The deliberations in the part on private right have likewise now come full circle: the conclusive, peremptory allocation of rights, and the guarantee for everyone's external freedom sphere, are established only with the constitutional inauguration of the democratic republic.

In Kant's view, this form of republican constitutionalisation constitutes the only legal condition in which external freedom is established and upheld in a rightful and undiminished manner, since freedom is limited to a use that not only can be, but also actually is united to the equal, reciprocal freedom of all through their common legislative will under the rule of law. To establish the democratic republic is to fully realise the idea of the original contract, an idea that lends all actual legal orders their legitimacy. For Kant, therefore, the democratic republic is the only state system that is entirely consistent with right; consequently, it is only within a republican-democratic constitution that freedom is completely and conclusively attained in each of its innate, private, and public dimensions:

> – Der Akt, wodurch sich das Volk selbst zu einem Staat konstituiert, eigentlich aber nur die Idee desselben, nach der die Rechtmäßigkeit desselben allein gedacht werden kann, ist der *ursprüngliche Kontrakt*, nach welchem alle (omnes et singuli) im *Volk* ihre äußere Freiheit aufgeben, um sie als Glieder eines gemeinen Wesens, d. i. des Volks als Staat betrachtet (universi), sofort wieder aufzunehmen, und man kann nicht sagen: der Mensch im Staate[378] habe einen *Teil* seiner angebornen äußeren Freiheit einem Zwecke aufgeopfert, sondern er hat die wilde, gesetzlose Freiheit gänzlich verlassen, um seine Freiheit überhaupt in einer gesetzlichen Abhängigkeit, d. i. in einem rechtlichen Zustande, unvermindert wieder zu finden, weil diese Abhängigkeit aus seinem eigenen gesetzgebenden Willen entspringt (6:316 f.).

I will now proceed to the next subchapter, which centres on the vast importance of the public (and private) use of reason that upholds and continually reinvigorates both freedom and right in the despotic and in the republican state. There, the above distinction between the non-institutionalised and the institutionalised political domain can hopefully once again be used to much effect.

3.4. On the public (and private) use of reason

The distinction in the peace essay between a mere distributive unity of the will of all and the collective unity of the united will (cf. 8:371) already shows us that Kant assigns the public use of reason a fundamental role in any rightful rule of law. His insistence that only the latter union of citizens can form a rightful and truly civil condition entails the claim that republics

[377] Cf. the definition of the pure republic already mentioned: "die einzige bleibende Staatsverfassung, wo das *Gesetz* selbstherrschend ist und an keiner besonderen Person hängt" (6:341).
[378] I here follow the *Akademieausgabe* in rendering the formulation this way rather than the original "... sagen: der Staat, der Mensch im Staate...".

are characterised by a distinctively public use of reason. Only the deliberated will of all can ground a legitimate basis for the exercise of political power; the privately held opinions of the masses do not, however many or loud their voices may be. In this subchapter, I intend to show that Kant's legal framework, which culminates in the democratic republic where laws rather than human beings rule, can ultimately be traced back to the inauguration of a public and thus all-inclusive, mutually recognising use of reason at the base of all political decision-making.

In the following, I shall therefore consider his concept of a public (and a private) use of reason to further delineate the procedures and possibly also contents of his republic. This will enable us to establish the connection between his reformative philosophy of right and the Enlightenment project of freedom and autonomy through public self-enlightenment. Against Habermas' accusation that Kant's legal and political philosophy lacks a component of public deliberation within the medium of law as such, I contend – with Maus – that Kant's account is in fact a lot closer to Habermas' own position than the latter wants to admit.

The allocation of sovereign legislative authority in the people, an allocation that Kant instates as the principal criterion of rightful rule, is – of course – not in itself a guarantee of rightful rule.[379] For Kant, as I have said above, this will corresponds with right only to the degree that this popular legislative will is not just distributive and private, but is a collective, public unity of all. In doing so, he places strong emphasis on the deliberative political process itself, which not only makes a qualitative contribution to rational debate and lawgiving, but also gives the latter two their entire public dimensions. The influence of Kant's concept of the public use of reason is still substantial, being a standard point of reference for discussions of both the public sphere and the modern, democratic rule of law. But although its origin may be attributed to Kant, it is commonplace today to claim – as we have seen, even Habermas does so – that Kant's concept lacks a vital component of modern democracy, since he allegedly does not develop a sufficiently elaborate concept of the public sphere in relation to the rule of law. In my view, however, this largely misses the point of his primary aim in his deliberations on the necessarily public character of politics and right.

First of all, as for instance Habermas himself and Volker Gerhardt have pointed out,[380] the concept of the public sphere is not commonly used at the time of Kant's writing. The term 'publicity' (*Publizität*) is employed to convey the same meaning. This is especially apparent in his use of the term with an indefinite article; cf. his description of the contemporary British

[379] However, as we have seen, it is a guarantee that any injustice that follows from the laws nonetheless can be legitimately attributed to the person(s) in question as self-inflicted in one specific sense.
[380] I will return below to Habermas' later claim to a lack of an institutionalisation of the public use of reason within the Kantian medium of right itself.

public sphere, to which I have referred above, as *eine lügenhafte Publizität* (because of its utter silence on the grave constitutional malpractice). Moreover, quite in line with his overall philosophical stance, the truly public character transcends any empirical and thereby also any sociological, historical, and/or anthropological account of what the public sphere actually is or depends upon. As with his universal principles of legal and moral philosophy, it is impossible in this case to think of a free public sphere that is causally determined by something external to it, let alone claim that it can impose on us obligations that lie beyond its possible means. Although the public sphere too naturally has an empirical side, its true essence is for Kant found rather in its peculiar capacity to transcend this aspect and form an *a priori* normatively binding obligation upon us through rational insight and deliberation.

And this the public sphere can and must do against all odds at any time and place, although, of course, the sociologist, historian, anthropologist, political scientist, etc. can point to indicators which make such an exercise of public reason more or less likely in different times and places. As Kant repeatedly underlines, not even the most fatalistic spectator can deny this possibility and normative duty in any meaningful sense. His concept of a public use of reason is, as we see, in more than one sense closely related to his concepts of freedom and autonomy, both in a strictly moral and in a legal-political understanding of the terms. Indeed, the public use of reason is nothing else than the practice of free and autonomous individuals who through deliberation in common both decide and question everything that concerns their common cause or, in other words, the public matter, the *res publica*. And since he envisages the regulation of all our intersubjective relations from the perspective of right, this – just like any other use of our external freedom – requires that the public use of reason is laid down as law in the republic, in order to guarantee its adherence and reciprocal recognition.

This is a big step forward from any juridical admission that all political decisions must only be commonly known (cf. his first definition of right in the peace essay), since this is usually the case even in despotic states too. The legal institutionalisation of the use of public of reason adds the criterion that political deliberations are precisely that, namely deliberations, not merely one-way state propaganda; the *res publica* itself (to which state actions most definitely belong) must also be publicly discussed and questioned. The right to a public use of reason thus occupies a central, indeed perhaps *the* central place in Kant's philosophy of right. To paraphrase his 1783 response to the moral fatalist: without the freedom to think in public

there is no public reason;[381] the former must therefore be presupposed in every state of affairs that aspires to be more than a mere display of an absolute and private, arbitrary will.

This emphasis on the right to reason in public is also seen in the *Gemeinspruch* essay, where the freedom of the pen is openly described as the *only* palladium of the people's right (cf. 8:304). It is also recognised in the ironically entitled secret article of the peace essay (cf. 8:369), where the mediating role of the public use of reason begins to come to the fore. The secret article gives a fundamental defence of the need for a non-institutionalised public sphere (here represented in the figure of the philosopher) where one is allowed to speak freely and publicly about the political maxims of the state institutions (be it the legislative power or state representatives).

Kant makes it in no uncertain terms clear that it is the state institutions that hold and must hold actual authority. Yet, he insists on the normative necessity of a non-institutionalised critique (and possibly also correction) of official state practices.[382] Given that "der Besitz der Gewalt das freie Urteil der Vernunft unvermeidlich verdirbt", the factual possessor of power cannot exercise a rule of rational law alone, but ought to seek counsel from the truth-seeking philosopher who, as philosopher, is "unfähig" to succumb to particular interests or contingent factors. At the same time, and for precisely this reason, Kant insists that a rule of philosophers or even philosopher kings "ist nicht zu erwarten, aber auch nicht zu wünschen" (8:369), since the facticity of all actual, institutionalised political power necessarily affects the free exercise and reflection of pure practical reason, which are no longer free. This latter, quintessential aspect of political life is in his view preserved only in the non-institutionalised sphere of an unrestrained use of public reason, where it must also remain.

Gerhardt emphasises that Kant is thus the first to repudiate in principle philosopher rule as an ideal of practical politics.[383] Gerhardt proceeds to examine the relationship between what he calls the politician and the philosopher, which largely corresponds to what I refer to as institutionalised state power and the non-institutionalised public sphere. An important part

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[381] Against Johann Heinrich Schulz' self-tormenting moral fatalist, Kant upholds that the former "hat aber im Grunde seiner Seele, obgleich er es sich selbst nicht gestehen wollte, vorausgesetzt, daß der Verstand nach objektiven Gründen, die jederzeit gültig sind, sein Urteil zu bestimmen das Vermögen habe, und nicht unter dem Mechanism der bloß subjektiv bestimmenden Ursachen, die sich in der Folge ändern können, stehe; mithin nahm er immer Freiheit zu denken an, ohne welche es keine Vernunft gibt. Eben so muß er auch Freiheit des Willens im Handeln voraussetzen, ohne welche es keine Sitten gibt" (8:14).

[382] As I see it, this is another aspect of Kant's recognition of the dual character of right, interwoven in both a normative and factual dimension.

[383] Cf. Gerhardt (2004: 182), where he emphasises with regard to all philosophical schools going back to antiquity: "So wird (…) am Satz über die Königsherrschaft der Philosophen nicht ernsthaft gezweifelt. (…) Kant [ist] der erste, der nicht nur einen pragmatischen Vorbehalt macht, sondern einen theoretisch begründeten Einspruch formuliert".

of the relationship concerns the role of agency, since only the former agent (i.e., the politician and the institutionalised state power) is necessarily bound to a specific context within which certain actions must be taken. The philosopher (or the citizen in a merely non-institutionalised public sphere) cannot be said to be immediately connected to this *de facto* reality, but is rather assigned the role of evaluating the universality and validity of the principles which underlie political action. Yet, as Gerhardt is correct to emphasise in this context, there is for Kant no direct or even necessary link between being a good philosopher and being a good politician: "Gleichwohl kann der Philosoph die konkreten Handlungen des Politikers nicht einfach aus den Grundsätzen ableiten (...): Die politische Praxis steht unter Konditionen sui generis, sie lassen nicht erwarten, daß gute Philosophen auch gute Politiker sind" (Gerhardt 2004: 186).

Even the *de facto* republican formation of the will stands under this dual character of right. It, too, has to be aware of the fact that not only the normative aspects of deliberations of morally autonomous individuals are voiced here. The *de facto* contingent dimension in which these deliberations necessarily take place likewise inevitably affects the outcome of the procedure, however rational it is. As Gerhardt stresses, the individuals' self-relation as social and cultural beings is an important aspect in this connection and must be taken into account accordingly. With the recommendation that the truth-seeking philosopher must always be allowed to give advice to the *de facto* political decision-makers, Kant seeks to preserve both the normative correction of public reason and the *sui generis* of political practice. I fully agree with Gerhardt's conclusion that Kant is no moral rigorist in the realm of politics and law, but rather has a keen eye for both its normative and its factual sides. There is, to quote Gerhardt, a "*Korrelation von Situation und sozialer Stellung* auf der einen und *moralischer Konsequenz* auf der anderen Seite ist in Kants Verwerfung der Philosophenherrschaft anerkannt" (ibid.).

A number of objections can, of course, be raised against the seemingly exclusive role of the philosopher as the one true preserver of the non-institutionalised public sphere that can transcend all contingent factors. At first sight, Kant's discussion of the privileged role of the philosopher in this regard pretty accurately parallels the exclusion of the so-called passive citizens from a related role two years later, i.e., that of a formal, institutionalised legislative authority as active citizens. But mere subjects of law could not be excluded from the role of active citizens at this later date; and it is even less possible to identify the role of philosopher exclusively with the *de facto* holders of the scholarly title.[384] Kings, jurists, and mere subjects

[384] As Eberl & Niesen point out (ibid.: 282), Kant has in the *Streit der Fakultäten* a much wider definition of who can lay claim to participate in the realm of scholarship (*Gelehrsamkeit*), namely all those who "mit Erweiterung oder Verbreitung derselben [Gelehrsamkeit] als Liebhaber [sich] beschäftigen" (7:17 f.).

of law can, of course, philosophise and in this sense be philosophers. His main point is rather, I argue, fairly straightforward and is echoed by Gerhardt as well: they cannot do this as kings, jurists, subjects of law, etc. Likewise, also a philosopher can, of course, be a king or a jurist in addition to his or her status as subject of law; but qua king, jurist, subject of law, etc. one is then no longer a philosopher. For Kant, the interests and roles or functions of the different actors must not be confused or compromised in any way, or, as Gerhardt phrases it: "Die Grenze zwischen Philosophie und Politik darf nicht verwischt werden" (ibid.: 188).[385]

We are here also close to another feature of Kant's use of reason in public, namely that there also is a private use of reason that must be accounted for. Already the *Aufklärung* essay had explicated and pointed to the necessity of a differentiation between a private and a public use of reason. The necessary "Mechanism" of the juridical order, means that in certain state and societal roles or functions it is "freilich nicht erlaubt, zu räsonnieren; sondern man muß gehorchen" (8:37). Kant has in mind here military officers and soldiers, subjects of law, state officials, priests, etc.,[386] all of whom can *as such* only obey the law and orders of the specific role they are given and cannot (as in the case of military officers) "über die Zweckmäßigkeit oder Nützlichkeit [eines] Befehls laut vernünfteln" (ibid.). Similarly, as a subject of law, one cannot resist the rules and regulations in accordance with which one is governed; nor can a state official as state official refuse to follow the administrative proceedings.[387] Here, only a private exercise of reason is allowed.

Nonetheless, it must still be possible in all these cases to step out of the role as one who merely obeys, and qua scholar – or, as above, qua truth-seeking philosopher – publicly address "die Unschicklichkeit oder auch Ungerechtigkeit" (8:37 f.) of certain (or all) rules of conduct. This corresponds to a public use of reason and must, for Kant, "jederzeit frei sein" (8:37). Only in this manner can a process of self-learning and self-enlightenment be formed,

[385] To quote Gerhardt in full on these important points: "Nach alledem ist klar, daß Kant mit seiner Abkehr von der Modellvorstellung Platons gewiß keinem Philosophen den Weg in ein hohes Staatsamt verwehren wollte. Ihm wird auch nicht daran gelegen haben, einem Staatsmann die Beschäftigung mit philosophischen Fragen zu untersagen. Wer das eine oder andere tut, tut dies aber *als* Bürger oder *als* Politiker und nicht *als* Philosoph! Die Grenze zwischen Philosophie und Politik darf nicht verwischt werden. Denn die Politik steht unter anderen Bedingungen als die Philosophie: Die Nähe zur Macht bringt Rücksichten mit sich, die der reinen Reflexion entgegenstehen können, so daß man bei einem philosophischen Urteil eines Politikers stets argwöhnen muß, daß insgeheim doch eine Interessenbindung besteht, die dem freien Urteil abträglich ist".

[386] Kant has also himself in mind as university lecturer and philosopher; in this capacity or role, he is not allowed to question the curriculum or the like in public, since that is an internal affair of the university and a private matter. He must, however, be allowed to bring up the question within the institution and, more generally, be allowed as a citizen to publicly discuss the role of university curricula and the like on a general basis.

[387] This, of course, does not imply that the state official or soldier must make himself an accomplice in violations, but only that he cannot reject standing regulations as state official or soldier. As a free human being, he or she can naturally refuse to follow orders (but may then be liable to coercion and/or punishment by this particular regime).

above all in relation to political questions. Nothing else than the freedom to a public use of reason is required for this endeavour, and he goes on to write the following memorable line: "Daß (...) ein Publikum sich selbst aufkläre, ist eher möglich; ja es ist, wenn man ihm nur Freiheit läßt, beinahe unausbleiblich" (8:36). And, as I have emphasised, this public use of reason must as a matter of principle include each and every one, in order to be truly public; I shall say more about this below.

Consequently, there can be no formal exclusion of one human being or another from Kant's public sphere. On the contrary, it necessarily includes all, and its signature, the public use of reason, is inherently a reciprocal recognition of every rational person. Moreover, the differentiation of the agents' functions within the institutionalised state system and the non-institutionalised public sphere excludes – at least in the democratic republic – any privileged political position; and his rejection of philosopher rule as a political ideal implies a necessity of keeping a political realm separate from the state system itself. This takes place in a manner that largely parallels his divisions between legality and morality as well as state and popular sovereignty, divisions that keep the latter entities from being absorbed and devoured by any *de facto* legal system. Accordingly, each individual must be allowed to exercise a public use of reason without state intervention.

Kant holds this to be not just beneficial, but even indispensable (*unentbehrlich*) for the state (and for the philosophers, cf. 8:369). Indeed, this is the only way that a state system can consistently claim that it is ruled by principles of rational right. For Kant, any state maxim that *a priori* excludes any number of persons from the right to participate in the public debate on equal terms automatically makes such a 'debate' neither public nor rational. It follows that the use of reason in the public sphere must, as a matter of principle, be public and open to all.

As with his definition of republican rule as one of law and not men, it is indicative of Kant's public sphere that what matters is the general validity of the argument itself, rather than the person who presents it. Additionally, the specifically public character of such a use of reason prevents it not only from simply being an exercise of private wills where the wants and wishes of the stronger rule supreme: the arguments must qualify as public, i.e., as universally valid before the court of reason. This, of course, does not imply that the outcome of public debates can in any way be decided beforehand; as with the principles of morality and legality, so here too it is impossible to deduce a list of untouchable material norms or values. Rather, as with morality and legality, the public sphere constitutes a rational procedure to distinguish between different arguments and at least negatively rule out (or disqualify) particular reasons as falling short of the criteria of universal validity.

Hence, the public debate must always be open to future arguments; this corresponds to the lack of specification of legal norms in the Kantian republic, except for the right to freedom and the procedural norms themselves. Nevertheless, the state power may, within its authority, still intervene and temporarily hold one line of reasoning to be official state practice – e.g., a disputed law may be posited by the people's representatives in parliament, or a controversial decree may for the time being be upheld by the state administrators. What is important, though, is that such acts can never be exempted from a future scrutiny by public reason. In other words, it must be possible for later deliberations to legitimately alter these facts.

The open, reflexive, and procedural character of all rationality in Kant implies that any *a priori* exclusion of different views, arguments, opinions, etc. is by definition irreconcilable with rationality itself. Such an exclusion of, or even inequality between, potential participants in the public debate renounces the public and rational character of the debate. Whereas the lawgiving and law-examining will can be exercised only by the individual itself in relation to morality, and in this sense must necessarily be monologous, it is completely impossible to exercise these two forms of the rational will in the realm of law and politics as a monologue. This would imply a despotic, paternalistic scheme according to which a private, particular will determines everything and has already beforehand decided what counts as so-called rationally valid arguments and who may make them.

The right to a public of use reason must therefore be presupposed, if we are to consistently call any political decision public and in line with rational principles of right. But this is not in any way to claim that the public use of reason may, as such, guarantee that the institutionalised state will in fact adhere to the prevailing opinion of the public sphere (cf. Kant's insistence that this opinion only has and should have an advisory character). Rather, in the non-institutionalised form that he here refers to, it hinders the state – if it listens – from erring when performing its office. However, with the altered understanding of key concepts of right in the *Rechtslehre*, his public sphere is granted greater authority than previously. With the definitive allocation of sovereignty to the united legislative will of the people as well as his further specifications of and elaborations on the different state powers, the public sphere is assigned in 1797 another task than that of being a potentially corrective, advisory tool of the state apparatus.

Whereas the all-inclusive public sphere cannot make a factual imprint on the executive or the judiciary exercise of power, it holds a much more prominent position in the legislative process of the *Rechtslehre*. With regard to the first two state powers, it must necessarily stay away from actual decision-making processes, in order not to make the state despotic. But with

regard to legislation, the introduction of a normative concept of sovereignty means that there is no inconsistency in giving the public sphere an institutionalised form. Indeed, the process of universal republican legislation itself can be seen from this perspective as a continuation or prolongation of the political deliberation of the non-institutionalised public sphere in the state institutionalised legislative assembly of parliament. The constitution lays down legal obstacles to the actual influence of the public on their representatives in parliament; after all, it is the latter who are authorised to exercise the most personal of all rights, i.e., the actual supreme legislation. But, crucially, they are merely authorised representatives, and cannot themselves decide to prolong their terms in office or to introduce new legislative procedures that are contrary to the state constitution. In the modern parliamentary system, which I argue Kant advocates as the model that is most conducive with right and freedom, it is still the citizens in the public sphere who also in actual practice remain sovereign, since they let themselves be represented by others for a certain time that has to be specified by the constitution.

On this reading of Kant, the public sphere qua united legislative will of the people is formally empowered (i.e., institutionalised) from time to time in the election of its legislative representatives – how often these processes take place, remains an open and political question – and through these, the elected representatives are given an institutional mandate or vote of confidence to be the representatives of the legislative will until the next election. Between elections or referendums, the public sphere is non-institutionalised and gives no reality to the currents of its particular wills; its unity and *de facto* sovereignty are ceded to the legislative assembly. Of course, the public sphere may with right and legitimacy voice its discontent with their representatives' interpretation of the mandate, and may help the factual sovereign not to err in its decisions. But until the next election, the public sphere possesses no rightful means to actually do something about the situation.

As in the case of the other two state authorities, the non-institutionalised public realm can only appeal to reason and the existing legal regulations to prevent perceived injustice by their legislative representatives. This, however, does not mean that extrajudicial appeals can have no factual imprint – they most certainly do so, when the appeals amend the original view of the representative(s) in question. It means only that the actual decisions and sovereignty still necessarily lie in the hands of existing state institutions. The entire deliberative process itself can, and in my view should, accordingly be viewed as the ongoing and fruitful tension between the non-institutional and institutional public dimensions of law and politics, where the public use of reason in a precise and crucial way takes on the role of rational mediation between the two.

This reading of rightful relations may at first sight perhaps appear to be a Habermasian stance on modern democracy and rule of law, more than a traditionally Kantian stance. I would like to argue that this is not the case; that the two approaches are in fact are similar, and certainly more so than the former wants to concede. Although Habermas is clearly influenced by Kant, something he himself does not in any way conceal,[388] he holds that there are two major disparities between them. The first centres on the relationship between morality and legality, where Habermas accuses Kant – wrongly, as I have tried to show above – of deriving his principle of right from morality as such. The other disparity concerns the point in question here, namely whether Kant actually provides room for an institutionalisation of the public use of reason in his philosophy of right. A brief summary and analysis of Habermas' critique of him on this last point may enable us to clarify Kant's final position on the topic as well as the differences between the two theories.

Habermas' primary accusation alleges that Kant does not have a fully fledged theory of the institutionalisation and thereby realisation of the citizens' political autonomy. Such a public use of reason may be an ideal for Kant, according to Habermas, but the crucial point is that it does not make any input to the legislative process itself; this process cannot be realised "*im Medium des Rechts selbst*". Rather, it is only the aspect of universalisation that is of importance for the validity of laws in Kant's legal system, and this makes it impossible to carry on politics without an institutionalised form of citizen consent. Although Habermas does not explicitly use the word, it is obvious that he too (like Kersting, Ludwig, Flikschuh et al.) believes that rightful legislation in Kant can be exercised in principle as a thought-experiment: "In der Kantischen Formulierung des Rechtsprinzips trägt das 'allgemeine Gesetz' die Last der Legitimation. Dabei steht immer schon der kategorische Imperativ im Hintergrund: die Form des allgemeinen Gesetzes legitimiert die Verteilung subjektiver Handlungsfreiheiten, weil sich in ihr ein erfolgreich bestandener Verallgemeinerungstest der gesetzesprüfenden Vernunft ausdrückt". This is immediately contrasted with his own approach, which is rather grounded in the "Idee der Selbstgesetzgebung *von Bürgern*", namely, "daß sich diejenigen, die als Adressaten dem Recht unterworfen sind, zugleich als Autoren des Rechts verstehen können" (Habermas 1998: 153).

Habermas goes on to apply the so-called discourse principle to the medium of law, and ends up with three categories of right that ground the private autonomy of the subjects of

[388] See, for instance, the introduction and the important chapter III in Habermas (1998 [1992]), as well as his approach to international relations, to which I shall return in the second part of the dissertation.

law and one category to ground the public autonomy of the citizens.[389] It is hard to see how the legal philosophy that Habermas advocates here is radically different from the one that Kant presents in the *Rechtslehre*. He would have been correct if Kant had not introduced there the conclusive character of public right and its key criteria, first and foremost the principle of popular sovereignty, which significantly departs from his earlier political essays. In addition, we also find in 1797 a principled division between legality and morality, a new justification of property, a new concept of a separation of powers, and so on and so forth. The sections of the public right part show, as I hope to have demonstrated above, that public autonomy is in fact preserved in Kant's legal framework, precisely in the allocation of sovereignty to the united legislative will of the people. This is not a chimera, but a normative ideal that all republics can and must strive after, both in an institutionalised and in a non-institutionalised sense. All of this, I believe, is firmly grounded in Kant's legal framework.

Against this, Habermas would most likely respond that there is nonetheless a lack of an institutionalised public use of reason within the deliberative legislative process itself – the public opinion- and will-formation is not properly explicated by Kant; furthermore, there is too little emphasis on the communicative freedom that is needed for citizens to exercise their public autonomy at all. We may concede that Kant does not develop a concept of reason from a discourse-theoretical perspective, and that there is accordingly no independent justification of the discursive elements of the political procedures as such. Yet there is, in my view, no doubt that his reflections on institutionalised sovereignty and his subsequent emphasis on the necessity of, and the right to, a non-institutionalised public use of reason (freedom of the pen, the necessity of letting reason be voiced in public) as fundamental to the public character of right more than indicates a correspondence between the theories.

Public deliberation and discourse, understood as a truly public use of reason – i.e., all-inclusive and granting mutually recognition where what matters is not persons, but only the rationality of their arguments – is vital to Kant's theory of the rightful rule of law. Without it, the political process would in Kant too be a mere private and privileged enterprise of the right of the stronger and thus neither public, political, nor rightful. Against Habermas' objections, we have seen that the public use of reason must be said to be presupposed in Kant's republic, both in an institutional and in a non-institutional sense, laid down as state constitutional law to form an actual and normative concept of sovereignty where the people are both authors and subjects of law. Both theories are inherently procedural and, consequently, yield no material

[389] Cf. Habermas (1998: 155 ff.), along with a rather unspecified fifth category of rights to basic or background conditions (*Lebensbedingungen*), which he argues are prerequisites for the exercise of the other four categories.

subjective rights independent of the public opinion- and will-formation – Kant insists on the normative position that this can be legitimately decided only by the united citizenry (either themselves, or through their legislative representatives) in line with the procedures of the republican constitution, which in turn stem from the principles of pure practical reason.

As Maus states in her precise analysis of the similarities between the two theories of right, it is in Kant (as well as Rousseau) "not so much the semantic generality of the law – as Habermas stresses (...) – as above all the democratic generality of the procedure preceding it that supports the legitimation of the law and the integration of society. (…) It is intrinsic to the structure of participation in democratic procedures that a will does not already exist but must first be formed" (Maus 2002: 112 f.). I also concur with her conclusion that except, of course, for the differences between the philosophical traditions in which their theories have been formulated, the great disparities that Habermas identifies between their philosophies of right must rather be seen as an attempt to create a greater distance between them than actually exists.[390] For both Kant and Habermas, nothing is given prior to the deliberative legislative process other than the private and public autonomy that are presupposed and confirmed by the legislative procedure itself.

Accordingly, along with the innate right to freedom and the form of private right, the democratic procedure of rightful legislation itself can be seen to be the only given in Kant's republic. Everything else must in principle be open to the deliberation of the public sphere; otherwise, there is neither for Kant nor for Habermas a *de facto* public autonomy. Habermas may find the aspect of public autonomy particularly lacking in Kant, but I believe that Kant's introduction of the concept of popular sovereignty in the *Rechtslehre* turns the principles of right, which were earlier formulated exclusively in negative terms, into actual republican policy. The merely postulated principle of legitimacy in the *Gemeinspruch* essay – "*Was ein Volk über sich selbst nicht beschließen kann, das kann der Gesetzgeber auch nicht über das Volk beschließen*" (8:304) – is granted in the *Rechtslehre* the status of a precondition for the rightfulness of any positive legal order, in order to form a normative concept of sovereignty.

A further explication of substantive, material rights beyond the strict preconditions of private and public autonomy would, of course, ruin the autonomy of the public procedure of legislation, and is therefore not included by Kant. In the next subchapter, I will touch upon what he more precisely considers to be necessary material preconditions for private as well as

[390] Cf. Maus (2002). I will briefly assess below her claim that Kant's theory in some respects is normatively superior to Habermas'.

public autonomy.[391] The fundamental right to public autonomy is, however, already formally designated by Kant in the principle of popular sovereignty that grants to all an equal right to participation in the process of deliberative legislation through a public use of reason – both in its institutionalised and in its non-institutionalised dimensions.

This view is not only present in Kant's stance on political reform in the republic, but also in its possible constitutional reform. Here, he can be seen to go a step beyond Habermas with regard to the right of public deliberation to evaluate and change all *de facto* legal orders. As I have underlined, Kant holds that it is both possible and necessary to alter any faulty constitution prior to the introduction of a republican. But what about constitutional change once the republic is established? Does his principle of popular sovereignty imply that citizens may change not only all simple legislation in the republic, but also the constitution? In the preparatory notes to the *Rechtslehre*, this question of whether or not some legal standards are to be perpetually inscribed in the state constitution[392] is described as an antinomy. Both the thesis and the antithesis are put forward by Kant as endorsed by pure practical reason: "1. Thesis Eine von einem Volk einmal angenommene Verfassung muß bey den Nachkommen immer dieselbe bleiben und also anerben. 2) Antithesis sie soll nicht anerben sondern muß jedesmal als neuer geschlossener Verein betrachtet werden und das Volk ist beständig als constituirend anzusehen" (23:341).[393] How does he seek to solve this apparent dilemma in the *Rechtslehre* proper?

There is, admittedly, no direct answer here with regard to the question whether there are basic and indeed inalienable substantial rights or norms[394] in the republic that the united

[391] This clearly resembles Habermas' fifth category of rights (cf. Habermas 1998: 156 f.).
[392] In the same context, Kant discusses whether religious norms can be said to be formulated once and for all. With his concept of religious constitution and its "innere Konstitutionalgesetzgebung" (6:327) that the state must refrain from meddling in, he conceives of religious practice in a similar way to political practice: just as a political community must have a constitution that lays down the norms in accordance with which it is led and the procedures that generate these norms, so must a religious community have a constitution of the central tenets and procedures for a possible reformulation of these through better insight. The members of both communities must adhere to the standing procedures and norms, but these must always be open to reform through a public use of reason. Again, as the subjects of law, the jurists, etc. cannot employ their private use of reason to demand change; here, they must obey. Accordingly, a priest or churchgoer as such cannot counteract the norms that govern the religious community at present. But as a matter of principle, the religious community – like the political community – must have a channel that is open to public deliberation and reform. Religious communities, too, are conceived by Kant as institutionalised, representative systems, analogous to political communities: the religious teachers and principals (i.e., legislators) who decide the central tenets of external religious practice must explicitly be chosen by the people itself – in this case, by the sum total of the members of the religious community (cf. ibid.).
[393] Langer, in contradiction to Maus, is somewhat too eager to embrace the antithesis as Kant's final stance, and does not point to, or elaborate on, its initially antinomical character when quoting the latter half of this passage (cf. Langer (1986: 17)). See also the further application and discussion of this statement (ibid.: 95 ff.).
[394] We have, however, seen that the innate right to freedom and the *form* of all rights and rights relations of both a private and a public nature are fundamental and inalienable. I return to this aspect shortly.

legislative will of the people cannot circumvent even if it wanted to. However, Kant answers the question indirectly in his General Remark C in relation to religious faith or doctrine. It is impossible that a religious community (let alone the state, which, of course, must refrain from all theological disputes)[395] can posit once and for all a certain faith or doctrine as unalterable (*unabänderlich*) and thus perpetually valid. This would amount to a banishing of reason from its Enlightenment throne and a retreat into the metaphysics of pre-modern society, since such a maxim would exclude rational inquiry of religious doctrine in perpetuity. The public use of reason is hence banished and replaced by dogmas. This, of course, does not mean that central and long-held tenets of religious practice must necessarily be altered, only that their validity is not given *a priori.* It must therefore be possible to alter them if reason provides reasons for this: "Nun kann aber kein Volk beschließen, in seinen den Glauben betreffenden Einsichten (der Aufklärung) niemals weiter fortzuschreiten, mithin auch sich in Ansehung des Kirchenwesens nie zu reformieren: weil dies der Menschheit in seiner eigenen Person, mithin dem höchsten Recht desselben entgegen sein würde" (6:327).

Little effort is required to apply the same argument to the sphere of political practice. In fact, this is what Kant's entire public right dimension is oriented towards: no legal or political tenet can qualify as *a priori* valid and accordingly place itself outside the scrutiny of public reason. Only the principles of an innate right to freedom, the form of private right, and the legislative and political procedure itself are beyond debate, since these are preconditions for private and public autonomy (and the rightful exercise of public reason). The inalienable rights and norms in his political philosophy are therefore, as I have indicated above, precisely the natural rights that are necessary to legitimately generate all other rights. The crucial point is that, for Kant, these rights are of an exclusively formal character and are not placed beyond the scrutiny of a public use of reason. On the contrary, they must be presupposed in order to exercise the public use of reason at all.

These rights can be said to constitute a first order of rights in both Habermas and Kant. They simply cannot be altered by the united legislative will of the people, since they already are preconditions for the exercise of both the private and public autonomy that underlie any

[395] This is not only beneath its dignity, but something it as a state simply cannot do – it could only have addressed these questions and disputes as a theological scholar, and thereby "[macht] der Monarch sich zum Priester". Kant's state has only "das Recht, nicht etwa der inneren Konstitutionalgesetzgebung, das Kirchenwesen nach seinem Sinne, wie es ihm vorteilhaft dünkt, einzurichten, den Glauben und gottesdienstliche Formen (ritus) dem Volk vorzuschreiben oder zu befehlen (denn dieses muß gänzlich den Lehrern und Vorstehern, die es sich selbst gewählt hat, überlassen bleiben), sondern nur das *negative* Recht den Einfluß der öffentlichen Lehrer auf das *sichtbare*, politische gemeine Wesen, der der öffentlichen Ruhe nachteilig sein möchte, abzuhalten, mithin bei dem inneren Streit, oder dem der verschiedenen Kirchen unter einander die bürgerliche Eintracht nicht in Gefahr kommen zu lassen, welches also ein Recht der Polizei ist" (6:327).

use of public reason in the first place. The rights related to an exercise of public autonomy include, in the theories of both thinkers, a popular right to sovereignty (in its institutionalised as well as in its non-institutionalised form), which again guarantees public reason as a legal principle that is to be adhered to. These rights are related to the pure form of rightful relations in a republic. For Kant (and Habermas), it would be clearly contrary to the supreme right of mankind (autonomous freedom) if some material rights simply were to be placed outside the scope of public deliberation and of a possible reformulation by the united legislative will of the people. This reading can solve the apparent dilemma that I referred to above. Inalienable constitutional rights and principles can be identified as those natural rights that are necessary for a continuous genesis of other rights, even those that are inscribed in the state constitution as more fundamental and therefore also more difficult to change than simple legislation.

On this view, too, the inauguration of a republic is an unsurpassable occurrence in the history of mankind. Once the republic has been founded, there is for Kant no way back to the *Unmündigkeit* or immaturity of past ages. The people can now no more renounce the right to be also politically autonomous than one can renounce one's free will and enslave oneself.[396] The free will to do so has to be presupposed in order to make such a contract valid and would, in the case of a factual agreement, in the same instance nullify the contract by its performative contradiction. Obviously, this right to a regulation of all aspects of communal life locates an enormous amount of power and hence responsibility in the legislative branch of government, which is precisely the supreme, i.e., sovereign authority in the state. This is a conclusion one is usually not inclined to draw in normative political theory, but as we remember from Kant's critique of traditional natural rights theory, anyone who rightfully stands above this principle and can forcefully resist its authority is, of course, the true state sovereign. The allocation of sovereignty and political power does not endanger individual freedom. It points rather to what has been, is, and always will be at stake in the political realm and calls for the necessity of a complete codification and total juridification of all factual power, both within and beyond the political realm.[397]

It is imperative here to keep in mind that just as the individuals cannot guarantee that they will not transgress rightful boundaries of legislation, so too no part of the state apparatus

[396] The empirical fact of a democratic republic again granting a despot sovereign rule does not disprove this claim, any more than does the empirical fact of a free person signing a contract to become a slave. Both instances are, of course, correct as descriptions of empirical events, but both (along with their contracts) are also entirely invalid and unrightful in a normative, prescriptive sense.

[397] Kant thereby indirectly makes the more general point that these rights are truly guaranteed against state transgressions only insofar as they can be changed and posited exclusively by the individuals themselves qua citizens. Only then is it up to the individuals, rather than the state apparatus, to undertake all reformulations.

can guarantee this; hence, a formal authorisation of an instutionalised agent to prevent such violations can only be a pragmatic principle in the face of a not yet enlightened public sphere. This cannot be a principle of pure practical reason. An example may illustrate this point: since Kant wrote his *Rechtslehre* sections, constitutional courts have been a standard inclusion in most newly formed legal orders. And in at least this regard, I believe Habermas operates with a more material or substantial concept of private and public autonomy than Kant.

As Maus also notes, Kant cannot be seen to take a definitive stance for or against such an institution – at least with regard to a court of appeal against any violations of the legislative procedures themselves. But insofar as the judicial review of a constitutional court approves or disapproves not only of the formal proceedings of the state, but also of the material rights that are the outcome of the legislative procedure, it would most positively violate both the concept of sovereignty and the principle of a separation of powers. Accordingly, the state will become despotic, since the supreme examiner of law is also the *de facto* supreme legislator, thereby inserting a conjunction between the lawgiving and the law-examining will.

On at least this point, Habermas (1998: 292 ff.) must be said to subscribe to more substantive concepts of freedom and autonomy than Kant. Insofar as a constitutional court can intervene not only to uphold the formal legislative procedures themselves, but also in relation to other, material rights aspects, I believe this is an example of what Kant calls a "gemäßigte Staatsverfassung", which he holds to be an "Unding" (6:320) and a mere pragmatic defence mechanism against possible transgressions on the part of a citizenry that is not yet enlightened or empowered. It bears repeating that it is no more possible for a constitutional court than for a factual legislative will of the citizens to guarantee that no unjust laws will be passed. Again, Kant's legal philosophy does not aim to guarantee the state or legislation that best promotes the most effective or progressive legal order, let alone the one that is most conducive with the happiness or welfare of the subjects of law. It rather sets out to realise the state or legislation that is consistent with freedom and right; accordingly, it instates the subjects of law as its only legitimate authors. In this sense, I hold that Kant must be considered the more democratic and Habermas the more pragmatic thinker of the two.

To conclude: what does this imply for the possible scope of legal regulation? I have already stressed that the location of sovereign authority in the united legislative will of the people does not by itself guarantee rightful rule. Granting this formal authority to the people does not say anything about possible boundaries to legislation itself. But as I have pointed out above, Kant holds that it is impossible *per se* to pass legislation against some facets of human

activity.[398] Another point is that the right to both private and public autonomy must be, and already is, presupposed by Kant in order to form a united legislative will of all in the first place. We have also seen in this subchapter that a distinctively public aspect of deliberation must be present in the political process, in order for legislation and its state administration to be rightful, under the auspices of the republican constitution that I highlighted in the previous subchapter. A more substantial theory of law that introduces additional agents, rights, and/or authorities in the legal framework to avoid possible transgressions by the sovereign legislative power seems only to overlook one of the important insights of Kant's philosophy of right: any such agent would be the true sovereign authority in the state, and would therefore require its own theoretical exposition with regard to its necessity, authority, and legitimacy. On the level of theory, it would be equally or indeed more liable to commit grave acts of injustice.[399]

Instead, Kant establishes a dual role and an identical relationship of the people as both subjects and authors of law – the citizens are granted all legislative authority, since it is they who in the next instance are subjected to the laws by the now formally empowered state apparatus. It goes almost without saying that the first rights the citizens would inscribe in the constitution, along with the political procedures that are the constitution itself, are extensive rights to their personal, subjective freedom, in order to prevent state transgressions into the private sphere, including those rights that are necessary to realise their public autonomy. But the crucial point is that these rights do not and cannot precede the political deliberations of the citizens. Kant does not subscribe to such a view of either law or politics.

The citizens themselves have the task of the further delineation of rights, formulated through legislative procedures that the republican constitution renders and contains. With reference to the antinomy mentioned in the preparatory notes, we can thus say that while the people, on the one hand, must be regarded as always constituting itself in positing new laws as well as retaining existing ones,[400] on the other hand, the constitutional principle of the location of sovereignty in the united legislative will of the people is fixed and must always

[398] These were, as we recall, aspects such as personal thoughts, morality, religion, the impossibility of enslaving oneself, etc. – since these are all aspects of internal legislation that any external legislation simply cannot regulate.

[399] Even worse, it would also be a supreme political power with a private, arbitrary will, insofar as it is not grounded in a constitutional system according to principles. If its power is formally constitutionalised, it is the supreme legislative power and true sovereign of the state. Accordingly, we can say that the degree to which it is adjoined to the state apparatus is also the degree to which its rule is despotic.

[400] One must not forget that this too is a form of the exercise of sovereign legislative authority. It is scarcely necessary to add that by endorsing the existing constitution and its laws, i.e., not changing it even if one could in principle do so, one of course grants it the same binding character as any newly posited laws. To refrain from altering the constitution and its laws is also an act of the united legislative will of the people; the people's representatives in the legislative assembly reaffirm the constitution at all times by not changing it.

remain the same, assigned to the state institutions themselves to posit, apply, and enforce.[401] This last aspect corresponds to the necessary continuum of law and to Kant's prohibition of revolutions and of the use of violence. In Kant's view, other legal frameworks or legislative procedures than the republican will only cause heteronomy. Also, the principle of a separation of powers is replaced in such systems by an empirical checks-and-balances approach of a legal order whose sovereign, paternalistic power is ultimately left unaccounted for and thus is both arbitrary and unlawful.

The principles of state law and its legal framework that Kant delineates in §§45-52 of the *Rechtslehre* are an attempt to unify freedom qua autonomy in a republic where all political power is juridificated and authorised through a constitution to form a rule of law rather than of men. His republican-democratic model places significant emphasis on the free deliberation of the citizens, since it is this dimension and its public use of reason that grant law and justice their distinctively public character. Through the contributions of the public sphere to both the legislative process and the informed critique of the actions of the state apparatus, as exercised respectively by the institutionalised and the non-institutionalised dimensions of sovereignty, freedom as autonomy is attained in actual political practice too. Accordingly, his republican democracy with a vital and always questioning public sphere is the only guarantee against all political power and domination that are inconsistent not merely with freedom, but also with right, and thereby even with humanity in our own persons.

3.5. On the specific rights and duties of a state

The deliberations so far have tried to establish the point that in a strict sense of the word, Kant is a legal philosopher rather than a political one; his purpose in the *Rechtslehre* is 'merely' to designate the structural framework of rational right, not to spell out actual republican laws and regulations. As he quite explicitly writes in the peace essay, politics is to be understood as "ausübende (...) Rechtslehre" (8:370), i.e., principles of a doctrine of right applied to *de facto* political practice. These legal structures – or, in Kant's words, metaphysical first principles of the doctrine of right – contain, as we have seen, nothing but the form of private and public right, which in turn follow from the innate right to freedom. The united legislative will of the people must then decide, through a public use of reason, the *de facto* explication of the natural rights and the positing of statutory laws of freedom; anything else would be mere paternalism,

[401] I prescind from taking a definite stance on the similarities and differences between Kant's philosophy of right and that of Sieyès; but this solution to the antinomy of the preparatory notes largely corresponds to the latter's famous and absolutely fundamental distinction between the *pouvoir constituant* and the *pouvoir constitué*.

and can cause nothing but heteronomy and despotism. This is why I argue that Kant, strictly speaking, should not be considered as a political philosopher: it is not possible to draw up a substantial list of state obligations or a political programme from his overall theory.

Nonetheless, this is not to say that no general, political obligations can be deduced on the basis of Kant's position. I have already stressed that the normative concept of sovereignty inherently generates the right to equal participation in the legislative process and the right to a public use of reason, thus granting a primordial status to what we today call civil and political rights; only with the legal, positive institutionalisation of these rights is it possible for man to be recognised as a political being. Kant's purely formal principles of right also intrinsically generate such basic rule of law concepts such as the separation of powers, non-retrospectivity of laws, equality before law, etc., along with the private right to personal belongings. These principles follow directly from the structural framework itself. But can anything more be said of particular law sections themselves? Beyond these first principles, is it possible to derive any political ideals or legal requirements from Kant's stance, so as to form certain obligations that the legislative not only can posit as a matter of positive law, but that there also is a state duty to adhere to according to rational right? Although I have stressed that any formulation of such obligations must remain a political question, and is therefore not a task assigned to legal philosophy *per se* (but to the united citizenry), some aspects of the specific rights that a state should and must contain are nevertheless indicated by Kant.

The most extensive account in this regard is presented, fittingly enough, in the General Remark of the *Rechtslehre*. It does not specify state structures or actual laws and regulations; accordingly, it is not a separate section. Rather, as we will see, it addresses institutions and institutional measures vis-à-vis relations of right that the private individuals cannot sort out on their own. Consequently, Kant's theory contains a need for a public authority to guarantee these relations. One such relation concerns criminal punishment (General Remark E), while other rights relations are intrinsically connected to economic policies (B) and distribution (C). In my view, this last aspect opens up for an interpretation of Kant's state that includes some sort of welfare state arrangement. This is certainly a minority position in Kant scholarship, but with Ripstein I nonetheless believe that, contrary to the views of Byrd & Hruschka and others, it can be shown that Kant has an argument for the *a priori* legal duty of states to provide for any subject of law who cannot provide sufficiently for him- or herself. Crucially, this right too is grounded in the right to freedom (understood as independence from the arbitrary choice of all other (private) persons).

In what follows, I shall briefly consider the main aspects of Kant's General Remark. I argue that although no legal obligations can be fully formulated outside the actual legislative procedures of the Kantian state, there are nevertheless specific rights and duties that the state qua state has to live up to, and which again can be traced back to the concept of, and the right to, external freedom in both the private and the public exercise thereof.

In Remark A, whose main features have been presented in some detail above, Kant grounds the prohibition of revolution and the popular right to negatively resist the executive in a parliamentary model. Remarks B and C go on to discuss aspects of economic policy and the distribution of welfare. Given the emphasis on private right in the *Rechtslehre*, quite a few scholars hold that Kant's state is liberal not only in a political sense, but in an economic sense too, with almost untouchable private property owners at its laissez-faire core and no policy of economic distribution, still less redistribution. It follows that there can be no or little room for social welfare measures in the Kantian state. Byrd & Hruschka, for instance, are unequivocal in their conclusion that "Kant rejects the welfare state" (Byrd & Hruschka 2010: 42). A closer look at Kant's Remarks B and C will, however, show that their conclusion is premature and that there is in fact a strong case for economic distribution (and even redistribution) in Kant for those who are worse off as a result of contingent factors; regulation of the economy and of the finance sector, as well as poverty relief, can in fact be seen to be mandatory for the state.

Kant makes it perfectly clear in the beginning of General Remark B that the legislative sovereign is in command not only of the laws of the land (and thereby also of the subjects), but also of the territory on which all things external are located. Since rightful possession in Kant can be derived only from the idea of an original possession in common, the sovereign (in its idea as head of the civil union) must also be regarded as the supreme proprietor of the land. He, she, or it is not only strictly necessary in order to divide or delineate private property in a conclusively rightful way (as well as to solve the two other structural defects of a condition of mere private right); there follow additional state rights and duties with regard to the land.

Qua supreme proprietor (*Obereigentümer*), the state may regulate private property in accordance with any number of statutory laws that are grounded in freedom. We have seen that the private property owner can rightfully exclude all *private* persons from an arbitrary use of his or her possessions, but this is, of course, not to say that no *public* authority can posit laws that impose certain restrictions on private property. The private property owner is not a small-scale sovereign. Laws about building regulations or public access obviously trump the authority of the owner. It would be foolish to claim that such laws and regulations have no rightful force, let alone that they dispossess the private property owner of his or her external

object. Rather, the state is required in a first instance to guarantee the owner an exclusive use of the object and to protect him or her against any arbitrary use of it by other private persons. In turn, the state may posit any number of rational statutory laws that also impose restrictions on the owner's use of his or her belongings insofar as this use hinders others' exercise of their external freedom.[402]

Ripstein has argued convincingly along these lines that the state has a right and a duty to provide every person with reasonable means of transport and communication. For instance, a state must secure the individual right to movement by building public roads. Otherwise, if all land were in private possession, we would be subjected to the mere moral beneficence of the owner whenever we wanted to move anywhere beyond the boundaries of our share of the land (cf. Ripstein 2009: 280). I disagree with scholars such as Byrd & Hruschka, who hold all kinds of public property to be a contradiction in terms for Kant. On the contrary, I argue (with Ripstein) that it would be clearly contrary to right if all property were in private hands.[403]

Communal ownership of land is accordingly not only allowed, but also required in the Kantian state.[404] Kant explicitly speaks of the possibility and legitimacy of the non-existence of private property altogether within a territory, such as in the case of nomadic peoples – even if this is explicitly described as an exception (cf. 6:324). The only strict requirement, as in the case of the nomads, is that every collective form of property relations is based in a contract. For the nomadic people, this constitutes in practice a sovereign state with only one property regulation with regard to land: namely, that there shall be no property regulation. Once again, we see that the question where the actual limits of the different freedom spheres are drawn in the state remains a political question that is to be answered by the sovereign.

The state must be forever upheld, *inter alia* because it is the only legal person with the authority to conclusively settle and continuously guarantee the individuals' private rights. As a result of this requirement of the "Erhaltung des Staats", the state has for Kant an explicit duty and therefore also a right to tax the private property owners in this regard. It can, for one thing, require the performance of certain services (e.g. military). Moreover, as he points out in

[402] In the continuation of this argument, Kant also makes clear that the state has a right to expropriate private property, since no-one can make a perpetual claim to ownership of an external object (cf. 6:324). Nevertheless, the state may, of course, not abandon the right to personal belongings on a general basis (nor, naturally, single out any particular individual(s) in this or any other regard).

[403] Kant's comment in Remark B that the supreme proprietor cannot own property as a private subject (and hence be subjected to the law as well as possibly be wrong in court) cannot be taken as evidence against this. He only confirms that the actual head of state cannot have or acquire property as a *private* subject (cf. 6:324). For an explicit mention of public property ("öffentlichen Eigentum"), see 6:326. It would therefore be plainly wrong to insist that his concept of property necessarily implies that all territory (even the ocean) has to be privatised.

[404] For further references, see the highly instructive chapter "Roads to Freedom" in Ripstein (2009: 232 ff.).

Remark B, it must administer the state's economy, finance, and police, since none of these tasks can be assigned to private individuals (cf. 6:325).[405] Crucially, these tasks are to be done by the people themselves through taxation ("das Volk [beschatzt] sich selber") and executed by the relevant representatives, "weil dieses die einzige Art ist, hiebei nach Rechtsgesetzen zu verfahren" (ibid.). In other words, it is once again not the state apparatus, but rather the people as supreme legislative authority that posits the laws and administrative procedures which the state apparatus is then authorised to demand from the individual subjects of law.

Hereby, Kant establishes the unquestionable right of the people to administer the state economy, finance, and police through its institutional representatives. In Remark C, he goes on to introduce an independent argument for the (indirect) right of the sovereign to some sort of welfare or at least subsistence system within the state. In Remark B, he had spoken of the indecency and negative moral consequences of, *inter alia*, begging and prostitution in public. On this basis, one could perhaps explicate a pragmatic or even aesthetic Kantian argument for establishing social welfare arrangements for the poor. But rather than do so, he deduces in his Remark C such state obligations from the eternal, non-dissolvable character of the legal order itself. Once again, we find that his state of public right and justice amounts to far more than the mere private right protection that is proposed by Byrd & Hruschka and other scholars.

As soon as it is founded, the actual state – qua guardian or representative of the united legislative will of the people – has not only the duty to perpetually preserve the legal order, but also the (indirect) duty to preserve the society and its members who are now subjected to the state. In Kant's view, this preservation must necessarily also include "die Glieder dieser Gesellschaft, die es selbst nicht vermögen, [sich] zu erhalten" (6:326). This Remark is seldom given sufficient attention in Kant scholarship. What he establishes here is nothing less than a state obligation to provide the poor with some sort of welfare arrangement. His argument is grounded in the fact that the wealthy (i.e., the private property owners) in the first instance are granted their subsistence from the state that gives them a conclusive right to an exclusive use of external objects. Since both their "Existenz" and its corresponding "zu ihrem Dasein nötige Vorsorge" are guaranteed only by the civil union itself, Kant's state has a coercible right to demand from the wealthy that they have a similar obligation "zur Erhaltung ihrer Mitbürger das Ihrige beizutragen" (ibid.).

[405] In addition, the state may and must inspect any secretive association (or person) that influences and endangers the public condition or well-being. All the same, a search of anyone's private premises "ist nur ein Notfall der Polizei, wozu sie durch eine höhere Autorität in jedem besonderen Falle berechtigt werden muß" (6:325).

Kant suggests that this can be realised in two ways, both of which involve taxation. One is state support of so-called charitable foundations (*fromme Stiftungen*) such as foundling houses and church organisations. Such an arrangement is, however, insufficient with regard to a *right* to subsistence, since it rests only on the beneficence and capacity of these foundations. (He also fears that it would lead to a simple means of acquisition for those too lazy to work, since these would prey on the greater benevolence of the foundations.) Accordingly, there is an additional need for "*läufende Beiträge*, so daß jedes Zeitalter die Seinigen ernährt". These contributions are to be collected "durch Belastung des Eigentums der Staatsbürger, oder ihres Handelsverkehrs, oder durch errichtete Fonds und deren Zinsen." It is important to note that the contributions are explicitly described as "zwangsmäßig" (ibid.).

This shows that while there are, of course, no Kantian restrictions or prohibitions on private aid and support of the needy, this help – in accordance with his legal philosophy in general – cannot only rest on the moral beneficence of others; it needs to be institutionalised and made a coercible right, if it is to be a right at all. And what he describes as preservation of the means of subsistence "den notwendigsten Naturbedürfnissen nach" (ibid.), i.e., according to the most necessary natural needs, is a legal obligation the haves owe the have-nots simply because *they* have and *the others* do not have. We are here witnesses to a perhaps surprising consequence of the postulate of the idea of original possession in common: the consequence is not just that all private property is a mere anticipation of a future rightful order and is only possible and rightful in light of this. It also implies that social welfare rights and arrangements through compulsory taxation become a state duty, *inter alia* as compensation for the exclusion of some persons from land and the means of self-subsistence. Accordingly, these rights too are required to prevent any individual from being entirely dependent upon the arbitrary will of others. Neither the right to welfare state arrangements is for Kant based in mere moral-ethical considerations or obligations. It is a legal right that follows from the innate right to freedom.

Ripstein (2009: 267 ff.) develops this identication of poverty as overdependence on another person's choice, and convincingly argues that a lack of welfare state arrangements is inconsistent with freedom and equality of opportunity within the civil society. Although he stretches his argument somewhat (especially when he almost derives a list of political goods from Kant's formal philosophy of right), he is in my opinion essentially correct in his main claim: from the state obligation to provide the most necessary natural needs to those unable to provide these themselves, there is a strong Kantian argument to be developed that includes the right to public schools, public health care, and other public services too (cf. ibid.). Ripstein may overlook the contingent factors such rights rest on and the distinctively political (and not

legal) dimension of formulating any such rights,[406] but I nonetheless endorse his central claim that from Kant's freedom argument, there also follows a state "obligation to provide the conditions of equal freedom" (ibid.: 238).

This is in stark contrast to Byrd & Hruschka's interpretation in their commentary on the *Rechtslehre*. They claim that Kant flatly rejects the welfare state on two grounds – his rejections of paternalism and of turning the happiness of citizens into a state maxim (cf. Byrd & Hruschka 2010: 42). I believe they are wrong on both counts.[407] First, it is their position that amounts to paternalism, when they insist that it would be paternalistic to establish welfare state arrangements of some kind no matter how unanimously the united legislative will and the political deliberative processes support such a proposition. Second, Kant simply does not ground the right to the necessary means to subsistence in the principle of happiness. They are in the first instance traced back, not to the happiness that may (or may not) follow from welfare rights, but to the right to life and freedom, i.e., independence from the arbitrary choice of others. Contrary to Byrd & Hruschka's assertion, welfare rights do not make happiness a state maxim. Instead, these rights are strictly necessary, and are based on the duty of the state to avoid letting anyone "wissentlich umkommen" (6:326).[408]

Another aspect of communal life that the private individuals cannot get right on their own is discussed by Kant in Remark D, which concerns the right of the supreme commander (*obersten Befehlshabers*) to distribute offices and dignities as seems required and appropriate. The possession of public (or civil) offices must be authorised by the state sovereign, who is entitled to choose to pragmatically keep or instate dignities (i.e., a nobility) with privileges not shared by the rest of the population. However, Kant cannot be seen to advocate the latter on any general basis.[409] He regards the notion of hereditary nobility as a normative impossibility, and he also ridicules any craving for such titles, seeing this as something that belongs to a feudalistic, bellicose, and, hopefully, long-gone age (cf. 6:329). His main concern at the end of Remark D is rather that human dignity always is, and must be, preserved by the state in the

[406] Again, it is difficult to deduce a specific list of rights or duties from Kant's legal (and moral) procedure(s) as such. It is also difficult to specify more definitely what social welfare rights should entail and grant for Kant – in contrast to the legal framework, this is not an exact science, but rather a political question that is thus open and must be defined by the union of citizens.

[407] Obviously, I agree that Kant rejects these two aspects of political (mal)practice. My claim is that Byrd & Hruschka incorrectly apply these to the question of poverty relief and disregard Kant's argument in Remark C, an argument that clearly explicates the necessity of some form of welfare state arrangements.

[408] Accordingly, the state also has a duty to provide for abandoned children, the sick, the poor, etc. (One might perhaps ask why the duty is formulated this way, rather than as a right of the individuals against the state to poverty relief, health care, etc. The reason is, I believe, that it is no *a priori* truth that there are individuals who cannot provide the most necessary means for themselves; there is, however, an *a priori* state duty to aid them, insofar as they themselves are unable to do so because of contingent circumstances.)

[409] Also, his own notion of 'nobility' of Remark D refers only to state officials (e.g. magistrates and professors).

shape of the dignity of the citizen (*Staatsbürger*). Serfdom and slavery are prohibited here as irreconcilable with the diginity (*Würde*) that is inherent to all human beings quite simply as members of humanity (cf. 6:330).

However, there is one particular instance that seems to cancel out human dignity. This concerns criminal actions. The theoretical position that a criminal act is equal to a one-sided breach of the social contract and hence also of one's status as citizen seems to be widespread in Enlightenment political philosophy; Kant, like Fichte and Rousseau, appears to claim that breaking the law places the agent in a lawless state, i.e., in the state of nature. Kant's legal condition of public law must therefore include a state right to punishment (*Strafrecht*), not just in order to punish the criminal for his or her crime, but, crucially, to bring the person back into the fold and retain him or her as a legal person within the civil condition. This state right (and duty) to punish, along with the right to grant clemency, is the topic of Remark E.

On this reading, therefore, *Strafrecht* serves a dual purpose. On the one hand, Kant clearly sees it as a penalty for transgressing public law (thus instating oneself as judge in other persons' cases). The normative need for the universalisability of maxims means that to act on a maxim that accepts murder, violence, theft, etc. is to claim that every human being or piece of property is subject to one's own unilateral will. On the other hand, punishment is also the only means that retains the criminal in the legal order to which he or she returns as a citizen once the punishment has been carried out. The criminal cannot become an outlaw because of his or her crime;[410] this would be to reject the legal status of the individual itself and leave him or her entirely to the arbitrary will of others. The right to punishment is thus required not only to protect the law-abiding citizens and the civil condition as a whole, but also to protect the criminal and reinstate him or her as a legal person or citizen. The citizens themselves have for Kant no right to punish the criminal at will (nor they may become judges in their own or other persons' cases); this right too is ceded to the state upon entering the condition of public law. Punishment is hence not an instance of private revenge or clemency, but of public justice exercised by the legal order, in accordance with standing laws and procedures. At the same time, however, this state right to punish can never imply a right to treat a convicted criminal as a means to another end, and in this insight, I believe, lies the novelty of Kant's account.

[410] The only exception here is the right to exile someone from the state territory altogether, which Kant treats in §50 – renamed by Ludwig as General Remark F. Here, Kant explicates the right of the *Landesherr* to banish or even exile a subject on the grounds of committing a crime that is detrimental (*verderblich*) to the entire state (in terms of the subject's communal association, cf. 6:338). In the same section (or Remark), he also establishes the individual right to emigration (no person is a state's property), and the state right to allow immigration (provided that the state subjects' private property of land is not thereby curtailed (*gekürzt*, cf. ibid.).

This understanding of punishment excludes all justificatory theories based on concepts such as deterrence, societal protection, restoration, condemnation, etc. as a legitimate basis for *Strafrecht*. In Kant's view, such theories know neither a categorical imperative nor laws; they establish only hypothetical imperatives based on prudence and the attainment of other ends. They are consequently exposed to arbitrary wills and contingent factors in each case, and arise anew in every situation. This is why he argues that such theories not only make a mere means out of the individual, but also (as fundamental theories) imply that in some cases the softest punishment, or even no punishment at all, is the right verdict; in other cases, the punishment may never become severe enough. Kant's own account is exclusively grounded in a concept of retribution, i.e., an infliction of pain; this is not advocated in order to prevent some bad or promote some good, but solely as retribution for the committing of a crime.[411]

Both the principle of the art and degree of punishment and the rationale for inflicting pain follow from "das Prinzip der Gleichheit" (6:332) and the reciprocity that runs through the entire *Rechtslehre*. Punishment is not instated by Kant in order to hinder hindrances to freedom (i.e., as mere deterrence); it is not identical with coercion. It is intended instead to take the criminal seriously, and inflict the same pain on the criminal that his or her unlawful action has caused (normatively speaking). Through a criminal action, someone has willed that a certain maxim should be given practical reality despite its contrariness to positive law. The state not merely rights the wrong and upholds "the supremacy of law" (Ripstein 2009: 302)[412] by once again giving practical reality to the rights of the victim whose freedom was violated. By punishing, the state recognises the criminal and his or her unlawful action and turns the criminal maxim against the criminal. The state thus acts against the criminal as he or she acted towards another human being. It is vital to note that this is done in accordance with a public law of retributive punishment; it is not a result of someone's private, unilateral, arbitrary will (i.e., revenge or clemency).

The basic idea in Kant's account of punishment is perhaps best summed up in the following quotation: "Also: was für unverschuldetes Übel du einem anderen im Volk zufügst, das tust du dir selbst an. Beschimpfst du ihn, so beschimpfst du dich selbst; bestiehlst du ihn, so bestiehlst du dich selbst; schlägst du ihn, so schlägst du dich selbst; tötest du ihn, so tötest du dich selbst" (6:332). This is an extraordinary passage. Not only is the state obligated to act

[411] See his exemplary description of this point: "*Richterliche Strafe* (…) kann niemals bloß als Mittel ein anderes Gute zu befördern, für den Verbrecher selbst, oder für die bürgerliche Gesellschaft, sondern muß jederzeit nur darum wider ihn verhängt werden, *weil er verbrochen hat*" (6:331).
[412] Ripstein's formulation in this regard somewhat confuses the distinction between coercion and punishment and their respective purposes. Otherwise, his account of Kant's *Strafrecht* is highly illuminating and to the point.

against the criminal as he or she has acted towards other persons. Kant actually says that it is the criminal – who as state citizen has subjected him- or herself to the laws of the land – who does to him- or herself what he or she has done to the other. On this view, to retain the rightful condition of a public universal will violated by the criminal act is not only to inflict the same pain on the perpetrator that he or she has done to the public universal will; it is a punishment that the criminal inflicts on him- or herself. Only according to this reciprocal and equal principle of state retribution can a rightful form of punishment be exercised against the person who in a public court of law is found punishable (*strafbar*) and guilty of the crime of committing an illegal act.

Nonetheless, Kant's theory of punishment is not the best developed part of his overall philosophy of right. In some contrast to other concepts that are first properly introduced and justified in the *Rechtslehre,* such as the principles of private property and popular sovereignty, the right to punishment can hardly be said to surface at all in any recognisable form in his earlier texts.[413] This, of course, is not to say that it is not consistent with the rest of his theory, nor that it is necessarily wrong or normatively flawed. As we can see from the passages that I have quoted, Kant is in favour of the death penalty for murderers (and revolutionaries whose actions endanger the entire legal order). This stance might seem contrary to a common view of Kant. It is nonetheless not inconsistent with the categorical imperative of not treating other persons as means to other ends, since the right to punishment does not serve any other end than to reinstate the legal order that has been violated and to inflict reciprocal retribution on the criminal. It is a form of rightful retribution that every citizen accepts by entering the civil union and its laws. These also include the penal code, based on the principles of equality and reciprocity.

In Kant's view, it is all other theories of criminal punishment that inevitably endanger human rights and dignity, since they know only hypothetical imperatives for their execution and justification. For Kant, it is clearly these theories that make a mere means of the criminal and that are ultimately based on arbitrary decisions and prudential advice which "hin und her schwanken". Furthermore, his theory does not imply that the state would have to hire official rapists, thieves, and the like to inflict the retributive act; the punishment must correspond to

[413] In the first *Critique*, Kant had even hedged the somewhat naïve and moralistic hope that the realisation of the republic would make punishment more and more rare so that "bei einer vollkommenen Anordnung derselben [der Republik] gar keine dergleichen [der Strafen] nötig sein würden" (4:202). (Also quoted by Maus (1994: 288), but in another context.) As I have noted above, it also surfaces in the *Grundlegung* rejection of the Golden Rule as supreme normative principle, since this gives the criminal a valid argument against judge, jury, and executioner. But, as Kant objects to the Marchese Beccaria in his attempts to reform contemporary criminal law: "Strafe erleidet jemand nicht, weil er sie, sondern weil er eine strafbare Handlung gewollt hat" (6:335).

the criminal action "der Wirkung nach" and not always "nach dem Buchstaben" (6:332).[414] I believe these aspects of the theory are not necessarily the most incomprehensible, let alone inconsistent with his general position, in a moral or a legal sense.

The aspects of Kant's *Strafrecht* theory that remain underdeveloped are, in my view, facets such as its relation to two of the main themes in his legal philosophy: the independence and sovereignty of the legislative process, and the relation between internal incentive and external action. Regarding the first aspect, we can say that although he lays down a principle for the adjudication and punishment of criminal acts (retribution according to a principle of equality), he still seems to undermine the sovereignty of the legislative procedure with regard to the positing of the penal law, into which deliberations and arguments on at least deterrence and restoration may enter without being illegitimate *per se*.[415] This also concerns the learning processes that each society goes through with regard to both right and punishment itself. Maus is on this point correct to emphasise that: "Kant tritt hier gleichsam selbst als Automatismus-Experte auf und nimmt vorweg, was erst der Automatismus des gesamten demokratischen Prozedere als Ergebnis ausweisen könnte" (Maus 1994: 186). For instance, punishments such as the death penalty and forced labour, both of which he explicitly supports,[416] must be open to debate and circumventable by civil society through the legislative procedure. Once again, it can be objected that Kant expresses a more apologetic stance towards the status quo than his theory advocates on a formal level.

The other aspect I have in mind is a lack of clarification in his theory of punishment regarding the relationship between internal incentive and external action. It is undoubtedly true that the incentive is not what is criminalised – yet another example of the need for the division between morality and legality. But internal motives clearly play a significant role in assessing the severity of a criminal act and its due punishment. There must indeed be varying degrees to a crime such as murder, which take into account aspects such as intent or volition

[414] It is not easy to grasp all aspects of this argument and fully understand how Kant thinks this sorted out in practice. He mentions only one example of such a theory of punishment, namely that a wealthy man may willingly indulge in lesser crimes (such as verbal injuries that are punished with nominal fines) because he can afford it. The solution Kant sees to this case is a sentence of equal public humiliation that corresponds with the nominal fine. Other, more severe cases would necessarily be more difficult to answer, but Kant would perhaps regard the self-inflicted ineligibility to have and/or acquire property for a shorter or longer period of time as the correct punishment for theft.

[415] Kant's point is perhaps rather that these cannot, as such, provide any normative justification of punishment. But, as we can see from his example of the shipwrecked persons in the *Notrecht* paragraph of the introduction, he does take deterrence into account when considering persons' *de facto* reasons for acting against the law. Since the fear of public execution cannot have any effect on the lost shipwrecked who, in order to save his life, pushes another person off the board, the death penalty for murder cannot be executed. Consequently, in a similar (but not identical) manner to the cases of crimes of honour in Remark E, the death penalty must for Kant objectively stand; nevertheless, it cannot be implemented by the particular public authority (cf. 6:235; 335 ff.).

[416] See his arguments throughout Remark E (cf. 6:331 ff.; 333 in particular).

and thus do not immediately make (for instance) involuntary manslaughter a capital offence, even on Kant's view. This is not by any means to say that what is judged in court is the actual intent; proofs in any direction can, of course, only be made plausible as relatable to specific external actions. On the basis of his insistence that punishment cannot always be carried out "nach dem Buchstaben", it is perhaps possible to develop a position of degrees of punishment for actions that are similar but based on different motives. All the same, Kant's text yields no further clue in this regard.[417]

To sum up this subchapter on the rights and duties of the state, it should be repeated that Kant does not fill out the details of any specific content of any state law. In the General Remark, he rather explicates some specific obligations that the state and its legal subjects owe one another merely on the basis of their legal status. Individuals, as subjects of the law, cannot have any right to actively resist the sovereign that, in turn, has the right and duty not only to administer the economy, finance, and the police, but also to provide welfare arrangements for those who for any reason cannot provide for themselves. Furthermore, the state can hand out civil positions, state dignities, and punishment according to the rational principles of right. All of these tasks are distinctively public for Kant, since they reveal aspects of our intersubjective relations which private individuals simply cannot get right on their own.

So whereas the content of laws remains a political and more or less open question for the united legislative will of the people to answer, the legal procedures and structures of this process are not open to deliberation. The latter are delineated in the field of philosophy of right, to which I contend that Kant gives a considerable contribution and important insights. It is therefore in my view more correct to refer to his theory as one of legal philosophy, not as a political theory. I believe this reading is also more consistent with his terminology and general theoretical focus, according to which politics is reserved for the factual, contingent realm of communal decisions and positive laws, whereas the term 'right' is reserved for the normative sphere of legal principles and procedures (and actual legal orders) that follow from the human being's innate right to freedom. The internal relationship between the two fields is conceived of by Kant in a manner that also can stand as a one-line synopsis of his overall position: "–

[417] A Kantian response to these accusations might be that the task he sets out to solve is only to provide a procedural framework for the state's entitlement and obligation to punish criminal acts, not to list substantial criteria for the degrees of severity with regard to any particular crime: this is the task of the relevant state authority, namely the legislator in terms of the specification of penal laws, the court in terms of judgement, and the executive in terms of application.

Das Recht muß nie der Politik, wohl aber die Politik jederzeit dem Recht angepaßt werden" (8:429).[418]

3.6. On the necessity of including international law in the legal framework

In this part, I have considered and debated the principles of Kant's *Staatsrecht* and thereby his concept of the rule of law within the state. We have discovered that his argument proceeds entirely from the concept of freedom, to ground innate, private, and public rights that together realise the autonomy and thereby also dignity of the human being. The change of perspective with regard to the internal relationship between legality and morality in Kant's writings plays an important role for the interpretation for which I have argued here. Against a traditional, moral reading of his practical philosophy, I have argued that the principle of legality and his philosophy of right are neither derived in a straight line from, nor subjected to, the principle of morality and what today is commonly known as his moral philosophy.

Instead, the concept of freedom takes centre stage. It may be that we first get to know freedom qua rational autonomy through our internal self-legislation of morality (cf. Kant's deliberations in the *Grundlegung* and the second *Critique*); but when it comes to a guarantee for the morality of other persons' actions and the required realisation of the moral law among human beings, we cannot remain within the realm of mere internal freedom and incentives. It is thus necessary to entrust the external realm of freedom and rightful human interaction to an autonomous legal philosophy that clarifies the conditions under which I as a matter of fact can act in this world without violating the equal right of others to do the same.

For Kant, this can be established only in a legal order that is exclusively concerned with a rightful exercise of our external freedom. Perhaps surprisingly, it is in fact his realm of right that then takes on a primary role when it comes to a realisation of the moral law. Kant makes it perfectly clear that it is not primarily from the realm of morality that mankind's true moral progress is attained, but "sondern vielmehr umgekehrt" (8:366), from the rightful state constitution of the republic. Accordingly, it is only natural that the *Recthslehre* is placed first in the *Metaphysik der Sitten*, since a realisation of the moral-ethical realm of the *Tugendlehre* depends in a certain sense on a *de facto* realisation of the republican rule of law. (But, again,

[418] This remark is located at the end of the essay *Über ein vermeintes Recht aus Menschenliebe zu lügen*, where Kant also addresses the question of how to proceed from the concepts of an entirely non-empirical metaphysics of right to a principle of politics which "diese Begriffe auf Erfahrungsfälle anwendet" (ibid.). To do so, the philosopher must provide 1) an axiom (i.e., universal freedom), then 2) a postulate (of external, public law according to a principle of equality), and finally 3) a solution to the problem of how freedom and equality can be maintained in society (through a representative system [of the people]), which, in turn, becomes a principle of politics to move towards in actual practice (cf. ibid.). This fully corresponds with his description of politics as "ausübende Rechtslehre"(8:370) in the peace essay, a description that I have already quoted and endorsed.

this does not make right a mere instrument to promote morals. For Kant, the realm of right is not required in order to realise morality, but to realise the main concept of his overall practical philosophy, namely freedom.) The internal relationship between morality and legality in Kant is therefore, I argue, to be read as complementary rather than hierarchical. In his late writings on practical philosophy, legality is not grounded in morality *per se*, but in practical reason and its now altered understanding and formulation of the categorical imperative. This moral law still establishes the practical-rational basis for our normative obligations, but the main point is that these are of two different and also equal kinds; they are related to our exercise of freedom as instances of, respectively, internal autonomy (morality) and external autonomy (legality).

On the interpretation for which I have argued here, the cornerstone of Kant's practical philosophy is not morality as such, but his concept of freedom. It is this concept that stands at the centre of the discussion of the *Rechtslehre* and also grounds the rational point of departure in his works on moral philosophy (including the *Tugendlehre*). With his late change of mind with regard to the (im)possibility of establishing a consistent and autonomous concept of right on the basis of his moral philosophy *per se*, we realise that his legal philosophy takes on a far more critical and crucial role within his overall practical-philosophical system than secondary literature has traditionally recognised. In fact, it is my claim that it is Kant's philosophy of right that gives objective practical reality to, and thus first unfolds, his concept of freedom, a concept that in turn unfolds not only his philosophy at large, but also mankind as a whole.

However, the concept of freedom in mankind's external relations is not fully attained by a realisation of the republican rule of law within each state. As Kant had already insisted in his 1784 essay on the *Idee zu einer allgemeinen Geschichte in weltbürgerlicher Absicht*: "Das Problem der Errichtung einer vollkommenen bürgerlichen Verfassung ist von dem Problem eines gesetzmäßigen äußeren Staatenverhältnisses abhängig, und kann ohne das letztere nicht aufgelöset werden" (8:24). In other words, the internal legal order of the state is dependent upon a rightful external legal order between states, if the freedom of the civil condition is to be fully guaranteed. This is not achieved with the establishment of a republican constitution and its authorisation of state power and the rule of law within the territory: external states and individuals are not bound by this jurisdiction, and insofar as it is possible for them to come into contact with the state, there arises the necessity of a rightful regulation of these relations and actions, too. There is also at this inter-state or international level a state of nature that knows only the freedom of the wild and the right of the stronger. Consequently, there must even at this level be established a civil condition similar to – but, as we will discover in the next part, not identical with – the republican union that is now instated at the national level.

Kant's deliberations on international law (or right) are not particularly extensive. As a topic treated in its own right, they are limited to the said essay and to the three main writings on legal philosophy of the 1790s (along with comments and passages in other publications, as well as the *Nachlass*). But as we will see in the next part when I present my sketch of the two components of his dual concept of international law – *Völkerrecht* and *Weltbürgerrecht* – his position can be seen to gradually change on this subject too. This change is intertwined with his new understanding of the internal relationship between legality and morality, along with a different understanding and definition of the legal concepts involved. In my exposition of his philosophy of right beyond the nation-state there are, moreover, several significant analogies and disanalogies between the national and the international levels that have to be taken into account, in addition to important conceptual difficulties that in the end make it impossible to impose straightfowardly the template and structure of state law upon the international stage. I will return to all these aspects in part II.

At present, it suffices to repeat the main features that made a civil condition necessary in the first place, including the postulate of public right that guarantees the transition from a state of mere private right to a state of public right in a republican civil union. Since the two components of *Völkerrecht* and *Weltbürgerrecht* are dimensions of public right, the obligation that one must "im Verhältnisse eines unvermeidlichen Nebeneinanderseins mit allen anderen, aus jenem [Naturzustand] heraus, in einen rechtlichen Zustand, d. i. den einer austeilenden Gerechtigkeit, übergehen" (6:307) holds good beyond the state. This, as we recall, is identical with the third formula of the duties of right that insisted that – unless one can shun all societal relations – it is a strict requirement to enter into a civil union: "Tritt (...) in eine Gesellschaft mit andern, in welcher jedem das Seine erhalten werden kann (suum cuique tribue)" (6:237).

This echoes the evaluation in the 1784 essay: devoid of a public legal order, mankind will remain in a sorry state of affairs that not only is inherently unrightful, but that also fails to provide the conditions for any proper realisation of our capacities, freedom, obligations, and morality. Hence, a union of some sort is called for by Kant at the international level too, both in order to secure the only half-constituted rule of law at the national level, and to establish as well as realise universal relations of right beyond the jurisdiction of each particular state. "Ehe dieser letzte Schritt (nämlich die Staatenverbindung) geschehen, also fast nur auf der Hälfte ihrer Ausbildung, erduldet die menschliche Natur die härtesten Übel unter dem betrüglichen Anschein äußerer Wohlfahrt; und Rousseau hatte so Unrecht nicht, wenn er den Zustand der Wilden vorzog, so bald man nämlich diese letzte Stufe, die unsere Gattung noch zu ersteigen hat, weglässt" (8:26). In accordance with this assessment, international law must for Kant be

included in the legal structural framework, in order to fully realise the two final ends of the entire *Rechtslehre*, that is, perpetual peace and cosmopolitan law.

II.

Völkerrecht and *Weltbürgerrecht*

The Rule of Law beyond the State

1. A dual concept of international law

Kant's basic premise and fundamental insight holds true for both individuals and states: prior to the establishment of a condition of public right, the normative problem is not merely that we can do each other wrong in our specific actions. Rather, the condition itself constitutes a wrong in the highest degree. Accordingly, Kant regards the international state of affairs that is devoid of public justice as nothing but "ein *Zustand* des Krieges (des Rechts des Stärkeren), wenn gleich nicht wirklicher Krieg und immerwährende wirkliche Befehdung (Hostilität)".[419] Just as in the case of individuals in the state of nature, it must be assumed that states, too, apparently do not want to have things any better. But although "dadurch keinem von dem anderen unrecht geschieht", the condition is nonetheless "an sich selbst im höchsten Grade unrecht" (6:344).

If we now apply Ripstein's description of the state of nature, which I endorsed in the first part of the thesis, it seems that unless we establish an international rule of law, we will encounter the three structural defects of unilateralism, assurance, and indeterminacy at this level too. Again, neither bilateralism nor the highly unlikely circumstance that all individuals privately want a certain action or social/ethical/religious/cultural practice to be implemented solves these deficiencies, which are inherent to the condition as such. Kant's unequivocal critique of Achenwall holds at the international level as well: it is not the social (or ethical, religious, etc.) condition that negates or overcomes the state of nature. States and individuals may, of course, find themselves in an international social community where some rightful relations might exist. Nevertheless, any condition that is devoid of public law and authority is a state of nature, and is, accordingly, unrightful *per se*.

This not only corresponds to our earlier description of the non-rightful condition prior to the institutionalisation of a state of public right which we have a legal obligation to enter. It also mirrors Kant's important distinction in the peace essay between any finite number of separate, post-war peace agreements (that is, temporary truces to end an instance of actual hostilities) and a condition of true peace (that is, peace in the form of an international legal order to finally end all hostilities). In other words, his primary focus on the formal features of the rule of law is upheld also at the international level.

Part II starts with a brief and general presentation of what I consider to be the two final ends of the *Rechtslehre* and hence also of Kant's three-dimensional realm of right. These two ends are the ideals of perpetual peace and cosmopolitan law, which correspond to a realisation

[419] The condition of war is thus normatively indefensible because it supplies only unrightful ways to claim one's rights. I will return through this part to Kant's rejection of war as a rightful course of conduct.

of both his dimensions of international law, that is, *Völkerrecht* and *Weltbürgerrecht* (1.1). I will then investigate his understanding of perpetual peace more closely, as this emerges in his various works on legal and political philosophy (1.2). This will also allow us to detect certain changes internal to his writings, in line with the gradual development of the central concepts involved; I have already addressed this in the first part of the thesis.

After these initial discussions of the law between states (*Völkerrecht*), I proceed to focus on one of Kant's most inspirational and controversial ideas, the inclusion of a third legal dimension in his juridical framework, i.e., cosmopolitan law (*Weltbürgerrecht*) (1.3). In both these subchapters, we will see that his approach to the two dimensions of international law reveals a remarkable similarity to the purpose of the private right part in the *Rechtslehre* – it sets out to identify natural rights and to discern criteria for a rightful and unrightful use of coercion in the absence of a legal order of public justice.

However, the analogies between a national and an international state of nature extend only to a certain point. A few crucial disanalogies hinder a straightforward implementation of the nation-state solution to the realm of international law (1.4), an admission that Kant seems to make only late in his writing career, partly because of a certain incompatibility between the international realms of *Völkerrecht* and *Weltbürgerrecht*, something that he is not sufficiently aware of at an earlier stage (1.5).

This difficulty in actually uniting the core principles of a dual concept of international law leads us to chapter 2, where I will discuss the hotly contested juridical character of Kant's legal order beyond the nation-state. There I will attempt to clarify which model for worldwide rightful relations he actually advocates. This is, as we know, a question that still causes great controversy in Kant scholarship. But before we get that far, I shall go to the primary sources and present the central concepts involved in his international legal framework, preparing the ground for a rightful condition of both perpetual peace and cosmopolitan law.

1.1. A brief overview of the two final ends of Kant's realm of right

With the two ends of perpetual peace and cosmopolitan law and their explicit formulations in Kant's texts as our point of departure in this part, our attention turns immediately to his three most elaborate works on legal and political philosophy – the *Gemeinspruch* and peace essays, and the *Rechtslehre*.[420] Although I will strongly contend that these two ends do not find their final and most consistent formulations before his three (or even two) last major political texts,

[420] As was the case at the level of state law, too, I hold there to be an ascending degree of precision within these three writings, in particular with regard to the differentiation of key concepts and to the specific features of right.

there are at least indirect references to them prior to his *Spätwerke*. Both the idea of peace and the cosmopolitan condition appear on several occasions and in different settings before they are brought together in their final form, when both their internal relationship and external distinction are more clearly sorted out. A brief overview of how the two ideals are developed by Kant in the various writings will help us delimit our analysis more precisely.

If we start with the concept of perpetual peace, there are numerous allusions to this in Kant's writings. The idea of peace as such is present from an early stage,[421] but the coupling of this term with its perpetual aspirations is not consistently enforced and developed until the 1790s, when, as I already have stated, his legal and political philosophy is formulated more precisely. We should, however, take notice of the fact that the term is not exclusively applied as a juridical or political term. As Hans Michael Baumgartner insists, there are three different usages of the concept within Kant's own vocabulary that we have to be aware of. There is the perpetual peace understood as concerning 1) philosophy as such; 2) the context of legal and political philosophy; and 3) the ethical-religious context of his essay on religion.[422] While I do not overlook the intertwinements between these three distinct domains of his philosophical thought,[423] I will be concerned in this part with the second usage, which is the most common in today's Kant literature, that is, legal and political usage.[424] Accordingly, if we direct our

[421] Notably in his "Erläuterungen zu G. Achenwalls *Iuris naturalis Pars posterior*", that is, his own notes in Achenwall's book on natural right, which also served as the main textbook in Kant's own lectures on the subject. There are passing references to the peace term in the first and third *Critique*, and 'perpetual' is also added to it twice in the former of the two *Critiques*, but, as I will argue, a specific clarification of how this construction should be understood more precisely is still missing. So is a clarification of the founding principle of law as such; the legal status of his propositions on politics and law correspondingly remain, as we have seen, somewhat ambiguous in the works published during the 1780s and the early parts of the subsequent decade.

[422] Cf. Baumgartner (1996: 76), who here singles out the Kantian idiom "im Hinblick auf [1] die Philosophie selbst, insbesondere auf die durch ihn selbst begründete kritische Philosophie. Er spricht vom 'ewigen Frieden' (...) in [2] den entsprechenden geschichts- und rechtsphilosophischen sowie politischen Texten, so in der Schrift *Idee zu einer allgemeinen Geschichte in weltbürgerlicher Absicht* (1784), des weiteren natürlich in der Schrift *Zum ewigen Frieden* (1795) selbst, (...) [und] in den 'Metaphysischen Anfangsgründen der Rechtslehre'. Schließlich spricht Kant [3] vom 'ewigen Frieden' aber auch in der Religionsschrift: *Die Religion innerhalb der Grenzen der bloßen Vernunft* (1793) (...) im Hinblick auf das notwendig geforderte 'ethische gemeine Wesen'".

[423] As Baumgartner shows, not only do they all designate perpetual peace as a final end (*Endzweck*) for their respective realms, but the structure and justification of the concept also have strikingly similar features that should not be overlooked. He summarises this facet, which is often overlooked by Kant scholars, in the following manner: "Es ließ sich in allen drei an der Oberfläche zunächst wesentlich voneinander verschiedenen Kontexten der Kantischen Rede vom 'ewigen Frieden' immer dieselbe Begründungsfigur und Struktur finden: eine rationale Begründung der Notwendigkeit eines solchen Friedens sowie durch Teleologie (der Natur) gegründete Aussicht auf seine letztlich gelingende Realisierung" (Baumgartner 1996: 84). Another insight and emphasis in Baumgartner's instructive essay is the internal relationship within these three realms to constitute the first principle of the entire structure, as he, perhaps surprisingly, concludes: "Kant begründet seine Friedenslehre demnach durchgängig rechtsphilosophisch" (ibid.: 85). Baumgartner here suggests that the philosophy of right takes on a peculiar and indeed prominent position not only in Kant's political thought, but in the two other realms as well.

[424] Any attempt to reconstruct or interpret the interlinking of the three usages will, of course, lie far beyond the scope of this thesis. Once again, I can here only accentuate the often underemphasised role of Kant's philosophy of right within his overall philosophical framework.

current efforts to the distinctively political field, it is in the peace essay that we find the most detailed description of what, for Kant, the end of perpetual peace amounts to.

In the short and popular essay, itself composed as a peace treaty,[425] we find already in the first preliminary article an important distinction regarding our subject topic. Kant sharply distinguishes the 'perpetual peace' he has in mind from agreements that merely cause a truce or ceasefire (*Waffenstillstand*). In contrast to an instituted, peremptory condition of peace, the latter agreement would for him only be another "Aufschub der Feindseligkeiten, nicht *Friede*, der das Ende aller Hostilitäten bedeutet, und dem das Beiwort ewig anzuhängen ein schon verdächtiger Pleonasm ist" (8:343). As a result, the term 'peace' is conceptually opposed to a mere temporary suspension of the hostilities, which is all that any previous (so-called) peace agreement can be said to have accomplished. Nothing less than an end to all wars is called for by Kant, an end to which the entire practical-philosophical framework of both the peace essay and the subsequent *Rechtslehre* is devoted.

Evading this ambiguity that is commonly inherent to the peace term by distinguishing it from mere ceasefires, Kant is clearly also aware of how the concept may be read as having something of a Janus face. The perpetual peace idiom finds a dual and satirical meaning in the "inscription on a (...) signboard picturing a graveyard" (Kant 2009: 317). The perpetual peace found in the grave not only alludes to the ever-present and constant threat of an outbreak of war that we find in the state of nature; in his view, this is also the only peace that is attainable through a policy that insists on the rightfulness of a *ius ad bellum* and hence acts on uni- or bilateral maxims of sheer force (*Gewalt*) to decide what is right (*Recht*).[426] In other words, unless there is a justified possibility of the realisation of an international legal order in both theory and practice, Kant reckons that there is no state of peace to be found in this life.

As we know, the term 'perpetual peace' is not originally Kant's expression. In picking up its first formulations from Abbé Saint-Pierre and Jean-Jacques Rousseau,[427] Kant argues

[425] On the literary form and its relation to seventeenth- and eighteenth-century peace treaty formulations, see Saner (2004: 44).

[426] This, as we recall, was clearly rejected by Kant at the state level. The view is upheld in the peace essay with regard to international relations as well: "Bei dem Begriffe des Völkerrechts, als eines Rechts zum Kriege, läßt sich eigentlich gar nichts denken (weil es ein Recht sein soll, nicht nach allgemein gültigen äußern, die Freiheit jedes Einzelnen einschränkenden Gesetzen, sondern nach einseitigen Maximen durch Gewalt, was Recht sei, zu bestimmen), es müßte denn darunter verstanden werden: daß Menschen, die so gesinnt sind, ganz recht geschieht, wenn sie sich unter einander aufreiben und also den ewigen Frieden in dem weiten Grabe finden, das alle Gräuel der Gewaltthätigkeit sammt ihren Urhebern bedeckt"(8:356 f.). I will return to the aspect of *ius ad bellum* and its formulations in the *Rechtslehre* later.

[427] Cf. Rousseau (2005b; 2005c). Other political philosophers of the time also discussed the matter. For instance, Voltaire composed an essay "*De la paix perpétuelle*" in 1769; Jeremy Bentham published his "Plan for an Universal and *Perpetual Peace*" two decades later; and James Madison wrote a text on "Universal Peace" in 1792. For an overview also of other accounts; see, for instance, Raumer (1953) and Dietze & Dietze (1989).

not only for the desirability of such a condition, but also for its strict and fundamental necessity. Only in a state of affairs in which rightful relations have been properly dealt with also at the international level, can the right of man and, thus, the dignity of man be attained. Kant's first publication that is entirely devoted to the idea of rightful international relations is his essay *Idee zu einer allgemeinen Geschichte in weltbürgerlicher Absicht*, written in 1784. In complete agreement with both Abbé Saint-Pierre and with Rousseau, Kant envisions here the expansion of law-governed relations to the international realm too. But whereas Kant is clearly inspired by other theorists' first formulations (and possibly also criticisms)[428] of the idea, there are several dissimilarities between the respective final versions. Without going into detail regarding Kant's position and how it is formulated as an overall theory here, it suffices, for our present purposes, to briefly indicate how it crucially differs from Rousseau's (as well as Abbé Saint-Pierre's) account of the idea on at least five separate points.

First of all, Kant does not delimit the scope of the perpetual peace to an exclusively European context; it requires a worldwide realisation. Secondly, as I have already indicated, this is an *a priori* legal principle that is not only pragmatically desirable, but strictly necessary and inherent to the concept of right and the rule of law already from the outset.[429] Another aspect to consider along these lines is the relationship between theoretical justification and practical realisation, where Kant has a much more – correctly understood – realistic view of the (legal) complexity of the transition from theory to practice.[430] Furthermore, each state is to be considered free and equal in the realisation and continuous maintenance of such a rightful condition, in which "jeder, auch der kleinste Staat seine Sicherheit und Rechte (...) erwarten könnte" (8:24). This is in clear contrast to any hierarchical discrimination of states based on size, wealth or power.[431] And finally, Kant is somewhat more optimistic[432] than the other two about the possible realisation of the idea of perpetual peace in actual politics, however wishful and distant in realisation it might be considered:

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[428] Voltaire, for instance, had earlier criticised Rousseau and his attempt to give life to Abbé Saint-Pierre's grand idea. For his sarcastic response, written as a letter of complaint from the Emperor of China, see Voltaire (2005 [1761]).

[429] This also implies that, for Kant, Rousseau is wrong to make the "plan for perpetual peace" ultimately hinge on the good government with sufficient diplomatic skills to force the temporarily "very absurd plan" into a state of affairs where "perpetual peace will become a reasonable plan again", something which in turn is unachievable "except by means that are violent and formidable to humanity" (Rousseau 2005c [1761]: 60).

[430] On a further note: Hans Saner (2004: 45 f.) underlines that Kant's emphasis on the philosophical approach to the theory is not to be considered as a 'plan' (or, in the original French formulation, *projet*), but as an "Entwurf", cf. the subtitle of his essay. In my view, this highlights far more coherently the role both of the philosopher and of theory in their relations to *praxis,* and we are also reminded of Kant's rejection of Plato's philosopher king.

[431] Something which at least the Abbé Saint-Pierre is guilty of perpetrating, see Rousseau (2005b: 39 f.).

[432] This is, *inter alia,* inherent to the claim in the *Gemeinspruch* essay that anything that can be proven feasible in theory must also be possible in practice. I shall return below to how this applies to the international legal dimension, and to the analogies and disanalogies that exist between the two levels of state theory.

> So schwärmerisch diese Idee auch zu sein scheint, und als eine solche an einem *Abbé von St. Pierre* oder *Rousseau* verlacht worden (vielleicht, weil sie solche in der Ausführung zu nahe glaubten): so ist es doch der unvermeidliche Ausgang der Not, worein sich Menschen einander versetzen, die die Staaten zu eben der Entschließung (so schwer es ihnen auch eingeht) zwingen muß, wozu der wilde Mensch eben so ungern gezwungen ward, nämlich: seine brutale Freiheit aufzugeben und in einer gesetzmäßigen Verfassung Ruhe und Sicherheit zu suchen (ibid.).

In the *Idee zu einer allgemeinen Geschichte in weltbürgerlicher Absicht*, Kant seems to agree with Rousseau that the original *projet* of the Abbé Saint-Pierre in its simplicity does not take enough potential risks into the account, something which led Rousseau to sincerely doubt the feasibility of a practical realisation. But both Rousseau and Kant understood the immense importance of establishing some form of international guarantee for the sovereignty of states. Both jurists and natural rights thinkers had already done extensive work on a number of international rules and customs for quite some time, but chiefly from the point of view of warfaring states (e.g. *ius ad bellum*).[433] The insight that international law is needed to overcome the condition of war led Rousseau to prefer the unbound freedom of the wild also within each state before an international legal order was established (cf. Rousseau 2005a [1753/58]; 2005c [1761]). Kant does not substantially disagree with this evaluation of internal state law, unless this order is also secured externally through the rule of law: "*Rousseau* hatte so Unrecht nicht, wenn er den Zustand der Wilden vorzog, so bald man nämlich diese letzte [internationale] Stufe, die unsere Gattung noch zu ersteigen hat, wegläßt" (8:26).

For both Rousseau and Kant, it is thus evident that the introduction of an international legal dimension is necessary not only with regard to states in their external relations, but also to preserve the rule of law within the state. Without a guarantee from other states with regard to non-intervention in one's internal affairs, the entire project of establishing institutions of state law that are to secure rightful relations between individuals can fall prey to any superior power; the rule of law within the nation-state must be complemented by some form of international legal order. Perpetual peace, that is, an international guarantee of the sovereignty of each state and thus security from intrusion by other states or coalitions, is accordingly deemed necessary by Rousseau and Kant alike, although they clearly differ in their views on how achievable it is in practical politics and how it is to be theoretically construed.

A critical factor in this latter regard, which will be explicated at length in subchapter II.1.3, is Kant's inclusion of a cosmopolitan dimension of law, to give each individual a legal status also beyond the nation-state. Widely celebrated as *the* innovative feature of his legal

[433] Grotius' work *De Iure Belli ac Pacis* from 1625 is one obvious example; the Peace of Westphalia is another.

philosophy,[434] his systematic inclusion of a third dimension of international individual rights gives depth to the juridical framework by establishing principles not only of international, but also of cosmopolitan law (*Weltbürgerrecht*). In fact, as he stated in the 1784 essay; unless a history with a cosmopolitan intent can be written, i.e., a development of the human condition towards a specific and final end according to which every people and state can be valued (and nature as such destines us), all human actions must merely seem to be "ein sonst planloses Aggregat" (8:29).

It is worth noting that the term 'cosmopolitan law', like the term 'perpetual peace', does not figure in Kant's earliest published text regarding the final end both of mankind and of practical philosophy. In the essay, he refers instead 'only' to a "cosmopolitan condition" (*weltbürgerlicher Zustand*) in a broader sense, without making any further specifications with regard to our two terms. Moreover, he does not discuss the aspect of law (or legality) in its internal relationship to the concept of morality in any further detail. I think it is characteristic of what we can call his 'official' position at the time that he conceives the end process of this universal history of mankind with a cosmopolitan intent as "ein moralisches Ganze" (8:21).

The important point is that, on such a reading, it remains unclear how the internal relationships between legality–morality, national–international law, and perpetual peace–cosmopolitan law are to be understood. As I have shown in part I of the dissertation, it is only later that Kant formulates a concept of right that is not to be derived in a straight line from the concept of morality, and that he singles out a threefold, non-hierarchical legal framework. The characteristic features of the dimension of cosmopolitan law, as distinct from a cosmopolitan condition *per se*, can be grasped only on the basis of the development that his realm of right in particular and his practical philosophy in general undergo. Therefore, I will argue that the approach Kant uses even as late as in the *Gemeinspruch* essay to a certain extent fails to take into account a possible overlap and a consequent inaccuracy concerning the differentiation of key concepts and the overall framework. My investigation below will illustrate a conceptual confusion that even at that late time troubles the Kantian framework for establishing rightful relations worldwide. To the degree that this conceptual confusion is not properly addressed and dealt with in current secondary literature, the same problem relates to those works too.

Nevertheless, this is far from saying that the *Gemeinspruch* essay has nothing to offer us. After building the case for the strict impossibility of claiming that something that can be proven feasible in theory does not hold for practice in: I) morals generally and; II) the right of

[434] See, for instance, Habermas (1999: 192).

a state (*Staatsrecht*); Kant maintains the same point with regard to III) the international level. However, the treatment given of the subject here makes it evident that further clarifications are called for. Throughout the section, there are no clear indications that perpetual peace and cosmopolitan law will be ascribed to two distinct dimensions only a couple of years later. On the contrary, the right of nations and the cosmopolitan dimension are treated under the same conceptual umbrella (of *Völkerrecht*); moreover, they are treated in terms of an overall moral-philanthropic enterprise.[435] At this stage, where most of Kant's legal concepts and dimensions are less than fully developed and differentiated, he proceeds to speak of the necessity of a *civil* constitution (*staatsbürgerliche Verfassung*) also at an intrastate level; in addition, he calls for a *cosmopolitan* constitution (*weltbürgerliche Verfassung*), i.e., a "Zustand eines allgemeinen Friedens". Should this lead to the "schrecklichsten Despotismus" rather than to the condition of peace that is sought, "ein rechtlicher Zustand der *Föderation* nach einem gemeinschaftlich verabredeten *Völkerrecht*" (8:310 f.) is also a viable solution.[436]

Although he refers to more or less the same terminology that he will use in later texts, it still remains unclear how Kant will relate these terms to each other in an overall framework. For instance, his 1793 approach fails to treat cosmopolitan law as a separate juridical-political entity, holding on to a two-tier construct of state law and international law; thus, he subsumes the cosmopolitan aspect under the dimension of *Völkerrecht*. If he wants to include individual rights that go beyond the territorial integrity and rule of law of each nation-state, he has at this point not adequately dealt with the possibility of conceptual contradictions between individual and state rights at an international level. The objection can certainly be made against such a Kantian legal construct that it is possible to think of diverging rights conceptions within it. I will therefore argue that it is only with the introduction of the threefold, non-hierarchical legal framework in the 1795 peace essay that this fundamental ambiguity starts to be sorted out in principled terms, something which is also addressed in the *Rechtslehre*.

Accordingly, neither a clearer differentiation between the three dimensions of right nor a distinctively legal perspective is present until Kant's two last and major works on law and politics, and it is to these we must turn for the most coherent view on the subject.[437] When I

[435] Already the section title is indicative of this: "Vom Verhältnis der Theorie zur Praxis im Völkerrecht. In allgemein-philanthropischer, d. i. kosmopolitischer Absicht betrachtet" (8:307). The footnote to the section headline admittedly hints at an awareness of a certain incompatibility between the two, but a differentiation is by no means completed in the text itself.

[436] These two alternatives, the former preferred to the latter, correspond to his later distinction between a world republic (*Weltrepublik*) and its "negative surrogate" (cf. Kant 2009: 328) of a world federation. See also below.

[437] This is, of course, not to say that earlier works, let alone the handwritten *Nachlass*, are to be overlooked in our context. On the contrary, they will provide both an important background to the overall position as well as highly detailed and further insight in key areas of my presentation. As a general stance, however, I will argue

enquire further into the matter below, I will also examine how there may in fact be some form of inherent structural defect in an international legal order that sets out to ground positive law without proper recourse to what we have already established as a precondition for the rule of law at the levels of both *Staatsrecht* and *Völkerrecht*, namely the concept of sovereignty.

This means that I must try to clarify the principles belonging to the internal structural relationship between national and international law, and between the two dimensions of the latter, *Völkerrecht* and *Weltbürgerrecht*. These are in turn elaborated from the concept of right as developed within the realm of *Staatsrecht*, but do not share all the features of the latter. In order for us to grasp the meaning of Kant's insistence on perpetual peace and cosmopolitan law as the final ends of the entire doctrine of right, we must work out how these two ends are related to the rest of the main constituents of his philosophy of right and how his international legal order is not identical with the legal order at the state level.

I hope that these assertions will become clearer in the course of the discussions below. But as an indication of the road ahead, the central position and starting point for the following proceedings should remain clear throughout: Kant insists on the strict necessity of expanding any consistent legal philosophy to include also an international dimension where both states and individuals stand in rightful relations to one another according to the principles of rational right. For Kant, as we shall see, neither the rule of law within each separate state nor non-institutionalised conventions between the different states is sufficient in this context. On this view, the key task for our philosophical investigations and practical endeavours remains to answer the fundamental question how to construct an international legal framework that is not only normatively required, but that also is consistent throughout.

1.2. Perpetual peace and its preconditions

As already noted, Kant's reflections on perpetual peace stem from the reflections on this topic by Abbé St. Pierre and Rousseau, but they are also significantly altered in the process. The exploration in part II aims to show that his conclusive position on the subject of international law can be adequately presented only on the basis of the arguments that are adduced in the peace essay and the *Rechtslehre*. In part I, we have seen how the final formulations of central concepts such as private property, the separation of powers, sovereignty, and even *Recht* did not surface until the 1797 publication. This must lead to discrepancies in any interpretation of the Kantian rule of law at the state level based on the publications prior to the *Rechtslehre*.

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that Kant is changing and developing his position throughout his writing career, and, as I have stated above, that his final form of his philosophy of right is to be found in the last two works.

Here, however, we note that his stance on international law is in fact mostly identical to the essay written two years earlier. This, of course, is connected with the nature of the object of study. We will observe that only states and individuals are in question at the international level, which decfinitely does not deal with a specification of private property and its relations. This is why it crucially lacks a *lex permissiva* that operates as it did on the state level.

Consequently, we will have a somewhat easier task in this chapter, given that we have already examined the juridical definitions of states and individuals, and that there can be no private right dimension to Kant's international legal order. Moreover, the few and relatively minor differences between his two last writings on philosophy of right can be easily explained on the basis of changes in the *Rechtslehre* that I have demonstrated in part I.

Nonetheless, since Kant's publications on public right and international law are neither particularly extensive nor always entirely unambiguous, some further clarification of the main constituents is called for. The many scholarly disagreements about these two texts, and hence about what his final take on international law actually is,[438] make his claim in the *Rechtslehre* that its principles can be treated "mit minderer Ausführlichkeit" than those preceding them – because they for him seem "aus diesen leicht gefolgert werden zu können" (6:209) – less than obvious.[439] For the same reason, we must go step by step through his argument, starting with his earliest plans for perpetual peace and following the development to an international and, crucially, institutionalised legal order that will peremptorily end all hostilities.

In the previous subchapter, I presented some basic, historical-biographical features of Kant's concept of perpetual peace (and of cosmopolitan law). I also underlined how a number of the main constitutents also of his international realm of right must be said to significiantly change over the years. One of the fundamental insights that did not change during the course of his writing career, however, is the point made in the opening line of the important seventh thesis of his *Idee zu einer allgemeinen Geschichte in weltbürgerlicher Absicht*, a passage also quoted above: "Das Problem der Errichtung einer vollkommnen bürgerlichen Verfassung ist von dem Problem eines gesetzmäßigen äußeren Staatenverhältnisses abhängig und kann ohne das letztere nicht aufgelöset werden" (8:24).

[438] In the course of this discussion, I will briefly visit the main controversies and scholarly positions in the contemporary debate. The greatest disagreement centres on nothing less than the very juridical model and character of Kant's international legal order, which I will discuss at some length in chapter 2 of this part.
[439] Ulrich Thiele's assessment is exemplary in this regard: "Allerdings ist unbestreitbar, dass Kants Völkerrechtstheorie einige höchst missverständliche Formulierungen enthält, an denen sich bis auf den heutigen Tag heftige Kontroversen entzünden. Gemeint sind vor allem die Kantischen Auskünfte über die institutionelle Form der geforderten friedensstiftenden Organisation" (Thiele 2011: 177). (As we have noticed above, Kant's claim can also be read as relating to the public right part in general, not only to its international dimensions.)

At first glance, Kant seems to give priority to the external relations of states, at the expense of their respective internal realms. This however, does not mean that he gives ground to a hierarchical interpretation of the legal framework – in this regard, his 1784 position is not in contrast to his final and undisputedly non-hierarchical tripartite structure of *Staatsrecht*, *Völkerrecht*, and *Weltbürgerrecht*. Rather, I argue, it points to a dialectical and interdependent process between the two levels of national and international law, a process of which Kant is fully aware even at this point of his writing career. For the apparent priority of international law is put into perspective by the inherent presupposition of the passage that there already is such a thing as states to form lawful external relations at all. Without a plurality of states, it is simply impossible to establish an international law regime.[440]

Kant will reaffirm this important point also in the 1795 peace essay: "– Die Bedingung der Möglichkeit eines Völkerrechts überhaupt ist: daß zuvörderst ein *rechtlicher Zustand* [auf der Staatsebene] existiere. Denn ohne diesen gibt's kein öffentliches Recht, sondern alles Recht, was man sich außer demselben denken mag (im Naturzustande), ist bloß Privatrecht" (8:385).[441] The state (or, actually, a plurality of states) is a strict precondition for international law; at the same time, international law is an equally strict precondition, if the states are to peremptorily guarantee the rights of their internal legal orders. These legal orders are just as insecure from external interference as the rights of man were in the state of nature prior to the establishment of state law. Kant therefore appropriately describes such an international state of affairs in the same uncertain terms as at the individual level: states, too, are in their external relations "von Natur in einem nicht-rechtlichen Zustande" (6:344).

We can, however, see that the structural, interdependent relationship between Kant's two levels of law changes somewhat during the course of his writings. I have already noted that he sees the cosmopolitan condition as "ein moralisches Ganze" (8:21) in the 1784 essay, and that he calls for a cosmopolitan constitution for the world at large in the *Gemeinspruch* essay of 1793 (cf. 8:310). Still, he has as yet not clarified how such a law arrangement is to be united with possible rights divergences at the state level. It is only with the peace essay that the tripartite legal structure becomes fully recognisable and Kant is close to his final position on international law. As I try to demonstrate when we examine the details of this writing, he can be seen to develop a line of argumentation for international law that is similar to his line

[440] I am grateful to Audun Øfsti for emphasising this important point. (The case would, of course, be different if one were to grant nations or peoples, qua non-state entities, positive rights in a global legal order, but as we will see later in the discussion of cosmopolitan law, Kant seeks to realise this differently.)

[441] This, of course, does not exclude the possibility that the transition from private to public right is fully completed for Kant only with a transition from state law to world state law, but as we shall see later, this position cannot be considered his final stance on the subject.

of argumentation in the *Rechtslehre* and its part on private right – the first task is to discern criteria for the rightfulness of actions in a non-rightful condition. Although this parallel is seldom drawn, I hope to show that this is precisely what he has in mind with the so-called preliminary articles of the peace essay.

a) The position of the peace essay

I have already pointed out that the essay has the literary form of a contemporary peace treaty, with six preliminary articles that designate the negative conditions that must be met by the conflicting parties prior to the point in time at which the state of actual war and its hostilities come to an end.[442] These are the preconditions for establishing a state of peace, since Kant argues that a violation of any of them would undermine the ground on which the international legal framework is to be built. A brief outline[443] of the main points in his six articles will be made here, in order to reveal their meaning and importance in his overall legal structure, with particular emphasis on the question of the concepts and objects of study that come into consideration in the first place. I am then in a better position to substantiate my initial claim that Kant assigns the preliminary articles a task that is in effect identical to the task he assigned to the private right part in the first half of the *Rechtslehre*: that is, to prepare the ground for a state of public right.

Kant's negatively formulated preliminary articles for a state of perpetual peace can be summed up as follows; these prohibit all types of: 1) secret reservations for future warfare; 2) (private right) acquisition of states; 3) standing armies; 4) credit systems for the funding of warfare; 5) forcible interventions in other states; and 6) dishonourable actions that prevent trust between the parties. Furthermore, articles 1, 5, and 6 are described as examples of strict laws of prohibition, "die *sofort* auf Abschaffung dringen", whereas Kant allows the realisation of articles 2, 3, and 4 to be postponed for some time because of contingent circumstances, provided that the parties do not lose "den Zweck aus den Augen" (8:347) in the process.[444]

For reasons of presentation and the flow of argument, I will not consider the various preliminary articles in their original sequence. Instead, I shall start with number two, as it is most helpful in clarifying and delimiting the object of study, and gives further support to my claim that, for Kant, only states and individuals come under the heading of international law.

[442] Again, see Saner (2004) for the correspondences between the peace essay and peace treatises in Kant's own period.
[443] Naturally, I cannot explain these in full here. I can only present a sketch. For further details, see, for instance, Saner (2004) and Eberl & Niesen (2011), to which I also refer in the following.
[444] Kant is also clear that this does not make these articles "Ausnahmen von der Rechtsregel" (ibid.).

This can be seen *inter alia* in his rejection of a right to acquire a state as if it were a thing. The second article reads as follows: "Es soll kein für sich bestehender Staat (klein oder groß, das gilt hier gleichviel) von einem andern Staate durch Erbung, Tausch, Kauf oder Schenkung erworben werden können". He is quite unequivocal on this point and deplores this "neue Art von Industrie" (8:344) by European states, a practice that in his view endangers all international rights relations.

The reason for this stance is clear: "Ein Staat ist nämlich nicht (wie etwa der Boden, auf dem er seinen Sitz hat) eine Habe (patrimonium). Er ist eine Gesellschaft von Menschen, über die niemand anders, als er selbst zu gebieten und zu disponieren hat" (ibid.). To treat the state and the individuals in it as things is to do away with (*aufheben*) the status and existence of the state (and its individuals) as moral persons (cf. ibid.), that is, as beings capable of moral action as well as of legal accountability. For Kant, no state or person can have that right. Of course, as we have seen in the part on private right, the territory on which a state is located is an object of possible personal property; but the state itself is not an object of this kind. It belongs entirely to the realm of public right. Like the individual, it can never be made subject to the categories of private right. To inherit, exchange, purchase, donate, sell, and/or trade a state would be a clear violation of its rights, just as it would be to do any of these actions to an individual. Neither the state nor the individual is a commodity.

A crucial point is that the private right part, as such, plays no role in the discussion of international law in Kant. Only the innate right to freedom of the individual and the public right of the state come into question here. It is therefore no surprise that his international law deliberations focus on these two rights bearers, and these only.[445] But it is, of course, possible that these rights claims too may clash. One obvious example here concerns the right of the state, in times of war, to demand that its subjects put their rights and property, and even their life at stake. Kant's attempts to answer this difficult query are not merely limited to the preliminary articles; they also extend into the first definitive article and are taken up again in the *Rechtslehre*.[446] A key question and natural point of departure for Kant is thus: can a state rightfully use its subjects for purposes of war?

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[445] I can modify this important claim to some extent: as we will see in the next subchapter, Kant also assigns stateless peoples rights, according to the *Weltbürgerrecht*. I will also explain further why the *lex permissiva,* which is operative at the pre-state national level, finds no application at the international level.

[446] This is indeed posited in §55 as the first question of international law and a possible right to go to war: "Frage: welches Recht hat der Staat *gegen seine eigene Untertanen* sie zum Kriege gegen andere Staaten zu brauchen, ihre Güter, ja ihr Leben dabei aufzuwenden, oder aufs Spiel zu setzen: so daß es nicht von dieser ihrem eigenen Urteil abhängt, ob sie in den Krieg ziehen wollen oder nicht, sondern der Oberbefehl des Souveräns sie hineinschicken darf?" (6:344).

To prevent any misunderstandings, I should stress at this point the fairly obvious point that the arguments that Kant puts forward in his discussion of the rightfulness of actions related to war and warfare apply primarily to aggressive wars. As in the case of personal self-defence (regardless of whether it takes place in a state of nature or a state of public right), states are entitled to use force to stop an attack – be it actual or attempt – against themselves, though not, of course, with every means available.[447] His main concern about a possible state use of its subjects for purposes of war is therefore not related primarily to defensive wars, although, as we will see below, he draws clear and discernible limitations also in this regard. But unless otherwise stated, I shall discuss his argument for the rightfulness of certain state authorisations (and actions of war in general) in relation to wars that are not merely defensive – i.e., wars waged only to preserve one's own legal order and freedom, qua precondition of state law.[448] As we will see later, this is not to turn Kant into a just war theorist; my argument is that what he does is to discern criteria for rightful actions in an international condition that is devoid of public justice. And his answer to the basic question of how a state can and cannot use its subjects for purposes of war suggests that his position is anything but bellicose.

In preliminary article 3), Kant questions a right on the part of the state to coerce its subjects or hire soldiers or mercenaries to risk their own and others' lives for state purposes. For Kant, to be hired with the key purpose to kill or be killed implies "einen Gebrauch von Menschen als bloßen Maschinen und Werkzeugen in der Hand eines andern (des Staats) (…), [was] sich nicht wohl mit dem Rechte der Menschheit in unserer eigenen Person vereinigen läßt" (8:345). This view is further elaborated two years later: he holds that a use of individuals in war not only as means (which they certainly are, as soldiers), but also as ends in themselves is possible only in a republican state. With regard to freedom and sovereignty, it is only the people in a state with a republican constitution who, as authors of laws, can authorise the executive power to put their rights, property, and life at stake as subjects of law. He therefore prescribes referendums "zu jeder besondern Kriegserklärung".[449] As a result, a state can be entitled to a legitimate use of its subjects for the purpose of war only in a republic where the people through its "freie Beistimmung (...) seine Stimme dazu gegeben habe" (6:346). Only in this manner can the intrusion upon rights be reconciled with the concept of right.

[447] Kant does not yet offer any further specification of what constitutes an attack or threat and what means can be rightfully used. We will see later how he attempts to delineate and mediate between such ambiguities, and that a key point is that none of these things can be rightfully done without recourse to an international legal order.
[448] This is also underlined by Kersting: "Man darf nicht vergessen, daß das Kantische Argument natürlich nur auf Angriffskriege, nicht auf Verteidigungskriege gemünzt ist" (Kersting 2004: 96).
[449] On this aspect, its influence on real-life political movements, and its later widespread disappearance from the international realm of both theory and practice, see Eberl (2008).

The same argument is put forward in the peace essay and its first definitive article on the peace-promoting character of the republic. When Kant holds that a state with a republican constitution is less likely to be warmongering, since the people itself must bear the costs of warfare (cf. 8:351), his point is not only pragmatic. Nor is it just an empirical claim that can be proven wrong, although it is highly likely that it is correct: self-interest will lead the people to resort to more peaceful means than those chosen by non-republican rulers.[450] Nevertheless, his claim is not just that war referendums most likely lead to fewer wars, as well as preventing wars from turning into "eine Art von Lustpartie". It is, rather, a claim presented from the view of rational right, namely that, in a republic, "es (...) nicht anders sein kann" (8:351). It is only with the people's prior consent, through constitutional procedures, that the people as subjects can rightfully be forced to put their property, freedom, and even life at risk for the purpose of the state. Consequently, Kant holds that the citizens' approval of declarations of war is a strict precondition for the rightful use of themselves as subjects in a state at war.[451]

A related question that was extensively discussed in Kant's own time is whether the state has a right to demand obligatory military service of its subjects under law. If the use of individuals as soldiers (to say nothing of mercenaries) is put under such constraints in times of war, then what about times of relative peace? In preliminary article 3), Kant can be seen to contrast the unrightful use of men as machines by state armies "mit der freiwilligen periodisch vorgenommenen Übung der Staatsbürger in Waffen bewandt, sich und ihr Vaterland dadurch gegen Angriffe von außen zu sichern" (8:345). This passage claims clearly that state armies shall not be standing (something I will return to later), and that citizens are to be summoned to

[450] The internal relationship that political science often postulates between democratic development and peacefulness is one that Kant does not approve unconditionally. For instance, his critique of England on this point is unequivocal; democratic development and peacefulness are not necessarily intertwined: "Die englische Nation (*gens*), als Volk (*populus*) betrachtet, ist das schätzbarste Gantze von Menschen in Verhältnis gegen einander betrachtet. Aber als Staat gegen andere Staaten allein das Verderblichste, Gewaltsamste, Herrschsüchtigste und Kriegserregendeste unter allen" (15:595, R. 1366). For a Kantian critique of political scientists' assertion of the inherent peacefulness of democracies, see, for instance, Eberl (2008).

[451] Again, we detect the normative hierarchy in Kant's republic: the legislative authority must in all questions preside over the executive power in all questions, and none is more important than the question of war. One might perhaps ask why the people (qua supreme legislative authority) is granted a right to what, after all, is a particular decision (to declare war), which more than suggests that the executive power should have been the authority to make this call. The reason is, as I also wrote in a part I footnote on Kant's view about absolute monarchy in England, that the executive is granted extended authority and all state powers to wage war: "– Denn Krieg ist ein Zustand, in welchem dem Staatsoberhaupte *alle* Staatskräfte zu Gebot stehen müssen" (7:90). The constitution is thus altered, and this in turn requires an authorisation from the branch of government that possesses the rightful authority to do so, namely the legislative. On a further note, it should be added that in the peace essay, the declaration of war seems to require an actual war referendum (cf. 8:351) whereas Kant in the *Rechtslehre* assigns it to the people "vermittelst seiner Repräsentanten" (6:345). It can, however, be seen that the actual specifications on this point in the actual republican constitutions are a political question, not a subject for a metaphysics of morals. In any case, it is clear that if a declaration of war is to be rightful, it must be made by the supreme legislative authority.

military exercises only periodically. Participation in such exercises must be voluntary. He can thus be seen to argue for a non-compulsory form of military service with a voluntary[452] citizen militia instead of standing, professional armies, a view that was widespread in Enlightenment republican thinking.[453]

Moreover, as Kant emphasises in the second preliminary article, military troops of one state cannot be assigned to another state (unless they are fighting a common war); this, too, would be to treat the soldiers as means at the arbitrary disposal of the state ruler (cf. 8:344). This is unrightful even in a republic, since it cannot assign its troops to the cause of another state. Only in the case of a common war with a common goal, common command, etc. is such use of state subjects a viable normative approach. And this would amount to a declaration of war from the republic itself, and hence no "Verdingung der Truppen eines Staats an einen andern" (ibid.), which is prohibited. As Kant consistently argues, individuals simply cannot be used for purposes other than their own, and in instances of war, their consent to such a declaration through the constitutional procedures of the state is a precondition for a rightful infringement of their innate right to freedom.[454]

Variants of the arguments in preliminary article two can also be seen to apply to what is probably the most contested article, that is, number five, about the possibility of a right to intervention in other states. Kant clearly rejects any kind of coercible right to do this: "Kein Staat soll sich in die Verfassung und Regierung eines andern Staats gewalttätig einmischen" (8:346). Despite this unequivocal prohibition, several contemporary scholars have nonetheless argued for a position on the part of Kant that, in varying degrees, holds intervention (e.g. on humanitarian grounds) to be rightful and even obligatory international conduct.[455] I will later consider the current debate on this vital point, but can for now present a preliminary defense of Kant's claim in article five that corresponds with our recent assertions and with the general argument presented in part I.

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[452] As I have indicated earlier, the voluntariness may, of course, change if the state is under attack. Just as the constitution may (or indeed must) change in aggressive wars in order to facilitate the deployment of state resources to the cause of warfare, so too in defensive wars; the constitution then prescribes rules and regulations that differ from those prescribed in times of peace.

[453] On the then contemporary debate on a republican rejection of standing armies for citizen militia, see Eberl & Niesen (2011: 183 ff.). I will also consider below Kant's further arguments against standing armies.

[454] The argument is, of course, not in any way weakened if it can be shown that any individual actually has the same intentions and purposes as a warmongering state ruler. The private person cannot as such rightfully engage in actions of war or warlike activity, even if he or she consents. (He or she can only do so as an enlisted soldier.) This would still be to treat oneself (and every other participant) as a mere thing and not an end in him- or herself. I have already shown how *inter alia* gladiatorial fights and slave contracts involve a contradiction that makes them unrightful *per se*.

[455] For a general allowance of Kantian humanitarian interventions, see, for instance, Tesón (1998). For a far more balanced but still affirmative account, see, for instance, Habermas (2005). I return to both accounts below.

Above all, there simply cannot be a universal, coercible right for a state (or individual) to enforce its own conception of law beyond the realm of its jurisdiction. Such a conception of justice would merely perpetuate the very state of nature that one initially sought to overcome. The key question is raised at once by Kant in the article: "was kann ihn dazu berechtigen?" In line with his argument against any form of coercible right to resistance, we must admit that a concept that could trigger such a right must be considered as authorising a new sovereign. And granted that the subjects of law could not rightfully let happiness or any other concept take the place of right within the state, the "Skandal" or "böse Beispiel" of inner turmoil cannot trigger a coercible right for other states to intervene.[456] Crude as it may seem, no Kantian rights of other states are violated by the internal conduct of another state. No wrong, "keine Läsion", is perpetrated in such instances on other states, peoples, or individuals. Rather, for Kant, it is the "Einmischung äußerer Mächte" that constitutes a clear violation of right and "ein gegebenes Skandal". As a matter of principle (and that is, of course, what he is concerned with here), such a right to intervene would only make "die Autonomie aller Staaten unsicher" (8:346).[457] It simply cannot be made a principle of right.

Nevertheless, Kant seems to make one important exception to the prohibition, namely, cases in which a state has divided itself into two parts, "deren jeder für sich einen besondern Staat vorstellt, der auf das Ganze Anspruch macht; wo einem derselben Beistand zu leisten einem äußern Staat nicht für Einmischung in die Verfassung des andern (denn es ist alsdann Anarchie) angerechnet werden könnte" (ibid.). But is this helpful? Does not Kant here suggest that in civil wars, other states are freely allowed and even encouraged to take sides and use force to end the conflict? Surely, for instance in a Cold War climate that he might not have envisioned, this would just as likely escalate a local or regional conflict and potentially trigger World War III. And in an example he must have had in mind, would not such a reading imply that he would have had to favour interventions during the French Revolution? Contrary to a common understanding of the passage, I believe a closer reading will reveal that his exception is not related to civil wars (let alone any lawless, anarchic state) as such. Nor is it in fact an exception to a rule.

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[456] This recalls his critique of Hufeland's discussions of a concept of right, which do not sort out the aspect of coercion in terms of principle and thus fail to establish any fundamental limitation on the use of state powers, even in the realm of personal freedom and the development of the individual's capacities.

[457] Employing the same argumentation, a state would, of course, commit no wrong against another state in an implementation of national, non-violent sanctions. This means that for Kant, sanctions of a diplomatic, economic, federative, social, or similar nature would be a viable normative alternative, in order to rightfully hinder internal injustice in other states.

To take the latter point first: Kant's formulation does not say that an exception is involved here, but rather that the article simply does not find any application in such a case or condition. More important, though, is the actual interpretation of the case in question. The ban on forceful intervention holds as long as the internal conflict between the parts "noch nicht entschieden ist" (ibid.). What, more precisely, does this mean? I think Gregor's translation, "not yet critical" (Kant 2009: 319), seriously hampers our understanding and is responsible to some degree for the common mistaken interpretation that Kant's prohibition on intervention does not apply to actual civil wars. In line with the interpretation by Eberl & Niesen (2011), I suggest a different and more nuanced reading of the fifth preliminary article.

Eberl & Niesen convincingly underscore that the article relates not only to the French Revolution, but also to another important event that Kant was greatly concerned with, namely the divisions of Poland. It is indeed true that the article expresses, in part, a response to those of his contemporaries who publicly advocated an invasion of France because of "der großen Übel, die sich ein Volk durch seine Gesetzlosigkeit zugezogen hat" (8:346) or the 'scandal' or 'evil example' it represented.[458] But the article is likewise a clear rejection of any perceived right to invade Poland that Russia, Austria, and/or Prussia might think they had on the same grounds. According to Eberl & Niesen, there is an additional argument to be made for the application of Kant's fifth article to the different constitutional projects of the divided Polish people in a manner that is not applicable to the French context. Unlike the situation in revolutionary France, Poland was divided by other states and consisted of separate territories where dispersed public spheres pursued different constitutional projects, all of which laid claim to a Polish state based on their own constitution.[459]

With this in mind, we are right to speak of two instances that are not covered by the prohibition on intervention in the fifth preliminary article. As long as the separation of territory and/or an ongoing constitutional conflict is not yet *decided* (and not 'critical'), other states *would* wrong the parties by taking sides in such a conflict, just as they would if they were to forcefully engage themselves in the French Revolution. But once these conflicts have found their answers, other states are allowed "einem derselben Beistand zu leisten" (8:346), that is, to give or offer assistance to one of the parties in the subsequent struggles. In other words, intervention is not normatively rejected by Kant once the state territory is divided, or an inactive constitution is decided upon by a people who live in a non-state entity. With Eberl

[458] This was argued *inter alia* by conservative thinkers such as Gentz, Rehberg, and Burke. For a sketch of the debate into which Kant entered, see, for instance, Cavallar (1999: 83 ff.).
[459] For this point and the following discussion, see Eberl & Niesen (2011: 189 ff.).

& Niesen, I suggest that such an interpretation of this passage can establish criteria for when and how assistance can be rightfully given to people in conflict areas.

On this reading, Kant can be seen to underline the necessity that there is an actual constitutional project at work, making this a precondition for rightfully taking one side against another (that also has a constitutional project). Obviously, states do not in this way forcibly interfere in the constitution and government of other states, since there is no single state constitution to interfere in; all that is involved is the support of one project over another in a state of anarchy.[460] But this reading also requires that parties to which support can be offered must have a rightful case, i.e., they must *inter alia* have an ongoing constitutional project for the entire territory and all its individuals. The lack of application of his general prohibition on intervention is hence limited to a specific condition of anarchy, not to any civil war situation.

This interpretation can also be squared with Kant's description of anarchy in the 1798 essay on *Anthropology*. Here, he defines anarchy as a condition of "Gesetz und Freiheit ohne Gewalt" (7:330). At first sight, this definition might strike us as odd. Anarchy is traditionally understood as a lawless condition, but towards the end of his writing career he presents it as a condition that merely lacks the force to implement its otherwise perfectly republican features of law and freedom. What can be read out of this somewhat strange characterisation?

A further investigation of Kant's notes and lectures helps to clarify this question. At an early stage, he clearly defines the combination of law *and* freedom without irresistible force as "pohlnische Freyheit" (15:790; cf. also 15:595; 893 f.). This is contrasted to the condition one would normally associate with anarchy – that is, freedom *without* law and (hence also) without rightful force: "Freyheit ohne Gesetz, mithin ohne rechtmaßige Gewalt, ist Wildheit (anarchie)" (15:790), a condition that in his lectures is also defined as "völlige Anarchie".[461]

In his late writings, however, Kant discards both terms; neither Polish freedom nor complete anarchy is present here. Instead, the term 'anarchy' now signifies what was earlier referred to as 'Polish freedom'. On the other hand, and in line with the overall development of his writings, 'complete anarchy' is a state of nature and no description of a state of law. As the *Anthropology* essay evidently shows, to further underline a main claim of the *Rechtslehre*, law is a necessary precondition for freedom. For Kant, it is entirely meaningless to speak of any form of external, public, or political freedom if law is absent. There is simply no freedom without law, and both of these need force (or coercion) if they are to be realised in the world.

[460] The case is, of course, different (and is clearly rejected by Kant) if revolutionary movements do not codify one specific constitutional project before using unilateral or bilateral force, let alone if they rebel against a state ruler.
[461] Cf. the reference to this term in Kowalewski's edition of Kant's main lectures in Eberl & Niesen (2011: 195).

And this requirement is accompanied by his republican claim that a *rightful* use of force can take place only in a state that knows and exercises the principle of a separation of powers.[462]

This clue significantly aids our interpretation of the fifth article. Although Eberl & Niesen do not make the same assertion regarding a change in terminology, they highlight an important distinction regarding the two branches of government, to which Kant refers here. With the distinction between two possible instances for rightful extra-state support in mind, I can, with Eberl & Niesen, contend that states can render rightful support to a constitutional project in two manners: either an unproblematic, non-coercive support to the constitutional project *per se* (qua legislative process), or support (even military) intended to strengthen the executive branch of government so that laws can have actual force (cf. Eberl & Niesen 2011: 196 f.). Accordingly, the ban in Kant's fifth article is not applicable to a Polish situation when the constitutional dispute has been settled by the parties themselves (since, in that case, other states can assist the project in line with the above criteria), but the prohibition still stands with regard to the contemporary French situation (or to any other civil war situation as such).

The latter aspect of the exercise of force by a state beyond the protective and protected realm of its own jurisdiction is thus in accordance with right, as soon as disputes over state territory and/or constitution are decided. (Aid to states that ask for support from others in trying times is, of course, permitted and not banned by the article in the first place.) I believe that this interpretation, in clear contrast to the view that Kant permits intervention as soon as any civil war situation is deemed critical by any external state, is coherent with his stance in his philosophy of right in general, and more specifically, in his fifth preliminary article.[463]

It may be obvious, but let me emphasise that I do not hereby reject the existence of any actual individual human rights in Kant's international legal order, for example, in cases of genocide or other state atrocities. I am making a twofold claim at this point. First of all, war is prohibited, since it, *per se*, provides no rightful course of action. Also, there cannot exist any general right or permissive law superior to the other rights and juridical obligations that legal

[462] To include the two other combinations: a despotic state (law and force without freedom) may preserve law and order, but has no dimension of (rightful) freedom, since the executive power of force also claims legislative authority and thus incorporates the dimension of freedom into its own unilateral understanding and private exercise thereof. Barbarism (force with neither freedom nor law) is, of course, nothing but sheer violence in a sorry state of affairs, whether pre- or post-state. (If freedom without law were not impossible, there would then, of course, be eight combinations that the *Anthropology* would have to address, not just the four indicated here.)

[463] I should also point out that, in the article itself, Kant singles out only the constitution (not the government) as that which other states in an anarchic condition can meddle in. This relates, in turn, to the distinction between the legislative (cf. constitution, freedom) and the executive (cf. government, coercion). The prohibition of forceful interference thus applies to the latter branch, not the former.

systems are intended to secure; this would merely instate a new and unaccounted sovereign, in an equation with a random outcome even in normative terms.

The possible existence of natural (i.e., rational) rights in the international legal realm is discussed further in Kant's deliberations on cosmopolitan law (to which I will return in the next subchapter), and he attempts to incorporate it into his final model for an international juridical order (to which I return in the next chapter). At this point, he only affirms what ought to be self-evident: a state cannot have a right to use coercive force beyond the sphere of its own jurisdiction, nor can a dismayed citizen of one state have a right to demand that another state intervenes to counteract the wrongs. Such rights cannot be authorised, since they would obviously run counter to the very definitions of states and individuals as legal entities. They simply do not have any possible rightful authority to do so.

In other words, Kant's most basic normative claim is that war is unrightful *per se*. His argument goes back to the legal nature of individuals as well as states and their rights over their subjects of law, something that is also extensively discussed in the *Rechtslehre*. We have now seen it in action, applied to the second and fifth preliminary articles (as well as parts of the third) to give further indication of how war and warfare can never be justified as such. This is based on the inherent and inalienable normative value of both individuals and states. Individuals simply cannot be used for the purposes of someone else, and the additional ban on intervention in the fifth article comes merely as the result of the juridical status of states (qua moral beings), in order to exclude the very possibility of any physical (enforceable) right to interfere in another state on the basis of its constitution or government.[464]

I hope that I have now identified the objects we shall study. The second preliminary article aptly shows the natural boundaries to Kant's international legal dimension, a field that knows no category of private right. Instead, all rights relate to states and individuals. Since they are under rational laws of freedom, they can never be treated as mere commodities, and therefore cannot be made subjects of forceful interventions from without.[465] Instead, qua legal

[464] Hence, there is also an argument at play here that limits extra-state intervention. This is related to the question of who can be rightfully coerced or permitted to take part in such an intervention. With Ripstein, I not only claim that states, as such, are clearly not authorised to intervene in another state, but also argue that no state can have a rightful authorisation to use its subjects of law for the purposes of another (without popular consent). This would then also imply that support of another state in its constitutional project – which I have argued is rightful in Kant's eyes – must not only be based on citizens' consent (through constitutional procedures); it must also be entirely voluntary for soldiers and/or other state officials to participate in. Since there is no right to use individuals of one state for the purposes of another (unless there is a declaration of war, and thus no right as such to speak of), no subject of law can rightfully be forced to aid such a cause.

[465] As in the case of subjects of state law, such a hindering of personal freedom would be possible only through a specific law and authorisation to use force that prevents a use of one's own freedom that is not consistent with

(or moral) persons, they have uncircumventable, inalienable rights to freedom, as this is delineated in the *Rechtslehre* before the sections on public international right, and as I have described in part I of the thesis. At this stage, we can move on to the other main points that are presented in the remaining preliminary articles, to see what is implied in more specific, practical terms by the constituents he proposes for an end to all hostilities. This will show that Kant goes on to develop certain criteria for an evaluation of the rightfulness of actions outside of a full international legal order, to make a realisation of such a condition possible in actual political practice.

The first article is fairly uncontroversial and straightforward. It contains a prohibition of preserving what Kant calls a *reservatio mentalis* in any peace treaty, that is, a secret intent to reignite the feud that started the actual hostilities, once opportunity beckons. This is not only beneath the dignity of states and its rulers; it also prevents the peace agreement from being something more than a mere truce; cf. his distinction, mentioned above, between a truce and a condition of perpetual peace.[466]

A related argument is put forward in the sixth article, applied here to actual hostilities. Although these may be nothing more than what the parties had to expect, and in one sense what they deserve – insofar as they have refused to let their external actions be law-governed – there are nonetheless actions in war that make any kind of peace agreement impossible. Trust is the key word. For Kant, if actions (or publicly held maxims) make it impossible for one party to trust that the other will keep treaties, promises, common rules for warfare, etc., it is unreasonable to expect that any peace or even truce can reasonably be established, let alone upheld. Without trust in the other with regard to its observation of at least some standards of conduct (even in warfare), the only outcome of hostilities would be a war of extermination.[467] The strictly prohibited policies of preliminary articles 1) and 6) would break the foundation of any peace treaty or agreement. Trust in the other party is, therefore, a necessary precondition for peace. It must be present even before the full establishment of an international legal order.

Kant gives us some examples of what he means by breaches of trust. This list includes "Anstellung der *Meuchelmörder* (...), *Giftmischer* (...), *Brechung der Kapitulation*, *Anstiftung des Verrats* (…) in dem bekriegten Staat etc.", and also "Gebrauch der Spione" (8:346 f.). The

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one's freedom according to a universal law, such as (for example) the rightful use of coercion against suicidal persons. I will return below to the question of a possible rightfulness of interventions.

[466] In Kant's view, the use of 'perpetual' with the latter term is actually "ein schon verdächtiger Pleonasm" (8:343). Like Kant himself, however, I will retain the term 'perpetual peace' to describe his *Völkerrecht* project.

[467] Cf. Kant: "Denn irgend ein Vertrauen auf die Denkungsart des Feindes muß mitten im Kriege noch übrig bleiben, weil sonst auch kein Friede abgeschlossen werden könnte, und die Feindseligkeit in einen Ausrottungskrieg (…) ausschlagen würde" (8:346).

strict prohibition of some of these strategies – which is, of course, not limited to these few examples – may perhaps today seem somewhat trivial or even exaggerated, and it may appear unrealistic to enforce such a ban in current political practice. But, as we will see, what he has in mind is not concerned with such empirical or pragmatic objections.

First of all, Kant's primary task is to present a purely normative, not an empirical view. Secondly, he emphasises the necessity of a distinct, recognisable boundary line between war and peace. As he quite rightly insists, such "höllische Künste" are not just "an sich selbst niederträchtig"; they are also difficult, if not impossible, to reverse when they are first let loose (cf. 8:347). Hence, one main worry is that states will continue to wage war even after the agreed end to actual hostilities. Such a condition would be peaceful only on the surface.[468]

Some of Kant's remarks in the preliminary articles can undoubtedly, in line with the nature of the articles themselves, be seen as mere pragmatic responses to developments in his own time.[469] But this would be to misunderstand their placing and purpose in his overall legal construct, and to conceive them too narrowly, as if they contain arguments that do not point beyond the specific context in which they were formulated. As Hans Saner has emphasised: "Die Präliminärartikel sind nicht als rechtsanalytische Herleitungen entstanden, sondern als Einsprüche der Vernunft gegen die vorherrschende politische Praxis" (Saner 2004: 49). They are not formulated with the intent of offering a systematic perspective on right – this is the task of the definitive articles and the *Rechtslehre*. Nonetheless, they are general and rational appeals against certain forms of international conduct, with the current state of affairs as a natural starting point for the discussions. The same applies to the next two articles we turn to, the prohibitions on a credit system to fund wars in 4) and on standing armies in 3).

Whereas Kant reposes considerable faith in the spirit of commerce (*Handelsgeist*) to promote rightful relations worldwide,[470] he also argues for several restrictions on international financial systems. In a manner similar to his condemnations of dishonourable war strategies in article 6, he laments in the fourth article another fairly recent development at the international scene, this time in the sphere of economics. National debt to help fund civil projects is not in the limelight; this is "unverdächtig".[471] Rather, his attention is focused on financial credit systems that work "als entgegenwirkende Maschine der Mächte gegen einander", with the

[468] This is also stressed by Eberl & Niesen (2011: 197 ff.). (It will thus be only a truce, not a peace agreement.)
[469] For instance, the employment of assassins (which Kant had explicitly banned) had been practised quite recently, and for the first time, by the house of Habsburg in its war against Prussia.
[470] This is demonstrated in the first supplement in the peace essay, on the guarantee of perpetual peace, in which the spirit of commerce – "der mit dem Kriege nicht zusammen bestehen kann" (8:368) – is emphasised as one of the mechanisms to aid mankind in its pursuit of perpetual peace. I will return to this aspect later.
[471] But, as is clear from the *Gemeinspruch* essay (8:311), Kant forbids states to take up debt which is then left for coming generations to pay. See also his similar stance on tax in General Remark C of the *Rechtslehre* (6:326).

English credit system to fund wars a particular cause for concern. As a credit system that can grow indefinitely and thus inevitably leads to state bankruptcy that also drags other states into its vortex (even without their actual participation in the system as such), England inflicts "eine öffentliche Läsion", a public wrong, on those states. He also underlines the highly dangerous consequences such a system has for the facility with which wars can be declared, as soon as the directly economic costs of warfare can be circumvented. For these reasons, Kant does not regard state finance systems as an exclusively internal affair. Instead, they require their own preliminary article, whose conclusion makes "andere Staaten berechtigt, sich gegen einen solchen [Staat] und dessen Anmaßungen zu verbünden" (8:345 f.).

Another controversy in Kant's own time that is given its own article is the question of standing armies, and the linked question of obligatory military service.[472] On the matter of standing armies, too, he points in the third article to a certain dialectical process operating between the national and international levels: standing armies "bedrohen andere Staaten unaufhörlich mit Krieg durch die Bereitschaft, immer dazu gerüstet zu erscheinen", causing other states to join an arms race that can only heighten the chances of actual hostilities. Not just the armament and/or the sheer number of military forces, but also their expenses become an "Ursache von Angriffskriegen" (8:345). At the same time, the necessity of a common guarantee against precisely such an interstate use of force grows more and more urgent by the day.[473]

Towards the end of the article, Kant returns to the inherent and uncontrollable vicious circle found in any arms race, but this time sees it active in the sphere of the economy. Since force can be exercised in international relations not only as military power, but through state alliances and monetary power as well, Kant has a similar analysis of the economy of states. Here, too, the mere accumulation of assets can lead to war, even if no rights are violated *per se* and no harm is inflicted in the process. Kant develops no specific normative standpoint, as in the case of the rightful uniting of states against a credit system that threatens the economy of all; nevertheless, he points out that too large accumulations of money can be regarded "von andern Staaten als Bedrohung mit Krieg", hence also compelling them "zu zuvorkommenden Angriffen" (8:345).

In the international lawless condition described thus far, states lack a public authority not only to guarantee what is rightfully theirs – i.e., territorial sovereignty and hence internal

[472] The aspect of voluntary military service has been discussed in some detail above.
[473] To give another example of how fundamentally opposed any arms race is to Kant's peace project, he considers such militaristic policies to be nothing less than "die barbarische Freiheit der schon gestifteten Staaten" (8:26).

freedom – but also to determine what is specifically entailed by a rightful exercise of external freedom towards other states. This means that they have no other option than to use unilateral force to protect what they consider to be right. Although their rights claims may be reasonable as such, this state of affairs nevertheless meets the precise definition of the state of nature, "in welchem jeder seinem eigenen Kopfe folgt" and every state (like every individual prior to the establishment of the rule of law at the state level) does, and is entitled to do, "*was ihm recht und gut dünkt*" (6:312).

As I have tried to show, the examples from the preliminary articles constitute instances of what Kant regards as unrightful acts, although it is not always clear who violates another's natural rights or when, let alone how. With the exception of articles 1) and 2), we realise that there is and necessarily must be reasonable disagreement about what more exactly constitutes a rights violation here and now. Although these instances are not identical, we nonetheless see how they have obvious parallels to the discussions in the part on private right: two parties can act according to their own separate, but still perfectly reasonable, rights claims. Even so, it is equally apparent that their claims nonetheless contradict one another, and the conflict cannot be resolved in a rightful manner (i.e., one that does not amount to a rights violation). Without a public legal authority, states, like individuals, simply cannot get it right.[474]

b) The position of the *Rechtslehre*

This is also the main point of departure for Kant in the discussion of international law in the *Rechtslehre* (cf. 6:344). Here, too, he can be seen to develop further the criteria for a rightful use of force outside of a full legal order. These are presented in §§55-60 and discuss *inter alia* a possible right to actual warfare, which corresponds to some extent to the just war tradition of *ius ad bellum*, *ius in bello*, and *ius post bellum,* but also strongly diverges from it. The forthright nature of his deliberations in these sections has led some scholars to believe that he abandons the position he took in the peace essay, in which the second definitive article had made clear that: "Bei dem Begriffe des Völkerrechts, als eines Rechts *zum* Kriege, läßt sich eigentlich gar nichts denken" (8:356). But a closer inspection of the sections in question will reveal that he stands by this statement in the 1797 text too. This is an appropriate occasion to introduce some current interpretation of the discussion of international law in the *Rechtslehre*.

[474] The parallels to the private right part are perhaps most obvious with reference to §§36-40 on acquisition (or, for that matter, an actual rights claim), which is dependent subjectively upon the decision of a public court of justice. I will later return to the question of how an international court of justice will take on a pivotal role in our discussions of Kant's final framework, along with his reasons for why the parallels nevertheless do not amount to identicality.

Byrd & Hruschka are among those commentators who believe Kant's view radically changes between his two last writings on philosophy of right. They claim that, in 1797, Kant "abandons his position in *Perpetual Peace*" and now grants states a general permission to "wage war," to "coerce" other states to "enter a juridical state of states" (Byrd & Hruschka 2010: 195), this being the world state of a *Völkerstaat*. I will return in the next chapter to the dispute about the legal model on which he actually decides. At present, I reject the assertion by Byrd & Hruschka that Kant discards his former position on the unrightfulness of war.[475]

Even though Kant discusses a right to war, right in war, and right after war in the *Rechtslehre*, he makes it at the same time perfectly clear that this relates to an international state of nature where there is no court of law that can judge with rightful force (cf. his definition in the peace essay). Both the quotations from the *Rechtslehre* that Byrd & Hruschka employ to warrant their dubious claim that he ultimately in fact supports a right to wage war are unequivocally clear that such a use of force relates to states against each other "im Naturzustande", "[i]m natürlichen Zustande" (6:344; 346, cf. Byrd & Hruschka (2010: 14 f.)). The quotation I already have made from his *Rechtslehre* shows that all use of force outside an international legal order is in itself wrong in the highest degree, and is identical with violence (*Gewalt*) rather than with rightful coercion (*Zwang*). Even if the parties themselves are not necessarily wronged by the particular, material actions against one another (insofar as they do not want to be governed by law), the actions are nonetheless wrong on a general and formal level and thus also in the highest degree.

The second quotation Byrd & Hruschka refer to, explicates Kant's intention further:

> Im natürlichen Zustande der Staaten ist das *Recht zum Kriege* (zu Hostilitäten) die erlaubte Art, wodurch ein Staat sein Recht gegen einen anderen Staat verfolgt, nämlich, wenn er von diesem sich lädiert glaubt, durch eigene *Gewalt*; weil es durch einen *Prozeß* (als durch den allein die Zwistigkeiten im rechtlichen Zustande ausgeglichen werden) in jenem Zustande nicht geschehen kann (6:346).

First of all, Kant is adamant about the vital point that the so-called right to wage war derives from the fact that there is no legal process to solve the dispute about rights; it is applicable only here. It is clearly connected to a certain context of political contingency or facticity: it does not express a general normative view. Second, the positing of a 'right' to war is not meant as the abandonment of his position in the peace essay, according to which a right to war is unthinkable; Kant is just as unambiguous in this regard when he inserts here the exact opposite of right, *eigene Gewalt*, as the means to exercise this 'right.' War is nothing more

[475] I have earlier taken issue with Byrd & Hruschka in a review of their 2010 book (cf. Lundestad 2012, to which, of course, the above argument is related).

than the only permissible way for a state to claim its right against other states in a condition that is void of an international public authority. Third, Kant does not regard any state right to something external to it, acquired through warfare, as a right in a peremptory sense. Any such acquisition is unrightful. It is only provisional, and cannot be made a conclusive right. Kant is unequivocal on this point: "alles durch den Krieg erwerbliche oder erhaltbare äußere Mein und Dein der Staaten [ist] bloß provisorisch" (6:350). I believe Byrd & Hruschka fail to take these aspects into sufficient consideration.

I have already underlined how there quite simply is no *lex permissiva* that operates at Kant's international level as the permissive law did at the state level. But their unshakable conviction that his final position is the world state leads Byrd & Hruschka to elaborate at some length to claim the contrary, namely, that the anticipation of the international legal order is permitted on a general basis and through the use of force (cf. Byrd & Hruschka 2010: 15). What such a general proposition (or even law) would lead to in practical politics, if it were to be universally implemented, is anyone's guess; the peace of the graveyard, of which Kant warned in the peace essay, springs to mind. I do not see how it would not inevitably lead to a condition of perpetual warfare, rather than to the desired perpetual peace. I will return later to the question of which international legal model he actually advocates; at this point, however, I am already in a position to reject the general and unconditional character of a Kantian right to war.

Unlike Byrd & Hruschka and their interpretation of a general permission to wage war in Kant, I believe it is more fruitful, as well as correct, to consider his §§56-60 as an effort to discern specific criteria for the use of force in the international state of nature, that is, in an international condition of mere contingency and facticity. They are permissible actions in this condition, but they do not lay any normative claim whatsoever to any kind of validity in an international legal order as such, nor are they allowed as some sort of anticipation of a state of states. Rather, they specify and thereby also exclude certain means and rules of conduct in an international setting that, so to speak, brims with facticity and is devoid of public right. A short summary of these sections can hopefully provide us with further knowledge of what he views as necessary preconditions for a state of perpetual peace.

I have already discussed and answered the first question Kant asks, namely, with what right a state may use its subjects for purposes of war. His stance, that such a use of individuals can be in accordance with right only if it stems from republican constitutional procedures, is contrasted in §55 with any use of subjects of law as the property or natural product of the

land, standing at the arbitrary disposal of the state ruler (cf. 6:345).[476] As Kant emphasises, the limited right of a state to use individuals for purposes of war is then to be derived from the duty of the sovereign to the people, not the other way around (cf. 6:346). In this regard, too, the people has its inalienable rational rights that impose certain limits on the rightful exercise of state power and sovereignty.[477]

§56 further delineates the right of states to go to war. As we have seen in the quotation employed by Byrd & Hruschka, Kant holds war to be a permissible course of action in the international state of nature in order to seek one's own right (since there is no legal condition to peremptorily grant what is mine and yours). He presents two instances of state conduct that allow states to rightfully go to war, one instance more obvious than the other: "– Außer der tätigen Verletzung (der ersten Aggression, welche von der ersten Hostilität unterschieden ist) ist es die Bedrohung". In addition to the obvious case of aggressive violation (actual harm), states are accordingly also entitled to declare war when they consider themselves sufficiently threatened by another state (or alliance of states). Kant can here be seen to make yet another distinction: "Hiezu gehört entweder eine zuerst vorgenommene Zurüstung, worauf sich das Recht des Zuvorkommens (*ius praeventionis*) gründet, oder auch bloß die fürchterlich (durch Ländererwerbung) anwachsende Macht (*potentia tremenda*) eines anderen Staats" (6:346).

From the peace essay, we remember that Kant considered any arms race to be a severe threat to all peace treaties and projects. In similar fashion, he now grants states a right to treat instances of unwarranted preparations for war (be these uni- or bilateral) as cases that can warrant states to use uni- or bilateral force to protect themselves against hostilities that are not yet aggressive violations. This is what Kant means with *ius praeventionis*, a right to prevent wars that are waiting in the wings. States do not have to wait for the first aggression (and thus learn from bitter experience, cf. §44), before they may use force beyond their own borders. The second instance is somewhat more controversial. At any rate, the case of another state whose power grows to tremendous proportions (cf. *potentia tremenda*) is an example that has caused several scholars considerable concern in its interpretation.

Again, we can employ the commentary by Byrd & Hruschka. They are correct in their claim that Kant uses the Latin term here differently from its use in the peace essay, where he had coupled it with the principle of publicity in its negative form, to reject a right of smaller states to unite against any fast-growing, frightening force. This was grounded in the inherent

[476] This is, as Kant scornfully remarks, how the monarch's jurists justify the use of subjects in war (cf. ibid.).
[477] This follows from Kant's normative position that sovereignty stems from the right of the people itself (as supreme legislative authority) to govern themselves (as subjects of law), an exercise that in turn is subject to the constant critique of the non-institutional public sphere as well as to the limits of rational right.

problems of the promulgation of such a maxim, which would lead the larger state to resort to preventive attacks and the tactic of *divide et impera* (cf. 8:384).[478] But two years later, Kant seems to have changed his view; smaller states now appear to have a right to unite and resort not only to preventive attacks, but also to attacks that rather resemble pre-emptive ones.[479]

Byrd & Hruschka use this difference to underpin their argument that the position in the peace essay (*inter alia*, the inconceivability of a right to war) is abandoned in the *Rechtslehre* – where, they claim, "establishing a juridical state of states is a permissible reason to wage war" (Byrd & Hruschka 2010: 15). But, again, they fail to see that Kant's ban on warfare is upheld in the latter work: the difference lies in the development of criteria for a rightful use of force in an *international state of nature*, in which the threat of a *potentia tremenda* is now a potentially rightful cause for resorting to war. In this international sphere, which is devoid of public right, a tremendous and terribly powerful state is "eine Läsion des Mindermächtigen bloß durch den *Zustand* vor aller *Tat* des *Übermächtigen*, und im Naturzustande ist dieser Angriff allerdings rechtmäßig". Kant even goes on to speak of this right as based on "das Recht des Gleichgewichts aller einander tätig berührenden Staaten" (6:346).

If Kant had meant this right to war as a final, general position – as Byrd & Hruschka suggest in their most recent work – this grounding of the right would have obliged him to retract his critique of empirically-based doctrines of peace, as seen in the *Gemeinspruch* essay of 1793, where he had compared the political pragmatism of a so-called balance of power in Europe with a house whose construction lacks proper foundations and accordingly sways and collapses as soon as any shift of balance occurs. But he does not champion such claims in the *Rechtslehre*; nor does he advocate here a general right to wage war. Rather, he makes it clear that in an international state of nature, a relative balance between state powers is both a right that can be exercised and a precondition for leaving such a sorry state of affairs.

In other words, the position he takes is not very different from that of the peace essay. Kant can perhaps be seen to slightly adjust his stance on one point, when he further clarifies the meaning of the *potentia tremenda,* two years later. Unlike Byrd & Hruschka (2010: 14),

[478] This claim is, of course (and as Kant probably realised), both empirical and contingent (and thus does not supply any objective practical law).

[479] I wish to emphasise here an important fact pointed out by Byrd & Hruschka in another context. Contemporary discussions of pre-emptive and preventive defence/attacks/warfare suffer at times considerably under the difference in terminology between the American and the European debates. In the US debate, pre-emptive defence "is a defensive attack in the face of an imminent and known threat, whereas [preventive defence] is a defensive attack against a potential future threat (...). European philosophers and international lawyers tend to use exactly the opposite terminology" (Byrd & Hruschka 2008: 601, note). Unlike Byrd & Hruschka, I will use here the European terminology; but I agree with them that Kant argues for the rightfulness of both in the state of nature.

who hold that the thought-figure supplies no cause for war in 1795, but a full right in 1797, I believe this view is contradicted already by the preliminary articles of the peace essay. Here, in an international lawless condition, a state may unite with others against states whose financial systems and/or armies threaten the fragile peace. Although he does not explicitly use the thought-figure, or in any way advocate war – mostly, he matter-of-factly asserts what is likely to happen – the notion of a *potentia tremenda* certainly lies in the background here too.

What Kant does differently in the *Rechtslehre* is to clarify these ambiguous features in his previous text by insisting that a pre-emptive attack against a frightening force is related only to a tremendous acquisition of land or territory (cf. 6:346). Only *Ländererwerbung* comes directly into question here, whereas a state's future economic and/or military power is not immediately linked in the *Rechtslehre* to any right to pre-emptive attack. If only to avoid any misunderstandings, it should be highlighted that the thought-figure of a *potentia tremenda* remains from the outset unrelated to any state invasion, occupation and/or acquisition of another state. Such instances are not what he has in mind, since they evidently are aggressive violations and actual harm against states, and are thus already covered by the right to self-defence. (As I have noted, in these cases, other states than the state whose territorial integrity and sovereignty is violated would also be allowed to unite in order to counteract the public wrong.)

For this reason, I think that Kant's clarification with regard to the *potentia tremenda* in §56 can relate only to the acquisition of uninhabited land. In the next subchapter, I shall investigate how peoples and individuals living in non-state entities have rights, according to his concept of cosmopolitan law (and this means that he must have something else in mind in §56). But uninhabited land, as we learned from his private right part, imposes no immediate obligation on anyone to refrain from an arbitrary use. At the international level, however, he evidently holds a tremendous acquisition of uninhabited land to be unrightful and contrary to the peace project, since it causes excessively vast differences between the various actors of the international community. Consequently, his international theory of law curbs colonial and imperialist enterprises (of which he was well aware and deeply critical), even if these were to take place in remote and uninhabited areas of the earth.[480]

We have now seen how Kant advocates a right to go to war, both preventive and pre-emptive, but only as a provisional right that is applicable solely in a state of nature. Moreover,

[480] The spread of peoples (and in due time of state formations) to all parts of the globe thus becomes important for the establishment of rightful relations worldwide too, since it reduces the existence of vast, uninhabited lands that imperial states crave to make their own.

such a right is subject to a number of criteria that limit both its pertinence and its exercise. In §57, he proceeds to discuss a possible right in war. Such a right is, as he more than readily admits, the international law question "wobei die meiste Schwierigkeit ist, um sich auch nur einen Begriff davon zu machen und ein Gesetz in diesem gesetzlosen Zustande zu denken (inter arma silent leges), ohne sich selbst zu widersprechen". In Kant's view, the only possible answer to this difficulty is: "den Krieg nach solchen Grundsätzen zu führen, nach welchen es immer noch möglich bleibt, aus jenem Naturzustande der Staaten (im äußeren Verhältnis gegen einander) herauszugehen und in einen rechtlichen zu treten" (6:347).

In the subsequent discussion, Kant repeats much of what he has already pointed out in the peace essay. Trust must be possible even between states in times of actual hostility; the means of defence may not include spies, assassins, etc. The only addition to this list is the spreading of false reports. Here too, he argues that it would annihilate (*vernichten*) the trust necessary to ground any lasting peace in any foreseeable future. Moreover, staying with the *Rechtslehre* discussion of a possible right in war, there can for Kant neither here be legitimate talk of punitive wars (cf. ibid.), this due to the very nature of the condition: without a public authority, there cannot be rightful exercise of punishment. In addition, wars of extermination as well as subjugation are also clearly contrary to right and accordingly prohibited, this due to the moral annihilation (*Vertilgung*) of the state such wars imply (cf. ibid.).

The last paragraph in §57 then builds a thematic bridge to the next section, concerning possible post-war rights. In keeping with what has been said above, it is not necessarily forbidden to lay war claims to supplies and contributions by a defeated state. But to claim the belongings of the people of the defeated state would be to plunder the individuals of their property. Again, we must bear in mind a distinction between people and state: however much the people has contributed to the state in its warfare, it is always for Kant the state that wages war and is defeated. The people can never be considered defeated as such, nor, for that matter, can the people in any way become liable for actions perpetrated by the state (cf. 6:347 f.). Only states win and lose wars.

This view is further developed in §58, about a possible right after war, *ius post bellum*. Kant's discussion is once again related to rational rights restrictions on conduct, in this case, primarily on what a victorious state can allow itself to do against a defeated state and its subjects. First of all, the subjects of the defeated state do not thus lose "ihre staatsbürgerliche Freiheit". Since there can be no rightful punitive war, it is also normatively impossible that a

defeated state can become a colony, or that its subjects could "zu Leibeigenen abgewürdigt würden" (6:348).[481]

Kant's definition of a colony is of substantial interest in this context: "– Eine *Kolonie* oder Provinz ist ein Volk, das zwar seine eigene Verfassung, Gesetzgebung, Boden hat, auf welchem die zu einem anderen Staat Gehörige nur Fremdlinge sind, der dennoch über jenes die oberste *ausübende* Gewalt hat" (6:348).[482] The definition clearly raises the standard of both theory and practice of international law in his time (and in some respect, in ours, too). In order to attain the juridical status of even a colony, the people must have its own constitution, legislation, and territory. Only the aspect of supreme executive power is relevant for Kant. This also reduces every form of extra-state executive rule to the hierarchical relationship of a mother state to its colony. His definitions and general arguments imply that a people that is not merely governed by another state, but that also has its constitution or legislation (or even only parts thereof) dictated by another state, would not be considered as constituting a people, but rather as the victim of a war of subjugation, insofar as it "nun mit dem des Überwinders entweder in eine Masse verschmelzt, oder in Knechtschaft verfällt" (6:347).

Returning to other criteria for what can and cannot constitute a Kantian right after war, the rest of the section considers the consequences for an actual peace treaty, given that the international realm is a state of nature. Peace conditions can be laid down only by the victors. (Nevertheless, the treaty and its negotiations can only be agreed with the defeated state; this assumes that the treaty cannot be a pure dictate.) Besides this, the victor cannot demand any compensation, for this would again be to presuppose the rightfulness of its own acts and a similar unrightfulness of the other party. But since there is no legal condition or authority to grant a right to punitive war, there cannot be a right to compensation. If this were the case, it would imply that one warring party could rightfully hold the other to be unjust (and itself just), whereas the basic point remains that there is no international court of law to rightfully pass such a verdict (on guilt and/or compensation) For Kant, both parties have acted unjustly, by letting their disagreements be solved through force and the right of the stronger. Instead, it follows from any cessation of the hostilities (i.e., an actual peace treaty) both that all claims to

[481] Inherited serfdom or bondage is, of course, excluded for the same reason (cf. 6:348 f.).
[482] Quotation in full: "– Eine *Kolonie* oder Provinz ist ein Volk, das zwar seine eigene Verfassung, Gesetzgebung, Boden hat, auf welchem die zu einem anderen Staat Gehörige nur Fremdlinge sind, der dennoch über jenes die oberste *ausübende* Gewalt hat. Der letztere heißt der *Mutterstaat*. Der Tochterstaat wird von jenem beherrscht, aber doch von sich selbst (durch sein eigenes Parlament, allenfalls unter dem Vorsitz eines Vizekönigs) regiert (*civitas hybrida*). Dergleichen war *Athen* in Beziehung auf verschiedene Inseln und ist jetzt Großbritannien in Ansehung Irlands" (6:348).

compensation are dropped and that all prisoners of war are released free of cost, this without taking into account the respective numbers on each side (cf. 6:348).[483]

These are the chief criteria Kant gives as examples of war conduct that is reconcilable with the concept of external freedom. As I have shown, not even the *prima facie* bellicose character of §§56-58 can lead us to the conclusion put forward by Byrd & Hruschka and others, that he grants here a general permission to wage war. Instead, as in the six preliminary articles of the peace essay and the private right part of the *Rechtslehre*, Kant can be seen to do two things. First, he defines the necessary preconditions for the sheer possibility of a state of public right and secondly, he proceeds to specify some criteria for what can and cannot be considered a rightful use of force in a condition void of public justice. Since the condition *per se* lacks a rightful public authority to decide what is right, and is in fact nothing but the right of the stronger, the criteria do not immediately prohibit all types of warfare. But, crucially, they apply to an international state of nature – and to this only.

Contrary to what Byrd & Hruschka suggest, they do not authorise a general permission to anticipate or approximate a rightful condition with the use of force (unlike individuals in their state of nature). Regardless of how Kant in the final instance actually conceives his international juridical model, he does not elaborate or champion any *lex permissiva* to realise this through the use of force, even if this were done with the best of intentions.[484] Instead, as I have shown, I contend that §§56-58 in the *Rechtslehre* complement, and are in fundamental agreement with, the preliminary articles of the peace essay. They also have the same function and role as the private right part: they delineate and discern criteria for a rightful use of force in an unrightful condition, but are not by any means, as such, normatively adequate. Rather, they 'merely' prepare the ground for a later realisation of the perfectly rightful condition of public justice under the rule of law.

Kant offers further reflections on the rightfulness of actions in an international state of nature in §§59 and 60. But before we turn to §59 and its right(s) to peace, we ought to first consider §60 on a quite controversial subject: the unjust enemy. Here, Kant actually sets aside an entire section for this concept. In his discussion, he goes clearly beyond what he wrote in his peace essay, where he had refused to include the concept in international law proper, since his overall position meant that it fell outside the international model altogether. It would not

[483] Related to this argument is also the right of the state ruler to grant clemency for actions in war. Kant concludes §58 with the following remark: "Daß mit dem Friedensschlusse auch die Amnestie verbunden sei, liegt schon im Begriffe desselben" (6:349).

[484] I will return to this claim in the next chapter, where I also will reject one of Byrd & Hruschka's implicit claims, namely that the kinds of rightful actions Kant allows for even in war can be used by an international legal order against so-called rogue (or despotic) states to force them to enter a world state.

only imply an acceptance of a doctrine of punitive wars (cf. 8:347), but also require a court ruling ("Richterspruch", 8:346) for its rightful application. In the *Rechtslehre,* however, to the obvious surprise of several commentators, it is given its own section and justification. Carl Schmitt, for one, was clearly taken aback by the appearance of an unjust enemy in Kant, an enemy against whom a state right "hat keine Grenzen" (6:349) regarding quantity or degree. Schmitt went on to claim that Kant embarked on a crusade here, and was more of a theologian than a jurist (cf. Schmitt 1997 [1950]: 140 ff.).

The curious concept of the unjust enemy gives, however, no excuse or opportunity for the cunning statesman to declare a state of exception or emergency. Rather, it can and should be accounted for along the lines of right that Kant already has indicated. He seems to treat the figure as one that is a common theme in the contemporary theory and practice of international law, but, crucially, adds at the end of the section that the term, as such, is a pleonasm in the state of nature, which, *per se*, is "ein Zustand der Ungerechtigkeit" (6:350). A *just* enemy – likewise a common subject of discussion in some classical (but rather bellicose) notions of international law – would for its part be a person whom I would be unrightful to resist, and hence no enemy proper (cf. ibid.). But the pleonastic character of a term (now in the thought-figure of the unjust enemy) does not prevent him from applying and discussing it here as a subject of international law. The most crucial passage of §60 reads as follows:

> – Was ist aber nun nach Begriffen des Völkerrechts, in welchem wie überhaupt im Naturzustande ein jeder Staat in seiner eigenen Sache Richter ist, ein *ungerechter Feind*? Es ist derjenige, dessen öffentlich (es sei wörtlich oder tätlich) geäußerter Wille eine Maxime verrät, nach welcher, wenn sie zur allgemeinen Regel gemacht würde, kein Friedenszustand unter Völkern möglich, sondern der Naturzustand verewigt werden müßte (6:349).[485]

The unjust enemy is, accordingly, a moral person who in an international realm devoid of public justice makes truly impossible the approximation to and/or establishment of rightful relations. Instead of breaking just one (or several) of the criteria that we have seen Kant holds to be necessary preconditions for perpetual peace, the unjust enemy would break the most crucial or even all of these. But what, more precisely, does this entail in and for his theory?

It goes almost without saying that the description and application of the unjust enemy are highly contested among Kant scholars. This sparked a controversy between Susan Shell and Georg Cavallar a few years ago.[486] I agree with Cavallar that Kant's conception of the unjust enemy does not turn him into the "kind of realist and just-war theorist" (Cavallar 2006:

[485] I will return below to a key aspect of this passage which is not further elaborated here, namely that it clearly shows that Kant holds that every state, even in international law, will remain judge in its own cause.
[486] Cf. Shell (2005: especially pp. 100 ff.); Cavallar (2006). On the unjust enemy in general, see Eberl (2008).

117) he correctly accuses Shell of portraying him as: Kant's project is still entirely normative in its base. But Cavallar himself stretches the term somewhat. On his reading, Kant believes that a "*majority* of states is authorized to coerce the unjust enemy" and that "a majority vote" (ibid.: 121) can trigger a Kantian authorisation of rightful force in the international realm.

I disagree with Cavallar on this point. Despite all his considerations to ground such an authorisation in an institutionalised and representative international legal framework, not even a majority vote can be seen as the decisive yardstick for Kant on this vital and controversial question. The formulations in §60 are not notoriously vague or ambiguous. I suggest, rather, that they are construed in order to keep the door open for rational disagreement about what constitutes an unjust enemy. At the same time, another door slams shut concerning any easy, trigger-happy application of this necessarily disputable concept. I do not share Cavallar's view that Kant entrusts to a majority decision even of a rightful state of nations/world republic (*Völkerstaat*/*Weltrepublik*) the task of deeming someone an unjust enemy.

For one thing, a majority vote, as such, is never a guarantee of a rightful legal decision or procedure. More importantly, Cavallar presupposes precisely what we do not find here. His claim that a recognised international institution of law and due process can rightfully impose sanctions on a legal subject is, taken by itself, correct. But Kant emphasises that precisely this authority or authorisation is missing in this condition: there is no court of law here which can by right actually sentence someone on a charge of heinous crimes. The crucial point is that, in the juridical condition of which Cavallar speaks, such a person would not be an unjust enemy. Instead, he would be a legal subject convicted as a criminal.[487]

Again, I believe that Kant raises the bar very high with regard to any uni- or bilateral declaration of someone not only as a *persona non grata*, but also as a moral person against whom one could and should forcefully claim one's own and/or others' rights. The next example he gives of something that could in a rightful manner make someone an unjust enemy emphasises that the latter's violation of public contracts must be presupposed to concern "die Sache aller Völker" (i.e., peoples, not states), whose "Freiheit dadurch bedroht wird" (6:349). One can perhaps then ask: historically speaking, which state or individual (singular or plural), if any, would have to be considered an unjust enemy, according to Kant?

To my mind, by far the clearest historical example is Nazi Germany. But it is, of course, problematic to decide exactly when it became an unjust enemy according to Kant's own criteria. Indeed, it may be impossible to answer this question. One would, however, find

[487] However, I agree with Cavallar that (for instance) Saddam Hussein's regime in Iraq (at least not at the time of the so-called 'Operation Iraqi Freedom' of 2003) should clearly not be considered an unjust enemy (cf. ibid.).

that it is not the task of a metaphysics of morals to answer the various questions raised in this connection; that is a task for political reflection. Kant the philosopher did not provide actual politics with procedures that produced specific results, only certain standards within which rights claims could be formulated and the attempt made to mediate these in a rightful manner. To attempt to find out who would be an unjust enemy in the eyes of Kant the citizen would, in turn, be little more than pure speculation. That would also divert our attention from his main argument here, namely, that only the state sovereign is authorised to make such a declaration. It must remain up to the different states, not to any particular number of citizens, to decide why and when someone is an unjust enemy.[488]

Regardless of whether Kant would have held that Nazi Germany was an unjust enemy and that the Allied Powers were right in joining forces to defeat it, he can be seen to posit restrictions with regard to the steps and measures that can be taken against even such a state (or group). Not even Kant's unjust enemy is stripped of all rights. For instance, a defeated enemy state cannot be divided among the victors as some kind of prey, to make it so to say disappear from the earth (as Kant puts it): "denn das wäre Ungerechtigkeit gegen das Volk, welches sein ursprüngliches Recht, sich in ein gemeines Wesen zu verbinden, nicht verlieren kann". Rather, the victors should allow the people of a defeated state "eine neue Verfassung annehmen zu lassen, die ihrer Natur nach der Neigung zum Kriege ungünstig ist".[489] The objective can only be to remove the unjust enemy from power, on the basis of its publicly held maxims and/or actions that make perpetual peace impossible to realise; only this allows other states "ihm die Macht dazu zu nehmen" (6:349).

We have now considered the main line of argument in Kant's *Rechtslehre* sections that relate to possible warfare rights, and we have seen that these are clearly not warmongering or bellicose. Rather, they are designated to discern criteria for a rightful use of force by states that find themselves in an international state of nature.[490] This is not to claim that the actions

[488] Let me repeat the obvious: a world state would not solve the normative (as well as epistemological) problems that still linger here. Qua world state, it is in no position to label someone an unjust enemy. All it can do is to charge the moral person as a criminal. Again, the figure of the unjust enemy exists only in an international realm devoid of public justice, and hence outside of a rightful condition. (To repeat the important objection raised above, this is exactly what Cavallar forgets, when he presupposes precisely something that, as Kant emphasises, is missing.)

[489] A republican constitution is most likely what Kant has in mind here. However, as I will return to, he does not turn the internal constitution of a state into a criterion for membership in an international legal order.

[490] Kant's memorable proposal for a day of atonement following the end of each particular war is another indication that war is only the "traurige Notmittel" (8:346) in the sorry state of international affairs, and that no right can be derived from it. "Nach einem beendigten Kriege, beim Friedensschlusse, möchte es wohl für ein Volk nicht unschicklich sein, daß nach dem Dankfeste ein Bußtag ausgeschrieben würde, den Himmel, im Namen des Staats, um Gnade für die große Versündigung anzurufen, die das menschliche Geschlecht sich noch immer zu Schulden kommen läßt, sich keiner gesetzlichen Verfassung im Verhältnis auf andere Völker fügen zu

and maxims we can derive from these criteria are, as such, in accordance with right (*Recht*), but merely that, for Kant, they are rightful (*rechtlich*) in a condition without public authority. Here, as we remember, is "alles Recht der Völker und alles durch den Krieg erwerbliche oder erhaltbare äußere Mein und Dein der Staaten bloß provisorisch" (6:350). Kant is adamant on this important point: there cannot be legitimate, conclusive acquisition or rights in this state. Nevertheless, as with the task of the part on private right in the *Rechtslehre*, the criteria are normatively necessary, in order to delineate what constitutes rightful actions even in a lawless condition, as well as to be able to approximate a rightful legal condition at all.

Let me sum up: in addition to establishing the unrightfulness of invading the personal realm and inalienable rights of individuals as well as of states, we have seen how Kant's criteria lead to a number of examples of maxims that prevent the project of perpetual peace from developing. Consequently, states can rightfully resist these maxims. Examples include maxims that make trust between states impossible and those that make a state (or a group of individuals) a frightening force, whether in primarily territorial, or also in military or financial terms. But not even an unjust enemy can be completely stripped of rights or dignity – it, too, remains a subject of the rational rights at the centre of his theory of international law.

One could, of course, have hoped for some further specification with regard to what in fact would constitute a breach of international conduct for Kant, and thus warrant the use of force. His works and notes do not yield many further clues. But the limited amount of debate of such primarily empirical aspects is in my view not necessarily a weakness in his theory or approach. Instead, there is bound to be considerable rational disagreement on what adds up to a breach of conduct (and when, why, etc.) in any theory and practice of international law. Rather, Kant can be seen both as opening the door to a significant room for discussion, not limiting it to contemporary subjects, *and* as rejecting certain acts and maxims as completely contrary to the peace project and its foundations of rational right. In the next chapter, I shall discuss the institutional legal model he chooses, and I shall indicate how at least some of the difficulties here can be addressed and perhaps also solved.

But regardless of which international legal model Kant chooses, it is obvious that the public use of reason will and must play an important role therein. In a manner very similar to what we have seen at the state level, where they critically complemented the institutionalised state sovereign, the establishment of non-institutionalised international forms of interaction and communication will be crucial for a realisation of rightful relations worldwide. And the

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wollen, sondern stolz auf seine Unabhängigkeit lieber das barbarische Mittel des Krieges (wodurch doch das, was gesucht wird, nämlich das Recht eines jeden Staats, nicht ausgemacht wird) zu gebrauchen" (8:357).

public use of reason is entirely non-coercive at this level, just as it is at the national level. Accordingly, it does not pose any threat to the legal institutions as such, but only aids and corrects them unwaveringly. I return below to the question of how the public use of reason must be further implemented in Kant's model for international rightful relations.

My brief discussion of Kant's preconditions for perpetual peace can be concluded by looking at his short and concise §59 on the right of peace. The right of peace is threefold, and covers states' rights to neutrality in times of actual war; a guarantee for the continuance of concluded peace agreements; and a right to form defensive state alliances against attacks. The right to form defensive alliances also stresses the point that he has a non-state, non-coercible union in mind; it is quite clearly a "*Verbindung* (Bundsgenossenschaft) mehrerer Staaten, sich gegen alle äußere oder innere etwaige Angriffe gemeinschaftlich zu *verteidigen*." This union or alliance is evidently not a state, nor "ein Bund zum Angreifen und innerer Vergrößerung" (6:349). In other words, states have a Kantian right to not be dragged into war by other states (friend or foe), and are allowed to defend their sovereignty through exclusively peace-oriented alliances with other states that are equally pacific.

In the next chapter (II.2), I shall attempt to present a conclusive answer to the pressing question of which international juridical model Kant favours. This will throw further light on the preliminary rights and/or criteria that he has granted states at this stage, in an international condition devoid of public authority. Now, however, we must turn to his second, and equally important dimension of rightful relations beyond the jurisdiction of the nation-state. This, of course, is his concept of cosmopolitan law.

1.3. Kant's third dimension of right: cosmopolitan law

The inclusion of a third dimension of right in his overall legal framework is widely regarded as one of Kant's finest achievements in political philosophy.[491] His concept of a cosmopolitan law (*Weltbürgerrecht*) that holds every individual to be free and equal even on a global basis has been an immense inspiration and highly influential in both the theory and the practice of international law,[492] establishing a position according to which each person is a human being endowed with rights regardless of origin, nationality, political or religious conviction, gender, race, etc. Although Kant may not have been the first to consider the *Weltbürger* as a figure of

[491] See, for instance, Habermas (1999) and Anderson-Gold (2001).
[492] See, for instance, Habermas (2005) and Eberl (2008).

thought,[493] he is considered to be the first to conceptualise him or her within one, consistent theoretical structure and as an inherent and indispensable part of any theory of law, politics, and/or morals. Yet, there is significant disagreement among scholars even today about how, more precisely, Kant delineates his cosmopolitan idea. Consequently, we must look at this in greater detail here.

Much of this controversy is settled if we are sufficiently aware of two vital points that I have already emphasised, namely that there is a clear distinction in Kant between the legal and the moral realms, and that he must be said to advocate in his mature philosophy of right a threefold and non-hierarchical juridical structure that includes *Weltbürgerrecht* as a necessary supplement to, not as a substitute for, *Staatsrecht* and *Völkerrecht*. My argument addresses these two crucial features of his theory as follows:

Above, in II.1.1, I emphasised that Kant's first writing devoted to the cosmopolitan idea – the 1784 essay on an *Idee zu einer allgemeinen Geschichte in weltbürgerlicher Absicht* – speaks without any differentiation of a cosmopolitan condition that changes the world into a moral whole. Moreover, it does not distinguish between cosmopolitan and international (i.e., *Völkerrecht* or inter-state) law as such. Similarly, the 1793 *Gemeinspruch* essay is basically unclear with regard to these crucial distinctions, advocating the cosmopolitan constitution rather straightforwardly, without looking at the potential problems with such a solution. Yet again, we find the most constructive and coherent approach in his two last publications on the subject: the peace essay and the *Rechtslehre*. And on these subjects, too, there are decisive differentiations that often are ignored, or at least underemphasised, by current commentators.

Both the third definitive article of the peace essay and §62 of the *Rechtslehre* highlight the difference between the cosmopolitan law project as a moral-ethical and a legal endeavour. In fact, the deliberations in both publications begin with the same distinction. Kant addresses the concept of cosmopolitan law – as well as the *Weltbürger* as such – from an exclusively legal perspective, rather than an ethical perspective. "Es ist hier, wie in den vorigen Artikeln nicht von Philanthropie, sondern vom *Recht* die Rede" (8:357). "Das Weltbürgerrecht (...) ist nicht etwa philanthropisch (ethisch), sondern ein *rechtliches Prinzip*" (6:352). In addition to the unequivocal distinction between right and ethics here, it is only with these two works that he assigns *Völkerrecht* and *Weltbürgerrecht* to separate dimensions and paragraphs/sections.

The distinctions must be seen as an unmistakable specification of (and also distancing from) the *Gemeinspruch* section on international law, where the conceptual pairs right–ethics

[493] The first notions are traditionally traced back to Stoic philosophy, although Diogenes of Sinope (a Cynic) is regularly cited as the first to make references to the term.

and *Völkerrecht–Weltbürgerrecht* had been considered in a clearly undifferentiated manner.[494] Even as late as 1793, Kant had evidently not properly clarified how the internal relationship between these quintessential concepts was to be delineated and located in his overall practical philosophy. In his writings of two and four years later, the mistake was not to be repeated; here, the concept of cosmopolitan law is explicitly not to be confused with either the concept of international law (i.e. inter-state law, *Völkerrecht*) or ethics (i.e. philanthropy).

The lack of understanding (or even awareness) of these late distinctions is one, or indeed the major cause of confusion in substantial parts of Kant scholarship on international law. This not only concerns the relationship between his legal and moral realms; the internal relationship between *Völkerrecht* and *Weltbürgerrecht* as two distinct but yet equal and non-hierarchical dimensions of international law, both of which must be realised, likewise remains a woefully misinterpreted aspect of his philosophy of right. Common misunderstandings that are related to these two relationships not only severely influence and hinder contemporary readings of his theory, but are also the single two sources most responsible for the many current criticisms which allege that Kant's cosmopolitan account is limited or outdated.[495]

But if we consider Kant's remarks in their correct context, i.e., his legal argument on the basis of freedom in all three dimensions of right, we are bound to recognise at least three vital things. First, his approach to the subject is not ethical in nature; it is exclusively related to the concept of right and the overall legal framework. Secondly, in diametrical opposition to the sorry comforters Grotius, Pufendorf, and Vattel (as well as a vast number of contemporary theorists), he is concerned with theses that can actually have lawful force; they are not merely pious wishes. And thirdly, a consistent juridical structure must (as Kant does) include a dual concept of international law that incorporates the individual rights claims of the dimension of *Weltbürgerrecht* in a manner that also preserves and promotes the principles of *Völkerrecht* in the process.

I will accordingly argue here not only that Kant's cosmopolitan theory is formulated with coherence and the utmost precision. Despite the fact that his explicit remarks on the topic span only five pages in total, and therefore may seem somewhat short in length and limited in scope, I will also contend that his concept of cosmopolitan law is a theory and approach that

[494] As I already have pointed out, the section title itself is clearly indicative of this and demonstrates my point: neither of the two conceptual pairs are at this stage differentiated properly by Kant.
[495] This is the case even in Habermas (1999; 2005), who – despite his awareness of the distinction between morality and legality (also in Kant) – still finds this lacking and tries to readapt the peace project to present-day conditions. This is one reason why he ends up with a misconceived relationship between the two international dimensions in the process. I return later to the misreadings of Kant on these crucial points by Habermas and others.

still imposes the greatest demands and obligations on any realisation of worldwide rightful relations. It is not merely a product of its time, but is part of a metaphysics of morals with a doctrine of right and a dimension of public justice through the rule of law that holds even today. But what, more precisely, does the concept of *Weltbürgerrecht* mean and entail in his theory?

Whereas Kant's concept of *Völkerrecht* considers the possible rights and rightful relations between states, his concept of *Weltbürgerrecht* concerns possible rights and rightful relations of individuals at a global, cosmopolitan level, in their relations both to other states and to other individuals.[496] Hence, cosmopolitan law is meant to lay the ground for worldwide individual rights. On this point, it certainly resembles what we today refer to as human rights. But what individual legal rights can consistently be established in terms of both theory and practice beyond the jurisdictions of the separate nation-states? Have we not, at least up to this point, emphasised a Kantian law model according to which no individual can have a rightful authority to execute rights claims even against his or her own state? A universal right to something external beyond the jurisdiction of one's own state seems to assert that anyone can forcefully claim his or her rights anywhere against all others, either by oneself or through the relevant state authority. How, then, can a cosmopolitan law vis-à-vis *every other state and individual* be ascribed to everyone and reconciled with the very legal definitions of states and individuals in the overall juridical system, where *Staatsrecht* and *Völkerrecht* have already been established as necessary constituents?

Kant's initial, peace essay definition of cosmopolitan law is, admittedly, formulated in a quite limited and negative manner. The third definitive article reads: "'Das *Weltbürgerrecht* soll auf Bedingungen der allgemeinen *Hospitalität* eingeschränkt sein'" (8:357).[497] The law is therefore confined to what he calls conditions of universal hospitality. What, more exactly, is meant by this? His subsequent distinction between a right to be a guest (*Gastrecht*) and a right to visit (*Besuchsrecht*) will help us considerably with the first few steps along the way to an adequate understanding of his initial claim.

For Kant, cosmopolitan law is not and cannot be a right to demand entry into another state than one's own, let alone to demand this or that right within that state. Such conceptions would only render this person the true sovereign of the state, in all its normative impossibility.

[496] Let me make this generalisation somewhat more specific: *Völkerrecht* in part also discusses to what degree and how states may use its own subjects for purposes of war; as we shall see, *Weltbürgerrecht* also considers the rights of state-less peoples, not just those of particular individual(s).
[497] Why Kant puts this definitive article (and not the other two) in quotation marks remains unclear. See also Eberl & Niesen (2011: 248).

Instead, his *Weltbürgerrecht* is a rational right of all to visit any area of the globe, and in such a process "nicht feindselig behandelt zu werden" (8:358). On the analogy of the owner of a house or estate, who can rightfully deny others' wishes to trespass or be invited as guests, the host state may reject visitors' claims to entrance, indefinite stays, etc. The individual is not thereby wronged by the state; it is the latter that must have the final say in the matter.

Still, the conditions of universal hospitality put restrictions on the rightful exercise of such decisions. These conditions, too, are preconditions for a realisation of a rightful state of affairs. In accordance with the example of the householder, the refusal of non-subjects at the border cannot take place if it results in the demise or destruction (*Untergang*, cf. ibid.) of the individual who seeks entry. The state (let alone its subjects) cannot treat an otherwise law-abiding non-subject as if he or she were an enemy, that is, one who is illegal *per se*. Each individual must be treated in accordance with law and acknowledged as a legal subject. On Kant's view, states can rightfully deny someone the juridical status of citizen, guest, or even visitor, but they must nevertheless recognise the individual as a legal subject. In short, a state can "ihm nicht feindlich begegnen" (ibid.). Consequently, this right is widely and correctly compared today with a right to asylum or a right of refuge (cf. e.g. Ripstein (2009: 295 ff.)).

More positively formulated, Kant's cosmopolitan law is a right "sich zur Gesellschaft anzubieten" (8:358). Society is understood here both as the global community in general and also every local, national, and/or regional community in particular. The right is derived from the same right that we have seen behind all rightful possession, i.e., the right to interact with any other subject (or object) in this world on the basis of the original possession of the earth in common (cf. ibid.). We all have an original and equal share in the world at large. No-one has for Kant any more right than anyone else to exclude a person from using external objects. However, there are crucial differences between the two dimensions of state and international law (encompassing the dimension of cosmopolitan right), with regard to how we can acquire these objects. The same right leads to different rights claims and authorisations at the different levels. As we recall, the original right to possession in common contributed at the state level to a *lex permissiva* to unilaterally claim property rights on behalf of the rest of the people or the population (so to speak). But as we will see at the international level, a crucial point is that it does not lead to a permissive law to anticipate or approximate an international legal order by force, in spite of the fact that it justifies his concept of cosmopolitan right. What is the reason behind this conception?

First of all, Kant is aware that because of the spherical surface of the earth, people cannot disperse themselves indefinitely. And as embodied beings who occupy space and time,

we naturally have to take our places somewhere alongside each other. Now, the concept of original possession in common does not merely open up the normative space for a unilateral anticipation of external objects at the national level (and for a later redistribution under state law). It also entitles everyone to an equal, original right to take up any position in the world. It is for Kant self-evident that originally, "niemand an einem Orte der Erde zu sein mehr Recht hat, als der Andere" (ibid.). This, as we remember from part I of the thesis, is the original, normative point of departure for every one of his deliberations on any particular, actual right to any piece of property.

History, with all its contingent circumstances, has as a matter of fact allocated persons, fortunes, and resources differently. However, this cannot be turned into a normative argument for the rightfulness of such a state of affairs, let alone for its continuation. Others must be granted the possibility to change the *de facto* world according to normative claims. But, as I have argued, any such change is, of course, also subordinated to normative claims, and cannot be justified without reserve. The right to take up a place in the world thus finds itself limited in several regards, all of them related to a reciprocal right to external freedom. At the state level, we have seen that the right to a particular place within the borders was confined to places not already taken (either in terms of physical presence or private or public property). At the international level, we will see that there are other limitations, too, in accordance with the possible rightful interactions between rightful, that is, authorised actors. In Kant's view, the relevant actors at this level include not only states and individuals, but also peoples who live in non-state entities.

In the previous subchapter, we observed a Kantian prohibition on the acquisition even of excessively large portions of uninhabited land, based on the threat this constituted to a promotion of peace and public justice worldwide. Limitations on extra-state acquisitions in cases where a territory already is inhabited are, however, discussed and imposed by Kant in his account of cosmopolitan law. Here, we will see that he presents a line of argument that, contrary to the opinion of some scholars, does not treat cosmopolitan law as the undisputable right to engage in and facilitate commercial activities worldwide. Rather, his cosmopolitan law theory clearly rejects such a reading: not only is there an unequivocal denunciation of such practices as were perpetrated by colonial enterprises in his own time; but, as a matter of fact, his perspective is not concerned exclusively with economic activities. Cosmopolitan law can (and, in my view, should) be regarded first and foremost as a right to refuge and universal legal recognition. Yet, it also entails a rational right for states, peoples, and individuals who live in non-state entities, such that asymmetries in economics, knowledge, and/or power will

not influence the settlement and/or mediation of rights claims. Let us look at this in greater detail:

We can once again take the case of individual(s) approaching a state border. For Kant, it is the state, not the individual(s), that defines and decides a possible admittance into the state. This plainly rejects any rights of, say, trading companies to dictate the conditions under which they enter a state – it does not lie within their rightful authority to demand even access to a state territory. This is evidently shown in the third definitive article of the peace essay and its explicit reference to a right of China and Japan to exclude such companies. Not only are the two states fully within their rights when they impose protectionist policies; they have also done so "weislich" (8:359). In other words, states are allowed to pursue their own models for economic development. Moreover, they should do so (at least in these instances). No wrongs are thereby committed against other states or individuals. Instead, wrongs take place as soon as any trading company, colonial power, or other actor makes a physical claim to land and/or resources in another state.

Kant argues that obvious wrongs according to cosmopolitan law can be committed not only against other states, but also against peoples and individuals who live in non-state entities. The criterion for a rights violation in the case of states or of individuals is not, of course, that the right can be, and actually is, enforced by the one that is aggrieved; there is no inherent normative problem in assigning rights to those who live in non-state entities. In cases of individuals who live in some kind of communal society rather than a state, it is equally possible for wrongs to be committed by others – not only against the innate right of freedom that belongs to all human beings, but also because the other party cannot have an undisputed right to the use of force, according to their unilateral conception of justice. All of Kant's rights and rights relations always work both ways, and there are some things to which one simply cannot have a right, regardless of whether or not actual resistance or even consent is involved.[498]

In §62 of the *Rechtslehre*, Kant develops his stance on cosmopolitan law further. Here, he makes it perfectly plain that these rights relations include all individuals "die untereinander in wirksame Verhältnisse kommen können" (6:352). This not only posits all inhabitants of the earth as *Weltbürger* (whose innate right to freedom must be recognised worldwide); it also extends to external, acquirable objects. Areas of the globe that may seem uninhabited, but that nevertheless are necessary for the purposes of nomadic tribes, shepherds, hunters, etc. cannot

[498] This does not relate only to external things with a 'mine or yours' structure, but also and always to the two innate or inalienable (*unveräußerlich*) rights of personal freedom (cf. 6:237) and popular sovereignty (cf. 6:342).

simply be turned into private property by others (cf. 6:353). Settlers or traders are required to abstain from any use of force in their efforts to interact with the locals. Honest contracts are required for the rightfulness of an acquisition, and Kant obviously disallows any profit that would be drawn from an asymmetry in the knowledge of the actual worth of the objects being traded (cf. ibid.), let alone from asymmetries in other kinds of power. He is adamant that no means–end argument for the forceful introduction of state and rights relations can be justified in this context, whether in order to acquire resources or land, or to establish a rule of law. This holds regardless of the condition in which the local population lives, even if this is anarchic or completely lawless, and of the intentions of the uninvited visitors. Under all circumstances, the use of coercion is subordinated to right: "vermeintlich gute Absichten können doch den Flecken der Ungerechtigkeit in den dazu gebrauchten Mitteln nicht abwaschen" (ibid.).[499]

Kant devotes no less than half of his discussion of cosmopolitan law to a fundamental and unequivocal critique of these and similar kinds of colonial and imperial enterprises. Far from flying the flag of free trade, he laments colonial and imperial practices in no uncertain terms: the so-called visits to distant and not too distant shores are in fact identical with conquests. In his view, these not only go "bis zum Erschrecken weit". The description of the grave injustice perpetrated on others by the Europeans does not end there: "das *inhospitale* Betragen der gesitteten, vornehmlich handeltreibenden Staaten unseres Weltteils" was not in any sense surprising, "denn die Einwohner rechneten sie für nichts". Furthermore, as they "in der Rechtgläubigkeit [sich] für Auserwählte gehalten wissen wollen," they would also, *inter alia,* establish "der allergrausamsten und ausgedachtesten Sklaverei"[500] and would "Unrecht wie Wasser trinken" (8:358 f.).

Hence, in Kant, cosmopolitan law is a rational right of states, peoples, and individuals to reject the advances made by others in trade, rather than a right to launch trade on a global scale. This, of course, does not deny commercial companies a right to establish themselves elsewhere and to engage in business for whatever motive. It is, quite simply, a different allocation of the sovereign right to decide on such offers and enterprises. Such a right does not

[499] Kant parallels his criticism on this point with his condemnation of the forceful introduction of religion (cf. ibid.).

[500] What he describes as the cruellest and most calculated slavery is located in the West Indies (*die Zuckerinseln*). But the Eastern parts are not exonerated: "In Ostindien (Hindustan) brachten sie unter dem Vorwande bloß beabsichtigter Handelsniederlagen fremde Kriegsvölker hinein, mit ihnen aber Unterdrückung der Eingebornen, Aufwiegelung der verschiedenen Staaten desselben zu weit ausgebreiteten Kriegen, Hungersnot, Aufruhr, Treulosigkeit, und wie die Litanei aller Übel, die das menschliche Geschlecht drücken, weiter lauten mag" (ibid.). For further discussion of his anti-colonialist argument, see Eberl & Niesen (2011). The rejection of such practices is, of course, not limited to those perpetrated by European colonialists, but also includes similar but far less systemic actions by pirates and Bedouins, who plunder other persons when they have the opportunity (cf. 8:358).

and cannot belong to guests.[501] Instead, it is by Kant unambiguously described as a right, "einen Verkehr mit den alten Einwohnern zu *versuchen*" (8:358), and "sich zum *Verkehr* untereinander *anzubieten*" (6:352). The premises clearly remain on the side of the host.

This makes it strange, to say the least, to see that Kant's cosmopolitan law is often interpreted today as a kind of free trade argument that is concerned only with commercial activity. A fairly extreme version is set out in the commentary on the *Rechtslehre* by Byrd & Hruschka, who hold fast to their private right explanation of Kant's entire legal and political philosophy, claiming that his cosmopolitan right exists only in order to facilitate and establish an international commercial trade market. On their reading, Kant sees the final end of both the philosophy of right and mankind as "the idea of a perfect World Trade Organization". In politics, this explicitly turns out to be "something on the order of but more far-reaching than today's General Agreement on Tariffs and Trade" (Byrd & Hruschka 2010: 7; 209).

This interpretation is clearly incorrect for a number of reasons, and Byrd & Hruschka have to go to some lengths to make it plausible at all. They discard the peace essay (and every other of Kant's publications on law and politics) as "useful (...) only to a limited extent" (ibid.: 13). Controversially, without textual evidence, they suggest that the right to visit now actually belongs to the realm of *Völkerrecht*, i.e., inter-state law (cf. ibid.: 208). Also, Kant's emphasis on peoples in the discussion of cosmopolitan law in §62 of the *Rechtslehre* is taken as proof of a complete restructuring of the entire juridical framework. *Weltbürgerrecht* now deals only with the relations between peoples, not between states, peoples, and/or individuals, as was still the case in the peace essay. They seek to underpin their point with the further claim that the *Verkehr* (interaction) he refers to in §62 regards only commercial activity.[502]

I have already considered how and to what extent Kant changes his legal approach, concepts, and framework up to and in the *Rechtslehre*. Some of the conceptual changes were admittedly significant and of great consequence, but he certainly did not revoke and rebuild his entire juridical framework in the period of less than two years that separates the peace

[501] It is also explicitly "nicht ein Recht der Ansiedelung auf dem Boden eines anderen Volks". For this, "ein besonderer Vertrag" is "erfordert" (6:353), meaning either an honest contract or nothing less than a social contract and thus the establishment of a new state. But the traders cannot rightfully do this, since they can neither be citizens of two different states – and so serve two masters (cf. 6:342) and have two sets of possibly conflicting obligations – nor abandon their citizenship and unilaterally form a new state (to whose rights the local inhabitants too would have an equal entitlement). And as we notice from Kant's definition of a colony, he would be very reluctant to ascribe even such a term to the territories occupied by the so-called civilised, commercial states.

[502] When we bear in mind that Byrd & Hruschka also hold that there is a Kantian permission to "wage war" and "coerce" other states to enter the "perfect juridical state" of this "perfect World Trade Organization" (Byrd & Hruschka 2010: 195; 187; 7), their interpretation borders not only on absurdity, but must almost inevitably lead in actual politics to the peace of the graveyard.

essay from the *Rechtslehre*, as Byrd & Hruschka claim. They fundamentally misunderstand the possible patterns of interaction of the three dimensions of public right in Kant. The state level considers rightful relations between the state and its subjects. The inter-state level addresses the possible rightful relations that can exist between states and other states (as well as their own subjects). Finally, the cosmopolitan level regards the rightful relations between states and non-subjects, who may be individuals or peoples, but are in any case outside the boundary of the jurisdiction of the relevant state. Cosmopolitan law also covers the rights of these individuals and/or peoples in their reciprocal interactions. Kant does not restructure his framework in the *Rechtslehre*, and although he principally talks of peoples in §62, this is not an argument for locating the individual right to visit (or the right to refuge or asylum) in the inter-state dimension, nor is this all that he does here.

The concept of cosmopolitan law that Kant proposes is grounded in the right of the *Erdbewohner*, who as human being has an undisputable and inalienable right to take up a place somewhere on earth. This is something to which "jeder (...) ursprünglich ein Recht hat" (6:352).[503] The right is later also called "das Recht des Erdbürgers" (6:353). We note that in both instances, the right is assigned to a moral person in the singular. Contrary to the view of Byrd & Hruschka, Kant does not move the individual from the level of cosmopolitan law to the inter-state dimension, leaving the cosmopolitan dimension to peoples alone; it is clear that all individuals are regarded as *Weltbürger* in the *Rechtslehre* too.[504]

The last and perhaps most crucial point in the cosmopolitan account given by Byrd & Hruschka is their claim that interactions covered by this dimension of law concern only trade and commercial activity. The contested word is 'Verkehr' (interaction), which is at the centre of the definition of Kant's basic human right, "sich zum *Verkehr* untereinander *anzubieten*" (6:352). The two commentators are adamant that interaction here refers only to the term in its narrow sense of trade. "Kant uses the expression *Verkehr* in its broader meaning to indicate 'interaction', but in the context of cosmopolitan law it means 'commercial trade'" (Byrd &

[503] The word 'derselben,' which is omitted from the quotation, refers to a communion of individuals (i.e., a people). It does not in any way build a case for the interpretation suggested by Byrd & Hruschka. The quotation expressly uses the word 'jeder' – not 'jedes' (Volk) – and thus grounds the right in the individual *Weltbürger* (or *Erdbewohner*), i.e., the moral person in the singular.

[504] The interpretation offered by Byrd & Hruschka is not only ill-conceived in this regard. It would also have the clearly unintended consequence that contradicts the point they are trying to make, namely, that the *Rechtslehre* provides the ground for the private individual to act on the (worldwide) free market as an instance of public (!) justice. For if the section and dimension of cosmopolitan law is restricted to peoples, then the commercial activity supposed to be granted by this right covers only peoples; private individuals are, as such, not authorised by cosmopolitan right to engage in these activities.

Hruschka 2010: 209). But although the second half of this sentence is highly questionable, they scarcely see the need to argue for their viewpoint.

Byrd & Hruschka expressly view the term 'commercial trade' (*Handelsverkehr*) as the only correct rendition of the interaction (*Verkehr*) considered in §62. But they overlook the fact that the term does not occur at all in this section. In fact, it is mentioned only once in the entire *Rechtslehre*, in General Remark C (6:326), where it is placed, ironically enough, in a list of what can be taxed to support the poor.[505] However much 'Verkehr' is supposed to implicitly mean 'Handelsverkehr' and hence 'commercial trade' in "§31 (...) and many other places" (Byrd & Hruschka 2010: 209n.), this does not, of course, imply that it must be read thus in §62. There is no conclusive evidence to support their assertion.

Instead, both the lack of specification and the general character of the deliberations in this section must, if anything, lead us to the opposite conclusion, namely that Kant here means global interaction in a broader sense.[506] In §62, as in the *Rechtslehre* in general, 'Verkehr' does not automatically imply 'Handelsverkehr'; here, it means interaction in a general sense. In any case, it relates primarily to "alles Veräußerliche" (6:301), that is, all *private* things. This stands in distinct contrast to the inalienable (*unveräußerliche*) rights of both individuals and states, which is precisely the topic covered by Kant's theory of international *public* right.

This, of course, does not mean that Kant disregards the importance of international trade for the establishment of rightful relations worldwide. All I am affirming is that this is not the only topic he considers at the level of cosmopolitan law, and that he is not unaware of the asymmetries and grave injustice that are potentially involved. I have shown that he argues both for and against worldwide trade: he praises the spirit of commerce as a means to promote rights relations on a global scale, *and* he devotes considerable attention to highly problematic features of its 'free' exercise, imposing a number of restrictions in this regard. As we have seen, this is done at both the inter-state and the cosmopolitan level. His remarks in the peace essay as well as in the *Rechtslehre* clearly substantiate my initial claim that he has more than free commercial enterprise in mind when he considers the third dimension of public right.

Up to now, I have argued that the right of the *Weltbürger* can be viewed as a right to universal recognition and refuge (or asylum, visit, etc.), implying a right to attempt interaction with anyone worldwide. Moreover, this yields neither an immediate right to the unilateral

[505] As we have seen above, the two categorically hold that "Kant rejects the welfare state" (Byrd & Hruschka 2010: 42).
[506] For instance, another *Verkehr* that Kant mentions in the *Rechtslehre* and that is relevant at the cosmopolitan level is the public exchange and interaction of thoughts – "Gedankenverkehr" (6:208) – that he advocates on a worldwide basis through his insistence on the necessity of realising a global public sphere. I return to this below.

pursuit of one's economic interests, nor a right to use force to implement any one specific conception of trade or economy (or even justice) on a global scale. Rather, it is a right that is directed against all such unmediated efforts (e.g. colonialist enterprises). But can Kant derive further worldwide human rights from these promising but brief remarks? What, more exactly, does and can the concept of hospitality entail? Admittedly, there is not much more that can be derived directly from the relevant textual passages. This, however, does not imply that all further enquires must come to a halt. Peter Niesen, for instance, has repeatedly suggested a reading that can be seen to agree with the line of argument I have presented above, and also to expand it on one specific point.

For Niesen, Kant's equation of cosmopolitan law with hospitality presents us at first sight with "an enigmatic category" (Niesen 2007: 90) that needs further investigation. As he has argued elsewhere, hospitality not only endorses a right to visit, etc., but can also be considered to include a right to communication (cf. Eberl & Niesen 2011: 248 ff.). The line of reasoning goes as follows: first of all, the anti-colonial side of the argument further underlines the vital point that the right cannot be conceived of as a "konkretes Eigentumsrecht" (ibid.: 262). As I have stressed, it would be normatively quite impossible for Kant to ground such a specific right to external objects, whether private property or public rights, beyond the realm of one's own jurisdiction, since this would be diametrically opposed to the core principles at the levels of state and inter-state law. But trade companies, migrants, etc. are nonetheless not forbidden to try to initiate contact and try to establish trade routes or other rights relations. For this reason, what cannot be rejected is not a right to engage in commercial trade activity or the like, but the *attempts* to do so. This also applies to the example of the stranger at the border and the right to universal legal recognition (i.e., the right not to be treated as an enemy *per se*). One must be allowed to express oneself and present one's case. Niesen summarises his main line of thought in this manner:

> Es wäre zu eng, wollte man das Weltbürgerrecht vorrangig als eines des kommerziellen, also wirtschaftlichen Austauschs, gleichsam als kategorisches Postulat des Freihandelns anzusehen. Das übergreifende Merkmal des Weltbürgerrechts in allen seinen Variationen kann vielmehr darin gesehen werden, daß es erlaubt und möglich sein muß, einen sprachlichen Kontakt zu etablieren, um Vorschläge zu unterbreiten, Mitteilungen zu machen, Anfragen zu stellen, sie anzunehmen oder abzulehnen. Das Weltbürgerrecht ist also als Kommunikationsrecht zu verstehen (ibid.: 251).

Even if a right to communication may not be what Kant directly had in mind when he defined his concept of cosmopolitan law, Niesen's argument nevertheless presents a strong case for at least its compatibility with the original formulations. With Niesen, I believe it can

be established that Kant's third legal dimension cannot be directly applied to or understood as a right to external physical objects; that would be a normative impossibility. But what of its possible application to 'non-physical' sides of the human condition, such as communication? Niesen argues for a right to communication not only as a human right *per se*, but also as an inherent and collective feature, as well as a focal point, in Kant's reflections on cosmopolitan law.

Although Kant does not explicate a cosmopolitan right to communication *per se* in any of his works,[507] a closely related idea is nonetheless clearly apparent in the relevant sections and paragraphs. I shall now look at one essential aspect that surfaces in both the discussions of cosmopolitan right in his late texts. Both the third definitive article and §62 make indirect references to an imperative feature of right that works independently of, and goes beyond, the jurisdiction of each particular state – the role of a global public sphere. As I now conclude the exploration of a possible content inherent to his dimensions of international and cosmopolitan law, one last feature must be considered: his emphasis on a global public sphere, and how the realisation of this realm forms a necessary, but ultimately insufficient precondition for rightful relations worldwide.

Far from suggesting that only trade can bring together peoples and individuals who are located miles apart, Kant envisions a development of international affairs which, despite the physical distances, brings us together in a common global community. Although he nowhere uses the exact term at the state or the international level,[508] this amounts to the formation of a public sphere to address rights violations everywhere. This, too, is a matter of cosmopolitan law for Kant. As contemporary critique intensified with regard to the empirical feasibility of both the peace project as such and the cosmopolitan dimension, Kant remained adamant that his endeavours were entirely normative in nature and that it was perfectly possible to realise them in practice. In the peace essay, he then formulated the following memorable passage, underlining how a non-institutionalised international community can give (and already helps to give) objective practical reality to the normative idea of cosmopolitan law:

> Da es nun mit der unter den Völkern der Erde einmal durchgängig überhand genommenen (engeren oder weiteren) Gemeinschaft so weit gekommen ist, daß die Rechtsverletzung an *einem Platz* der Erde *an allen* gefühlt wird: so ist die Idee eines Weltbürgerrechts keine

[507] The *Gemeinspruch* insistence on the 'freedom of the pen' as "das einzige Palladium der Volksrechte" (8:304) is, of course, close to conveying the exact same point, however much it is discussed there in the context and within the limits of state law. See also Shell (2010) for Kant's emphasis on language as bearer and developer of social, cultural, and national identity, and thus, implicitly, the importance of rights that include education in one's mother tongue.

[508] As pointed out above, the term was not in common use at the time. Kant has, however, some references to the phrase '*Publizität*', which greatly corresponds to the concept of the public sphere.

> phantastische und überspannte Vorstellungsart des Rechts, sondern eine notwendige Ergänzung des ungeschriebenen Kodex sowohl des Staats- als Völkerrechts zum öffentlichen Menschenrechte überhaupt und so zum ewigen Frieden, zu dem man sich in der kontinuierlichen Annäherung zu befinden nur unter dieser Bedingung schmeicheln darf (8:360).[509]

In a manner very similar to the case of the French Revolution, the quintessential role of the enthusiastic public spectator comes into play. For Kant, a rights violation anywhere is felt everywhere; the public awareness of rights violations binds us together in a community with rational claims to right and justice. As in the case of revolutionary France, the spectators do not thereby obtain a right to intervene in the state of affairs of another country, but rather form a non-violent, non-hierarchical union with those whose rights have been violated. Thus, an international or even global public realm can aid the just cause of non-institutionalised and non-violent political movements in their struggles against a non-republican state authority for the realisation of their legitimate claims to private and/or public rights. As is readily apparent from this passage, he stresses that the development of such a global sphere is a precondition for holding that we are drawing near to perpetual peace and cosmopolitan law.[510]

There is an obvious objection: for all its worth, does such a promotion and realisation of global solidarity suffice for a full realisation of rightful relations worldwide? Kant himself had in his criticism of Achenwall upheld that no communal standard or social/ethical/religious practice could, *per se*, be enough for the establishment of rights. Only the rule of law with a state monopoly on legislative, executive, and judicial authority could circumvent the inherent structural problems of the state of nature. Regardless of how well-integrated they are thought to be, Kant sees all social unions as examples of states of nature that require public right to secure any meaningful concept of external freedom. The same applies, of course, to the non-instititutionalised global public sphere, which may be a necessary condition for both perpetual peace and cosmopolitan law, but which on the basis of his own criticism of Achenwall seems to provide an insufficient condition for the required realisation of such a state.

We have therefore come as far as we can in relation to a possible further specification of the content of international and cosmopolitan law in Kant. The next, inevitable question relates to the form of rights relations beyond the nation-state: what international legal model does he advocate? If the answer were the unceremonious institutionalisation of a world state, I

[509] The reference to injustice "an einem Orte unseres Globs" that nonetheless "an allen gefühlt wird" is also repeated in the *Rechtslehre* (6:353), but in less lofty terms. Here, it is linked in a matter-of-fact way to the colonial enterprises and is understood as their direct consequence.

[510] I here allude to important distinctions made in I.3.3 between institutionalised and non-institutionalised public spheres, as distinct from the constitutionalised public realm of states. I return to the role and the necessity of non-constitutionalised global public spheres in subchapters II.2.2 and 2.3.

could close the discussion at this point, since all private and public rights would be secured by a supranational state entity whose realisation could be forcefully anticipated, along the lines of what is indicated by the private right part and the criteria for a rightful use of force in the international state of nature. The only remaining task would thus be to empirically discern and pragmatically judge what measures would be most conducive to Kant's world state, and the relevant rights involved. But before we embark on an investigation of his final stance with regard to the international juridical order, we must recognise that he sees not only analogies, but also important and decisive disanalogies between the two levels of state and international law. The crucial point is that these disanalogies will make the establishment of international public law differ from the transition from a state of private right to a state of public right at the state level. This will in turn also lead to a different process of realisation and a different model of international law in Kant than what we have seen at the national level.

1.4. Analogies and disanalogies between national and international law

Let us start with an analogy that we already have confirmed the validity of: for states, as for individuals in the state of nature, there is a legal duty to leave this condition devoid of rightful public authority. On the international level too, prior to the establishment of public right and justice through the rule of law, we are in a condition "aus dem man herausgehen soll, um in einen gesetzlichen zu treten" (6:350). Insofar as individuals, peoples, and states may, and do in fact, enter into "wirksame Verhältnisse" (6:352) with each other that also cross the borders of the state, one is correspondingly obliged to enter into relations that are governed by law, not by power. If it is impossible to avoid extra-state interactions (and no man, people, or state is an island, in a Kantian legal sense), then the third duty of right applies to the international realm as well: "*Tritt* (...) in eine Gesellschaft mit Andern, in welcher Jedem das Seine erhalten werden kann" (6:237).

This analogy between individuals and states in their conditions without public right is repeated in all of Kant's major writings on legal and political philosophy. Not only in the *Rechtslehre*, as my quotations show, but also the 1784, the 1793, and the 1795 essays have direct references to such an analogy.[511] In Kant's eyes, the very existence of a state of nature makes it impossible both for individuals and for states (as well as peoples) to get things right:

[511] See, for instance: (8:24); (8:312); and perhaps in particular (8:354): "Völker als Staaten können wie einzelne Menschen beurteilt werden, die sich in ihrem Naturzustande (d.i. in der Unabhängigkeit von äußern Gesetzen) schon durch ihr Nebeneinandersein lädieren, und deren jeder, um seiner Sicherheit willen, von dem andern fordern kann und soll, mit ihm in eine der bürgerlichen ähnliche Verfassung zu treten, wo jedem sein Recht gesichert werden kann" (8:354)

wrongs are not only bound to occur, but are inherent to the condition itself; interactions are *a priori* conducted with the use of unilateral choice and thus of force. I can have no guarantee for my innate freedom or for my external possessions: "– Der Mensch aber (oder das Volk) im bloßen Naturstande benimmt mir diese Sicherheit, und lädiert mich schon durch eben diesen Zustand, indem er neben mir ist, obgleich nicht tätig (*facto*), doch durch die Gesetzlosigkeit seines Zustandes (*statu iniusto*)" (8:348). If there is no rule of law, then it is impossible to understand what should be the basis of reciprocal trust in a rightful exercise of one's personal freedom.[512] Once again, we recognise his rejection of a purely moral-ethical answer to such a query – this condition of war can be overcome only by a condition of right.

At the level of state law, we have seen that Kant postulates a coercible duty to make others subject themselves to the actual rights and jurisdiction of a given state or, upon their refusal, to make them leave its premises. We have a strict duty to enter civil society, a duty which also others can execute on our behalf. This has been correctly described as the non-voluntarist conception of political obligations in Kant (cf. Varden 2008). But does Kant also advocate a non-voluntarist conception of international political obligations? In other words, can other states, peoples, and/or individuals coerce others (and indeed everyone) to enter an international juridical order? Against some scholars,[513] but with Varden, my answer to this question is negative, based on important disanalogies between the two realms of national and international law, something of which Kant only gradually becomes aware. As we shall see, the disanalogies relate, not to the legal obligation to enter a condition of public right *per se*, but rather to vital differences in the establishment and realisation of law at the two levels.

Contrary to his position up to and including the *Gemeinspruch* essay, Kant clearly reaches an at first sight surprising conclusion in the peace essay regarding the implementation of international law. Despite the fact that, in an international condition without public legal authority, states can pursue their rights claims only by means of war and never through due legal process, i.e., "bei einem äußern Gerichtshofe", he still makes it perfectly clear that "von Staaten nach dem Völkerrecht nicht eben das gelten kann, was von Menschen im gesetzlosen Zustande nach dem Naturrecht gilt, 'aus diesem Zustande herausgehen zu sollen'" (8:355). At least from the second definitive article onwards, Kant claims that the strict legal obligation of *exeundum esse e statu naturali* does not apply in the same manner at the international stage as

[512] Cf. (8:356). The passage in question here will be discussed in greater detail below.
[513] I will return to some of these scholars in the next chapter, when I discuss the international legal framework in Kant. One obvious example, already mentioned, would be Byrd & Hruschka (2010).

it did at the national. In other words, his international *exeundum* argument does not generate a non-voluntary, coercive obligation.

Kant immediately presents the first argument that is relevant here: "weil sie als Staaten innerlich schon eine rechtliche Verfassung haben und also dem Zwange anderer, sie nach ihren Rechtsbegriffen unter eine erweiterte gesetzliche Verfassung zu bringen, entwachsen sind" (8:355 f.). Accordingly, states cannot rightfully be forced to leave the state of nature to comply with an international legal order; in Kant's view, they have already "outgrown" the necessity of others' coercive constraint. What does this assertion mean? It certainly cannot be meant as an empirical statement about the maturity and perfection of states; even in his own days, history would surely have convinced him otherwise. Instead, of course, this assertion is purely normative in nature. With regard to their internal affairs, states are already in a rightful condition and in no normative need of another. On the contrary, any coercive constraint from without would only undermine the authority of the no longer sovereign state and would cause incoherency in a non-empirical, normative sense.

This is because coercive constraint either is grounded in law and legal procedures, or it is not. In the latter case, one might in particular cases call for coercion to be applied to make a state comply with, for instance, basic individual rights standards. For Kant, however, there is an inherent, irresolvable problem with such an approach also beyond the jurisdiction of each nation-state: as long as these decisions are not grounded in international legal arrangements, this is nothing but war (or colonial exploits). Regardless of the possibly benevolent intentions of the belligerent or colonial state, this still constitutes a clear violation of right. In fact, Kant would not even use the word coercion for such a practice: it is an unlawful and unrightful use of unilateral force (*Gewalt*).

In such a case, of course, what is called for is the establishment of legal arrangements beyond the jurisdiction of each state, in order to use extra-state coercion according to standing positive law and procedures. The important point, however, is that in Kant's view, this would already have abolished the state character of the territory in which the intervention took place. Nothing less than a world state seems to suffice to meet the legal requirements concerning the use of coercion against another state, which in that case would not be a state, but a federal state, a province, a county (or the like) within the juridical arrangement of a world state.

A full investigation of the juridical character of Kant's international legal order must follow this line of thought. Although he makes passing references in the peace essay to two organisational forms of a possible world state – the peaceful world republic (*Weltrepublik*) and the feared universal monarchy (*Universalmonarchie*) – I must postpone the discussion of

these until the next chapter, where I shall consider whether or not they are compatible with his overall legal framework. Nevertheless, the very existence of the thought-figure of a universal monarchy makes it clear that for Kant, a world state cannot in fact offer a final guarantee for the preservation of all rights claims. Not even a world republic can outgrow the possibility of the empirical existence of wrongful acts that *de facto* prevail within its realm of jurisdiction, acts that are performed either by the world republic itself or by its subjects of law.[514]

Before I consider further Kant's different models for worldwide rightful relations in the next chapter, the claim that there are not only analogies between national and international law with regard to a realisation of the latter must be investigated. We soon realise that Kant nowhere argues for a forceful anticipation of an international juridical order. True, states may let another state that they have defeated in war adopt a constitution that is more pacific than the one previously held as a matter of *ius post bellum*. They may also declare and conduct wars against enemies that they believe make it impossible to realise the peace project as such. But as we also have seen, this can be done only as a defensive strategy to preserve one's rights and legitimate hopes of a peaceful world; it cannot be a coercive strategy to change the constitution and internal affairs of other states. Once again, a forceful improvement of one's inner capabilities can be legitimately executed only from within. Any lack thereof does not constitute a legal wrong that other, external powers may remedy at will.

To repeat a main line of argument at the international level of right in Kant: because of the normative nature of individuals and the states in which they reside, it is simply impossible to appeal to an international *lex permissiva* for a forceful anticipation or even approximation of a global legal order. Any such action beyond the jurisdiction of each separate state lacks *per se* rightful authority. It simply cannot be sanctioned by rightful law, but only by unrightful force.[515] To appeal to a Kantian international non-voluntary obligation, i.e., a coercible right to anticipate or approximate a legal order beyond one's own realm of rightful authority and formal jurisdiction, would be to utterly misunderstand the legal status and nature of the only two subjects of law involved at this level – the individual (singular or plural) and the state.[516]

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[514] A problem that thus remains in this model is that there is no earthly 'outside' to appeal to for any *rightful* use of *external* force in case of rights violations by *this* state authority. I return to this aspect later.

[515] As I have emphasised above, the only case to which this prohibition does not generally apply is that of uninhabited territory. But even if no individuals or states are wronged in such a case, Kant also maintains a right against a frightening force that acts too excessively in this regard – not in order to instate an internationally coercible legal order (an argument behind which the *potentia tremenda* can hide), but in order to make it possible not as an instance of mere unilateral choice and the right of the stronger.

[516] In the last subchapter, I also underlined that the original right to possession of the earth in common, contrary to what the consequences at the national level, did not result in an international permissive law to claim rights in inhabited areas of the world that were thought to be lacking in lawful authority. As I pointed out, this forms yet another disanalogy between the two levels of law.

As arguments against the attribution of normative legal status to individuals are quite rare, to say the least, theoretical misunderstandings primarily concern the normative juridical status of states. A standard stumbling block in Kant scholarship has been conceptions that treat the state as a possessor of a certain territory on which private and public relations take place. On this view, the state claims a right to state territory as if it were its property owner, but then claims a right that only private individuals have. Arguing in this manner, Byrd & Hruschka deny that states possess an equal legal character; instead, states possess merely the right to protect the private property and rights of the individuals who are at the real centre of Kant's legal philosophy (cf. Byrd & Hruschka 2008; 2010). The outcome of this is that states cannot make any rightful claim to sovereignty and a prohibition of intervention, since the only factor that matters are individuals and their private (and possibly public) rights.[517]

It is, however, possible to argue with Ripstein that this presents a false picture of Kant's state and thus also of his position on public right. The state, too, is a moral person with normative value and legal responsibility. Instead of conceiving the state territory as something to which the state claims an unrightful or at least unprivileged property right, Ripstein argues that the territory is rather "the spatial manifestation of the state" (Ripstein 2009: 228).[518] It would perhaps be more correct to say that it is the spatiotemporal manifestation of the state, but the point is in any case very well taken. Contrary to Byrd & Hruschka, but with Ripstein, we now realise that the realm of state jurisdiction is not a property that rulers have acquired or that they can hand over to others as if it were some sort of commodity. For Kant, this cannot be done in any rightful way. Rather, the state territory constitutes the borders within which the universal legislative will of the united people can attain objective practical reality.[519]

This highly instructive interpretation sheds much light on my general line of argument as well. For one thing, Ripstein supports my assessment that states too are moral persons with inalienable rights. Hence, a state can be viewed as the embodiment of the universal legislative will and therefore also of the moral person that the political community constitutes. If we then consider states as embodied moral persons that are adjacent to each other, rather than as a sort of possession of external objects, intrusion on state territory is analogous to a violation of the bodily integrity of individual human beings.[520] This means that intrusion on state territory (or

[517] Fernando R. Tesón (1998; 2005) is another Kant scholar who profoundly underestimates the normative legal status of states. I will *inter alia* in the next subchapter come back to his account.
[518] As is also emphasised and quoted by Mikalsen (2011: 311).
[519] The same point and vital differentiation are also made by Kant in a peace essay passage already quoted: "Ein Staat ist nämlich nicht (wie etwa der Boden, auf dem er seinen Sitz hat) eine Habe (patrimonium). Er ist eine Gesellschaft von Menschen, über die niemand anders, als er selbst zu gebieten und zu disponieren hat" (8:344).
[520] For the same line of argument, see Ripstein (2009) and Mikalsen (2011).

popular revolution, for that matter) is not analogous to claiming or reclaiming possession of an external object that is already (but unrightfully) held by someone else. On Kant's account, state authority (*inter alia* over its territory) is not a thing with a 'mine or yours' structure that can be handed over to someone in any way. Rather, state authority is a strict precondition for saying that something is mine or yours in the first place, and it presupposes state sovereignty. For Kant, this right to state sovereignty (at least in terms of legislative authority, i.e., popular sovereignty) is an inalienable right;[521] in its idea, it belongs to the people; in practical reality, it belongs to their *de facto* state representative(s).

Not only does this reading correspond with the *Rechtslehre* and the second preliminary article of the peace essay, with their adamant insistence that only states and individuals (and peoples) come into consideration in Kant's international law dimensions. It also agrees with his critique of Hufeland and any Wolffian grounding of the principle of right: if the principle is located in an obligation of moral (or even legal) perfection, then there is quite simply no limit to what one can rightfully coerce other persons (in this case, states) to do. Those who, unlike Kant, advocate a general permission to intervene in another state due to its presently imperfect state of affairs must then explicate another, ad hoc concept, as yet unaccounted for, in order to counter the normative possibility that, according to the primary obligation, there is in fact no end to the lengths to which one can go. The moral or legal fervour that is inherent in such an understanding of international relations is not found in Kant.[522]

Contrary to the incorrect analogy between states and possessions suggested by Byrd & Hruschka, the helpful analogy between states and persons proposed by Ripstein gives further support to my assessment that there is not, and cannot be, any international *lex permissiva* for Kant. In fact, there is another inherent feature of states that lends support to Ripstein's interpretation of them as moral persons adjacent to each other, a feature that also prevents or at least significantly hinders the actual use of coercion in the international realm. For merely by manifesting itself as a state within the time-space continuum, the state not only settles all rights claims internal to its territory. It also abandons all further rights claims external to it. States *can* refrain from an external use of freedom, perhaps not completely, but to a far lesser degree than individual persons: they may, so to speak, be entirely self-sufficient, especially in the quintessential terms of exercising one's freedom. It is no *a priori* truth that a state must go

[521] It suffices to quote the very last paragraph in the *Rechtslehre* sections on state law: "Das Recht der obersten Gesetzgebung im gemeinen Wesen ist kein veräußerliches, sondern das allerpersönlichste Recht" (6:342).
[522] I will return in the next subchapter to a brief critique of current views on so-called humanitarian interventions. For additional remarks against a Kantian moral or legal fervour on this point, see Lundestad & Williams (2011).

beyond its embodied being to act in the world. In fact, the opposite is true. As an *a priori* legal entity the state does not, and cannot, rightfully act beyond its own borders.

Acknowledging this has important consequences for grasping Kant's general argument and theory of international law. Like the individual, the state is a moral person. Nonetheless, all legal problems related to the consequences of both individual freedom of movement and contestable external objects can now be seen to fall outside the realm of international law.[523] In other words, there is, and can be, no rightful acquisition of external objects for Kant's states. His discussion of acquired rights simply does not apply to the inter-state sphere. Not only is a right to deny due legal status to other individuals and peoples out of the question. Qua state, the state has already constituted its boundaries for a possible rightful jurisdiction and authority and can have no further rightful claims to anything external.[524]

Kant's entire system of acquired rights thus completely lacks application in his domain of international law. It is scarcely necessary to point out that this aspect significantly helps to narrow down our investigation. We will witness in the next chapter how the realm of rightful interaction that is to be covered by his international legal model only has to consider some aspects of his system of rights, not its entire catalogue. The international legal order can thus be seen to settle and to warrant only a few carefully circumscribed rights claims. This will in turn have crucial consequences for its juridical character, and we will see below that this creates yet another disanalogy between Kant's two realms of state and inter-state law.

But there is more to be said here. As Kant quite explicitly claims, and as Ripstein's interpretation also underlines, the international state of nature is not analogous to the state of nature at the domestic level. They both stress that states already have a rightful constitution in terms of internal relations; it is only the external relations to other states (*Völkerrecht*) and peoples and individuals (*Weltbürgerrecht*) that need to be clarified as a matter of principle. In simpler terms, what is at stake in a state of nature is not the same in its two versions.

This is why Kant does not regard the realisation of international law as a transition (*Übergang*) from a condition of private to public right, like the realisation of state law (cf. §§41-42). Rather, it is 'merely' an extension of public right to the international domain, and with no *lex permissiva* to authorise any use of rightful coercion to facilitate the actual process of realisation. The international state of nature is accordingly different from the state of nature that individuals have a non-voluntary obligation to leave. The international lawless condition

[523] The feature of individual freedom of movement is, however, still applicable to the dimension of cosmopolitan law. I will consider this important aspect in greater detail in the next subchapter.
[524] As I already have highlighted: stateless, uninhabited land admittedly still generates the same problems as if we were in a state of nature between individuals. (But this too, as we have seen, is included in his reflecctions.)

must be viewed in a different light than its national equivalent. We must reflect on the vital consequences this has for the legal model that Kant advocates beyond the nation-states.

I shall look at this in detail below. At present, I can consolidate my initial support to Varden's claim that Kant's international political obligations have to be considered voluntarist in nature, not non-voluntarist. In Kant, accordingly, there cannot be any rightful authority to coerce other states and individuals to enter an international juridical order on someone else's terms. The different kind of obligation involved at the international level encapsulates the sum of the several disanalogies between the two legal dimensions. Again, this is not to suggest that the categorical imperative to leave the state of nature is somehow not categorical after all, or that it does not apply beyond the nation-state. Rather, the point here is that the establishment and realisation of an international rule of law must be conducted along different lines.

This, I have pointed out, stems first of all from the inalienable legal status or character that Kant assigns to individuals as well as to states. Both have outgrown the normative need for external coercion with regard to the internal affairs of moral or legal perfection. Also, it is normatively impossible for any external force to guarantee the rightful development and preservation of these, any more than the relevant moral person. Of course, this does not imply that the international community should not be concerned with these questions, nor that it should not forcefully intervene in certain limited cases. But it does impose certain restrictions and preconditions on how it can do so. These aspects have been investigated at some length in the two preceding subchapters, with states as the only rightful actors in an international realm devoid of public authority. I shall discuss in the next chapter whether a Kantian international legal order can be realised in order to overcome the state of nature that such a condition nonetheless is. I shall attempt there to clarify the legal character of his peace proposal.

Before I turn to this, however, another disanalogy between national and international law has to be addressed. Unlike state law, international law has two separate dimensions whose main principles also diametrically oppose each other. As already indicated, the main purpose of *Völkerrecht* is to ensure that all states remain free, equal, and sovereign. No other state (or, for that matter, individual) can rightfully claim something that is contrary to the public authority in question: in Kant's view, this would be synonymous with having a new sovereign in that state. As a matter of law, the reciprocal prohibition of any coercive use of external freedom is precisely what guarantees the internal freedom of states.[525] On the other

[525] Propositions about the so-called external sovereignty of states do not, of course, alter anything here, since they do not enter the argument at all. Many have interpreted the Peace of Westphalia as implying an *external* sovereignty of states, but for Kant, this does not, and cannot exist. States have – normatively speaking – internal

hand, the main purpose of *Weltbürgerrecht* is to secure individual rights despite this internal sovereignty of states. Cosmopolitan law grants each human being his or her inalienable rights to external freedom on a global scale, but it risks making a claim that runs completely counter to the key principle of inter-state law, i.e., the sovereignty of states in all matters of law. The final two dimensions of Kant's legal framework thus seem to contradict one another, thereby destabilising and undermining the entire construct.

1.5. *Völkerrecht* and *Weltbürgerrecht* as mutually exclusive?

The reason for the *prima facie* irreconcilable unification of both inter-state and cosmopolitan law lies in the mutually exclusive principles that the two dimensions are meant to guarantee. On the national level, the two principles of individual rights and state or popular sovereignty interacted to mutually presuppose and strengthen each other, but on the international level, they denote two different realms. Thanks to Kant's crucial expansion of international law to include a dimension of *Weltbürgerrecht*, he is able to make violations of individual rights a matter of jurisdiction that goes beyond the nation-state. The latter cannot hide behind the concept of internal state sovereignty in cosmopolitan affairs. Instead, it has legal obligations towards every individual across the globe. As a possible matter of positive law, however, this also has consequences for the conception of both popular and state sovereignty.

In part I, we observed that neither popular nor state sovereignty could do without each other in a realisation of *Recht*. Popular sovereignty is the normative basis for a rightful rule of law through the citizens' self-legislation of their rights, but it still needs to be embodied in actual state institutions that are already established (but that often fall short of the normative requirements of a rightful rule of law). Neither concept can do without the other: popular sovereignty without sovereign state institutions is an undifferentiated call of the masses with no recourse, as such, to rule of law principles, whereas state sovereignty that is not grounded in the principle of popular sovereignty is only the formless embodiment of an administrative will of distributed justice. Individual private rights may be preserved here, but only as the expression of the personal and basically private, despotic, paternalistic will of one who is a mere usurper of state power, no matter how beneficent the execution of this state power may be. There is no public autonomy, distributive justice, or republican rule of law in such a state of affairs.

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sovereignty, but can – empirically speaking – contest others' sovereignty and have their own contested. This does not alter the normative rightfulness of the first claim of internal sovereignty, nor does it establish an empirical (or normative) external sovereignty (since a plurality of states, or even of individuals on an equal legal footing, can equally contest the same right, with the consequence that no one is sovereign).

Popular and state sovereignty thus mutually presuppose each other. In turn, this united concept of sovereignty also stands, as I have argued, in a mutually strengthening relationship with individual rights. No individual rights without the sovereign state of public right, and no state of public right without the inalienable rights of the individual to both private as well as public autonomy. For Kant, the realisation of right thus takes the shape of continuous reforms of the spatiotemporal, factual condition of positive law according to *a priori* legal principles, which in turn are grounded in the human person's inalienable right to freedom (both private and public). Only this can give objective practical reality to the principles of right. Contrary to the opinion held by numerous scholars, this theoretical justification of legitimate law can be found in modern democratic theory as well as in Kant's philosophy of right. Its principle of a separation of powers ensures that rightful relations exclude the empirical identicality between rulers and ruled, but it also presupposes the normative identicality between legislators and legislated – the subjects of law, as citizens, must be the authors of the same laws.[526] Hence, individual rights and the sovereign state are clearly interdependent: at the state level, at least, they mutually presuppose and strengthen one another. But how is this internal relationship to be realised in the international realm?

Here, the picture quickly becomes complicated, because Kant's theory of international law contains a dual concept that is meant to guarantee both the inalienable sovereignty of states and the inalienable rights of individuals. At the same time, these two chief constituents are located on two different levels of law. The problem is not only that a natural right may be empirically violated or ignored by the actual rule of law at some specific point in time. This is, of course, a real risk for all legal orders and their subjects, regardless of the actual positing of the right in question or of the extent to which the legal order has in fact been realised. In this instance, the problem seems to be inherent to the juridical structure as such, since there is apparently a mutually exclusive relationship between *Völkerrecht* and *Weltbürgerrecht*.

Once we think of cosmopolitan right in substantial, positive terms, an expansion of the juridical framework can be achieved only through a relativisation of inter-state law and its main principle of state sovereignty. The problem does not arise within the old construct of just two legal dimensions. Here, on the one hand, states are sovereign in internal affairs, but with

[526] See my deliberations on this in part I, also Kant: "Die Idee einer mit dem natürlichen Rechte der Menschen zusammenstimmenden Konstitution: daß nämlich die dem Gesetz Gehorchenden auch zugleich, vereinigt, gesetzgebend sein sollen, liegt bei allen Staatsformen zum Grunde, und das gemeine Wesen, welches, ihr gemäß, durch reine Vernunftbegriffe gedacht, ein platonisches Ideal heißt (respublica noumenon), ist nicht ein leeres Hirngespinst, sondern die ewige Norm für alle bürgerliche Verfassung überhaupt und entfernt allen Krieg" (7:90 f.). Once again, Maus (1994) presents the best (and one of the few) accounts of Kant's theory as profoundly democratic.

some natural right obligations to reform the legal system according to the legitimate claims of the subjects of law (qua citizens), according to the principles of state law. On the other hand, this internal sovereignty is empirically threatened by the very existence of other states whose external affairs have to be regulated by inter-state law and its treaties and customs. In short, individuals realise their rights claims through state law, and states realise theirs through inter-state law. But as soon as cosmopolitan law enters the equation, there is a threefold juridical structure in which individuals now have rights claims against other states too. Any substantial understanding of cosmopolitan law must inevitably undermine the entire legal model, since such rights claims would *a priori* interfere with, and intervene in, the internal sovereignty of states which the two other levels attempted to reconcile and guarantee.

The apparent aporia, therefore, is that any actual realisation of individual cosmopolitan law presupposes a sovereign legal entity that guarantees this. But the concept of a sovereign legal entity in all internal matters is precisely what cosmopolitan law calls into question and seeks to remedy in the first place. Nevertheless, a realisation of *Weltbürgerrecht* presupposes both *Staats*- and *Völkerrecht*; these do not exist merely for their own self-preservation, but are also necessarily inherent to the legal order that is meant to guarantee individual cosmopolitan law as a matter of public right (and not unilateral might). It may appear highly paradoxical, but without state sovereignty there is quite simply no juridical entity to warrant a universal concept of *Weltbürgerrecht* and hence realise a safeguard against the sovereignty of states. In terms of a realisation of cosmopolitan law as specific individual rights in one positive, global legal order, the dilemma seems to be very real indeed.[527]

The problem here is not only that neither individuals nor states can get things right in a state of nature. It is also that Kant's two moral persons cannot both make their rights claims at the same time in a threefold legal framework. This is due to the fact that either is the state sovereign in relation to subject and non-subject alike (with different natural right duties that must be posited by the state in question), or else the non-subject cosmopolitan can rightfully claim his or her rights against other states too (which hence are not sovereign). I have shown above how he presents a theory of international law that does not appeal to external physical objects to indicate a possibility of reconciling his three legal dimensions, but another aspect seems now to make things even more complicated. For although the acquisition of external

[527] The case would, of course, be different if moral (i.e., legal) persons themselves could rightfully settle all rights claims in a conclusive manner even in a state of nature. But, as we have seen, Kant (unlike Locke) does not endorse such a view, and the international legal order that is required to overcome the present condition is precisely what is lacking at this stage of the investigation. (I return to this dilemma below.)

physical objects is not part of either of the two international dimensions in Kant, there is still one important feature that remains, namely, the individual freedom of movement.

Naturally, this aspect did not apply to the discussion of inter-state law. Now, however, it enters the discussion on cosmopolitan law with full force. Since individual free movement is both a precondition and a focal point of this dimension of law, there is no actual rights claim that the cosmopolitan can make without intruding on the main principle and purpose of *Völkerrecht*, i.e., the sovereign right of states to legislate and administrate their own juridical order. The interaction of human beings (and their belongings) that is covered by cosmopolitan law presupposes physical presence and movement on the territory of another state, a territory which, as we have seen, is 'only' the embodiment of the united legislative will of the people. But an actual right to this physical movement is either in correspondence with the law of the land (and thus allowed), or it is not (and thus prohibited). In other words, although there is no private right acquisition involved in Kant's rule of law beyond the state, there still remains a basic and seemingly irreconcilable conflict between his two international law dimensions.[528]

Kant's *Weltbürger* quite simply cannot have his or her claim enacted without thereby rejecting the principle of internal state sovereignty. He or she can neither personally make a coercible rights claim to do so, nor rightfully call upon a state or alliance of states to intervene in another state's territory. For Kant, any forceful enactment of such a substantial, unmediated concept of cosmopolitan law will necessarily stand in diametrical opposition to the other legal concept of international law, the sovereignty of states. The true dilemma of international law is how to unite these two concepts in the international sphere. Still, quite a few scholars (not to mention statespersons) gloss over this fact when addressing the topic of global justice. This is perhaps nowhere better seen than in contemporary discussions (or the lack thereof) of the case of so-called humanitarian intervention. These present us with an excellent example that illustrates the main point here.

Over the last few decades, in the noble name of protecting human rights, there has been a sharp increase in military interventions. Even if this form of warfare and justification is not necessarily new,[529] it has nonetheless acquired a peculiar feature in recent years. Such an intervention is in fact war, but this term is almost never used when speaking of it. Instead, it is lauded as some sort of international legal police action against rogue states, loosely based on

[528] Ripstein (2009: 295 ff.) quite rightly emphasises that freedom of movement is included in Kant's formulations of cosmopolitan law, and goes on to argue for a Kantian natural right to travel across states to visit otherwise inaccessible lands. But the realisation of this right in actual practice, through an international legal order, is a task that still must be sorted out in a manner that does not violate the principle of state (and popular) sovereignty.

[529] Cf. e.g. Chesterman (2001). See also my co-authored 2011 article, upon which the above argument draws.

an indeterminate but global concept of a so-called responsibility to protect all human beings. Not only is this development in serious danger of downscaling the levees that separate law from morality in the international realm; it also blurs the delineated borders between states as well as between legislative authority and monopolised means of coercion. Although the calls for various humanitarian interventions come from a wide range of locations and differ greatly in reason and intensity, they usually ignore the real dilemma at hand.

A fairly plain and regularly cited justification of humanitarian intervention is given by the jurist Fernando R. Tesón in his *Philosophy of International Law*. Advocating what he calls a "liberal theory of international law" committed to "*normative individualism*", he holds the individual to be the "primary normative unit" (Tesón 1998: 1). The state exists only in order to protect individual rights, and in cases of rights violations, other states (in particular liberal democracies) are entitled to go to war, as long as this practice is "consistent with respect for international human rights" (ibid.: 56). As a self-professed Kantian, he proceeds (without any textual evidence) to argue that this corresponds with the position taken by Kant, whose theory allegedly "includes a theory of just war; it is the war waged in defense of human rights" (ibid.).[530]

A lot can be said about this. The key objection here concerns Tesón's reduction of the state to mere protection of human rights, a task that apparently can be handed over to anyone, as long as it contributes to fewer human rights violations. On such a reading, any principle of state sovereignty and a corresponding ban on intervention is completely secondary (if, indeed, it is relevant at all) to the principal priority: namely, that each one is secured his or her own rights. But this entails subscribing to the view (not attributable to Kant) that private rights can in fact be conclusively delineated and guaranteed without final recourse to a concept of state sovereignty and public right. When Tesón (1998: 25) goes on to advocate UN reforms that do not recognise the sovereign equality of states, he installs an international hierarchy between them that is incompatible with the Kantian concept of law (that presupposes the *equality* of all subjects). In the end, Tesón clearly ascribes to self-professed liberal democracies a privileged role in a global distribution of rights and sanctions that are exercised on their own terms.

Tesón's theoretical and practical judgment on these issues may perhaps be singled out as particularly poor and bellicose. Nonetheless, other proposals that seriously try to ground all instances of state intervention in an international legal order are similarly unable to overcome the structural problem that has arisen between Kant's inter-state and cosmopolitan levels.

[530] On the Second Gulf War as legitimate and justified qua humanitarian intervention, see Tesón (2005).

However one constructs the legal system, it seems that one cannot attain both dimensions in actual practice. If one guarantees the *Völkerrecht* principle of internal state sovereignty, then one cannot guarantee the cosmopolitan law of worldwide human rights, and vice versa: if one guarantees the principle of *Weltbürgerrecht*, then one no longer guarantees the principle of the sovereignty of states. In the practical realisation of international law, we seem obliged to concede that in the final analysis, one dimension is affirmed and the other is not. And if the contemporary theory and practice related to the case of humanitarian intervention can teach us anything, it is surely that the present momentum is on the side of global human rights.[531]

I will return to the question of whether international legal institutionalisation (or even constitutionalisation) of a particular kind might overcome this apparent aporia with regard to establishing the rule of law beyond the state. Habermas is one of those who consider this possible, but he has to relativise the principle of state sovereignty in the process. The specific elements of this view will be presented below, but I can already assert that normative grounds require him to establish a so-called new concept of sovereignty in the international realm (cf. Habermas 2005: 332 ff.). Thereby, he confirms my point: contrary to what is the case at the national level, the two dimensions of the sovereignty of states and cosmopolitan law seem to be mutually exclusive as soon as it is a question of the practical realisation of an international rule of law.

Of course, the whole problem would have been avoided if the two concepts had been integrated in one sovereign world state, in a manner similar to the legal arrangement within each separate nation-state. In that case, the *Weltbürger* would truly be a world citizen, both the author of cosmopolitan law and its subject. But as the final chapter and the epilogue will show, Kant nowhere suggests that the third dimension of law includes some sort of universal citizen right to legislation. The cosmopolitan cannot actively change the laws of other states

[531] I will consider various aspects of this debate below. At this point, I can make the following affirmation about a possible interpretation of Kant: contrary to Tesón and most other self-professed Kantians today, Kant himself seems rather to favour the enactment of the principle of state sovereignty over the principle of cosmopolitan law (cf. his prohibition of warfare in general in both the peace essay and the *Rechtslehre* and, more specifically, the fifth preliminary of the former text, which certainly comes down on the side of state sovereignty). A definitive position on Kant and humanitarian intervention would perhaps be mere speculation, but a few points can be made. It is beyond all doubt that such actions still amount to war, a fact that most scholars and statespersons today circumvent all too lightly. Also, any advocacy for intervention based on Kantian grounds must clearly delimit its criteria. It is evident that he does not give a general permission in any of his works. This is something commentators must take into account before they argue that he somehow still advocates such a stance or that he ought to have done so. An argument for the latter case begs questions about who is authorised to do what, with what means, and at what time, in the case of which rights infringements perpetrated by whom, and how, on whom, etc. I think it is (at best) ignorance to suggest that Kant did not think of these questions himself, or that he answered them in any way other than through the necessary requirement of a legal condition, which at the national level is the state with its rightful claim to the use of coercion, and at the international level, as we will see, the free federation that by definition cannot consistently make the same claim.

that prevent an exercise of one's corresponding rights (not even through the state channel of legislation); nor does Kant sketch an historical or political development towards one global citizenry (let alone its normative necessity). However much the right is grounded in a right to possession of the Earth in common, from the perspective of cosmopolitan law, his *Weltbürger* is not part of a universal legislative will. Individual rights at the global level are not inherently coupled in his book with a claim to partake in a concept of world state sovereignty.

These general remarks seem sufficient to suggest at least a potential structural problem in any threefold legal framework. Thus far, I have considered the preconditions and criteria for a rightful exercise of force at the inter-state as well as the cosmopolitan levels in Kant. I have also illustrated how crucial disanalogies between national and international law prevent a straightforward implementation of his state right principles in the international domain. One of these differences included his assignment of the two main principles of state law to two different realms, once these were lifted out of their context of established rule of law in the state and imported to international dimensions devoid of an established public authority. We cannot determine how he tries to theoretically establish a rightful international legal system in actual practice without answering the now evidently imperative question of the legal character of such an order. Up to this point, the discussion has concentrated primarily on the possible content of, and criteria for, rightful relations beyond the nation-state (and a possible dilemma in this regard). In the next chapter, I shall consider the rightful form of these relations.

2. The juridical character of Kant's international legal order

Kant scholars, both past and present, disagree strongly about which international legal model he actually advocated. Did he ultimately prefer the non-voluntary world republic rather than a voluntary federation of a league of states, in order to establish rightful relations worldwide? Many of the scholars are, however, quick to reformulate this question, asking instead which of the two models he actually ought to have advocated, the standard position being that Kant, in his late writings, settled for the league of states, but for purely pragmatic reasons; his one and only normative ideal was always the world republic.

One scholar to whom this standard view is attributable is Pauline Kleingeld, who holds that Kant settled for the league of states model, but only as the negative surrogate he himself admitted it was (cf. 8:357). Kant's normative ideal still remained that of a *Völkerstaat*, that is, "a state of states" (Kleingeld 2006: 483). His reasons for discarding the positive idea of the republican world state in favour of the model of a *Völkerbund* are thus mainly perceived as entirely pragmatic, and not a few commentators have found it difficult to square this with his overall position, which clearly argues that what holds for theory must also hold for practice. Cavallar, too, has raised the quite common and substantial objection that Kant thereby "shifts from a convincing transcendental approach to an empirical one, from genuinely juridical a priori arguments to a pragmatic one" (Cavallar 1999: 123). Therefore, both he and Kleingeld have proposed what we can call a step model – treating the league of states as a necessary but only intermediary step on the road to a realisation of the one true ideal: a world republic that conclusively guarantees perpetual peace and cosmopolitan law (cf. Cavallar 1999: 113 ff.; Kleingeld 2006: 477 ff.).[532]

In what follows, I will not argue against the correct assessment that the world republic is a Kantian ideal for establishing worldwide rightful relations that is both theoretically cogent and practically realisable. I will, however, make the controversial claim that Kant's league of states model also provides a normatively sufficient legal framework in this regard. This means that the world state is not the only way to realise the peace project and global human rights. I will contend that he preferred the state world model of a league of states to the world state model of a world republic for normative reasons as well,[533] and also that the league of states is

[532] Mikalsen (2011) has in a similar manner addressed and criticised the approaches of both Kleingeld and Byrd & Hruschka as two different 'stage model interpretations' of Kantian international law. We may note here that Habermas argues somewhat differently when he places his international construct somewhere between Kant's two models (and thus, like me, does not primarily conceive of these in terms of a step model, but rather as two different formal alternatives with differing advantages and disadvantages). I return to this below.

[533] Inherent to this claim is Kant's insight that the league offers the better solution to the apparent aporia between the two dimensions of *Völkerrecht* and *Weltbürgerrecht* highlighted above. I return to these questions below.

in fact his only model for international law. This, of course, is connected to the legal character of the juridical orders in question. A closer inspection of his remarks on international law will reveal that the perfectly coherent model of the republican world state is never discussed in his mature texts as a model for *international* law, and falls outside of the equation entirely. This is because a world state turns all law into world state law: it may provide a consistent juridical framework for rightful relations worldwide, but it also discards the international realm in the process.

Over the course of the next subchapters, I hope to demonstrate these novel claims convincingly. With the help of Kant's legal concepts that I have already presented, and an elaborate investigation of his discussion of the juridical character of his legal models for rightful relations beyond the nation-state, I shall attempt to show that he actually prefers the league of states in both theory and practice. To corroborate this assertion, I will first consider the three different models he discusses with regard to global rightful relations – the universal monarchy, the world republic, and the league of states (2.1). In the ensuing subchapter, I will develop the claim that both the world republic and the league of states provide theoretically consistent and normatively sufficient legal entities for worldwide rightful relations, but that only the league retains the international dimension. I shall argue that the idea of international law presupposes the league of states arrangement, which can be best described as Kant's non-constitutionalised model for an international legal order (2.2) Finally, I will put forward the claim that this is the only model that is in line with his basic concepts and requirements for an international rule of law, and that it must be understood as an ongoing process of a continual approximation to perpetual peace and cosmopolitan law (2.3).

2.1. Three Kantian models for worldwide rightful relations

As we know, Kant considers various models in his deliberations on the establishment and realisation of law beyond the nation-state. Some terms are used interchangeably, while others are completely antithetical. The most obvious example of the latter is his explicit dichotomy between the two concepts of a world state (*Völkerstaat*) and a league of states (*Völkerbund*). Since it is not always intuitively clear to what concept all other terms actually relate, a certain amount of confusion is almost bound to arise in the secondary literature. Kant, it has been argued, may have to shoulder some of the blame in this regard (cf. Byrd & Hruschka 2008: 628 ff.), although the assertion that his terminology in the different texts "constantly varies" (ibid.: 632) is more than stretching the point.

With Byrd & Hruschka, I contend that Kant discusses three different legal models for worldwide rightful relations, although I slightly disagree with their classification of all the terms. However, I more than slightly disagree with their view of how the different groups and models relate to the overall normative ideal of realising the peace project. I shall discuss that in the next two subchapters. Here, I will consider only what I believe are his three different juridical models for global right and justice, and I shall discuss this primarily in terms of their formal qualities. In other words, I will not take a final position with regard to their respective potential for realising perpetual peace and cosmopolitan law in practice. At this point, the task is only to investigate whether, and to what degree, the legal models as such are theoretically coherent with Kant's insistence on the necessity of establishing the rule of law even beyond the nation-state.

The three models I shall identify and discuss here are the universal monarchy, the world republic, and the league of states. Our understanding of Kant's position on the world state will be much clearer once we realise, as I suggest here, that it appears in his writings in two different forms: the universal monarchy and the world republic. This vital point is ignored in most (or even all) secondary literature. Cavallar's *cri de cœur* is exemplary: "Kant does not seem to distinguish between a universal state with a republican or a despotic form of government" (Cavallar 1999: 116). I argue, on the contrary, that this is *precisely* what Kant does (and why he ultimately prefers the league of states even from a normative perspective). This often overlooked, but highly important aspect follows, as I will show, because the world state must necessarily have one of the two forms of government that he distinguishes at the level of state law, depending on whether it knows and exercises a strict separation of powers. Hence, the world state, too, has either a despotic or a republican form of government; this is, respectively, the universal monarchy and the world republic. This novel claim will hopefully become more evident when I now turn to the details of Kant's first model for rightful relations worldwide, the universal monarchy.[534]

a) The universal monarchy

The feared legal entity of the universal monarchy surfaces in all of Kant's mature writings on legal and political philosophy, although not always in that exact phrase. It is formulated most

[534] Consequently, Byrd & Hruschka's (and others') identification of three different models in Kant's works is to some degree helpful, and I will employ it myself when discussing their various characteristics. Nevertheless, I believe this standard interpretation can be unfortunate, insofar as it overlooks the more important insight that I argue is inherent to Kant's models, namely that he, crucially, also addresses two separate legal entities in this context: the world state (despotic or republican) and the league of states. I shall develop this claim and its implications further in the following sections.

poignantly in the peace essay as a clear warning against proceeding towards international rule of law arrangements that expand too swiftly. Whatever shape such a legal integration of states takes, it must not lead to a "Zusammenschmelzung derselben [der Staaten] durch eine die andere überwachsende und in eine Universalmonarchie übergehende Macht". This will only create "ein seelenloser Despotism" that eradicates "die Keime des Guten" before it dissolves into "Anarchie" (8:367). His great fear of soulless despotism as a possible global legal entity without proper freedom is presented in even gloomier terms in the 1793 essay on religion:

> Ein jeder Staat strebt, so lange er einen andern neben sich hat, den er zu bezwingen hoffen darf, sich durch dieses Unterwerfung zu vergrößern, und also zur Universalmonarchie, einer Verfassung, darin alle Freiheit und mit ihr (was die Folge derselben ist) Tugend, Geschmack und Wissenschaft erlöschen müßte. Allein dieses Ungeheuer (in welchem die Gesetze allmählich ihre Kraft verlieren), nachdem es alle benachbarte verschlungen hat, löset sich endlich von selbst auf und teilt sich durch Aufruhr und Zwiespalt in viele kleinere Staaten, die, anstatt zu einem Staatenverein (Republik freier verbündeter Völker) zu streben, wiederum ihrerseits jeder dasselbe Spiel von neuem anfangen (6:34).

His awareness of a possibly negative outcome to an unrightful (or merely unfortunate) process of establishing the rule of law beyond the nation-state is apparent also in Kant's other two main works on the philosophy of right. In the *Gemeinspruch* essay, where he also holds the cosmopolitan constitution as *the* ideal of worldwide rightful relations, he does so with a clear proviso. This "Zustand eines allgemeinen Friedens" must not be established if it "auf einer andern Seite" brings with it "den schrecklichsten Despotismus", which for Kant poses a greater danger to freedom than a condition of constant wars. Such developments towards a horrible, soulless despotism, "wie es mit übergroßen Staaten wohl auch mehrmals gegangen ist" (8:310 f.),[535] may take place even in and under the direction of a state endowed with rule of law arrangements. Kant accordingly holds any expansion of jurisdiction (even when this is in accordance with positive law) beyond the nation-state that in the process also jeopardises external freedom to be more dangerous and to be feared than a condition with an inherent possibility of wars and actual hostilities breaking out at any time. For Kant, any process of juridification in the international realm that thus endangers rather than promotes the freedom it seeks to establish is inconsistent with right and must be avoided.[536]

Although the term 'universal monarchy' is not used in the *Rechtslehre*, I believe that a related reference to the other texts couples it to the peace essay's description of the soulless

[535] It is difficult to identify with certainty the overgrown states Kant has in mind here, but the concept of universal monarchies was often used at that time with regard to the Chinese Empire, the Holy Roman Empire (at least under Charles V), as well as the attempts at French expansion throughout Europe under Louis XIV.
[536] This is, of course, a normative, but primarily pragmatic claim (insofar as it is based on contingent factors). I will return below to the viability and normative desirability of the processes of international juridification from this and other perspectives.

despotism. The world state of 1797 is rejected, insofar as it "bei gar zu großer Ausdehnung" cannot be governed by law and, accordingly, makes its main purpose, "die Beschützung eines jeden Gliedes endlich unmöglich" (6:350). This remark can be seen to echo Kant's objection to the universal monarchy two years earlier, when he rejected it because "die Gesetze mit dem vergrößerten Umfange der Regierung immer mehr an ihrem Nachdruck einbüßen" (8:367) and thus make it impossible for legal orders to promote and provide the freedom from which they draw their legitimacy in the first place.

This objection, which we see is raised in the peace essay and the *Rechtslehre*, seems at first glance to be of a purely pragmatic nature. Legal orders that expand too quickly are, as a matter of fact, unable to protect the subjects of law, and thus cannot guarantee what they were established for in the first place, that is, global individual rights. Indeed, such an ill-thought-out and premature legal expansion makes the actual enforcement of law arbitrary, and thus no rule of law at all. As several commentators have argued in this connection (e.g. Cavallar), the validity of such a claim rests on purely empirical grounds and will collapse as soon as a legal and political culture, administrative procedures, technology, etc. are sufficiently developed to actually guarantee the rule of law worldwide. Taken by itself, this response is, of course, correct. However, I believe this affirmation fails to consider another Kantian objection that is not just pragmatic, but rather normative, namely the internal structural relationship between the legislative and executive power within the legal order itself.

If we look once again at Kant's criticism of rule of law arrangements beyond the state in his two major works on the subject, we will see that both of them address a shift of political power within the legal order itself. The universal monarchy or the world state that expands too quickly is rejected not merely for pragmatic reasons, but because it transfers (at least *de facto*) state sovereignty from the legislative to the executive authority. In the peace essay, the reason why the universal monarchy is a soulless despotism is because "die Gesetze mit dem vergrößerten Umfange der Regierung immer mehr an ihrem Nachdruck einbüßen" (ibid.). Similarly, in the *Rechtslehre*, the "Regierung" of a world state that expands too hurriedly is impossible, since the executive power cannot grant the individuals in this condition what they are entitled to according to law and legislation. In neither instance is the argument exclusively pragmatic. Rather, it also points to an inherent development regarding the internal relationship between the legislative and executive authority. In both instances, actual laws and legislation gradually lose their vigour as the executive, coercive power either grows too large or simply cannot guarantee the rights that the legal order prescribes.

Considered from this perspective, the world state solution is also exposed to a basic normative argument of republican-democratic origin. Since the legal institutions necessary for the rule of law beyond the nation-state are established too quickly, the legal and political power and authority, not to mention the sovereignty, have accordingly to be transferred from the legislative to the executive branch of government. The move towards worldwide rightful relations thus initiates a corresponding move within the legal order itself. The latter move is oriented towards coercion rather than freedom, to particular rule rather than universal laws, to facts rather than norms, to state apparatus rather than the union of citizens, to administration of justice rather than public deliberation on justice, and to the distribution of justice rather than distributive justice. In short, it is a move towards despotism rather than a world republic. This perspective can hopefully strengthen my initial claim that this aspect is precisely what Kant has in mind when he refers to and rejects the universal monarchy. It is a juridical entity that provides (or at least sets out to provide) a consistent framework for worldwide rightful relations, but that in the process also dilutes or even negates the Kantian principle of a strict separation of powers. Accordingly, it turns into a despotic world state devoid of right and of rightful relations that are in keeping with universal laws of freedom.[537]

My claim that Kant's feared universal monarchy is simply a despotic world state can also be read out of the very definition of monarchy. The monarch, as we recall from §51 of the *Rechtslehre* (cf. 6:338 f.), is the single executive ruler of the state, whereas the autocrat is the single legislator and sovereign under the republican rule of law. A monarch is possible as a rightful executive power representing the sovereign in a republic, but a monarchy is *per se* a despotic state for Kant, as the executive power does not stand under republican legislative control. Again, this is precisely what a universal monarchy is, and this is why it is rejected by Kant. It may – at least for a while – provide a "Zustand eines allgemeinen Friedens" (8:310), but it cannot provide a rightful, republican condition, since it is by definition a world state in which a single executive ruler who is not bound by law or legislative control runs the state of affairs according to his/her/its own arbitrary will – in other words, despotism. This does not mean that the content of laws may not be the same as, or even better than, in a perfectly rightful world republic; the point is only that they are upheld as the private moral argument of the ruler, not as a matter of autonomous public right.

[537] I will return in the next subchapter to a further discussion of the possibility of world state despotism. At this point, I can further undergird at a formal level my assertion that the universal monarchy is precisely this: a world state which does not know and/or does not exercise the principle of a separation of powers.

It is accordingly possible to conclude that Kant rejects the legal entity of the universal monarchy on a basis of principle. Granted, it was rejected at an earlier stage on the grounds of a risk analysis of probable empirical consequences. But his late introduction of a formal legal viewpoint, accompanied by *a priori* normative arguments, means that the universal monarchy can be, must be, and is rejected by Kant because it constitutes a despotic global government that is not bound by law (or is unable to uphold this requirement). The despotic world state may, of course, like a despotic state, provide a theoretical framework that establishes rightful relations within its relevant territory, but the crucial point is that these are upheld only as the beneficent expression of the arbitrary will of the monarch who is on top. Thereby, this system amounts to what he sees as the worst form of despotism, namely, paternalism, on nothing less than a global scale and with no possible rightful exit.

b) The world republic

What is sought along these lines is the Kantian world state that is also formally correct, i.e., the world republic. This legal entity is not only theoretically cogent and normatively sufficient for global rightful relations, but also knows and exercises the principle of a strict separation of powers in order to instate a world republic that guarantees worldwide human rights according to universal laws of freedom. I am convinced that this is what Kant has in mind when he refers to a condition with a cosmopolitan constitution that does not endanger freedom in the *Gemeinspruch* essay (cf. 8:310), to the *Völkerstaat* understood as the positive idea of the *Weltrepublik* in the peace essay (cf. 8:357), and finally, although only indirectly, to the world state that does not expand too quickly in the *Rechtslehre* (cf. 6:350). In all three works, such a state is sufficient for both the theory and practice of worldwide rightful relations.

Accordingly, I do not disagree with those scholars who advocate the world republic as a Kantian solution to instate right and justice on a global level. The world republic ends the international state of nature and establishes perfectly rightful relations worldwide. It is, as the peace essay adamantly insists, a proposal that is right "*in thesi*" (8:357), that is, theoretically correct. Apparently, all that remains to be done is to realise this theoretical juridical model in political practice without thereby violating any other principles of right. In view of this, one should perhaps simply follow Kleingeld and Cavallar in arguing for a Kantian step model in which the league of states is a mere transitory stage and the main question is pragmatic: how are we most likely to attain the actual realisation of the world republic?

However, this is not all there is to Kant's account of international law. I will shortly present his league of states model and argue that this juridical entity also provides a consistent

framework that is normatively sufficient for worldwide rightful relations. Before I do so, I shall examine Kant's positive idea of the world republic, to confirm the affirmation that we are not allowed to ascribe to it a specific content with regard to laws and/or justice. I take as my starting point the classification by Byrd and Hruschka of what they, too, consider to be the three different international legal models in Kant's mature works. I hope to show why their classification and evaluation of the various models are somewhat off the mark.

On two separate occasions, Byrd & Hruschka have presented almost identical readings of the three Kantian models (cf. Byrd & Hruschka 2008: 627 ff.; 2010: 196 ff.). They are right to identify these as the universal monarchy, the state of nations or world republic, and the league of nations or states (*Völkerbund*).[538] But they soon introduce contingent facets to make their further evaluation plausible. They see the universal monarchy and the world republic as distinct, not because of the form of government, but because of the source of state power. The first has "only *one* source, only *one* origin of state power" (Byrd & Hruschka 2010: 197) to establish it as a unitary world state. The world republic has several sources, since "the peoples and the states representing them are preserved" (ibid.: 198). (In order for this state of nations to be a world republic and not merely a league, the states "must submit themselves to public coercive law" (ibid.: 202).) In a surprising justificatory move, Byrd & Hruschka proceed to claim that the three different juridical models must be understood on the basis of substantive rather than formal aspects: "The distinction between the individual models must be drawn on the basis of substantive and not terminological criteria" (ibid.: 200).

This is difficult to accept. Because Kant's various discussions of the models do not employ one uniform standard of terms, or because the terminology "constantly varies", as we have seen them put it in a passage already cited, Byrd & Hruschka advise us to follow one substantive interpretation – their own – of what, by all Kant's standards, are entirely formal concepts of law. They then use warnings in earlier texts against the empirical consequences of a universal monarchy as proof of its despotic character. Typical examples are the fear or risk analysis expressed in the peace essay and the essay on religion: a universal monarchy can ruin all freedom, virtue, and science. In the introduction to their commentary on the *Rechtslehre,* however, they had dismissed every other text as unimportant (cf. ibid.: 13), holding aloft the purely metaphysical character of his final work as Kant's definitive position. But they then do the opposite of what this final text states: they include empirical, contingent features in their

[538] As indicated earlier, I will consistently use the term 'league of states' for Kant's *Völkerbund*, although 'peoples' (or, correctly understood, 'nations') comes closer to conveying the original meaning. How the league of states must be understood as guided by peoples rather than by states will also become clearer in the next subchapter.

evaluation of the rightfulness of the different juridical frameworks, which are supposed to be entirely formal constructs.

On their reading, the universal monarchy is inconsistent with right and peace, because it is more likely to stifle than to promote freedom; also, it melts all peoples and cultures into one, it despotically imposes one language and religion, and it suppresses rather than resolves disputes (cf. e.g. ibid.: 198). Not surprisingly, the state of nations happens to exercise the positive variants of these aspects, by not merging all nations, peoples, states, social cultures, languages, religion, etc. into one. Instead, these are maintained in the world republic or state of nations as a multitude of "independent sources of state power" (ibid.: 197).

But this is to give a formal model empirical features that it cannot itself guarantee, but only aspire to. It is thus clear that Byrd & Hruschka rather naïvely use the term 'republic' as conveying all that is good about government by law (e.g. "the word 'republic' has a positive meaning from the time of *Religion* (1793) all the way through the *Doctrine of Right*" (ibid.: 199)), and the universal monarchy as a symbol of all that is bad. This way of addressing a question has as much explanatory force as Mallet du Pan's description of what constitutes a good government – namely, the best is the one that is best governed. Kant argued against this claim that it is either an empty tautology or simply wrong; such a formulation does not clarify what amounts to a good or rightful constitution, nor does it establish any other principles for evaluating what is good or rightful in the conduct of one specific government (cf. 8:353).

Furthermore, it is simply not the case that the universal monarchy is despotic because it only has one source of power, whereas the state of nations is a republican and positive idea of legal international institutionalisation because it maintains a plethora of sources in nations, peoples, and states. Cultural, social, ethical, religious, linguistic, historical and other sources from which legal entities can draw their political legitimacy are, of course, important for their recognition, preservation, further development, etc. But when Kant establishes a metaphysical framework of right, his primary interest is not in these empirical features. Instead, he seeks a universal principle of law that does not allow differences in these or any other sources to result in differences in our inalienable rights qua human beings. This endeavour is conducted from a legal perspective that operates on an entirely formal level of rights, a formal level that includes the public authority of the state to posit, apply, and enforce these rights. For Kant, this latter aspect relates to the threefold and procedural form of the public rule of law, not to its particular content or outcome. It is indeed true that he speaks of contingently dependent positives and negatives when discussing the different juridical models, especially in the essays

on peace and religion. But if we stick to his normative argument, I believe we will arrive at a conclusion in which empirical effects of this kind are not turned into initial causes.

Therefore, I argue that we must treat the universal monarchy and the world republic according to the same principles that Kant established at the level of state law, and not with reference to *societal* sources of power. This last aspect can, of course, be arranged in various ways and with various outcomes within one and the same legal order. For instance, a federal world state with only a limited central government can leave many or even all of its decisions to lower levels of law (e.g. states or regional regimes) according to a principle of subsidiarity. This arrangement can then preserve, promote, and enhance social, national, political, cultural, ethical, and other sources in a perfectly fine manner. A more strongly integrated world state solves these tasks differently, for better or for worse. Kant's main point, however, is that this does not *a priori* make one federal arrangement more preferable than another. For Kant, the difficult challenges of taking the 'right' decisions at the 'right' level are, of course, important. However, these questions are of a more or less purely contingent nature and must be answered in a distinctively political context. They are not questions for a philosopher king to decide.[539]

Rather, the quintessential question that Kant asked concerns the *legal* source of power and authority. To answer this, we must ascertain whether and to what degree there is a rule of law or not, and whether it is republican or despotic. The question is not, as Byrd & Hruschka assume, whether several social sources are drawn upon for legitimacy in legal and political processes, but whether there is a single, sovereign authority of law from which the legitimacy of these processes is constituted in the first place. *This* authority must necessarily be a single source of law, regardless of how (or whether) it authorises, at a next step, any number of other sources for the rightfulness of the legal and political processes that it generates. For Kant and Enlightenment republican thought, the principal question concerns the rightful, sovereign source of legal and political authority. In Kant's view, this is what philosophy of right means at its most basic and formal, metaphysical level: namely, how to answer the question and the challenges posed by the sovereignty of states and hence also the rule of law. And at the global level of the realm of right, both the universal monarchy and the world republic emanate from a single source of law (a world constitution). Although the two models can diverge greatly in the use they make of a multitude of social sources and federal levels within their constructs, the first question that has to be addressed and answered for Kant is, as it was at the state level, whether the constitution is republican or despotic.

[539] Again, with reference to this aspect, see Kant (8:369) and Gerhardt (2004). I return to this important facet in the next subchapter, where I discuss the respective desirability of the world republic and the league of states.

On this interpretation of Kant, the universal monarchy and the world republic are the two possible forms of world state government. The former juridical model is a despotic world state, the latter republican. They contribute in different directions to negative and/or positive contingent facets within the legal condition. This is important. Nevertheless, it does not apply to their normative classification as despotic and republican forms of world state government. Their internal structure with regard to different levels of decision-making is another question. A despotic world state may have a federal solution that is superior to the solution offered by a world republic, and it may even produce the best outcomes; but this does not in any sense alter Kant's normative conclusion that the latter has a rightful form of government, while the former does not. Of the two models, it is always the world republic that is right. It provides and promotes a juridical framework for worldwide rightful relations that is sufficient in both theory and practice.

c) The league of states

If we now were to follow Kleingeld and/or Cavallar, the next remarks on the league of states would be relevant only as an intermediary step that enables Kant and ourselves to finally reach the end of the *Rechtslehre*, the legal condition of both perpetual peace and cosmopolitan law. These remarks would be justified only pragmatically, that is, in order to help us not to stumble and thus having to start from the very beginning the process of realising the one and only ideal of the account Kant gives of international law, namely, the world republic. Byrd & Hruschka ascribe the league of states a similar task when they write, in derogatory fashion, that despite all of its inadequacies, it still "is better than nothing" (Byrd & Hruschka 2010: 200). Contrary to these views, I argue that the much-maligned league actually provides what Kant seeks, that is, an international legal framework for solving differences or disputes about rights in a rightful manner. He thereby establishes a theoretically consistent and normatively sufficient legal order for worldwide rightful relations in the shape of a league of states. I will argue in the next subchapter that this is also his only model for *international* rightful relations. Here, in this section, I limit the discussion to a reading of the league model that regards this too as a rightful Kantian juridical framework on par with the framework offered by the world republic. Let us therefore start with the passage that most often is taken to contradict this controversial claim.

A lot has been made out of Kant's comment in the peace essay that the model of an all-encompassing world republic is right *in thesi*, but is rejected *in hypothesi* by the peoples, who prefer the non-coercible and voluntary agreement of a league of states (cf. 8:357). This is

widely regarded as indisputable evidence of his theoretical preference for the world republic model and a corresponding rejection and merely pragmatic defence of the league of states. Cavallar is one of many commentators[540] who interpret the passage this way. Accordingly, he finds Kant's claim almost unfathomable, and in direct contrast to the main thesis of the 1793 *Gemeinspruch* essay, namely, that what is right in theory also holds for practice (cf. Cavallar 1999: 123). But Kant surely did not make such a blatant mistake as to contradict himself on this pivotal point of his practical philosophy. A brief investigation will show that what is discussed in the passage in the peace essay is not the relationship between theory and practice.

In the *Gemeinspruch* essay, Kant admittedly says that the relationship between *in thesi* and *in hypothesi* is one commonly referred to as the relationship between theory and practice (cf. 8:276). But this does not mean that he treats them as identical, let alone that everything that is correct *in thesi* is also correct *in hypothesi*.[541] In the final paragraph of the essay, Kant makes an unambiguous reference to what Cavallar is interested in – but this reference can be seen to disqualify Cavallar's view that the relationship between theory and practice accurately corresponds to that between *thesis* and *hypothesis*. Here, at a time when Kant's ideal for global rightful relations is the cosmopolitan constitution, the world state construct is defended against those who hold the sketches by Abbé St. Pierre and Rousseau to be too fanciful and unrealistic, on the grounds that it must be possible to realise in practice that which is valid in theory. The crucial point is that, in a direct application of this principle, Kant does not refer to the realisation of the cosmopolitan constitution as something that also is possible *in hypothesi*. He prefers rather to say: "*in praxi*" (8:313). If we now consider the peace essay in the light of this, we comprehend that if Kant had unequivocally meant in that text what Cavallar believes he meant, he could simply have contrasted *thesis* to *praxis,* and the case would be closed. The fact that Kant chooses not to do so means that the contested phrase in the peace essay is inconclusive with regard to a rejection of the league of states and to a supposed preference of the world state over the confederative model.

Another aspect in the same passage that hints at a possible compatibility of a league of states with worldwide rightful relations is that the theoretically correct world republic is not rejected by the will, wish, or notion of the peoples. Instead, it is their *idea* of international law that is the cause of their rejection of a world state solution, or at least their reluctance to accept this (cf. 8:357). Again, I do not contend that the world republic is not a rightful model or an ideal of Kant's account of worldwide justice; my argument is that it is not the only one.

[540] Cf. e.g. Byrd & Hruschka (2010: 200), who hold the world republic to be rejected due to "human weakness".
[541] On the contrary, the latter point is emphasised in the *Nachlass* (18:695, R. 6373, see also: 18:695 f., R. 6374).

It may be objected that Kant says *their* idea of international law, but I nevertheless maintain my initial affirmation that he sees this as an idea of right, not merely as a positive declaration of will, let alone a pious wish or notion.

The further interpretation and the full implications of these two aspects of the peace essay passage will be discussed at more length in the next subchapter, when my subject will be Kant's deliberations on a final stance on his model for worldwide rightful relations. I hope that what I have written up to this point lends support to the claim that even what appears to be the most pro-*Völkerstaat* argument of his last two texts does not imply a rejection of the league of states as a sufficient model for the theory and the practice of Kantian international law. In the remainder of this subchapter, I will draw on Ripstein's reading of Kant to suggest an interpretation of the league that establishes this model too as a theoretically consistent and normatively sufficient juridical entity for perpetual peace and cosmopolitan law.

Let us begin by reiterating the central features and concepts of Kant's reflections on rightful relations beyond the nation-state. As we recall, no subject other than the two moral persons of the state and the individual comes into question. Simplifying somewhat, we may say that Kant ascribes rights to states and individuals in two different (and potentially self-contradicting) dimensions of international law, the realms of *Völkerrecht* and *Weltbürgerrecht* respectively. In his conceptualisation of international law, there simply cannot be any rightful acquisition of objects, since it does not have a private right dimension to it, let alone any possibility of treating the two relevant moral persons and legal entities as mere commodities that could somehow be acquired by someone else. This would be entirely contrary to Kant's concept of right. Nevertheless, the international realm too is a state of nature devoid of right and justice (i.e., of mere unilateral might) until there is a recognised public authority to decide what is mine and yours according to a legal process (i.e., universal right) (cf. e.g. 8:355 ff.).

Following Ripstein's terminology, we should assume that the three inherent structural problems of the state of nature between individuals also apply to the state of nature between states. Yet, as Ripstein also argues, the defects relate primarily to an *acquisition* of something external, and this aspect of rights and rights relations is, as I have pointed out above, entirely absent from the realm of international law. Additionally, the different legal nature of (private) individuals and (public) states means that the states, qua states, have already limited their possible rightful exercise of power to within their spatiotemporal extension. This corresponds, of course, to the innate right individuals *have,* qua individuals. It does not relate to the rights the individuals can *acquire* in a next step: and it is precisely this that Kant's private right part sets out to answer. Both the innate and the acquired rights must, in a subsequent step, be

conclusively granted by a public legal authority (the state), but the structural defects mainly refer to the latter set of rights.

If we now consider the international realm from this point of view, we realise that the way in which we conceptualise the state territory makes an immense difference. Is it an innate aspect of the state, or is it something merely acquired with a corresponding 'mine or yours' structure? A reading like that of Byrd & Hruschka, according to which the state territory is an arbitrary and unlawful form of public property, implies that the authority to rule over subjects on state territory can be acquired in the same way as between private persons: in other words, it can be handed over to any particular person and in a multitude of ways. But Ripstein's interpretation of the state territory as the spatiotemporal extension of the citizens' legislative will makes the question of state authority over its territory a question of an innate, inalienable right that is not arbitrary. It has a single lawful form – the republic in which the united people possesses sovereign legislative will. And this form can be rightfully realised only according to a reform process in keeping with distinctively public legal and political principles, not by any one in particular through a multitude of means (revolution, intervention, acquisition, etc.).

Insofar as we are correct in considering state territory and the right to rule over it by law as an innate right (i.e., not an acquired right that is up for grabs, so to speak), additional plausibility is lent to the further claim that the problems of establishing an international rule of law are neither inherent nor *per se* structural. Or, to be more precise, only one of the defects to which Ripstein refers is still inherent to a Kantian international condition without public authority, namely, the problem of indeterminacy. Ripstein correctly argues that this is the only defect Kant discusses in his remarks on international law: the problems of unilateralism and assurance do not emerge as inherent to the international condition that is void of law as such (cf. Ripstein 2009: 228). It is true that the problems of unilateralism and reciprocal assurance still remain in the specific instances of international relations. States lack a guarantee against the possible transgression of their sovereignty by others and where there is no legal authority, the only means to resolve their differences is unilateral action, that is, war. But these two problems are not structural, since they relate only to particular cases. And as particular cases, they are bound to happen at a specific coordinate within the space-time continuum and thus within one specific state with already established legal processes for regulating that particular case as a matter of public law.[542]

[542] Thus, as I have already argued, the international state of nature differs, for Kant, from its national equivalent. Accordingly, the measures and obligations required to overcome it are also different, as we will see.

The only formal, structural defect that persists is the problem of indeterminacy, which means, at the state level, that moral (legal) persons cannot by themselves rightfully determine or delineate what constitutes their legitimate sphere of freedom. At the international level, this structural defect presents itself in two ways. First, it is obvious in the problem of delineating borders which all are recognised and accepted by all the states that are concerned. This is not something that the states themselves can sort out as a matter of universal right, rather than unilateral might. Second, it concerns inter-state treaties and what constitutes a breach thereof, in what circumstances, with what legal consequences, etc. Unless this is properly determined by an independent juridical entity, all actions based on such treaties still remain unilateral and lack reciprocal assurance – i.e., they remain in the state of nature. But the admitted lack of such a feature in the international realm does not necessarily imply that a constitutionalised world state has to be established. All it means is that an independent juridical body must be institutionalised and authorised to settle rights disputes that are related to differences in the parties' interpretations of international regulations, such as treaties and commonly accepted rules of conduct.

Ripstein comes to the same conclusion, emphasising the vital aspect that the state, qua public rightful condition, cannot have legitimate rights claims beyond the realm of its own jurisdiction (cf. ibid.: 228 f.). I have already endorsed this view. On the purely metaphysical or formal level on which Kant operates, it means that it is normatively impossible for states, unlike individuals, to exercise any external freedom and still act in accordance with right. Qua *a priori* juridical entity, a state (unlike individuals) is not entitled to have or to pursue private purposes, i.e., to act for purposes beyond itself. It can only act to uphold itself as the legal entity it is meant to be. As a matter of right, it can only have public purposes, and only within the confines of its spatiotemporal extension. In complete accord with my general argument, Ripstein adds that a rightful state "could never have grounds for going to war except to defend itself or to defend an ally whose defense was important to its own self-defense, or to unite against a state that poses a general threat to the condition of peace among nations" (ibid.).

This evaluation corresponds precisely to the discussion in the *Rechtslehre* of the rights of war and peace. Outside of a legal order, it is only states that are authorised to follow their own conception of justice, in order to defend what they hold to be right; §§56-60 specify the material criteria when such actions are right, although they still necessarily constitute a formal wrong. Importantly, it is not rights that are lacking in order to realise the rightful condition of perpetual peace and cosmopolitan law, but the right or authorisation to decide on these rights: when they are violated, by whom, what legal sanctions are to follow, etc., as well as to settle

border disputes. For Kant, this does not require a full-scale realisation of a world state model. Instead, 'only' a recognised international legal body such as a forum or independent court of arbitration is strictly needed. This, like the structural defect itself, accords with the necessity of establishing a court of law to determine what is mine or yours according to a universal law of freedom. In other words, on this reading, only an international forum or court of arbitration is needed to realise a legal framework that guarantees rightful relations on a worldwide basis.

Ripstein also refers to the peace essay, to indicate that Kant himself here is aware of this possibility and in fact advocates it with his league of states (cf. Ripstein 2009: 228). A league "von besonderer Art" that tries to end not just one, but all wars through "einen Vertrag der Völker" may in practice succeed in this regard, since Kant believes that the theoretical possibility or "Ausführbarkeit (objektive Realität) dieser Idee der *Föderalität*" (8:356) can be outlined. And insofar as it is possible in theory, it must also be possible to realise in practice. Ripstein shows that Kant more than indicates that this league does not need legislative or executive competences (cf. ibid.); this corresponds to the non-existing defects of unilateralism and lack of assurance on the structural level.

Ripstein could even have reinforced this claim with additional references to the peace essay; here, in all his quotations that address the international state of nature, Kant can be seen to emphasise that it is a judicial capacity that is missing. In his view, the international state of nature is precisely this insofar as "kein Gerichtshof vorhanden ist, der rechtskräftig urteilen könnte" (8:346) and "jeder in seiner eigenen Sache Richter ist" (8:355). Also, if someone is to be adjudged as having acted contrary to international law, "ein Richterausspruch" (8:346) has to be presupposed. In all these cases, Kant is 'only' calling for a judicial function to overcome the international state of nature. This should not be ignored.

In emphasising this point, I do not conceal that Kant clearly insists in the peace essay that without the juridical establishment of a supreme *legislative* authority, "so ist es gar nicht zu verstehen, worauf ich dann das Vertrauen zu meinem Rechte gründen wolle" (8:356). This seems at first sight a clear suggestion that only a constitutional world republic is sufficient for worldwide rightful relations, but he then directly contradicts such a reading. What establishes this trust is not the world state, but precisely "der freie Föderalism" of a league (ibid.), which reason couples with an account of rightful international law.[543] Once again, a forum or court

[543] Quotation in full: "Daß ein Volk sagt: 'Es soll unter uns kein Krieg sein; denn wir wollen uns in einen Staat formieren, d.i. uns selbst eine oberste gesetzgebende, regierende und richtende Gewalt setzen, die unsere Streitigkeiten friedlich ausgleicht' – das läßt sich verstehen. – – Wenn aber dieser Staat sagt: 'Es soll kein Krieg zwischen mir und andern Staaten sein, obgleich ich keine oberste gesetzgebende Gewalt erkenne, die mir mein und der ich ihr Recht sichere,' so ist es gar nicht zu verstehen, worauf ich dann das Vertrauen zu meinem Rechte

of arbitration in the shape of a league of states seems fully sufficient for Kant; at any rate, he does not reject this as a consistent model for global justice. In his principal text, Ripstein, who appears more interested in the private than in the public right part of the *Rechtslehre*, does not pursue these lines of argument to elaborate the important claims he has now put forward. With my starting point in his argument, I contend that the league of states can be seen to provide exactly what Kant is seeking, namely a consistent and sufficient legal framework for rightful relations across the globe. The remarks about the league in the *Rechtslehre* show that it does indeed help to solve the problems related to the peace project.

§59 on the right of peace can be said to indicate a first step, not on the road to a world state, but to Kant's all-encompassing league of states. As we have seen, states have a right to enter a reciprocal alliance or confederation of states (*Bundesgenossenschaft*) to institutionalise a common defence against attacks from without. This must be the exclusive purpose of the confederation; Kant emphasises that it does not have any kind of right or authority to attack others or increase its territory (cf. 6:349). §61 then pictures such a league as a worldwide legal entity, and contrasts it to the "unausführbare Idee" (6:350) of a world republic that expands too far, too fast. The exclusive purpose of the league (or of the permanent congress)[544] is "den Frieden zu erhalten" (ibid.). It is clearly distinguished from a non-voluntary, binding union of states. The congress may be "permanent", but it involves no transfer of state sovereignty; it is explicitly "dissoluble" (ibid.). Kant describes it in no uncertain terms as what we today call a confederation; it is plainly not a constitutionalised world state, no matter how the federal law levels are internally arranged: "Unter einem *Kongreß* wird hier aber eine willkürliche, zu aller Zeit *auflösliche* Zusammentretung verschiedener Staaten, nicht eine solche Verbindung, welche (so wie die der amerikanischen Staaten) auf einer Staatsverfassung gegründet und daher unauflöslich ist, verstanden" (6:351).[545]

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gründen wolle, wenn es nicht das Surrogat des bürgerlichen Gesellschaftsbundes, nämlich der freie Föderalism, ist, den die Vernunft mit dem Begriffe des Völkerrechts notwendig verbinden muß, wenn überall etwas dabei zu denken übrig bleiben soll" (8:356). As we shall see more clearly in the next subchapter, the passage agrees with a reading of Kant's legal obligations as non-voluntary at the state level and voluntary at the international. A people may accordingly with right decide to join a supra-state legal entity (league of states or world state), but a state (apparatus) may not. (This would refute the above-mentioned objection that Kant's reluctance with regard to the world republic, because of the peoples' idea of international law, is merely pragmatic. Rather, the peoples – unlike the individuals at a state level – cannot be rightfully coerced to enter a legal order against their own will. His philosophy of right simply does not advocate or even condone this.)

[544] Byrd & Hruschka (2010: 204 f.) make a differentiation between the two terms that I do not. They regard both as "dissoluble", but the league is formed by treaties, whereas the congress is only "in a pre-contractual phase of negotiations". Without further references to Kant's texts, I do not see how this reading necessarily follows. As I will argue in the following, the congress is not reduced to this function, but meets precisely to discuss treaties and/or any other regulation of international relations, whether legal, political, contractual, customs, etc.

[545] The Weischedel edition writes '*ablöslich*' instead of '*auflöslich*', but this does not affect the crucial point.

In a distinct contrast to the federalist model of the American constitution of only ten years earlier, Kant points to the confederative assembly of European states gathering in The Hague in the first half of the eighteenth century as closely corresponding to his ideal of a league of states.[546] In this time period, and with this institutional arrangement, Europe could think of itself "als einen einzigen föderierten Staat (…), den sie in jener ihren öffentlichen Streitigkeiten gleichsam als Schiedsrichter annahmen" (6:350). Within this legal structure and timeframe, international law was upheld (and accordingly given practical reality). This state or condition of international law is in clear contrast to what happened next, when it is "bloß in Büchern übrig geblieben, aus Kabinetten aber verschwunden, oder nach schon verübter Gewalt, in Form der Deduktionen, der Dunkelheit der Archive anvertrauet worden ist" (ibid.).

We see that also here, Kant refers only to the legal function of *Schiedsrichter*, a public arbiter to resolve the differences between states. The term implies that he has in mind an independent forum or court of arbitration, rather than a permanent international judicial court. The latter would be authorised through a constitution and a set of positive rules that it is to interpret and pass binding legal verdicts on. But this is evidently not what Kant envisages here. Such a legal order would presuppose an indissoluble union of states (which thus lose their statehood), a constitution, a legislative assembly, and an executive authority with irresistible coercive power to implement the verdicts of the court as a matter of universal right, not as someone's arbitrary will. For sure, an international court could be granted formal legitimacy and material jurisdiction from a legal entity of this kind. But such a legal arrangement is, of course, not a league of states, but a constitutionalised world state, regardless of how federal (or republican) its construction may be.

Kant's main point is, of course, not that this world state is not a consistent theoretical model for worldwide rightful relations, but rather that the permanent congress of the league of states overcomes the international state of nature too. In fact, due to the difficulties as well as the dangers involved in realising a world republic that must guarantee both the private and the public rights of all human beings at all times across the globe, the league may indeed be a preferable alternative. In the next subchapter, I shall consider the material advantages and disadvantages of the two models. At this point, I repeat my intention, namely to demonstrate that Kant's league of states also provides us with a formally correct model. The league only needs to establish an international forum that can mediate between, and potentially settle,

[546] His clear preference for a confederative model (and equally clear rejection of a non-voluntary federal state template) is also shown in the §54 reference of the *Rechtslehre* to the purely defensive Greek alliance of the *foedus Amphictyonum* as the template for a realisation of *Völkerrecht* (cf. Eberl & Niesen 2011: 244).

inter-state (or even cosmopolitan) disagreements about the international obligations of the various actors. The permanent congress does not constitute a legislative authority, because it is a question here only of international treaties formed by states that remain sovereign and that therefore also retain all legislative competences. Instead, it takes the shape of an international forum or court of arbitration, which, as such, precisely because of the lack of international laws, legislation, and/or constitution, does not amount to an international juridical court.

We may therefore justifiably claim that Kant's model of a league of states sees only a public forum or arbiter (*Schiedsrichter*) as required and necessary for its international legal framework. As I have emphasised, with Ripstein, it is only this function and structural defect that Kant mentions in the relevant passages in the peace essay and the *Rechtslehre*. Likewise, Kant insists that the permanent but dissoluble congress of states does not imply a transfer of any state sovereignty, since that would presuppose the model of a world state. Ripstein too makes this point clearly: the international public arbiter makes it possible to solve differences between states "'as if before a court'" (Ripstein 2009: 230; cf. 351), emphasising the aspect of 'as if'.[547] Kant is perfectly unambiguous about this formal feature of the league of states: it resolves, or, better, can resolve international public differences "gleichsam als Schiedsrichter" (6:350), "gleichsam durch einen Prozeß" (6:351). Importantly, it does not do this *as* public arbiter or through a legal process; it does so *as if* this were the case (because anything else would presuppose the juridical model of a world state).

But, it might be objected: does not this admission show the necessity of a theoretical preference of the perfectly rightful formal model of a world republic over the imperfect model of a league, and that this is also expressed by Kant here? I shall argue in the next subchapter that Kant maintains that the league of states is the only model for international law; at this point, I shall summarise the arguments presented up to now in defence of the separate claim that it also is on a par with the world republic in terms of establishing a legal framework that is coherent and sufficient for worldwide rightful relations. I can then draw some conclusions about the three different models Kant discusses with regard to a realisation of global justice, and affirm that the league of states delineated here is in fact more than merely an intermediary step on the road to the allegedly unique model of the peace project, i.e., the world republic.

The 'as if' character in my account (and that of Ripstein) does not imply that the league of states is an imperfect *theoretical* model for world peace, and hence a mere negative surrogate that is favoured only in practice. On the contrary, I suggest that Kant sees, at least in

[547] Eberl & Niesen (2011: 246) have grasped the same point, but they do not discuss the 'as if' character that is made a vital feature of Kant's account of international law here.

his two last writings on the topic, that if there were not an 'as if' aspect to the league, and it could actually guarantee due legal process, it would quite simply be a world state governed by world state law. My controversial contention is that this lack of an actual guarantee does not make the league an imperfect legal entity for Kant, nor should it for us. It is true that this is in sharp contrast to what is claimed at a state level, where such a lack of an actual guarantee for everyone's freedom under universal law was precisely what made it normatively necessary to leave the natural (and social) condition of private right for the public right and authority of the rule of law within the state. So what difference does it make, when I argue here that the international forum or court of arbitration provides a legal model that is both consistent with, and sufficient for, worldwide rightful relations?

The validity of this claim is a consequence of a clarification of the possible objects of study at the level of international law in Kant. This, with the vital disanalogies between state and international law that this clarification brings to light can justify my assertion.

Let me reiterate the most crucial difference between national and international law in Kant: at the latter level, only the two moral (i.e., legal) persons of states and individuals are involved. Unlike the level of state law, there is no external object that can be acquired, since neither states nor individuals can be treated as commodities; they are persons with inalienable rights. (As I have underlined, external objects with a 'mine or yours' structure are already, in a prior instance, located within the spatiotemporal extension of the already established rule of law according to rational right.) What Kant's account of international law must then provide is 'merely' the legal framework that guarantees the freedom and rights of these two persons. But since the rightful freedom that is assigned to states and individuals (qua citizens or mere subjects) does not imply a right to exercise their freedom beyond the protected and protective realm of state jurisdiction, neither the state nor the individual can lay a rightful physical claim to rights (or objects) beyond this spatiotemporal extension of the united legislative will and state authority. In fact, this prohibition of any extrajudicial exercise of choice (however much it may correspond in a material sense to natural private right) is exactly what rightful freedom under universal law entails: no-one can have a legal right to act, for personal purposes, upon a unilateral will beyond one's own rightful sphere of freedom.

As Ripstein says, the only inherent structural defect of the international state of nature is the problem of indeterminacy. All that is strictly necessary for an international legal order is thus to establish an independent juridical body that is authorised to rightfully delineate where my international freedom sphere ends and yours begins. This is the only problem that the moral persons in question cannot get right at the international level; they must leave it to an

international public authority to resolve this problem in a rightful manner. The authority does not have to be a full-fledged world republic, since the problem is not one of unilateralism or assurance. Any particular rights claim that is disputed and comes under these two categories is bound to happen within the jurisdiction of a singular state, a state that can and must treat this rights dispute according to its own laws (which, of course, may incorporate regulations that are also maintained by other states in their jurisdictions). The existence of states, which has to be presupposed, prevents particular actions on a formal, structural level from being unilateral and/or lacking reciprocal assurance. Consequently (and this supports the position that I have argued for here), such actions do not constitute an inherent problem to an international realm where as yet no public authority is recognised.

Only the problem of indeterminacy constitutes a defect of this kind, and it finds its appropriate solution in the form of a recognised international forum or court of arbitration. This authority can deal with all problems related to a proper and rightful delineation of one's freedom spheres at the international level, to the extent that it is authorised to do so by states that, crucially, remain sovereign. The public arbiter is accordingly not only authorised to draw the line in border disagreements, but can also be called on to interpret international treaties and commonly accepted rules of international conduct that initially had been agreed upon, but that now are disputed by any (or all) of the parties involved. On this reading, Kant regards a recognised public arbiter (and not just a full-scale world state with legislative and executive competences) as sufficient for solving the inherent structural defects of the international state of nature, since this establishes precisely what is needed, namely a public international legal authority that can solve all the potential problems of a worldwide community of states and individuals. The juridical order provided by the public arbiter of the league of states is thus admittedly different, but it is still sufficient at the international level.

One may perhaps object that this reading paints a very idyllic picture of international relations. Why would states more or less voluntarily recognise this authority as imposing an obligation on them to respect its decisions, let alone to hold its verdicts as binding even if they do not agree with the results of these resolutions? Furthermore, is not Kant now back at the level of mere moral-ethical self-obligation? Has he not left the dimension of right with its legal obligations and a rightful use of coercion?[548] The public arbiter of the league of states surely cannot provide a genuine guarantee against violations of international law.

[548] As I have pointed out earlier, this is central to the objections raised by Habermas (1999) and others.

This last point is, of course, true. The league does not have executive capacities, and thus lacks the rightful means of coercion to implement its resolutions and to protect the rights of states and individuals not to have their freedom spheres invaded. But this, however, is also beside the point. An international juridical order that is authorised to regulate the activities of states (and individuals) according to a treaty-based league model (rather than through a world constitution) *can* resolve differences in a rightful manner and in actual practice provide a legal framework within which verdicts can be passed according to international law.

My point may become clearer once we admit that it is not required at a state level that there should be no actual breaches of laws, but 'only' that there is a juridical order which is obligated to uphold the law and rectify potential breaches. On Ripstein's reading of Kant's account of international law, this is provided by the league of states. The permanent congress of states that Kant advocates is a forum through which the attempt can be made to mediate and resolve, with the means of right rather than might, any particular state (and individual) difference with regard to both inter-state and cosmopolitan obligations. In Kant's terms, it offers a possibility of solving international disputes as if by a legal process. And to the degree that the resolution of the dispute is also recognised by the states in question (which remain sovereign), they accordingly keep the legal promise they made when it was first accepted that a public arbiter should pass a resolution on the disputed rights claim. The important point is that they thereby also give objective reality in practice to international right through the model of a league of states.

In this model, it admittedly still remains up to the nation-states to enforce the verdicts or resolutions of the congress. Without a world state monopoly on the means of coercion, the possibility of warfare and/or the non-recognition of the verdicts of the congress obviously exists. This, however, does not constitute a problem that is inherent to the legal model. It is a problem in relation to the *de facto* recognition of laws by the various actors, just as it would be in a nation-state (or world state) in which rightful claims succumbed to unilateral claims of brute force. It is obvious that this does not lead us to discard the normative theory of a rule of law; it only makes us acknowledge the severe lack of actual recognition and enforcement of laws within that particular condition. If there is no, or too little, recognition of laws, we do not speak of a legal condition at all. But the crucial point is that this is 'only' a factual problem, not a normative problem with regard to the model as such. The *de facto* adherence to laws is another question, which will be briefly discussed in the next subchapter. At this point, as I have shown, it suffices to say that the model of the league of states, together with the model

of the world republic, provides a Kantian legal framework that is both coherent and sufficient with regard to establishing worldwide rightful relations.

Only one potential objection to the normative sufficiency of a league model must still be addressed. I have maintained that the league of states provides a legal framework so that states *can* solve their international disputes in a rightful manner. This is arguably not the same as saying that they *must* solve their differences through the relevant public authority – i.e., the legal obligation that Kant posits at the level of state law. In the international realm, therefore, it appears possible to evade the demand of rational right that a public authority must solve a dispute. But the assertion that states are free to seek justice in other manners implies that they could have private purposes within, or legitimate rights claims beyond, the borders of their own jurisdiction (which also confines the pursuit of ends by individuals).[549] In Kant's theory, however, states, qua states, are obliged to seek right and justice in a rightful, public manner, and at the international level this is provided by the league. States may, of course, believe that their own capacities to resolve international disagreement are superior to those of the league, but this does not in the least affect Kant's clear insistence that the former, unilateral course of action is wrong in the highest degree, whereas the latter course taken by the league is not.

If they are to act in a rightful way, neither states nor individuals can physically claim rights beyond their own designated freedom sphere, let alone unilaterally decide international rights disputes. But a recognised international public arbiter *can* do the latter in a fully rightful manner, and on this level, all rights claimants that aim beyond their respective freedom sphere simply *must* leave it to the public arbiter to decide the validity of their claims (in order to act in a rightful manner). This, of course, does not mean that all moral persons actually do so, or that the league can authorise coercion in this regard. It is only to maintain that practical reason requires that they do not resolve disputes by unilateral means (war), and that the same reason also provides them with a normatively sufficient model in the shape of the league of states that can – and must – resolve these disputes whenever they occur. And to the extent that the resolutions of this forum or court of arbitration are recognised by the parties concerned, the rights claim is also in fact granted by an international legal order, and we must speak of legal obligations (not merely of moral-ethical obligations). In other words, on this view and with this model, it is also meaningful to speak of international juridical obligations in Kant.[550]

[549] Again, there is no external object that can be acquired as a mere commodity in the international realm. States, qua states, are thus required to seek their rights (and conceptions thereof) in a manner that does not amount to a violation of any other moral person's inalienable and equal right to freedom according to universal laws.
[550] I will return below to further implications (and justifications) of this important claim.

Accordingly, it is correct to claim that his league of states and his world republic both provide a perfectly rightful legal framework for rightful relations across the globe.

When considered in this manner, there is nothing inherently lacking in Kant's league of states model. It is thus not vulnerable to the criticism by Kleingeld, Cavallar, and others, that it is only an intermediary step towards the world republic, and that it must turn into this legal arrangement. Instead, it is 'only' exposed to the empirical challenges of establishing the capabilities and capacities that are required, if its norms are to be recognised and enforced by the various actors worldwide. In view of these aspects, contingent factors may, of course, mean that it is inferior to the model of the world republic; but that is another question, which I address in the next subchapter on the *de facto* viability of a realisation of the two different legal entities. Regardless of the outcome of such an evaluation, the league of states, as these brief remarks have argued, remains a theoretically coherent and normatively sufficient model that establishes international rightful relations. A complete legal framework for global justice is thus provided both by the world state model of a world republic and by the state world model of a league of states. Both models are recommended by practical reason.[551] In line with Kant's overall position, it is then up to the citizens – not the philosophers – to compare and choose between these theoretical models in order to realise the normative ideal of worldwide rightful relations in political practice.

2.2. Kant's non-constitutionalised model for an international legal order

Granted the correctness of these reflections on Kant's philosophy of right, it would not be entirely wrong to begin our conclusion at this point. As we have seen, it is not the task of philosophical enquiry as such to decide which model should be adopted by the citizens to realise perpetual peace and cosmopolitan law. However, he seems to have a clear preference for the league of states, and he presents at the very least further philosophical advice on how the two juridical entities can and must be realised in a manner that does not conflict with the other principles of right. In this subchapter, I intend a) to show that the league is in fact his only legal model that preserves an international dimension, something that is subsumed under world state law in both world state models. On the basis of his mature publications, I shall also b) discuss the *de facto* viability of a practical realisation of the two models of the league of states and the world republic, and consider his evaluations and advice in this regard. I shall

[551] Although she follows a somewhat different route, Maus reaches the same conclusion (2004: 87): "both solutions, global state and federation of states, can comply with reason and (...) it is other aspects that decide the matter". (I will briefly return in the next subchapters to her analysis and preference for the latter model.)

argue that Kant's main point revolves around the necessity of continuous processes of legal institutionalisation in the international realm, but that he nonetheless, on both normative and contingent grounds, favours the league of states, an entirely formal juridical entity that is best described as his non-constitutionalised model for an international legal order.

a) The league of states as Kant's only model for international law

I have already touched on some of Kant's principal reasons for preferring the legal model of a non-constitutionalised league of states. These include the republican-democratic argument, inspired by Rousseau, about the normative preference for political entities that are small and transparent, and the principle that the world state itself cannot ensure that it does not lapse from a republican into a despotic, paternalistic form of government. I will return to these and other aspects when I assess the normative and contingent factors that influence the possibility and hence also the desirability of a *de facto* realisation of Kant's peace project in political practice. But first, an important clarification must be made with regard to the two models whose actual realisation then is to be discussed. This concerns the affirmation, made above, that it is in fact only the league that retains an international dimension. Controversially, I shall take what is certainly a minority stance within Kant scholarship and contend that his world state turns all law into (federal) world state law and that, in his final two texts on the topic, he in fact never discusses the world republic as a model that belongs to the realm of international law. When it is understood in this manner, it is clear that the league is in fact Kant's only template for an international legal order, and that it is both the means and the end for bringing about rightful relations and the rule of law also beyond the state.

The standard interpretation of Kant – that he normatively favours the world republic – should, in my view, encounter great difficulties in defending that claim when both the peace essay and the *Rechtslehre* have the league at the start, centre, and end of their deliberations on international law. A closer examination of the relevant passages will reveal that the dimension of international law is inseparable, for Kant, from the model of a voluntary federation, and is a self-contradiction for a world state. I hold this to be a basic Kantian premise and argument from the outset: with regard to international law, the last two works contain only a discussion of a league model with a voluntary and non-constitutionalised, non-coercive character.

Consider, for instance, the title of the second definitive article of the peace essay: "Das Völkerrecht soll auf einen *Föderalism* freier Staaten gegründet sein" (8:354). The first paragraph of the article (specifying this free federation) makes perfectly clear that this is the

league of states (*Völkerbund*), not the world state (*Völkerstaat*) (cf. ibid.).[552] International law as such, therefore, is based on a free federation of a multitude of free, that is, independent, sovereign states.[553] In the rest of the definitive article, Kant explicitly discusses a peace treaty (*Vertrag*) which seeks to end not just one but all wars. The treaty-based federation might thus be described as having "eine der bürgerlichen ähnliche Verfassung" (ibid.) or "eine erweiterte gesetzliche Verfassung" (8:356), but this is evidently not the same thing as having a world constitution in a strict sense, which would imply the world state. This leads Kant to the model of a peace league (*Friedensbund*) according to an idea of federalism (*Idee der Föderalität*), in contrast to the idea of a *Völkerstaat* in the shape of a *Weltrepublik.* He refers to the latter term only in the very last paragraph of the article (cf. 8:357).

Scholars who hold that Kant is in favour of the world state model fail to explain why the rest of the second definitive article discusses the state world model of the league, and this only. Their interpretation, however correct they may be to claim that Kant's world republic establishes a global rule of law, stands in "blatant contradiction to all of the arguments" (Maus 2004: 84) in the rest of the article. It is true that the world republic is a consistent legal model for worldwide rightful relations, but it is not the only one. In addition, it is inconsistent with an *international* dimension to the rule of law. This latter point is abundantly clear from the discussion of international law in the peace essay (and the *Rechtslehre*), as distinct from topical references to *Völkerrecht* in earlier writings.

For instance, the *Völkerstaat* with a cosmopolitan constitution that Kant had favoured in the 1793 *Gemeinspruch* essay is resolutely rejected from the outset in 1795 as a model for international law. It is now held to be a "Widerspruch", since (like all states) it constitutes a hierarchical relation of a superior (legislative authority) to an inferior body (one people as the sum total of the subjects of law). A world state (whether republican or not, federal or not) simply transforms the "viele Völker" of international relations into "ein Volk (...) welches (da wir hier das Recht der *Völker* gegen einander zu erwägen haben, so fern sie so viel verschiedene Staaten ausmachen und nicht in einem Staat zusammenschmelzen sollen) der

[552] Byrd & Hruschka, who most definitely favour the world republic, are mistaken when they assert that the "rechtlicher Zustand der Föderation nach einem gemeinschaftlich verabredeten Völkerrecht" (8:311) of the *Gemeinspruch* essay is the so-called state of states, i.e. the world republic (cf. Byrd & Hruschka 2010: 198 f.). It is simply not the case that "'federation' has a different meaning [in *Perpetual Peace*] from what it had in *Theory and Practice*" (Byrd & Hruschka 2008: 632). Kant does not adapt formal terms according to substantial content. Rather, he has in mind here too the free federation of the league, as a viable alternative to the world state with a "weltbürgerliche Verfassung" (8:310) that endangers rather than secures freedom on a global level.

[553] As I will further discuss below, Kant nowhere makes any form of government a precondition for membership.

Voraussetzung widerspricht" (8:354).[554] It is thus evidently a contradiction in terms to speak of both a world state – universal monarchy or world republic – and international law within one and the same legal construct.

If further proof is wanted, one can consider this completely unambiguous statement in Kant's account of international law just a few pages later: "Die Idee des Völkerrechts setzt die *Absonderung* vieler von einander unabhängiger benachbarter Staaten voraus" (8:367).[555] Although the world republic is a positive idea that is correct *in thesi*, it is not discussed in the peace essay as a model for international law, because this presupposes a multitude of states that remain sovereign. The rejection of the world state in the second definitive article is, of course, not related to the idea and normative necessity of worldwide rightful relations, but to the dimension of international, that is, inter-state law. This dimension simply does not exist at the world state level, where all law is world state law, regardless of whether it is republican or not, federal or not. Kant's world republic is thus a realisation of the sum total of the principles included in *Staatsrecht*, written rightfully on a global scale, that is, *Weltstaatsrecht* with only one dimension of law rather than three. The rightful relations regulated by *Völkerrecht* and *Weltbürgerrecht* do not occur within such a framework; their principles simply do not apply.

The same insight can be read out of Kant's formulations in the *Rechtslehre*. Here, too, the deliberations on international law have the league of states as their starting point, topical focus during the discussion, and final end (i.e., the continual approximation towards perpetual peace and cosmopolitan law by the voluntary congress). §54 on the elements of *Völkerrecht* offers little room for debate: to leave the international state of nature, "ein Völkerbund nach der Idee eines ursprünglichen gesellschaftlichen Vertrages [ist] notwendig (...), sich zwar einander nicht in die einheimische Mißhelligkeiten derselben zu mischen, aber doch gegen Angriffe der äußeren zu schützen" (6:344). My view that he only considers the league as an international law model finds further support in his fourth and final element of *Völkerrecht,* when he quite clearly states, "daß die Verbindung doch keine souveräne Gewalt (wie in einer

[554] Paragraph in full: "Völker, als Staaten, können wie einzelne Menschen beurteilt werden, die sich in ihrem Naturzustande (d.i. in der Unabhängigkeit von äußern Gesetzen) schon durch ihr Nebeneinandersein lädieren, und deren jeder, um seiner Sicherheit willen, von dem andern fordern kann und soll, mit ihm in eine der bürgerlichen ähnliche Verfassung zu treten, wo jedem sein Recht gesichert werden kann. Dies wäre ein *Völkerbund*, der aber gleichwohl kein *Völkerstaat* sein müßte. Darin aber wäre ein Widerspruch: weil ein jeder Staat das Verhältnis eines *Oberen* (Gesetzgebenden) zu einem *Unteren* (Gehorchenden, nämlich dem Volk) enthält, viele Völker aber in einem Staate nur ein Volk ausmachen würden, welches (da wir hier das Recht der *Völker* gegen einander zu erwägen haben, so fern sie so viel verschiedene Staaten ausmachen und nicht in einem Staat zusammenschmelzen sollen) der Voraussetzung widerspricht".

[555] Kant's next point in this passage implies that only the league of states can overcome the state of nature that an unmediated international realm is, which "an sich schon ein Zustand des Krieges ist (wenn nicht eine föderative Vereinigung derselben [der Staaten] dem Ausbruch der Feindseligkeiten vorbeugt)" (ibid.).

bürgerlichen Verfassung), sondern nur eine *Genossenschaft* (Föderalität) enthalten müsse". It is "eine *Verbündung*, die zu aller Zeit aufgekündigt werden kann, mithin von Zeit zu Zeit erneuert werden muß" (ibid.). The distinction from the template of state law is unmistakable.

This, of course, does not deny that the league one day may (or even should) turn into a world republic. The point is only that the latter has no international aspect (and that in any case, it is up to the legislative union of citizens to decide what model should be adopted). As the above quotation shows, the league of states possesses neither a constitution nor any state competences. On every question, it remains a voluntary, confederative alliance of states that commit themselves to protecting and delimiting their respective spheres of force and freedom according to law. Its actual legal right or authority to resolve international disputes through due process is limited only by what the sovereign states do not authorise it to solve. Its legal normative justification is derived by Kant from the right of states not to be dragged into actual hostilities: the league of states has "ein Recht *in subsidium* eines anderen und ursprünglichen Rechts, den Verfall in den Zustand des wirklichen Krieges derselben untereinander von sich abzuwehren" (6:344).

Although it at first may seem insignificant, this interpretation of §54 and the referent of its right *in subsidium* is crucial. The reading is the diametrical opposite of the interpretation of the same section and authorisation by Byrd & Hruschka, who hold that the other and original right from which the league draws its entire legitimacy can only mean the right of the *Völkerstaat* to instate a world legal order according to its principles (cf. Byrd & Hruschka 2010: 201). On their reading, the league of states is merely a substitute for this condition, and has only a subsidiary right to try to smoothen the transition from the international state of nature to its one and only counterpart, the world republic. But this gives all right to the world state (or, if this is not yet realised, to any of those that think they anticipate this order) and none to the already established states. On such an interpretation, there can hardly be a right to stay neutral (something Kant established in §59), and there is certainly no inherent right of states to have their territory and/or political decisions recognised or respected by international (?) law. There is only the right of one specific legal world order that must be established.[556]

I suggest instead that, as should be obvious from the very next words in this passage, the original right Kant has in mind is the right of states not to be exposed to war and all its

[556] If this account of the formal characteristics of Kant's international theory does not by itself seem incorrect (or at least implausible), one can only imagine how a practical realisation of such an order will turn out when there is a general permission to coerce states and wage war against them to enter this legal order that is nothing but a perfect WTO; cf. my presentation above. (I will return in the next subchapter and the epilogue to the downright bellicose character of some Kant scholars' proposals for a realisation of his peace project.)

horrors (cf. "den Verfall in den Zustand des wirklichen Krieges derselben untereinander von sich abzuwehren" (6:344)). States already have a juridical constitution within their respective territories, and have thereby internally left the state of nature. What is required is 'only' the external recognition of the rule of law within each state, i.e., a global recognition and further promotion of legal procedures and of the inherent rights of all states and individuals. The right of states to remain sovereign is presupposed and included in all of Kant's deliberations on international law in his last two texts; there is no supra-state public authority that implements and enforces regulations within state territory. If this is done by an authorised legal entity, then we have an all-encompassing world state exercising its rule of (world state) law; and in that case, what we have is not military intervention on the territory of another, non-abiding state, but rightful police activity against a non-complying individual (or a multitude thereof).

Another important consequence follows from this understanding of Kant's account of international law, and Byrd & Hruschka are not the only ones to miss this. The very concept of international law not only presupposes states, but also (by implication) the principle that states are the only legitimate actors in the implementation and enforcement of international law. Kant is adamant about this aspect as well: no other actor can be authorised to do this. Firstly, the world state rules out the international dimension *per se*; secondly, individuals have no rightful international executive authority; and, thirdly; the league model possesses no state competences. Consequently, only states can, with varying degrees of right,[557] implement and enforce notions of international law.

In §60 on the unjust enemy, Kant gives support to this reading in the following words: in *Völkerrecht*, "wie überhaupt im Naturzustande, [ist] ein jeder Staat in seiner eigenen Sache Richter" (6:349). A recognised, independent legal body in the shape of a permanent, but still voluntary congress of states may, of course, aid the resolution of such disputes, and it may provide a forum to clarify misunderstandings between states and/or individuals. However, all it can rightfully do is to pass a final verdict and thus authorise legal sanctions to the degree that the states have antecedently authorised it to do. Accordingly, it is still up to the states not only to implement and enforce international law, but also to recognise and authorise it in the first place through the sole consistent legal model for *international* law, namely the league of states. In this manner (and this only), a theoretical legal framework is provided through which international law can be exercised according to a formally correct juridical process. This legal

[557] As has been asserted above, states are always formally wrong when they exercise their unilateral notions of international law (i.e., do wrong in the highest degree), but necessarily, they (and no-one else) may be right in a preliminary, inconclusive sense (according to criteria of rational right in a condition void of a public authority). Crucially, however, as I argue above, they can also get it formally right through the league of states model.

procedure upholds an international rule of law in practice too. Nevertheless, it should again be noted that it does so only insofar as the states respect the legal authority that they already have vested in the league.

In other words, the league of states has no constitution that would allow it to pass legally binding verdicts. Both entering it and leaving it are completely voluntary, and it has no state competences to force a member (or non-member) state to comply with its resolutions. It can 'only' provide a forum or court of arbitration to try to resolve international disputes as if through due legal process. If no unanimous agreement on the point in question can be reached and implemented by each of the member states, they leave the table and the league is (for the time being) dissolved, even if the states do not thereby necessarily dissolve the institution of the public forum itself.[558] As I have argued above, there are no material limitations to the authority that states can voluntarily vest in the deliberations of the permanent congress, and although their resolutions are not binding *per se*, it is still meaningful to speak of international legal obligations within this structure of a league of states. The decisive point is that the states must always remain internally sovereign; it is only their (per definition unrightful) exercise of *external* freedom that is under consideration here.[559] And in order for there to be sovereign states as well as international law at all, the sole purpose of the league is to avoid precisely the kind of use of external force by states that in plain and simple terms is nothing but the act of war.

Accordingly, a league of states that is committed exclusively to the cause of ending all wars is doing everything that can be, and is, required of it *a priori*. Kant's main focus in his deliberations on international law is this kind of legal recognition of the internal freedom of states. Before an international public authority could be authorised *a priori* to intervene on the territory of a member state, there would have to be a constitution authorising it by law to do so and an irresistible executive power which had to enforce the verdicts of an irreversible judiciary. All of this amounts, of course, to a world state that has no international dimension or sovereign states. If this legal entity knows and exercises a principle of a strict separation of powers, it is a world republic. If not, it is a universal monarchy. In any case, it is inconsistent

[558] This, in my view, is precisely what the voluntary, yet permanent character of Kant's league entails in actual practice. If the member states do not reach a unanimous verdict, they agree to disagree and can only pursue their ends with unilateral and formally unrightful means. If they also disagree about the institution and in fact abandon it, then there is no longer even a formal possibility for international law (and another international institution has to be established and recognised before a new process of international law can commence again).

[559] Again, this *Völkerrecht* perspective is not an argument against the inclusion of cosmopolitan law at the level of the league of states. This can, of course, be done according to the procedure set out above. The question here is rather the rightful exercise of legal authority beyond the borders of each separate state, and here, as has been repeatedly emphasised above, only states can up to some point claim a rightful authority in this regard.

with the existence of a multitude of sovereign states and an international dimension to the rule of law, with which only the confederative and voluntary league of states is compatible. Kant concludes on these crucial points in the peace essay: "Nun haben wir oben gesehen: daß ein föderativer Zustand der Staaten, welcher bloß die Entfernung des Krieges zur Absicht hat, der einzige mit der *Freiheit* derselben vereinbare, *rechtliche* Zustand sei" (8:385).[560]

At first sight, this might seem paradoxical. The international condition with a league is considered here to be a legal condition, although the dimension of international law as such is described by Kant as a state of nature, as we see in my recent quotation from §60 (because states ultimately remain judges in their own causes). The best and perhaps only explanation of this somewhat strange situation draws parallels to the rest of Kant's legal framework, which also allows us to sum up the main affirmations thus far.

As I indicated above, I suggest that the two public legal dimensions of *Völkerrecht* and *Weltbürgerrecht* take on a similar role to the discussion of private right in the *Rechtslehre*. At the international level, they designate and identify criteria for a rightful use of freedom and coercion outside of a full legal order, just like the task of private right in the first half of the *Rechtslehre*. But whereas private right enables a *transition* (*Übergang*, cf. §41) to a rightful form of human interaction under the public right of the state, Kant's inclusion of the two international dimensions does not signal a transition to a unitary world state. Rather, as all his remarks make clear (cf. §43), it is an *expansion* of public right to a threefold legal framework.

Another feature of international law with both an analogy and a disanalogy to the part on private right concerns the objects of study. Granted, international law does not guarantee legal persons their freedom and independence from external force in as conclusive a manner as this is established at the state level by the transition from private to public right. Considered in this way, international law resembles an international condition of private right which is better than the pure state of nature, but which as yet is only an anticipation of the completely rightful condition of a world state. Nevertheless, since only states and individuals come into question at the level of international law, I must repeat that there is no private right dimension of potentially acquirable objects in this domain. Thus, the question is 'only' one of providing

[560] Kant continues: "Also ist die Zusammenstimmung der Politik mit der Moral nur in einem föderativen Verein (der also nach Rechtsprinzipien a priori gegeben und notwendig ist) möglich" (ibid.). Maus (2004) goes somewhat too far in her interpretation of this passage when she suggests that the league is the only legal model that corresponds to freedom at all (cf. the fear of the universal monarchy). Kant's assessment is, rather, 'merely' that the league is the only model that is compatible with the freedom of (a plurality of) states (cf. "Freiheit *derselben*", my italics), and thus with international, that is, inter-state law as such. (As was also pointed out above, the federation he speaks of is a confederation in our contemporary sense of the word; it is not a constitutionalised federal state.)

a guarantee of the inalienable rights of states and individuals not to have their designated freedom spheres invaded by external forces.

We are, accordingly, not in the territory of acquired rights. Rather, we are in the realm of innate rights to freedom and, possibly, the discussions in §§37-40 on mediating and settling rights claims, insofar as a plurality of parties have reasonable rights claims, but are claiming rights that are mutually conflicting and incompatible. Such disputes about rights claims are not irreconcilable; and they do not *per se* necessitate the establishment of a fully fledged state. All that is required, as I have argued with Ripstein, is an independent and recognised forum or court of arbitration to mediate and settle disputed rights claims at the international level. And to the extent that the actors in question authorise and acknowledge the public resolutions of this international authority as juridically binding, Kant has indeed established an international rule of law that is consistent and sufficient for rightful relations with regard to both states (cf. *Völkerrecht*) and individuals (cf. *Weltbürgerrecht*).[561]

This concludes our discussion of an international legal order. Kant's model of a league of states is the only juridical entity that keeps intact the sovereignty of states and thus also the international dimension of law. The conceptualisation of international law itself presupposes the state world model of a league of states. All his deliberations in the final two writings on philosophy of right have this model at the start, centre, and end, for the simple reason that the league is the only model that has an international dimension, in contrast to the two world state orders, however conducive to worldwide rightful relations they might also be. At this stage of the discussion, having discarded the universal monarchy as a proper model for the necessary legal institutionalisation of rightful relations beyond the realm of the nation-state, we should turn to Kant's views on the empirical viability and normative desirability of the two possible legal frameworks for global justice.

b) The realisation of worldwide rightful relations through legal institutions

As I emphasised at the end of the last subchapter, Kant leaves the discussion of which peace project model should be chosen, the league of states or the world republic, to a global public sphere of citizens. It is not the task of philosophers as such to intervene in the realm of public reason, 'only' to participate in it and contribute to it as citizens. Any other understanding of

[561] Both Maus and Eberl & Niesen come close in their commentaries to expressing the same position, and I largely agree with, and am indebted, to their contributions to Kant scholarship. Nevertheless, when Ripstein's reading has been proposed here as a main source of reference, this is simply because he most clearly and consistently brings out the main structural problems that have to be addressed in Kant's account of international law (even if his 2009 account of this is nonetheless quite sparse).

this division of labour between philosophy and politics would leave the path open to a purely paternalistic and thereby instrumental conception of public deliberation and legislation. I will not discuss here the glaring lack of attention to this insight in the contemporary debate about global justice. I shall instead concentrate on the advice Kant gives with regard to a possible preference on his part in view of a realisation of the two different models in practical politics. Although both models are consistent and express the fundamental point that legal institutions are required for the realisation of worldwide rightful relations, I hold that Kant favours the league of states over the world republic on both contingent and normative grounds.

I have already touched upon some of these considerations above, and I shall now bring them together again. On the face of it, the world republic ought really to be Kant's model of choice. A global republic that is as well-functioning as a national republic leaves less room for its stubborn subjects to hinder freedom-promoting legal reforms and universal rights than a league grants to its members. Juridical processes and laws stem from one constitution rather than from the continuous deliberation of all member states. Correspondingly, legal decisions are non-voluntary and are binding as such, instead of being voluntary and dependent on the agreement and compliance of sovereign states. Nevertheless, when he considers the paths that lead to this as yet unrealised juridical entity, Kant seems to settle for a league model. What are his main reasons for this choice?

As I have objected against Byrd & Hruschka and others, the distinction between the world republic and the universal monarchy is not a matter of which model has the higher number of *social* sources and inlets for political power, let alone which model produces the better material outcomes. For Kant, such a view addresses the basic questions of authorisation and institutionalisation of public law only from the perspective of private right. Rather, as he stresses: there is, and in all juridical models can be, only one *legal* source and inlet of political power, and this must be grounded in a formal constitution of public right. In the case of a world state order, one model knows the principle of a strict separation of state authorities, while the other model does not know this principle. This is why Kant regards the former as republican and rightful, and the latter as despotic and unrightful. As I have emphasised, the various juridical models themselves cannot guarantee better (or worse) material outcomes, but 'merely' provide formally correct (or incorrect) legal and political procedures.

Moreover, the juridical models cannot themselves guarantee that they will not develop into their opposites. They can only aspire to remain or become republican. In fact, Kant points to a number of contingent and normative factors that suggest that the realisation of a world republic is not as easy or straightforward as one might think. Indeed, as the passages from the

essays on peace and religion quoted above show, his reflections concerning political, moral, social, historical, and/or other aspects reveal a deep scepticism regarding the ability of a world state to establish or even simply uphold the republican rule of law out of its own resources.

Instead, Kant emphasises that a development towards despotism rather than right is a real possibility in the process leading up to the establishment of a juridical entity beyond the states (and in such an entity once it exists). The legal order cannot safeguard itself against a slide into despotism out of its own resources alone, since this is dependent upon contingent factors of a political, moral, social, historical, or other origin (e.g. the inner workings of the legal order itself). These factors contribute to the constitution of civil society as distinct from the legal order as such; in turn, a legal order without a civil society is an empty shell. If the analogy be permitted, such a juridical order is similar to the head in the fable of Phaedrus to which Kant likened all legal positivist theory.

A discussion of Kant's philosophy and reflections on politics, morals, society, ethics, and/or history in their actual, empirical consequences for juridical orders would go far beyond the limits of this dissertation, which studies the legal structures of his philosophy of right. It would also lead us astray from the subject of this subchapter, namely a consideration of his philosophical advice regarding the realisation of the peace project. In this connection, as we can see from his remarks on the topic, he is deeply sceptical about the potential of any world state (even a world republic) to uphold the required legal order in practical politics. Kant was adamant that a world state did not possess these resources and would fail in the process of its realisation, like all previous attempts at forming overgrown supra-state entities. The problems concern not only the actual establishment of a world state, but also its lasting sustainment. One should bear in mind here his comment that a republic "die schwerste zu stiften, vielmehr noch zu erhalten ist" (8:366), a concern that, of course, cannot be easier to alleviate on a global than on a national scale.[562] In short, Kant must be said to have held significant doubts about whether a world state solution was realistically possible to attain at all, let alone to uphold.

This certainly does not mean that Kant believes it would be impossible to realise the world state, but only that he has certain reservations about it. He sees the establishment of global relations in (for instance) communication and trade as greatly helpful towards the goal of a worldwide legal order (in whatever formal shape). The same applies to the contemporary

[562] As Cavallar too has pointed out: "Apparently Kant shared some of the convictions of eighteenth-century writers like Montesquieu and Edward Gibbon: large empires endanger political freedom and stifle cultural development" (Cavallar 1999: 70).

establishment of a republic. France, Kant thought, would provide the idea of a peace-oriented league with a "Mittelpunkt" (8:356) in actual politics, a league which could then be joined by any state that was obligated to the ideal of a peaceful condition.[563] Accordingly, he saw the worldwide development of republican rule, the spirit of commerce, and a global public sphere as very valuable signs that the peoples of the earth were growing closer together, even in a juridical sense; "bei anwachsender Kultur und der allmähligen Annäherung der Menschen zu größerer Einstimmung in Prinzipien" (8:367) perpetual peace was thus not merely a fanciful and unrealistic idea, but also something that could perfectly well be realised.

One of the most memorable formulations of this conviction has already been quoted – the final paragraph of the third definitive article in the peace essay, where Kant holds the idea of cosmopolitan law to be "keine phantastische und überspannte Vorstellungsart des Rechts", once "die Rechtsverletzung an einem Platz der Erde an allen gefühlt wird". Nevertheless, the establishment of such a global public sphere does not imply that the world state is proposed as the one and only ideal towards one must move and make a transition. Instead, Kant describes the concept of *Weltbürgerrecht* (and *Völkerrecht*) in no uncertain terms as "eine notwendige Ergänzung" to a juridical order (*Codex*) that must remain "ungeschrieben" (8:360), i.e., non-constitutionalised and non-coercive in nature. As in all his remarks on international law, this refers to a voluntary legal obligation to enter a league of states to end all wars and promote human rights worldwide, all of which is further aided by the realisation of the league's non-institutional counterpart, a global public sphere.

Some very interesting observations can be made on basis of this paragraph. For Kant, international and cosmopolitan law are evidently necessary expansions, not merely transitory stages on a given road to a world republic. Rather, they contribute to the parts of the overall legal framework that are not directly linked to the constitution and the state competences that stem from this; they constitute the distinctively non-constitutionalised facets of civil society, as contrasted to the state. In keeping with the classification in part I of the dissertation on the structure of republican rule of law, we can say that these facets relate to the spheres of both institutionalised and non-institutionalised political authority (but not to constitutionalised state power). Hence, this global political public sphere of non-constitutionalised international legal principles and cosmopolitan human rights can complement constitutionalised state rule to give further support to the actual realisation of all three of Kant's dimensions of right, and thereby

[563] As we know, this hope did not materialise at all. If anything, the complete opposite is probably true. This only goes to show that great philosophers quite often make terrible political predictions and evaluations in real life. It is sobering to see that one of Kant's last comments on international politics (in 1798) pinned the hope of peace in Europe on the successes of the cunning statesmanship of none other than Napoleon Bonaparte (cf. 12:381 f.).

of worldwide rightful relations. The non-constitutionalised principles of both international and cosmopolitan law are necessary expansions of (not transitions within) the threefold juridical framework. For Kant, these principles thus pave the way "zum öffentlichen Menschenrechte überhaupt, und so zum ewigen Frieden, zu dem man sich in der kontinuierlichen Annäherung zu befinden nur unter dieser Bedingung schmeicheln darf" (ibid.).[564]

Kant's key question with regard to an actual realisation of worldwide rightful relations is therefore not related to the constitutionalisation of a world state. In fact, this model is barely discussed even on a theoretical level, since it leaves out the international dimension in which his deliberations on global justice are located. Rather, it is related to actual realisations of both an institutionalised and a non-institutionalised component of a worldwide public sphere. This realm of practical reason and political authority can accordingly discuss and address any case or topic that is of relevance for the realisation of perpetual peace and cosmopolitan law. In this way, these final ends of mankind are given a political and legal framework in which they are to realise themselves. On this reading of Kant, therefore, the main challenge in translating these theoretical ideals into political practice is connected not to a constitutional process towards a world republic, but rather to the strict necessity of institutional processes towards establishing the public fora that unite all individuals and peoples into one worldwide political community under universal right (but with several state entities of particular positive law).[565]

Considered in this manner, the single political unit of a league of states can be seen to gain additional argumentative weight at the cost of the single legal unit of a world republic, a model that by itself cannot provide guarantees against a descent into the pitfalls of global despotism or anarchy (not to mention barbarism or *Weltbürgerkrieg*). Contrary to the view of Byrd & Hruschka and others, there can be no guarantee against despotic rule or developments in a world republic. Nor is it possible in this model to guarantee *a priori* that laws are upheld as laws, and that they will be adhered to and respected by the subjects, let alone that this will lead to better material outcomes. On all of these admittedly vital questions for the validity and actual recognition of a legal order, Kant is very reluctant to endorse the world state. Firstly, he rejects the idea that philosophers should (or even can) have some sort of privileged position to answer these questions (including which legal model to choose). Secondly, his advice goes in the direction of the league of states in all the above mentioned respects. In other words, the league is Kant's preferred model on contingent grounds too.

[564] This continual approximation to perpetual peace and cosmopolitan law and its further specifics are, as I have already indicated, the subject of the next and final subchapter of the dissertation.
[565] I shall return in the epilogue to this duality of universal legal principles under particular positive law and its necessity as a major motive in Kant's philosophy of right.

Other philosophers influenced by Kant's philosophy of international right have tried to dispel the fears of the potentially despotic features of his world state proposal by introducing a principle of subsidiarity. Both Cavallar (1999) and Habermas (2005) advocate this in order to lessen the chances of an impractical federal arrangement, an excessively fast expansion of the supra-state legal entity, administrative excess, etc. (This outline is also implied in Byrd & Hruschka's account of the world republic as having a multitude of sources of political power.) But to address the issue this way already presupposes a world constitution which deals with these (and all other) questions and challenges pertaining to right. Within this world state order, significant political power may, of course, be delegated to lower levels of regional and national regimes, but the crucial point is that these are not autonomous, sovereign states, but federal units that are subject to a world constitution and its non-voluntary obligations.

Let me repeat that there is nothing formally wrong with such a juridical construct. My contention is simply that Kant did not advocate it and that his reasons for doing so are not antiquated, as many commentators today assume (cf. e.g. Habermas 1999; 2005). One passage that makes it perfectly clear that Kant did not in any way advocate it (contrary to the view of Byrd & Hruschka), is the explicit rejection of the 1787 American federal state constitution, to which I have referred above, and the approval of the confederative league of states model of the Hague. Further arguments against the subsidiarity solution put forward by scholars such as Cavallar and Habermas go in the direction of a republican-democratic critique of the legal orders they advoate. These might establish juridical entities that are better suited to solve the contingent challenges related to an actual realisation of global rightful relations. Nonetheless, I believe Kant raises important objections of a purely normative nature to their approaches.

Against Habermas' rather surprising suggestion that Kant (at least in the dimension of international law) should have located his constitutional law theory within the liberal tradition of the American Federalists (cf. Habermas 2005: 327 ff.), I hold that Kant was correct to hold fast to his republican principles at the international level too. Habermas is of the opinion that a liberal proto-constitution for a so-called domestic policy of a pluralistic world community is clearly preferable to Kant's rigid conceptions of republican rule and state sovereignty. Instead of Kant's either–or solution of a world state or state world model, Habermas proposes a multi-level system in which the UN, regional regimes, and states are assigned various and carefully circumscribed functions of a global rule of law (cf. Habermas 2004; 2005). Accordingly, and in line with the principle of subsidiarity, an empowered UN (and in particular the UN Security Council) is given the role of guaranteeing peace and the protection of human rights; regional regimes (such as the EU) deal with challenges too big for the nation-states to administer (e.g.

economy, environment, energy), whereas the states retain their monopoly on coercion in order to implement these (and other, self-issued) decisions. Yet, however one responds to this kind of approach, it is simply not the case that Kant's theory is antiquated or has to be reformulated in order to retain its relevance to present-day realities. On the contrary, it addresses all these aspects and proposes even higher normative standards than Habermas' construct.

Considered from the Kantian legal perspective elaborated thus far, we can say that Habermas' multi-level order is in fact fully compatible with both the world state and the state world model in Kant. A major problem with Habermas' legal system is precisely that it seems to be compatible with either model (or with neither). To put it briefly, if the legal and political obligations incumbent on the lower levels in his juridical framework are non-voluntary, we have a (federal) world state with a world constitution. If, on the other hand, these obligations are voluntary, so that the lower levels can reject them or alter them, or subject them to further debate, etc., we must speak, in Kantian terms, of a league of states model. The problem with Habermas' model is precisely this aspect: it is not clear, antecedently to each particular case, whether legal and political obligations are voluntary or non-voluntary and at what level. It is, accordingly, unclear whether we still should speak of a state world, or say that we have now entered a world state. Unfortunately, it appears that fundamental questions (e.g. sovereignty) and basic structures of right (e.g. the principle of a separation of powers) seem not to have been sorted out as a matter of principle.[566]

This means that his model seems to hover somewhere in limbo between a league of states and a world state model. Habermas laudably subscribes to Kant's view of the strict necessity of mediation and of the settling of rights disputes through legal institutions both within and beyond the nation-state. But it seems somewhat arbitrary at what level and to what degree this is to be done. This may be a correct description of the actual state of affairs in international relations today, but on the level of theory, I think Habermas has to sort out these questions in a more principled manner. As it stands, the authorisation to decide what decisions should be taken at what level is in dire need of justification. In the system that Habermas proposes, topics such as peace and the protection of human rights are assigned to the global, UN level, whereas the challenges related to the economy, environment, and the energy sector

[566] This question of the voluntary or non-voluntary character of international obligations (and thus of sovereignty as well) can also be seen as a question of legal competences and the authority to establish new norms (e.g. at the international level). If this authority resides with the states (even in an authorisation of extra-state institutions to settle rights disputes), then we are, for Kant, still within the model of a league of states. If this authority as such is handed over to an extra-state institution, we have, for him (but possibly not for Habermas), entered a world state. Also, and perhaps most importantly here, I hold Kant to be the more clear-sighted and precise thinker of the two.

are located at a regional level (without being any less global in scope). The crux of this critique is not that it is (or could be) a wrong allocation of topical levels. Rather, a Kantian, republican critique specifies that the authorisation to carefully circumscribe and allocate these topics[567] to different levels in a first instance requires its own justification.

Habermas tries to avoid this by arguing that the UN (and the regional regimes) should only have a liberal constitutional function in limiting state actions; they do not need to have or to justify any constitutional power as such, as the republican tradition insists (cf. Habermas 2005: 328). This is surely too naïve. As soon as one enters the realm of actual disputes and conflicts (e.g. on war, human rights, and economic, energy, and/or environmental policies), the republican point emerges with full force: the legal and political authority that limits other legal and political authorities must itself be justified and constituted according to clearly delineated legal and political principles.[568]

This juridical order, too, is a legal and political actor that has to be codified according to certain principles of right, and for Kant (and the republican tradition to which he belongs), this implies a transfer of state sovereignty to the global level of a world constitution. The UN in Habermas' system must thus be considered to have the worldwide authorisation to decide on the allocation of topics and the appropriate division of labour between the different levels; also, it must be able to redefine these as it finds necessary thanks to any number of contingent circumstances or normative necessities. For Kant, this presupposes a world constitution and, consequently, also a world state. Any inclusion of a concept of so-called "divided" or "new sovereignty" (Habermas 2005: 327; 332) to try to bridge a possible gap of legitimacy on one side and a possible lack of law-enforcement on the other only clouds the more basic question of who decides what is right. As a republican, Kant would reject any concept (new or old) of

[567] Of these, it should be noted, only the environmental issue seems to imply a Kantian necessity for international legal regulations as such. Kant was, of course, not aware of today's real possibility that human activity can cause damage to mankind's natural conditions in a way that actually endangers all mankind's exercise of freedom on a global basis. Unlike the other topics referred to, the environmental issue takes place in a sphere where the human person *per se* (regardless of state borders) is put in "wirksame Verhältnisse" (6:352) with one another – cf. his third duty of right (cf. 6:237) and the very definition of what necessitates a move towards legal regulations in a rightful condition. Although I cannot pursue this line of argument here, there seems thus to be a Kantian argument to be made for the necessity of international legal regulations of the world from a biospherical, environmental point of view – something that cannot be done from an economic or energy perspective as such.

[568] Pogge too overlooks this crucial point when he makes peace and security, global economic justice, and even democracy (!) dependent on "a vertical dispersal of sovereignty" (Pogge 2008: 187), without sufficient clarification of how this new dispersal and legal order are ultimately justified. For Kant, this would be to place the cart before the horse, as it only begs the question of how and in what a first principle of justice is grounded. As we have seen, Kant does not base this on certain hypothetical objectives that are to be pragmatically attained, but on a categorical imperative of normative obligations related to freedom as such (which again necessitates both individual rights *and* the sovereignty of states in its *de facto* legal realisation).

'divided sovereignty' as a clear contradiction in terms.[569] A political authority that can divide sovereignty with right is the true sovereign, full stop. The principle of subsidiarity does not in the least revoke the basic question of a legal authorisation of all political decisions (including an application of that principle); it has to be sorted out in principled, legal terms.[570]

For Kant, it follows that the UN in Habermas' (and Cavallar's) system must turn into a minimal world state (both sovereign and federal) in order to address and authorise what they assign to it. Yet, with the concept of 'divided sovereignty' as leverage, Habermas does not believe that this move has to imply that the global populace must constitute one cosmopolitan, legislative union. The UN and its institutions do not have to turn into a world parliamentary democracy, far less issue global citizenship and equal individual rights to more than seven billion subjects and counting (cf. Habermas 2005: 335).

However, at least in a Kantian, republican sense, this refutes Habermas' own assertion about the co-originality of popular sovereignty and individual rights. This, as we recall from part I of the thesis, was one of Habermas' fundamental criticisms of Kant (and Rousseau); the latter could not ground the co-originality of these two concepts in the legal order as such, but had to leave them ungrounded in their respective natural rights categories. Here, it seems that the tables have turned. At the global level, Habermas' construct must hypostatise the concept of a cosmopolitan union of all mankind (cf. popular sovereignty) in order to grant each of its members their individual human rights. The latter concept of individual rights is accordingly given the status of an actual legal entity in Habermas' proposal, whereas the former is located within the context of mere natural rights, with the result that the UN (or the regional regimes) can (and must) reconstruct it in the manner of a legal and/or political thought-experiment. It is no longer grounded in the legal framework as such.

This evaluation of the two concepts can also be read out of Habermas' discussions of the internal relationship between their two international correspondents, i.e., *Völkerrecht* and *Weltbürgerrecht*. In his interpretations and also partial reformulations of Kant's legal order, Habermas sees the dimension of cosmopolitan law as *the* innovative feature of Kant's theory of right, not (as I have argued here) the unification of three different dimensions of law into one consistent framework. For Habermas, the basic point of a third dimension is to effect a "transition" (*Übergang*, Habermas 1999: 195) or a "transformation" (*Umformung*, Habermas

[569] On such a concept also as basically pre-modern and pre-democratic, see, for instance, Maus (1994; 2005).
[570] Kant rejects in no uncertain terms any concept of divided (legislative) sovereignty. See, for instance, his *Nachlass* comment: "Der Souverain aber, dessen Gesetzgebung eingeschränkt wird, hat nicht das Ganze Gesetzgebende Ansehen, und da ohne dasselbe und ohne das Recht auch keine Gewalt seyn kan, würde ihm Gesetzmäßig auch nicht alle Gewalt zukommen, d. i. er wäre kein Souverain" (19:574, R. 7989).

2004: 123; 2005: 326) of international law from the state-centred world of *Völkerrecht* (i.e., popular sovereignty) to the individual-centred world of *Weltbürgerrecht* (i.e., human rights). Instead of Kant's threefold and evidently horizontal legal framework, Habermas advocates a clearly hierarchical and basically unitary understanding of the different dimensions of law.[571]

Contrary to Habermas, Kant can be regarded as upholding the necessary co-originality between popular sovereignty and individual rights at the international level too. This can be seen both in the construction of a non-hierarchical legal framework, in which *Völkerrecht* and *Weltbürgerrecht* are equal and equally important dimensions of international law, and in his rejection of the world state template on normative-democratic grounds. Again, the reasons are not merely based on contingent factors, but point to inherent developments within the legal systems themselves as they grow beyond their means. Here, the executive and judiciary have to be extended in order to fulfil the tasks assigned to them by law. This, as Kant points out in his fear of the universal monarchy, means a decline in the influence and importance of the hallmark of republican-democratic rule, the legislative process as conducted by the citizens (and no-one else) in their institutional and non-institutional public spheres. In this way, the laws and individual rights legislated by the people in their exercise of popular sovereignty are diluted by their particular application by the state apparatus in a growing number of cases (cf. the peace essay critique), or are simply not upheld and enforced as laws (cf. the reservations in the *Rechtslehre*). In *de facto* realisations of this kind, the normative idea of a global rule of law has not moved beyond what it aspired to overcome: the unaccountable, and thus basically arbitrary expression of the hopefully beneficent will of state executives, now let loose on a global scale. Both the individual freedom and public autonomy from which this semi-juridical arrangement draws its entire legitimacy thereby become abstract, but nonetheless empowering ideals, instead of universal laws that the system is legally bound to guarantee.

For Kant, the republican unity and the requirement that the people be both authors and subjects of law are not automatically, but gradually phased out in such moves towards ever larger state entities. This move, unless it is initiated by the peoples themselves, will lead to a development within the juridical order that takes place on the premises of the state apparatus (with its inherent orientation towards its realms of coercion, facts, particular rule, particular actions, administration and distribution of justice, etc.). This stands in clear contrast to a legal and political development on the premises of the legislative union of citizens with its inherent orientation towards its realms of freedom, norms, universal rule of law, universal rights and

[571] I will briefly return to this critique on a more general level in section b) of the epilogue.

actions, and public deliberation on distributive justice. There is hence in Kant (and Rousseau) a recognition of, and a clear warning against, the possibility of a gradual development towards universal despotism instead of republicanism, insofar as the political processes that anticipate the latter are not grounded in the normative reasons of the public sphere itself, but rather in the contingent reasons of the state (or of a social subsystem such as the economy).

Kant's republican-democratic argument entails that the process towards a fully rightful condition of perpetual peace and cosmopolitan law can take the direction either of a league of states or of a world republic model. But it cannot hover somewhere in-between, and it can certainly not be initiated by anyone other than the peoples themselves. The necessary process towards legal institutionalisation beyond the state (and possibly constitutionalisation, as in the case of a world republic) must be undertaken in a completely voluntary manner. Accordingly, only the legislative union of citizens can do this (by exercising popular sovereignty through a public use of reason); it cannot be done by the state apparatuses, which may only apply and enforce this expression of freedom. For Kant, neither the state apparatus nor the philosopher king can rightfully conduct a thought-experiment to decide the most rational choice or road to be taken for the necessary further development of worldwide rightful relations. Subsequently, there cannot be any non-voluntary legal or political obligations in his philosophy of right to take this decision on behalf of the subjects of law; there can be only the right of the latter to do so qua authors of the very same laws.

This understanding of the realisation of the peace project can also be seen in Kant's infamous claim that the peoples of the earth reject *in hypothesi* what is right *in thesi* – a claim that I also discussed above. The rejection does not, of course, concern the theoretically correct world republic. Instead, it concerns the already established state constitutions and the idea and principles of international law, none of which can be acted against on the road to the world republic (or the league of states). The peoples (let alone the states) cannot *qua* peoples (or states) have a world state as the only rightful model towards which they must strive. That would not only require a Kantian non-voluntary obligation to enter a(ny) world state; it would also imply a rejection of the actual legitimacy of the present state order, hence discarding the binding character of its legal obligations here and now. Rather, the peoples of the world must take the already established legal framework and principles of state and international law as the point of departure to establish either a league of states or a world republic. This must then

be done according to their hypothesis (i.e., their subjective orientation of action),[572] which is compatible with the said framework and principles. For Kant, only such a process upholds the concepts of both popular sovereignty and individual human rights as expressions of freedom qua autonomy in their institutional and non-institutional public spheres.[573]

In the next and concluding subchapter, I shall return to how this hypothesis leads for Kant to the desired realisation of perpetual peace and cosmopolitan law, understood as the continual approximation to these two final ends of the *Rechtslehre*. At present, we can at least conclude that his advice on our subjective orientation of action towards either a world state or a state world, on both contingent and normative grounds, goes in the direction of the latter model of a league of states. Although both are consistent with the normative requirement and idea of worldwide rightful relations through a process of legal institutionalisation, the free and voluntary confederation of states which remain sovereign provides, in his view, a better and threefold legal framework that preserves and promotes popular sovereignty and human rights in a manner more consistent with individual freedom and public autonomy than the unitary world state does, no matter how federal and republican it is organised internally. However, as I have frequently pointed out, it is entirely up to the citizens (not the state or the philosopher) to evaluate and adopt one of the two theoretical legal models in their public deliberation and legislative process, in order to realise the peace project in actual politics.

2.3. The continual approximation to perpetual peace and cosmopolitan law

For Kant, therefore, the actual realisation of the league of states (or, in the course of time, of the world republic) must be considered in completely non-voluntary legal terms. No right or permissive law to coerce someone to enter a rightful condition beyond the nation-state can be deduced from his mature writings, for the simple reason that neither states nor individuals can have physical (enforceable) rights claims beyond their designated freedom spheres. Contrary to the views of scholars such as Byrd & Hruschka (according to whom states can rightfully

[572] Cf. the discussion of this important aspect in Eberl & Niesen (2011). A similar argument, although without the reference to hypotheses, is also put forward by Thiele (2011: 178): "keine rechtliche Verbindlichkeit [kann] behauptet werden, die jeden Staat nötigte, sich einem Völkerstaat anzuschließen oder ihn zu begründen".

[573] One could perhaps think that Kant holds that it is impossible to overturn the constitution of each state in order to enter a new constitution with another, neighbouring people, and that there can never be established a world state or constitutional union (such as the EU may be), cf. his *Rechtslehre* rejection of the non-voluntary, eternal character of the American federative model. I do not regard this as a necessary implication; for Kant, peoples (but not states, in the sense of state apparatuses) can, according to their own constitutional procedures, enter a new state constitution. His argument is 'merely' that only the united legislative will can do so, and that, once established, the voluntary agreement becomes non-voluntary and legally binding. Here, the American federative model is not rejected *per se* at the global level (although it is obviously not preferred); it is rejected because it eradicates the international dimension (and accordingly is no template for international law, only for world state law).

wage war for a state of states of a perfect WTO) and Tesón (according to whom some states can rightfully wage war for the protection of human rights), Kant gives no indication that he himself holds these actions to be rightful. Instead, it is clear that he argues for the opposite at a material level of particular actions, which in any case are unrightful *per se* at a formal level of universal laws. Much closer to Kant's position are Cavallar and Habermas, both of whom however seem to overstretch the argument in favour of the world republic.[574]

In contrast to all these accounts, I have argued that Kant in both theory and practice is in favour of the league of states model, which is his only framework for international law. I believe this view is also present in his last remarks on *Völkerrecht* and *Weltbürgerrecht* in the *Rechtslehre*, leading up to the conclusion. It may be that a final, peremptory guarantee of the freedom and rights of individuals and states cannot be given *de facto* in the league of states model; but the world republic is equally incapable of providing such a *de facto* conclusive guarantee. In the latter case, the lack of a guarantee will reveal an inherent flaw in the legal system as such, whereas the inability of a league to resolve conflicts is 'merely' due to a lack of *de facto* agreement between parties that do not have the right to use coercion beyond the protected and protective realms of their own jurisdiction. Until the world republic has the sovereign legislative, executive, and judicial authority as well as all contingent resources that are required for implementing global rule of law according to a universal law of freedom, this latter ideal must for Kant necessarily remain an "unausführbare Idee" (6:350).

Nonetheless, it is possible with the aid of practical reason to implement the "politische Grundsätze" that lead up to a realisation of the institutions and procedures necessary for establishing perpetual peace and cosmopolitan law. The political principles presented to us by practical reason are the obligations or alliances (*Verbindungen*) that states enter into for the peaceful purpose of letting the permanent (but dissoluble) congress attempt to mediate and settle disputed international rights claims as if through a due process of law. Considered in this manner, we are continuously approximating to the normative necessity and ideal of global justice and worldwide rightful relations, to the extent that the permanent congress of states is

[574] In other words: this makes it clear that Byrd & Hruschka advocate a non-voluntary legal obligation to enter a world state, whereas Tesón grants self-professed liberal democracies a privileged role in international relations (including a right to wage war). Cavallar and Habermas seem not to clarify sufficiently whether legal and political obligations beyond the nation-state are ultimately voluntary or non-voluntary. Cavallar comes close to advocating coercion in this regard when emphasising the Kantian right of states to compel (*nötigen*) other states to leave the state of nature and war, if only for the league of states (cf. Cavallar 1999: 121, with reference to Kant's *Nachlass*, 23:352). In the *Rechtslehre* proper, however, this right to compel other states to leave the state of nature is made in reference to actual warfare and a possible *ius post bellum* (cf. §§53, 60), according to which a victorious state has the right to let the defeated state (or unjust enemy) adopt a new and (more) pacific constitution (cf. 6:349). I do not, however, see that this implies a form of non-voluntary membership in a league of states – for Kant, this is left to the still sovereign people of the defeated state to decide.

recognised as the one and only rightful international public authority, whose obligations and resolutions are also juridically binding. In contrast to the unachievable idea of a world state (which is established too soon), the task of adopting the political principles issued by practical reason is "allerdings ausführbar", since it is "eine auf der Pflicht, mithin auch auf dem Recht der Menschen und Staaten gegründete Aufgabe" (ibid.).

But what (if any) guarantee can be given, if not for legal rights themselves, then for the continuous approximation to perpetual peace and cosmopolitan law, so that the idea has objective practical reality and does not remain a mere pious wish? The above critique of the world state affirms here that this is not something that the international legal order of a league of states can guarantee by itself. How does Kant conceive the last step that is to give objective practical reality to the very idea of worldwide rightful relations?

In the conclusion of the *Rechtslehre* (*Beschluss*), Kant starts by asking whether the lack of final ontological evidence of something (in this context, a *de facto,* final guarantee of perpetual peace and cosmopolitan law) must be counted as proof against the possibility of its (future) existence. No, Kant argues, for this to be the case, the theoretical impossibility of its existence has to be proven (cf. 6:354). Just as the lack of final theoretical evidence of the existence of God, the immortality of the soul, or the freedom of will does not constitute a refutation of these claims (unless evidence of the opposite can be provided), so too the aspect of a mere possibility of perpetual peace and cosmopolitan law cannot constitute an objection to this ideal. On the contrary, since no final refutation of this claim regarding the possibility of establishing worldwide rightful relations can be provided, one must rather ask whether the claim (or its opposite) is of any interest to the one who asks the question. Here, Kant returns in a very interesting way to the aspect of hypotheses.[575] The philosopher (in the broad sense of the word) who asks the question must ask if an interest can be found in assuming one or the other hypothesis, in either a theoretical (i.e., speculative) or a practical sense.

The ideal of worldwide rightful relations can neither be refuted by reason *per se*, nor be adopted as a mere pragmatic task (with its non-voluntary obligation leading only to the world state). Nor can we consistently want to remain in a lawless condition where all relations are upheld as the right of the stronger. Even if the ideal of a threefold legal framework cannot be conclusively established as a thesis, it nonetheless remains a hypothesis to which we can choose to orientate ourselves. At this point of the analysis, where no theoretical position can be established as valid once and for all, Kant says the following: "Nun spricht die moralisch-

[575] The link is also pointed out by Eberl & Niesen (2011: 241).

praktische Vernunft in uns ihr unwiderstehliches Veto aus: *Es soll kein Krieg sein* (…) – denn das ist nicht die Art, wie jedermann sein Recht suchen soll" (6:354).[576] Since an absolute refusal of the political principles that lead to worldwide rightful relations actually amounts to an endorsement of war as a means to realise one's rights and ends (no matter how inherent or justified these might be), it is not only possible, but indeed also necessary, from the point of view of practical reason, that we endorse those principles that are consistent with perpetual peace and cosmopolitan law.[577]

For Kant, we as embodied, rational beings have a legal (and a moral) obligation not to seek our rights in an unrightful manner. We have to endorse and obey the duties placed upon us by practical reason. At the international level, this amounts first of all to a strict prohibition of war – the use of force beyond the realm of one's own jurisdiction or sphere of freedom is the exact opposite of right. As at the level of state law, this is nothing but violence. This is absolutely not how one should seek one's rights. From this irresistible veto of practical reason there then proceeds the legal obligation to let all international law disputes be mediated and hopefully settled by an independent and universally recognised international forum in the shape of the permanent congress of states (as provided by the negative surrogate of the league of states). This hypothesis must be assumed to be valid and thus binding on all mankind qua rational beings. Accordingly, there is a legal and political obligation to adopt this subjective orientation of action and to strive towards it in continual approximation.

Kant then emphasises that under this obligation of practical reason, the vital question is not whether perpetual peace, ontologically speaking, is real or not ("ein Ding oder Unding sei"). Instead, normatively speaking, we have to act as if it were real ("als ob das Ding sei") even if it is not (cf. ibid). This duty is not, as such, coercible (i.e., non-voluntary), but it is a political maxim that every rational being has to adopt and promote as a moral person. In this way, that is, insofar as we act according to this maxim, it attains objective practical reality, since Kant regards its rejection (in either theory or practice) as a rejection of the moral law itself and thus of nothing less than both normativity and our humanity (cf. 6:355). Therefore, in all our political and legal actions we must move towards the ideal of perpetual peace and cosmopolitan law as if it already were real, thereby realising it ontologically in the normative

[576] Accordingly, even if modern warfare were to minimise (or even eradicate) the number of casualties in war, the latter course of action is, for Kant, still materially unrightful and takes place in a condition that is wrong in the highest degree.

[577] This, of course, does not mean that establishing political processes to implement these principles will be an easy task, and still less that it is easy to discern the best application of these principles under contingent circumstances. However, this is a task for the states and its citizens to deliberate and decide upon, not for philosophers as such.

political process of reforming our already existing legal systems through peaceful, rightful means (and only these means).

The crucial point is that, for Kant, to do so on the still uncertain ground of its *de facto* realisation is not a blind leap of faith. Rather, it follows from the primacy of normativity over ontology, and is in the next instance attainable only after we also have carried out the change of perspective within his practical philosophy, in order to grant his legal philosophy a primary role vis-à-vis morality proper in the realisation both of freedom and of the moral law as such. Here, in the conclusion of the *Rechtslehre*, we have finally delineated all Kant's principles of right that in theory ground "eine allgemeine und fortdauernde Friedensstiftung", something which we are also obliged to adopt as a political maxim. This task is assigned to us as well as answered by practical reason, the public use of which leads us, in Kant's formulation, "in kontinuierlicher Annäherung zum höchsten politischen Gut, zum ewigen Frieden". This does not constitute "bloß einen Teil, sondern den ganzen Endzweck der Rechtslehre innerhalb den Grenzen der bloßen Vernunft" (ibid.).

We have almost reached our end. This condition of perpetual peace and cosmopolitan law is guaranteed by a consistent legal framework which alone allows us to uphold rightful relations between all mankind and also three equal dimensions of law. This, of course, does not mean that there cannot be any injustice within this merely formal framework, but only that there is established a juridical framework for the mediation and settling of all disputes about rights claims according to a universal law of freedom. On this reading, no inherent structural problem remains for the philosopher of right to solve, only the material injustice that we all, as citizens, have a duty to rectify.

Kant, in designating both the structures of law and a clear division of labour between philosophy and politics, provides us with a formal framework that unites the private choice of one with a public, universal law of freedom for all. He does not give many further indications about the specific content of his legal order, but I can present here a few features that seem indispensable to the process of realising rights and rightful relations worldwide, to sum up his overall position. As we have seen, he lays particular emphasis on the necessity and role of the public use of reason (in both its institutional and its non-institutional dimensions), but two additional aspects can be highlighted here, to sum up my remarks. One aspect concerns a topic that we have already considered, namely the peacefulness of republics, a topic that can be seen to inhibit yet another feature to aid the development of global justice (which Kant himself may not have been sufficiently aware of). The final aspect concerns an emphasis on a particular concept in the *Nachlass*, but that is not explicitly referred to in his main works. This

is the enthusiasm that necessarily follows and also aids the maxim of a practical realisation of the ideal of worldwide rightful relations.

Let us start with the peacefulness of republics. Kant repeats this in the conclusion to the *Rechtslehre* too. Although he does not discuss here the material specifics of his entirely formal international legal order of a confederative league model, he comes back to the theses of the first definitive article of the peace essay as well as to the sections on international law in the *Rechtslehre* when asserting that the state constitution most conducive to peace is indeed the republican. Perhaps, Kant writes, it is the republicanism of all states ("den Republikanism aller Staaten") that is to lead mankind away from "dem heillosen Kriegführen" (6:354) and thereby put an end to all wars. Kant is not adamant about this claim, and it certainly cannot be interpreted to mean that a republican state constitution is to be required of all league members at the time of entry; non-republican states too must be able to join the confederation if they want to do so.[578] Nonetheless, the republican rule of law remains the ideal and contributes to the peacefulness of states, towards which all states should move through a slow and steady reform process at both the national and the international levels.

In addition to the general peacefulness of republics, we should not overlook another characteristic of this form of government. A further aid to the cause of establishing perpetual peace and cosmopolitan law is the structural aspect that makes republics republics in the first place, namely the principle of a strict separation of powers and the hierarchical relationship between sovereign legislative authority on one side and executive (and judicial) power on the other. Kant touches upon this in the second appendix of the peace essay when discussing a supposed antinomy between politics and morals in international law, since states here remain the guarantors of the promises they themselves make to others (cf. 8:383). Without a world state, it seems that states can enter and unilaterally break international treatises and promises at will, thereby relieving themselves of the legal obligation that should have been incumbent upon them.

From a private right perspective, this is a clear example of a structural problem and the very definition of a state of nature. States remain judges in their own causes. But Kant points

[578] For instance, Kant would not make it a presupposition that his own Prussia had to become a republic before it could join France in a potential effort to establish peace in Europe (and the world) through a confederative union. On the contrary, he explicitly warrants a second kind of permissive law for states to postpone republican reforms if their territorial sovereignty, and thus integrity, is threatened by other, neighbouring states. Accordingly, he holds that because of contingent circumstances, a republic is not always the form of government that is most conducive to a development towards sustainable peace (cf. 8:373 and 7:86). For the claim that Prussia is exactly what he has in mind here, see Cavallar (1999: 5). (In line with their overall approach, Byrd & Hruschka (2010: 199) somehow hold that the remark about the 'republicanism of all states' refers to a world state solution and that non-republican states cannot establish international legal relations at all (cf. ibid: 214)).

to a principled duality of republics (and upholds the demand that states cannot pursue private purposes). In a republic, the state apparatus of executive (and judicial) authority is precisely that, an apparatus or mere automat (cf. 8:305; 19:513), implementing the laws legislated by the united will of the people or by its representatives. The state officials in a republic must always "Rechenschaft geben" (8:383) to the sovereign (i.e., the legislator of universal laws), which in turn cannot act or decide in any particular case. In other words: those international treatises and promises that the people's representatives of a republican state have agreed upon (whether these obligations are included in the laws of the land or not) cannot rightfully be overturned by the state apparatus.

Admittedly, Kant's focus in the peace essay lies on solving the supposed antinomy as a matter of international law. Kant refers here only to the *empirical* likelihood that other states would either shun such a despotic state and/or even form alliances to unite themselves against this state, which fails to keep its international promises (cf. 8:384). Yet, even if Kant does not do so himself, it must be possible to apply this passage to a formal, republican level. Here, the state apparatus *must* implement what the sovereign legislative authority has promised others in international fora (e.g. human rights, rules for warfare, etc.). Otherwise, it is a despotic state. This means, as I have underlined earlier, that it in fact makes perfect sense to speak of international legal obligations undertaken by that republic, even if no world state has been constitutionalised. In this manner, international agreements on perpetual peace (prohibition of warfare) and cosmopolitan law (universal human rights) are both achievable and coercible as a matter of a distinctly republican rule of law. The normative ideal of global justice through worldwide rightful relations thereby actually attains objective practical reality.

One last feature of Kant's philosophy of right should perhaps be included here, at the end of its overall presentation. I argued above that although a final and conclusive guarantee for a *de facto* realisation of the threefold legal framework could not be given, Kant was right to insist that practical reason nonetheless places us under a juridical obligation to adopt and promote the political principles most conducive to its realisation. The ideal itself makes us overcome the last hurdle on the way to perpetual peace, by inspiring us to adopt the maxims required for this normative end. Kant does not go into further detail on this important point in his main writings, but he is somewhat more elaborate in a *Nachlass* passage dated after 1795, which nicely sums up his main line of argument as I have attempted to reconstruct it here.[579]

[579] The passage in question is found in reflection 8077 (19:608 f.), gathered from a collection of loose pages belonging to the *Nachlass*. The note is not dated as such, but the period between 1795 and 1799 is indicated as a likely date by the editors Erich Adicke and Friedrich Berger in their publication of Volumes 14-19 for the

Kant again returns to the French Revolution and the role of the enthusiastic spectator. The attempted realisation by an enlightened and at the time free people to go beyond their own interests and instate a true republic "durch Ideen des (gemeingültigen) Menschenrechts" that seeks to end all wars arouses an "inevitable enthusiasm" ("unvermeidliche Begeisterung", 19:607) in Kant and all other disinterested spectators.[580] True practical-rational progress can be seen here, offering a legitimate hope of a realisation of rightful freedom in all three legal dimensions. The French people has adopted "eine Hypothese [!] in (moralisch) praktischer Absicht, die immer hinreichend gegründet ist, wenn man ihr nur nicht die Unmöglichkeit entgegenstellen kann, welches hier der Fall nicht ist". In addition to our wish and hope for true moral improvement, we now also have "die That". He goes on to explain this vital point further: the true moral progress of the French Revolution is not primarily "in der Moralität menschlicher Gesinnungen sondern (…) in Thaten zu verstehen" (19:608). And, as I pointed out above, the *de facto* realisation of the moral law is not a matter of a realisation of morality leading to a realisation of legality, "sondern vielmehr umgekehrt" (8:366, cf. 23:354), it is to be expected from a realisation of a republican constitution which then contributes to "die gute moralische Bildung eines Volks" (8:366). In his view, the French Revolution carried the seeds of true human progress both in legal and in moral terms.[581]

The ideas and principles of the French Revolution and Kant's philosophy of right were virtually coextensive in his own view. They both sought the establishment of a republican rule of law unlike any other known state formation. At the international level, this would lead to a perfectly rightful legal condition of perpetual peace and cosmopolitan law guaranteed by a

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Akademieausgabe, cf. the online resources provided by korpora.org on Kant's handwritten *Nachlass* notes, see: http://korpora.zim.uni-duisburg-essen.de/kant/nachlass-a.html – consulted on 18 September, 2012.

[580] The quintessential aspect is, of course, not that the realisation succeeds as such, since this is dependent on any number of contingent conditions. Rather, it shows the spectator that it actually is possible and accordingly reveals a sign of true progress in the process of giving objective practical reality to the final end of mankind: freedom and peace in a true cosmopolitan condition. (Elsewhere in the note, Kant repeats his stern critique of the English legal order: he holds the French people with its new and "auf viel gründlichere Art freye" (19:605) constitution to be infinitely more free than the English people (who are "nicht frey sondern unterjocht" (19:606), since it is the executive monarch (and not the people, as supposedly sovereign legislators) who has the final say in matters of war).)

[581] For Kant, the fact that the ideas underlying the Revolution did not have lasting success under the contingent circumstances of late eighteenth-century Europe takes nothing away from their significance and rightfulness. Regardless of the absolute horror that followed in France and throughout the rest of the Continent in the wake of the revolutionary years, the fundamental theoretical principles of the Revolution itself were, in his eyes, still more or less correct. Kant did not overlook the point that the actual events would not necessarily lead to a rightful condition of global justice, but could require us to start all over again on this process. In the same note, he adds a remark with a double meaning in this regard: "Es ist eine Sache der Freyheit, von der man nichts mit Sicherheit vorhersagen kann". The philosopher can 'merely' establish the theoretical validity of practical principles, not guarantee that these norms will not subsequently be abused by someone, somehow. It would be foolish of the philosopher to think so, let alone to believe that he or she could know or predict the ways of actual political practice when it comes to a realisation of these or any other political maxims.

confederative union of a league of states. For Kant, the republican constitution establishes a form of government conducive to the normative end of mankind, a peace project that is "keine leere Idee, sondern eine Aufgabe, die, nach und nach aufgelöst, ihrem Ziele (weil die Zeiten, in denen gleiche Fortschritte geschehen, hoffentlich immer kürzer werden) beständig näher kommt" (8:386). This hope and firm belief of a perpetual approximation to worldwide rightful relations find a pregnant formulation in the *Gemeinspruch* essay: the legal evolution towards a full realisation of natural, that is, rational right is a process that can be "*unterbrochen*, aber nie *abgebrochen*" (8:309).

As Kant underlines in the *Nachlass* passage, even if a final guarantee cannot be given for the continued existence and preservation of actual peace, "Staatsbürgerlich und zugleich Weltbürgerliches Regiment ist in jeder Verfassung möglich" (19:608). In other words, each state has both the possibility and the normative necessity to rule in complete accordance with the principles of right and freedom, both within and beyond its own realm of jurisdiction, even out of its own resources, since the principles are inherent to the three and equal legal dimensions of Kant's overall framework. He thus envisions an all-encompassing political unit where all dimensions are fully realised in the course of time through republican rule and the league of states model. The league provides an independent and universally recognised forum through which the public use of reason can aid the reform processes within each state and hopefully avoid the outbreak of actual wars. States can thereby implement their international agreements as if there were a real legal process at the global level, and thus give objective practical reality to the final normative end of perpetual peace and cosmopolitan law.[582]

Every human being could accordingly with right consider himself or herself a member of an international legal order with a global public sphere that would react to any violation of the innate and acquired rights of human beings. For Kant, this would unite all citizens in one cosmopolitan condition, and the very idea of this contributes to the final step towards an actual realisation of the political principles leading up to this worldwide community. In all of Kant's writings, this idea and hope is perhaps nowhere formulated with more vigour than in the *Nachlass* note. In one memorable passage, he summarises almost all of his reflections on the peace project of worldwide rightful relations: "Sich als ein nach dem Staatsbürgerrecht mit in der Weltbürgergesellschaft vereinbares Glied zu denken, ist die erhabenste Idee, die der

[582] For Kant, republics in particular would be inclined to incorporate and implement international treaties of both human rights (cf. *Weltbürgerrecht*) and prohibitions of warfare (cf. *Völkerrecht*), but this cannot be seen as a precondition for membership in the 'merely' peace-oriented confederative union of a league of states.

Mensch von seiner Bestimmung denken kann und welche nicht ohne Enthusiasm gedacht werden kann" (19:609).

Mankind is hence united, not in a world state, but in a state world with an international legal order of three equal and fully realised dimensions of law – *Staatsrecht*, *Völkerrecht*, and *Weltbürgerrecht*. States remain sovereign, in order to realise the innate right to freedom of all men and women under a republican rule where the citizens are authors of the same laws they then are obligated to qua subjects of law. The international juridical order consists in a strict prohibition of war and warfare according to the rules of *Völkerrecht* and a global promotion of human rights to each and every one as a matter of cosmopolitan law. The league of states here provides the institutional forum that aids rights processes in the public implementation of international agreements within the legal codes of states that remain sovereign. It also aids the process of a further realisation of non-institutional fora to inaugurate a worldwide public use of reason that can address rights violations across the globe. The republican rule of law with a confederative league of states can thus establish two public authorities that are not inherently antagonistic, but are mutually inclusive, in the shape of the constitutionalised republic and the non-constitutionalised league. These two legal authorities promote and provide global justice through worldwide rightful relations – relations that go all the way back to and are founded in the innate right to freedom.

This is also the reason for the completely voluntary character of Kant's international law project. The cosmopolitan community of a confederative union of a league of states, in its efforts of realising worldwide rightful relations, encounters a boundary when it comes to the use of force. The league can require only the external rightfulness of states (and individuals), not their internal rightfulness.[583] For Kant, it is inconsistent with the concept of freedom to require that a state or its citizens in a non-voluntary manner exercise the non-state regulations of an international community, regardless of how cosmopolitan this may be in appearance or aspirations.[584]

Hence, the cosmopolitan community has to forego the legal capacities that would have entitled it to a rightful exercise of the use of force (legislative, executive, and judicial power). This is not merely because such an arrangement would be tantamount to having a world state,

[583] Nevertheless, as I have argued in this thesis, the league *can* solve any international rights dispute (inter-state or cosmopolitan), and states and individuals stand for Kant under a rational legal obligation not to use force when claiming their rights: they *must* solve disputes in a rightful manner. Crucially, the league of states provides a forum or court of arbitration that overcomes the international state of nature.

[584] If the cosmopolitan community could rightfully do so with force, it would have to be a world state. For Kant, this would not correspond to a world republic; it would then be equivalent to a universal monarchy. Here, to refer once again to his critique of the ancient Greek democracy, particular decisions are (supposedly) taken by all, who nonetheless are not all (cf. 8:352). As he sees it, such a state can only be a despotic one.

and would accordingly suspend the international dimension, but also because of the normative Kantian fact that there can be no *lex permissiva* to rightfully anticipate this process on behalf of someone else. All that a juridical order can require is the renunciation by the relevant moral persons of any external use of force that is incompatible with the equal right of everyone else according to a universal law of freedom. In Kant's view, this is already accomplished by the continual approximations to a republican rule of law within all states and to a confederative league beyond these. Together, the republic and the league of states constitute a cosmopolitan community that actually makes the necessity of a world state solution obsolete. Kant puts the point nicely in another *Nachlass* note:

> Der Grund warum diese cosmopolitische Föderation nicht auf Gesetzgebung und Rechtsverwaltung selbst für die Glieder dieser Weltbürgerlichen Societät gehen darf mithin keine Cosmopolitische republick gestiftet werden darf ist weil die bloße äußere Freyheit allein das Object ist was sie zu verlangen berechtigt sind mithin nur die formale Bedingung aller Rechte in einem bürgerlichen Ganzen (23:352).

One might object that Kant fails to give a final, theoretical guarantee for the practical realisation of the international legal order, insofar as there is 'merely' a world community of right and no world state (cf. his own critique of Achenwall on this point). However much this objection is correct from the perspective of private right, the international dimension of law in Kant simply has no private dimension or purposes to it. Once we realise that there can only be a public dimension to the international legal order to which all private purposes are subjected, we understand that his *Weltbürgergesellschaft* or cosmopolitan community both can and also does give objective practical reality to the final end of the *Rechtslehre* and of mankind (considered from a legal perspective). In other words, the establishment of a constitutionalised world state is not philosophically required for Kant, since the league of states too provides us with a consistent theoretical model that is not only normatively sufficient, but quite possibly also preferable. The final step towards the actual realisation of his peace project is in any case taken not by the philosopher, but by the citizens, who can only adopt the political principles conducive to both perpetual peace and cosmopolitan law as an expression of their own free will in an enlightened global public sphere. Kant's final and perhaps finest contribution to the peace project is his additional insistence that its practical realisation in turn is inspired as well as further aided by the normative end itself and by the enthusiasm that the idea of worldwide rightful relations instills in us.

Epilogue

This concludes the deliberations on Kant's philosophy of right, leading to his ideal of both the theoretical and practical realisation of the highest political good through a threefold juridical framework. This constituted the completely rightful condition of a republican rule within all states, and an international legal order of perpetual peace and cosmopolitan law beyond them. For Kant, these three dimensions are pure objects of practical reason. Accordingly, they have no equivalents in actual political practice (since they do not refer, as such, to any particular objects in the phenomenal world). Whereas this kind of unattainability may lead someone to think less highly of Kant's legal framework, I hold the opposite to be true. To instate an actual object as the theoretical end of political (or, for that matter, practical) philosophy would only lead to heteronomy and hypothetical imperatives within that model. As we have seen, the objects of Kant's philosophy of right are not external to the juridical order, but are entirely immanent to its structures. In fact, they are the legal structures themselves. His final ends of republican rule, perpetual peace, and cosmopolitan law are therefore nothing but the formal (or metaphysical) principles at work within each legal dimension, theoretical principles which in the next instance can be fully realised (i.e., are attainable) in political practice as such. The first aspect needs an elaboration by the philosopher; the second is the elaboration and distinct task, indeed the duty of citizens united in enlightened public spheres.[585]

The philosophical principles of right are accordingly taken up and realised by political communities worldwide to form a truly rightful and cosmopolitan condition. This division of labour between philosophy and politics sets a limit to the philosopher's political inquiry, and I see this limit as a clear strength rather than a weakness in Kant's theory. Through our efforts to promote and provide worldwide rightful relations according to universal laws, we realise the normative end in political practice as such. This process must always be an ongoing one (regardless of the occasional setback) that can be seen at the national, republican level as well as the inter-state and cosmopolitan levels to take the shape of an asymptotic approximation to the normative ideals and obligations that are imposed on us by the practical reason. All this, as I have emphasised in the main parts of the dissertation, is grounded in and proceeds from the innate and inalienable right of one human being to the freedom that is consistent with the equal freedom of all according to a universal practical law. And the thought of this instills in us an enthusiasm that aids our endeavours to realise the normative end of mankind.

[585] As Kant emphasises throughout his writings, the philosopher only needs to show that the pure objects of practical reason are consistent (i.e., capable of being realised) in order for them to necessarily hold in actual practice.

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In this epilogue, I will attempt to bring together some of the deliberations from this thesis and apply them to certain features of contemporary stances in both Kant scholarship and the actual state of affairs in the world. As I emphasised in the introduction, the interest in Kant's account of global justice is without doubt on the rise. Nonetheless, I believe that his peace project is in critical danger today of being reformulated and transformed into a bellicose enterprise by a growing number of scholars, who uncritically accept a vocabulary and contemporary political developments that can only widen the distance between Kant's original philosophical insights and the current political climate. Both at the national and the international level there is now, in my view, a real risk that his presuppositions and principles for worldwide rightful relations will be abandoned once and for all.

It is, of course, impossible at this stage to offer a satisfactory justification analysis of this dystopic claim (which hopefully is to be rejected). But these last remarks may serve as an indication of what I hold to be main lines of difference between the interpretation of Kant's philosophy of right that I have set out here and the present state of affairs in certain realms of Kant scholarship and of global politics. In this epilogue, I shall focus on the following three features and their relationship to the Kantian theory and the actual practice of international politics and law: a) the universality of legal principles and the particularity of positive law; b) the structural transformation of the concept of sovereignty; and, finally c) the present actuality of an international legal order.

a) On the universality of legal principles and the particularity of positive law

Kant leaves no doubt in his political writings clear about the important point that whereas the legal principles he advocates are universal in scope and character, the positive law required for their rightful practical implementation always remains particular. Naturally, this insight is also reflected in his juridical framework, both at a national and at an international level. The republic is precisely the fundamental separation between the universal rights claims of the union of citizens and the state apparatus with its particular rights claims against each subject of law. The former union is the sovereign state legislator (which does not know, let alone act in particular cases); the latter is in charge of *de facto* positive law by upholding the universal rights claim in each separate case. If the state apparatus itself could pass (or veto) the laws that it then had to uphold, there would be despotic rule. Worse still, if the state apparatus

could redefine the 'laws' in each particular case, then there would not be a rule of law at all, but only the private will and moral beneficence of an unbound usurper of violence.

The central dichotomy between the universal and particular finds its way into Kant's discussion of the rule of law beyond the nation-state too. For one thing, this critique can be applied equally well to the models of world republic and universal monarchy, since they are a republican and a despotic version of a world state. Another and more relevant aspect is that the dichotomy between universal and particular also helps further explain why Kant would favour the league of states over the world republic. Yet again, this can be done only with reference to the internal structure of the legal orders in question, not to any contingent factors that are related to an empirical equation that evaluates their material preference.

For Kant, the legal model of a league of states has another crucial advantage over the constitutionalised world republic. This advantage concerns the rights relations involved in the cases where international law is strictly needed: when rational rights claims diverge between international actors, whether state or individual. In the case of a rights divergence in a world republic, the institutional dimensions of both the global executive and the judiciary come up against singular cosmopolitans (as subjects of law who have no rightful exit) to impose rules and verdicts that may (or may not) be correct.[586] However, the same case, when applied to the league of states scenario, will turn out differently, and, importantly, more in line with Kant's normative principles.

In the case of a rights divergence in a league of states, the member of the cosmopolitan community comes 'merely' up against a national executive (and/or judiciary) and may appeal also to a global public sphere in both its institutional and its non-institutional dimensions. So whereas the cosmopolitan subject of a constitutionalised world state in each particular case is able to rightfully appeal 'only' to a non-institutionalised public sphere (which is bound by the same laws and regulations as the cosmopolitan subject), a 'mere' cosmopolitan member of the league of states can find actual resonance for the disputed rights claim even in the institutional framework. If the non-institutionalised realm at the state level does not aid his, her, or its (e.g. a people's) cause, then a rational appeal can be directed to the global public sphere, which in a last instance includes even the permanent congress of states and its resolutions. This course of action, on which *inter alia* most peace movements and human rights appeals up until this day have been conducted, cannot find any actual resonance in the institutional legal framework of a world state, whether republican or not, federal or not.

[586] Let me repeat that this claim does not revolve around the epistemological dimension, since a purely epistemic emphasis is wholly alien to Kant's non-paternalistic approach.

Admittedly, the league model contains no global executive or judiciary to implement world state positive law. Nevertheless, there is not only a possibility here, but an actual legal obligation for the states to abide by the resolutions of the independent public forum (or court of arbitration). Individuals (and states) can accordingly address a universal and global public sphere in its institutional and non-institutional dimensions, to seek and attain their universal rights in a manner that is completely rightful. Instead of a world state solution which cannot provide any actual guarantee that the state apparatus will not turn against its own principles, Kant opts for the decentralised juridical (but still global political) template of a league model with a multitude of states that remain sovereign. These then exercise particular, positive law at a national level (and only at this level), but they can realise universal rights as a matter of international and even cosmopolitan law through their own legislative processes, by including any number of rights and regulations in their state jurisdiction. All of Kant's three dimensions of his overall legal framework are accordingly fully realised in one juridical order that aspires to be both republican and international.

It should be repeated, as I also emphasised in part II of the thesis, that the promotion and recognition of worldwide legal institutions are admittedly more important for Kant than the question of whether or not these are constitutionalised. Nevertheless, together with a non-institutional global public sphere, I suggest the league of states model is normatively superior to the world state template. As these reflections have shown, I believe the league model is far better able than the world republic to contain the exercise of coercion and positive law within each state, while the corresponding non-institutionalised dimension can exert a far more vital and critical role in actual politics. As long as this is not part of a world state order, its public use of both reason and freedom can aid the causes of both peace and universal rights as a real political force, and not as one that is already incorporated in, and subjected to, the world state, a legal order whose legitimacy has been called into question. Instead of a world state solution in which rights divergences prompt the universal executive and judiciary to act according to disputable, but posited world state law, I contend that the league actually is Kant's model of choice, *inter alia* because it retains the universality of legal principles and the particularity of positive law far better than the world state template, even in the shape of a world republic.[587]

[587] On this point, the league is quite similar to Habermas' multilevel model, with the monopoly of the means of coercion still preserved at a state level instead of diffused on to the global scale. For Habermas, however, this seems to be more a question of functionability than a normative point in its own right. As I have also mentioned in the main parts of the thesis, Habermas appears at the global level to abandon the normative necessity that the subjects of law must be the authors of the laws and regulations that the supra-state and regional regimes impose.

Kant's insight that however universal in scope it may be, positive law will and must always deal in particulars is seldom paid sufficient attention to, either in Kant scholarship or in political theory and practice. This problem allows us to revisit a topic I also touched upon above, since this deficiency is perhaps nowhere more apparent than in the rapidly increasing calls for so-called humanitarian interventions in cases of gross violations of human rights. Of course, these defences of the universal rights of mankind are, taken by themselves, correct and laudable, but a surprisingly large number of scholars and politicians somehow take them to immediately imply a bellicose doctrine, advocating nothing less than wars of aggression.

Evidently, the arguments of these individuals run completely counter to Kant's peace project, even if they claim to follow his cosmopolitan ideal. We have already seen how Tesón is one prominent advocate of such a line of argument and policy; on his interpretation, state sovereignty is rendered null and void, since it is justifiable only provided that it is the best means for human rights protection.[588] Therefore, it can be acquired by someone else, provided that this is a 'better' solution from a human rights perspective. On this reading, the state is a mere means for the realisation of subjective rights and liberties that can apparently be posited, applied, and enforced in a rightful manner without being grounded in an already designated and authorised legal order. But this would imply, as I have argued throughout, that right and justice are somehow attainable outside a legal order, and can be perfectly clarified without recourse to a distinctively public form of deliberation within rule of law arrangements. Such a stance might be someone's scholarly or even 'political' position, but it is certainly not Kant's.

Subtler versions of more or less the same argument are found elsewhere, but with the insistence that an authorisation by international public authorities is relevant and desirable (e.g. Greenwood 1998) or indeed necessary (e.g. Habermas 2005) for justifying humanitarian interventions. The UN Security Council is accordingly not only the final arbiter in cases that it itself decides to investigate, but can also engage in or encourage military intervention against the individual(s) or state(s) in question. From Kant's perspective, this is clearly problematic for a number of reasons. A few of these can be briefly mentioned here, against the backdrop of the universality of legal principles and the particularity of positive law.

First of all, there remains an uncertainty within the legal construct itself, insofar as it is not settled antecedently that the UN Security Council (UNSC) is not only authorised, but also obligated to intervene in such cases as gross human rights violations. For Kant, this would be

[588] In a slightly different context, but with the same result, Byrd & Hruschka similary abandon the *Völkerrecht* principle of non-intervention in their (or any) pursuit of a perfect WTO, cf. above.

tantamount to a world state model that requires a constitution that authorises and obligates the different state authorities to act according to universal laws and the principle of a separation of powers. If the UNSC itself can decide which 'states' or individuals it can (not 'must') investigate and then impose sanctions and military measures on these, there is a real danger that his fundamental legal principles of republicanism and even law (as opposed to despotism and arbitrary rule) are simply not followed. The universal character of law, from which the decision to enforce a global human rights regime derives its legitimacy, turns in this case out to be arbitrary and particular, since some states, regimes, and individuals are less prone from the very outset to be subjected to UNSC decisions than others. At an international level, 'law' has become the contingent expression of a particular, unilateral will; and thanks to the legal structure itself, 'law' can never live up to its name. The problem is not merely one of overall consistency or norm-enforcement: it is also inherent to the model itself.

Naturally, this does not mean that one should not take action against gross human rights violations. It is only to voice a grave doubt and question the supposedly rightful manner in which this is currently done. As I emphasised in the critique of Cavallar and his approval of majority UN decisions against an unjust enemy, there cannot be any *right* to do so – the legal argumentation as such presupposes that there is a court of law that can pass binding verdicts that all subjects are obligated to and that can be enforced. For Kant, it is impossible to achieve this without a constitutionalised, sovereign world state that is endowed with all three branches of government. At the same time, a world state would by definition rule out not just the extra-legal nature of these interventions, but also the very aspect of intervention. Importantly, such actions would be legal and legitimate police measures under a global rule of law.[589]

This aspect, which is fundamental to the legal character or status of the international juridical order, remains undeveloped in both the theory and the practice of worldwide rightful relations. It is safe to say that the current state of affairs in the international realm must be considered basically unclear in legal terms, since the present institutional arrangement hovers and oscillates wildly somewhere between Kant's two models of either a world state or a state world. This is neither a strength with regard to the arrangement nor a sign of a world order developing from the one model (confederative league) to the other (federative world state). Instead, it is a rejection of two normatively correct legal models in favour of another global institutional (but still essentially anarchic) order. This might in some quarters be perceived as a preferable alternative; nonetheless, it remains an unrightful condition with a merely arbitrary

[589] In the league of states, there can be no authorised supra-state coercive force; this feature is precisely what the league cannot have. It must temporarily dissolve itself over this issue, and leave it to the states to settle it.

and ever-shifting, empirical balance of power which is inconsistent with both legal orders and hence also with law. In such a state of affairs, it is not only the perpetrator of human rights violations that does wrong, but also all moral agents that react to the injustice, since they too unilaterally pursue purposes and rights in a condition that, for all their endeavours, remains wrong in the highest degree.

This means that if a case of humanitarian intervention is to be rightful, in Kant's view, there seems to be a strict precondition that there exists a legal order to ensure at the formal level too that everything takes place according to universal legal procedures. Otherwise, there is only an arbitrary rule of moral beneficence or private will, and no consistent cosmopolitan condition. As we have seen, the world state solution that would make interventions rightful can operate only by means of legitimate police actions, not through the military measures that are called for in the first place.[590]

Nonetheless, scholars such as Greenwood (and to some degree also Habermas) remain reluctant to endorse the full-scale world state that appears to be necessary for such guarantees. They argue that the principle of humanitarian intervention comes into play in cases of gross human rights violations, and here only. But this surely stands in blatant contradiction to the individualistic rights claim that this cosmopolitan 'law' is supposed to secure and from which it is supposed to derive its legitimacy. If the right is active only when a multitude of persons have their so-called universal rights violated, it is clearly neither a universal nor an individual right. And if the enforcement of this 'law' varies from case to case, it is certainly even more arbitrary. Ingeborg Maus objects to Greenwood's view that a right to intervention is triggered if and when a 'significant part of the population' is endangered by affirming that such a line of argument actually implies that there is (or could be) such a thing as an insignificant part of the population and thus also of humanity (cf. Maus 1998).

These considerations lead us to reject the alleged rightfulness of certain aspects of the theory and practice of international law today. Since the human rights at the centre of these approaches are not, and cannot be, given the omnilateral legal framework that is required to turn their universal theoretical validity into universal legal practice, the key constituents from which this 'juridical order' draws its legitimacy can never attain practical reality. Instead, they can be realised only when and where factual forces which are subject to a long concatenation

[590] Within a league of states model, a rights dispute of this kind has legal and political fora, and it is only through these that the dispute could be rightfully settled. If all deliberations (and possibly international sanctions) fail to hinder the feared violations, there still remains the option of military intervention. But the crucial point is that this is done by states and still amounts to war (since the international congress is temporarily dissolved over this unresolved matter).

of contingent circumstances uni- or bilaterally decide that they should be realised. To speak of universal principles, human rights, international law, or a cosmopolitan legal condition in this context, where no-one is obligated to consistently keep allegedly juridical obligations is quite simply wrong. Irrespective of the extent to which such a practice in particular cases might be in correspondence with universal ideals, it remains an arbitrary and unilateral expression of private will in a condition devoid of universal public right.

Considered from Kant's legal perspective, we must hold fast to his vital insight that interventions of all kinds – humanitarian or not, successful or not, pragmatically desirable or not – are, and always will be, normatively indefensible. They can never be completely rightful or included in any order of law as such. Rather, they remain acts of war and are thus strictly prohibited. That is not to say that humanitarian intervention (once all rightful alternatives are thoroughly exhausted) can never be a (pragmatically) correct decision as seen from a Kantian normative point of view;[591] but the crucial point is that it necessarily remains an act of war in an international condition where all legal and political arrangements have broken down. The act of war is the exact opposite of right and is never compatible with an act of law or with a legal order – it is the very definition of a breakdown of the latter. This is not to suggest that war should be avoided at all costs, only that it must never be held to be the exercise of law. Kant's league of states model can be seen to leave open the possibility of actual warfare, but only precisely as warfare, never as an instance of right or justice *per se*. Warfare is an actual possibility when all normative attempts to solve the rights dispute have been exhausted. Yet, however reasonable the rights claims and arguments of either side of the conflict are, war – to repeat Kant's words – is quite simply not the way in which one should seek one's rights.[592]

The short-sighted line of reasoning at the base of efforts to enforce human rights at the global level also has a more peaceful, but still unrightful equivalent in current attempts to assign the guarantee of individual rights to legal institutions beyond each separate state. In section b), I will briefly discuss the structural changes inherent to these processes; here, I shall try to relate the present developments to the above considerations. Whereas advocates of so-

[591] This could then, according to Kant's own principles, be developed on the basis of §§56-60 of the *Rechtslehre*. Those sections on just and unjust wars, however, have the right of states (*Völkerrecht*), not cosmopolitan law (*Weltbürgerrecht*), at the centre of their deliberations (with a possible exception in §60 on the unjust enemy).
[592] In his writings, Kant can be seen to place his hope in slow but steady reform processes at both the state and the inter-state levels. For instance, nature can be seen to 'guarantee' the realisation of worldwide rightful relations in the peace essay, since it repeats *sub specie aeternitatis* all the constellations that are born of mere factual events, in order to provide sufficient space and time for true moral progress to occur. Still, the most prominent contributor to the normative end of mankind remains human beings themselves, in particular through their public use of reason. I am sure that Kant would willingly approve of Habermas' emphasis on the forceless force of the better argument to aid our efforts towards a realisation of the perfectly rightful condition of perpetual peace and cosmopolitan law.

called humanitarian interventions in varying degrees demand an "immediate implementation" (Maus 2004: 96) of the so-called universal rights in question, different roads are taken by proponents of a further establishment of international legal institutions, who rather emphasise the need for these to mediate between rights claims and to implement legal resolutions. This development, which has gained momentum in the aftermath of World War II and the Cold War, may at first glance seem to be exactly what Kant has in mind, since legal institutions are necessary to rightfully realise such rights claims in a first instance. But despite all the positive features of this development, there is at least one dimension that is often overlooked and that must therefore be addressed here.

As in the case of humanitarian intervention, the advocates of widespread juridical expansion of both legal rights and institutions beyond the nation-state can certainly be seen, despite all their internal differences, to ignore one basic normative feature in the process. This concerns the allocation or, perhaps better, reallocation of legal authority and political power in the efforts to establish global and regional rightful relations. As I objected against Habermas, the co-originality of individual rights and popular sovereignty, private and public autonomy, is now inadequately reflected in the supra-state legal framework, slanting the entire construct towards subjective rights and their distribution by the institutions themselves.

As a result, it is in current international structures difficult to recognise the democratic hallmark of rightful legal authority, as allocated and increased only in the symmetrical tension between non-instititutionalised and institutionalised public spheres (with the legislative realm on top). The actual circular process of a public deliberation on individual rights and political decision-making is reconstructed within the institutional framework as such, where it can be, and is, performed by state apparatuses in the justificatory manner of a thought-experiment. Here, it is not the citizens, but the government functionaries that are formally designated to make laws and decide the course of politics. Accordingly, the authority of citizens is usurped and the original normative relationship is inverted. In his apt description of current political developments, Hauke Brunkhorst makes an analogous criticism, paraphrasing Arendt and her lasting definition of democratic activity and power: especially at the international level, it is no longer the people, but rather the executives who act in concert (cf. Brunkhorst 2011: 337).

Instead of public deliberation on justice and rights claims, which are first assigned to the legislative sphere to be formulated in universal legal terms, and are then in each particular case to be enacted accordingly by the executive authority and (in the case of conflicting rights claims) to be settled by the judiciary, the latter two branches of government are now active participants in the former process. This not only means that the 'public' deliberation is moved

into the corridors of already established state authorities which in a first, constitutive instance were supposed to be both authorised and questioned by an authority independent and beyond themselves (the people in their exercise of public autonomy and popular sovereignty in a non-institutionalised political realm). Also, the very separation of powers collapses and is replaced by an empirical balance of mutually limiting state agencies, a construct that is diametrically opposed to Kant's legal structures and normative arguments.

For Kant, a juridical arrangement in which the state authorities, instead of fulfilling the universal legislative will of the people, usurp both this process and the functions of each other (as is still done in the majority of constitutions worldwide) amounts at best to a despotic form of government. Such a legal arrangement corresponds to what he refers to in the *Rechtslehre* as "den sogenannten gemischten Staatsverfassungen" (6:339). These are left outside the entire discussion of rightful forms of government, since they know no fundamental norms for the differentiation of the internal legal structure. Instead of one legislative, one executive, and one judicial authority which are united in terms of the form of the rule of law and also, for precisely this reason, are separated with regard to function, the latter arrangements turn at a formal level all legal and political processes into decisions that are to be made and controlled by the state authorities themselves. This kind of checks-and-balance approach may find some resonance in the 'principle' of a separation of state powers as it is formulated by Montesquieu in 1748. Nonetheless, it is in its essence only the pre-modern concept of monarchic rule in a different guise. This is how it was seen – and therefore rejected – by all the major political philosophers of the Enlightenment (cf. Maus 1994).

The universal character of public deliberation and of individual rights is thus no longer generated in the circular process of non-institutionalised and institutionalised public spheres, but is rather assigned to particular legal institutions. The exercise of public autonomy (that is, popular sovereignty) is therefore negated already prior to political deliberation, because of the *de facto* possibility that it *can* transgress its own limits. But the legal impossibility of doing so is already contained within the rule of law, since the normative impossibility of establishing the premises of one's own exercise of power is precisely what is meant to be guaranteed by the principle of a strict separation of powers. The authors of law cannot be the ones to decide how these laws then are enforced and implemented in legal practice, and vice versa. This insight implies not merely that only citizens can be the rightful authors of universal legislation (since they are subject to this in particular cases), but also that the state apparatus of executive and judicial power qua enforcers and implementers of law cannot transgress their own legal authority and participate in the legislative and/or constitutional process that authorises their

power in the first place. In such instances, the system would programme itself. Accordingly, it too violates the principle of a separation of powers, but this it does, first of all, at a formal, normative level and then also, *de facto*, in an even larger and possibly more dangerous extent than what it accuses the populace of (potentially) doing.

Consequently, the state apparatuses, to which Kant assigns only the authority to act in particular cases, have then usurped the universal character that was assigned to the legislative power and to law itself. Legal and democratic procedures are thus no longer a public exercise of reason and freedom through the symmetrical tensions and vital interplay between the non-institutionalised and institutionalised legislative authority, but have become an uncodified and unauthorised dealing with political matters by the state apparatus and its associates. Thereby, the circular process of individual human rights and popular sovereignty is broken, and the very reason for legal constitutionalisation and institutionalisation is itself suspended. Rather than one designated, that is, constitutionalised authority in legislative, executive, and judicial questions that overcomes the state of nature with its myriad of unilateral, non-guaranteed, and undetermined rights claims and arguments, these disagreements between different actors are now merely re-allocated to the legal framework itself. Instead of having one legal authority for each function of law, processes of law are increasingly not assigned to a particular branch of government.

The formal clarification of legal structures and procedures is still missing, since rights and rights claims still fluctuate between a multitude of actors. The crucial differences between this scenario and the hypothetical state of nature are not primarily a matter of bringing the number of authorised juridical actors down from potentially infinite to possibly three.[593] It is rather the facts that 1) within this system, there is still no clearly designated sovereign, that 2) all legal and political authority correspondingly is transferred from the people to the juridical institutions themselves, and also that 3) the thought-figure of a state of nature has accordingly become real, and is as a matter of fact played out within the legal and political powerhouses as such. Instead of the concept of sovereignty as normatively allocated in the entirely non-institutionalised realm of a public use of reason belonging to no-one in particular – and which, for that reason, had to be given practical reality *de facto* by a particular state institution – current developments are re-allocating the universal features of political authority within the particular state institutions themselves. In Enlightement legal and political philosophy, these particulars were supposed to be authorised by the universal rights and rights claims of a non-

[593] However, when several legal systems at the national, regional, and/or global levels within such a construct interact, the number of authorised legal actors can accordingly only rise again, to further complicate the business.

instititutionalised public realm, and by this only: a public realm that in actual political practice is necessarily anything but one fixed entity. Now, however, the fixed institutions of positive law have gradually usurped the universal standards of both rights and political discourse, with the result that they disperse power within their own institutional arrangement, over which they themselves preside.[594]

Whereas Kant grasped the distinctively dual character of *Recht* and thus of the realm of right as universal in terms of normative principles but particular in terms of positive law, containing both features in one overall framework, the current state of political affairs seems determined to do the exact opposite. The attempt is made to achieve a universal positive law, employing means which can only result in a corresponding expansion of the authorisation of particular juridical institutions; these, however, can do nothing more than realise particular principles in particular cases and particular places. Hence, both the objects and the objective are lost in the process. Present-day developments at both the state and the inter-state levels move from Kant's legal structures, based on formal, normative principles, towards basically pre-modern juridical standards and frameworks in which authority authorises itself. The fact that the various branches of state government in this setting can be empirically checked and balanced by other branches provides no relief, since the very premises of both public, political deliberation and legislation remain on the side of the state apparatus.

This development is the exact opposite of what the Enlightenment legal philosophers and the principles of the French Revolution prescribed, and pays testament to the profound erosion that public reason has undergone since its heyday. From the rightful calls for freedom as autonomy in both private and public life, with reference to individual human rights and indivisible popular sovereignty under the rule of law, we are now once again back at the level of legal and political conscience which is content with the mere permission to hope for the exercise of good governance.

b) On the structural transformation of the concept of sovereignty

It is, of course, impossible to supply sufficient detail in the remaining few pages to this only preliminary outline of a critique of the actual developments within public reason and its legal structures since Kant's days. Nevertheless, we cannot overlook here one crucial aspect that plays a significant part both in Kant's philosophy of right and in current political affairs. This concerns what I call the structural transformation of the concept of sovereignty, a process that

[594] For additional reading on these aspects, see Maus (2011).

has only increased in momentum over the period that separates us from the legal and political conscience of late Enlightenment thought.

There can be no doubt that no other concept is more contested, and no other concept less understood, in contemporary political philosophy than the concept of sovereignty. The main theoreticians whom I have referred to during these attempts at a critical reconstruction of Kant's philosophy of right have vastly different and contradicting understandings of this concept. Habermas is certainly aware of it and its importance, but at the same time he leaves Kant in his wake when he subscribes to another 'concept' of new or divided sovereignty (cf. e.g. Habermas 2005: 327). Byrd & Hruschka operate, as I have emphasised, with a "state of states" (Byrd & Hruschka 2010: 195), but do not see the obvious contradiction this would entail for Kant. Tesón seems not to pay the slightest normative attention to it, since it is only the function of human rights fulfilment. Even Ripstein is surprisingly vague when it comes to an evaluation of the normative work that the concept – regardless of its final interpretative status – must be said to perform in Kant's legal philosophy (cf. Ripstein 2009: 182 ff.). In my view, all these scholars labour under the serious misapprehension that a final clarification of the actual allocation or legal status of the concept is ultimately not decisive for the normative value of his theory. In clear contrast to such views, the imperative question of Enlightenment political thought, as we recall from earlier deliberations, was exactly this question concerning where and to whom sovereignty was allocated.

From Hobbes onwards, there is an often overlooked, but still discernible trajectory of argumentation that goes via Locke, Rousseau, and Sieyès, and ends with Kant. This is related to the allocation of sovereignty as the most fundamental question that political philosophy has to answer. Or, to be more precise, the attempt is not made to employ a theory of politics or justice, as such, to answer the questions raised by these philosophers in this regard. Rather, as I have argued in the introduction and the main parts of the dissertation, they are addressed from the perspective of a philosophy of right which relates primarily to the legal order and its framework *per se*. What separates these scholars from most other political theoreticians (both part and present) is the distinctively juridical approach that underlines the necessity of uniting pre-state individual rights with a state system that stands above these rights claims in terms of positive law, but at the same time is subjected to the same in terms of the original, universal normative principles of the realm of right.

Whereas Hobbes never actually succeeded in uniting the two concepts of individual rights and state sovereignty, the other four philosophers inherited his conceptual framework and redefined it in different (but still more or less consistent) ways. Above all, Kant can be

seen to bring the Enlightenment philosophy of right to its culmination with his completion of a procedural turn that includes individual human rights and indivisible popular sovereignty in one coherent framework. Under the Kantian rule of law, through the innate human right to freedom (in both private and public life), pre-state rights claims are given objective practical reality by the state authorities and still preserved in the people, in its inalienable right as united citizens to be the sole and sovereign authors of the laws they then subject themselves to as individuals. Through the principle of a functional separation of powers, state and popular sovereignty are able to refer to two separate, but still entirely consistent legal entities. The state apparatus of executive and judiciary is sovereign with regard to the necessary monopoly on the means of coercion and its juridical application; the people, on the other hand, remains sovereign with regard to all the rightful constitutional and legislative procedures that authorise the state apparatus in the first place and thus hinder despotism.

In Kant's republic, actual rights and institutions cannot be justified by virtue of any specific content or material value. They cannot be taken as given, nor can they be formulated at all, without reference to actual political processes under contingent circumstances. But the imperative point for Kant is that these processes are governed by *a priori* normative criteria which assign inalienable private and public rights to all human beings simply in virtue of their humanity and relate 'merely' to the freedom that can be united with the freedom of all according to a universal law. These are innate individual rights that the human being, as Kant puts it, "nicht einmal aufgeben kann, wenn er auch wollte, und über die er selbst zu urteilen befugt ist" (8:304). In this quotation – quite explicitly directed against the ultimate failure of Hobbes to consistently ground both the individual natural rights of the human being *and* the indivisible sovereignty of the state – Kant brings together these two dimensions as normative concepts that are not mutually contradictory. Instead, they are mutually inclusive, and neither can be achieved or realised without the other. Moreover, they are no mere factual expressions of (individual or state) will, but are subordinate to a practical law of reason, as two normative principles that cannot be circumvented.

Considered in this light, it is strange to see how little attention has been paid by later political theorists to Kant's thesis of the co-originality of individual rights and the concept of sovereignty.[595] Stranger still is the almost complete lack of attention given to the basic legal structures that stand at the centre of Enlightenment political thought. The telling clue that all

[595] Arguably, Habermas (1998) is one of the few who pick up this thread (assigned by him first of all to Kant and Rousseau), then elaborate it, and finally follow it to its natural conclusion – although he too holds that the two eighteenth-century philosophers ultimately fail in their attempts. Maus (1994; 2002) is one of even fewer to argue that, contrary to such a position, they actually succeed in their efforts.

of Kant's public right sections deal exclusively with the concept of popular sovereignty and the internal relationship between the state authorities that have to preserve and realise this united will of all citizens through the principle of a functional separation of powers seems to count for almost nothing in contemporary scholarship. Instead, the attempt is made to justify as valid – and often as enforceable – certain political standpoints or individual rights beyond what is attributable to the 'merely' formal framework of the *Rechtslehre,* without reference to the political processes and states of affairs on to which they are then projected willy-nilly.

Such a paternalistic understanding of law and politics is the complete opposite of what Kant argued for in his philosophy of right. The existence and justification of pre-state natural rights belonging to each human being were, of course, not regarded as an unresolved problem, either before or after Enlightenment legal and political thought. Instead, the great theoretical achievement by Locke, Rousseau, Sieyès, and perhaps preeminently Kant is the unification of inalienable human rights with a consistent legal system which includes an equally inalienable right of citizens to be the sole authors of the laws that they in the next instance are obligated to abide with as subjects of law. This crucial concept of popular sovereignty, which hands all constitutional and legislative (i.e., normative) authority to the people, is then contrasted to *and in full correspondence with* the concept of state sovereignty, which gives all executive and judicial (i.e., factual) power to the state apparatus. The latter two branches can then lawfully apply and enforce in particular cases the universal laws that have already been posited in a rightful manner by the united citizenry in their deliberations in the non-institutionalised and institutionalised public sphere. This was the true normative innovation of Enlightenment legal philosophy. It did not consist in a better or more extensive catalogue of individual rights, but in the procedural turn that united the two concepts of individual rights and indivisible popular sovereignty under one rule of law.

What has taken place since then in both the theory and practice of law and politics is a transformation of the latter concept, to either equate or confuse it with state sovereignty. This change occurs at the formal level of legal structures and thus relates to the internal division of labour within this construct. Turning away from the Enlightenment legal framework in which there were clear divisions between the people and the state apparatus, between norms and facts, between the different authorities of the state, between the universal and the particular features of the rule of law, between national and international law, between law and morality, and last but not least, between philosophy and politics, we have taken steps backwards in our political and legal spheres today, towards clearly more undifferentiated models in which these essential distinctions are blurred or even abrogated. Turning away from the Enlightenment re-

allocation of legislative authority from an absolute monarch to the people (i.e., the realisation of popular sovereignty), a majority of states and scholars have now returned to an inherently pre-modern doctrine of re-allocating all aspects of sovereignty to the state institutions as such, thereby equating or confusing sovereignty with state sovereignty, which was regarded in the late eighteenth century as the conceptual opposite (but nevertheless a complement) to popular sovereignty. Instead of being allocated to the fruitful tension and vital interplay between non-institutionalised and institutionalised legislative authority, current conceptions of sovereignty now reside in the corridors of self-authorising state institutions.

Nowhere is this development more visible than at the international level. The interplay and discussion between the various actors and opinions here do not principally arise between the non-institutionalised and institutionalised layers of a (global or regional) public realm, but are located exhaustively within the state institutions. Politically dispersed individuals can do nothing more than show their mere approval or disapproval of processes on which the non-institutionalised public sphere has no formal influence. The factual imprint which citizens can have on legal and political processes is reduced to the acclamation, every four or five years, of ready-made, always adaptable political parties in parliamentary assemblies that increasingly lose authority to, and become gradually more embedded in, the particular state institutions of the executive and the judiciary. And this development can only gather momentum both within and beyond the nation-state, as international relations move higher up the agenda.

This means that the non-institutionalised public realm, at the structural level, cannot be an opponent, or even a corrective, to the state institutions. The political philosophers of the Enlightenment emphasised the role and necessity of this dimension of the public sphere, to authorise all political authority through their exercise of popular sovereignty in first choosing (or choosing not) to be represented by their elected representatives in parliament and then in operating as a "*Gegenspieler*" (Maus 2011: 19) to the state apparatus of the executive and the judiciary. The tables have now decidedly turned. Political decision-making processes are no longer rooted firmly in the union of citizens (or, potentially, their institutional representatives in parliament). Instead, these processes are currently exercised primarily, and accordingly in a sovereign manner, on the premises of the state apparatus. Such a transformation may perhaps seem innocuous (or even preferable) at a material level, but at a formal level it nevertheless removes the political, public, and deliberative character of these processes, in order to instate a legal and political order in its own image.

The triumphant state apparatus can then justify itself by pointing to the successes in any number of fields external to itself. Progress in social subsystems such as technology or

the economy is taken as indicative of the rightfulness of the legal system as such, whereas any regression can be spun the other way. But the definition of democracy can surely not be found in a field external to rightful rule itself. In Kant and other Enlightenment legal philosophers, the democratic republic was a formal entity; a republican democracy is precisely that which it is impossible *per se* for a despotic state to be. A republican democracy does not mean being technologically or economically prosperous, let alone successful in war. Nor does it mean the protection of private liberties. It means being an autonomous civil society. Regardless of any contingent circumstances, the citizens of a republic can employ their political deliberation and public legislation to overcome any factual state of affairs to promote and provide distributive justice to all, in accordance with universal laws of freedom. And at the core of this insight stands the unification and realisation of individual human rights and popular sovereignty in the perfectly rightful normative condition of the rule of law.

The common stance in both theory and practice of law and politics today is to suppress this dual character of the justification of legal norms and to distribute rights as if they were values or commodities to be handed out by the benevolent state apparatus to its beneficiary subjects. Even a critical and observant political thinker like Hauke Brunkhorst accepts a legal structure which he otherwise strongly opposes, when he, with reference to Habermas, reduces popular sovereignty to something that exists only in "*subjektlose Kommunikationskreisläufe*" (Brunkhorst 2011: 343). In one sense, this is, of course, true. As I have emphasised in this disseration, popular sovereignty must be coupled with a concept of state sovereignty in order to attain objective practical reality. The danger, however, appears once this internal structural relationship is not primarily and irrevocably connected at the level of legislative authority, as distinct from the other two state authorities. Insofar as this is the case, these *subjektlose Kommunikationskreisläufe* fail to find a real subject in the public deliberation of the people, with the result that now the sovereign constitutional and legislative authority is gradually and necessarily usurped by the state institutions themselves.

In his 2011 article, Brunkhorst subscribes to the latter position when he, with reference to Christoph Möllers (2008), holds all three state powers to be equally important and "close" to the will of the people, so that it is impossible to ascribe any specific normative function, or at least priority, to the legislative authority and capacity of the people. Instead, all three state "organs" must be representatives of the people in all its actions (cf. Brunkhorst 2011: 344). The public political sphere can also here at all times remain vigilant and express critique of government decisions; nevertheless, all decisions – legislative, executive, and judicial – are in such a framework grounded in the state institutions as such.

But this, surely, is normatively indefensible on at least two counts: first of all, it hands *de facto* all authority over to the state authorities themselves; second, the separation of powers is more or less abrogated. Regarding the former objection, it must be said that such a position has to subscribe in one way or another to a two-world doctrine. Hence, government by the people may be an ideal, but it is an ideal which has to be modified and altered, because all actual government takes place in less than ideal circumstances. Accordingly, the state powers, not the people, are the ones to interpret the ideal, although it is of course impossible for any factual state government to attain this ideal fully. On the level of legal principles, therefore, the state authorities are authorised, not by the people, but rather by the ideal itself, which the people allegedly cannot properly realise in practice, but which the state authorities are able to somehow access. I must admit that I struggle hard to fathom how, on such a line of reasoning, there can be any fundamental argument against paternalism. This is certainly not possible at the structural level on which I have tried to navigate throughout this dissertation.

Instead of such a view (and inherently to the second objection), Kant and other legal philosophers proclaimed that sovereignty had to be allocated within the united legislative will of the people to avoid the possibility of the worst form of despotism, namely paternalism. The citizens' legislative will would then directly or indirectly, through the people's representatives in parliament, authorise the state apparatus to apply and enforce this public rational will. At the present time, this ideal was not a fact, but this did not in any way detract from the norm and obligation to reform the *de facto* legal order by transforming it into such a rightful condition. For Kant, republican rule of law is also attainable as a matter of fact, although it is never established once and for all, but forever remains an ongoing project. The strict necessity of a separation of state powers, in order to prevent the republic from turning into a democracy in the original, Greek sense of the word, is made perfectly clear in his rejection of the latter model. The ancient democracy is "notwendig ein *Despotism*, weil sie eine exekutive Gewalt gründet, da alle über und allenfalls auch wider Einen (der also nicht mit einstimmt), mithin alle, die doch nicht alle sind, beschließen" (8:352). This is another reason why Kant assigns normative priority to the legislative authority: unlike both the executive and the judiciary, it is entitled and obligated to make universal rights claims on behalf of all.

If the executive and judicial authority – we are now also on the territory of the second objection – were supposed by definition to carry out the actual will of the people in particular cases, there would necessarily be a despotic form of government where all (who are not all) could decide against one in a rights dispute. In other words: the fact that sovereign legislative will was to be assigned to the united people in actual practice is no normative contradiction

for Kant, but a necessity. But the idea that the role of supreme executive or judiciary, to rule in particular cases, could be assigned to the united people in actual practice stands in stark opposition to all his legal principles. That would *per se* be a despotic form of government.

A crucial objection to the view taken by Brunkhorst and Möllers is that they overlook the fact that the vital interplay between the non-institutionalised and institutionalised domains in the legislative authority is fundamentally different from the corresponding interplay in the two other branches of state government. Whereas the legislative institutional power has to be oriented towards and also is founded in the united will of the people – a point that is reflected in and authorised by institutional parliamentary elections and referendums, as well as non-institutional deliberation – neither the executive nor the judicial authority is oriented *per se* towards this popular will. Rather, they are oriented towards the laws, and these only. The state apparatus has to speak on behalf of the laws, not on behalf of the people (neither in an actual will nor a reconstructed ideal). For Kant (and other Enlightenment legal philosophers), any other legal structure would be nothing but a paternalistic and despotic state, since it would obviously invert the original normative constellation that the French Revolution sought to realise in positive law too.

For Kant, the authorisation of freedom and coercion is easily sketched. From the state constitution and its legislative procedures of *Recht,* belonging to the united collective will of the people – a right to sovereignty that is inalienable – proceed the authorisation and laws that the state apparatus is entitled and obligated to apply in order to decide what is *Rechtens*, that is, right according to positive law in particular cases. If the state apparatus of executive and judicial power were to attain a share in the universal and rightful claims of the people in the legislative, or include these in their own functions of state government, the universal character of right, the principle of popular sovereignty, and the principle of a functional separation of state powers would be abrogated. Although this is not the intention of Brunkhort or Möllers (who otherwise are firmly situated on the opposite scale from legal and political scholars who confuse democracy with mere good governance), this is nonetheless, in my view, a significant normative problem in their overall juridical constructs. All this shows how far the structural transformation of the concept of sovereignty has come.

These developments go hand in hand with the theoretical and practical efforts to attain democratic rule of law and human rights protection also beyond the jurisdiction of each state. Although the arguments and means applied in order to establish such an international state of affairs are of course diverse, a common denominator seems to be the conviction that the problem with establishing worldwide rightful relations lies in the very competence of states to

remain sovereign in their internal affairs. The so-called solution to this problem is to elevate political processes and human rights from the state level onto a regional or even global level, creating a new legal structure internationally that is supposed to guarantee right and justice by establishing additional firewalls against the possible inroads of states. Individual rights are thus in a first instance protected at the level of state law, and if this regime fails to live up to (someone's) expectations, rights are supposed to be guaranteed by international law.

But this doubling up of rights does not result in a legal system that is twice as good. Instead, it creates a system where rights can be exclusive or contradictory not just within one legal order, but also between two levels of law. For Kant, the fact that two parties could have perfectly reasonable rights claims that nonetheless were mutually exclusive made it necessary *a priori* to instate the rule of law. This in turn required the realisation of a sovereign state with supreme legislative, executive, and judicial competences, in order to overcome the so-called structural defects of the state of nature. With a legal order of individual rights expanded to the international level, however, there arises the possibility not just of two private parties with mutually exclusive rights claims. We also attain a juridical order in which two dimensions of public right (state and international) negate one another by making legally authorised claims to rights that can be mutually exclusive. The crucial point is that this problem occurs on the structural level. Kant and the republican tradition he belonged to easily recognised the clearly untenable situation such a construct would entail: a new sovereign would be necessary, to adjudicate between these two levels of law and decide who is right.[596]

This new sovereign – a 'third sovereign', if one will – that now emerges as a necessary juridical entity within the new framework of law beyond the nation-state is, of course, located within the international legal order itself. It thereby becomes what it always was, and had to be, for Kant: a new and sovereign world state, regardless of the federal arrangement it then establishes. This contemporary development is – again in line with Kant – not automatically wrong (cf. his world republic that explicitly is right *in thesi*). But the current juridification of international politics and law not only lacks objective practical reality (to say the least). It also has another twist in store. Neither in the regional nor in the global legal arrangements can we say that it is the legislative authority that forms the basis of sovereignty and thus of rightful rule.

[596] The situation is not dissimilar to the one sketched by natural rights proponents who would grant a popular right to use coercion and act, in particular cases, when the people thought they were treated unjustly by the state – something that the republicans promptly rejected. This would be "ein klarer Widerspruch", because it necessarily instates "eine *öffentlich konstituierte* Gegenmacht" and accordingly requires "ein drittes, welches zwischen Beiden, auf wessen Seite das Recht sei, entschiede" (8:303). Such a way of framing the question of defending oneself against the possibility of the state transgression of authority can only lead to an infinite regress.

Hence, the present realisation of a concept of new sovereignty[597] places authoritative rule in the hands of supra-state executives and judiciaries that, in line with the legal structure, are bound by neither parliament, constitution, nor the people. Instead, they are increasingly authorised by their own successes and responsible to their own dynamic interpretation of laws and standards which are established by the system as such, partly to cope with new realities stemming in no small measure from the system itself. All of this can still take place without meeting Kant's normative requirement that the particular rights claims they enforce in a first instance must be authorised by a parliamentary constitutional order grounded in universal laws of freedom. In sum, one basically ends up with an arbitrary and unilateral execution of power exercised by state and supra-state apparatuses that are increasingly self-programming in the confiscated name of international law. And yet, for some reason, this is now commonly hailed as a new world order of global justice.

In this manner, sovereignty is removed from non-institutionalised and institutionalised public spheres within states, to be reallocated within courts of law and corridors of power at an international level. This structural transformation of sovereignty implies several shifts in legal and political theory and practice which already have been mentioned: the development signifies a transition within the realm of law and politics from the universal to the particular, from the people to the state apparatus, from the public deliberation of distributive justice to the administration of the distribution of justice, from freedom to coercion, from norms to facts, from republicanism to despotism.

The kernel of this transformation is, of course, that it takes place under the pretext of being the exact opposite. It is thought that, by lifting legal and political processes out of the sphere of states and on to the supra-state arena, one has overcome the potential dangers of sovereignty and instated individual human rights and freedoms for everyone across the globe. In reality, all one has done is to undermine the legal construct that is required for the practical realisation of such an ideal.[598] In the moral fervour to establish worldwide rightful relations, the original normative relationship is inverted and all rightful authority is emptied already in the legal framework. Instead of seeing state and popular sovereignty as strict preconditions for

[597] Cf. the title of the work by Chayes & Chayes (1995), to which Habermas (2005: 332) refers and subscribes.
[598] Any co-originality of popular sovereignty and human rights is thus made impossible, due to the legal design that favours the latter concept on the ill-conceived ground that there is a mutually exclusive rather than a mutually inclusive relationship between the two. The state apparatuses accordingly usurp popular sovereignty by appealing to the supposed danger that they accuse it of exposing the people to. All of this somehow takes place to more or less unreserved plaudits from political theorists – as if the absolute horrors of twentieth-century totalitarianism were not juridically founded on exactly such a model: because of the supposed dangers of popular parliamentary rule, 'objective' values such as social/ethical/religious/economic practices, and/or catalogues of rights had to be preempted and effectuated by the state apparatuses, to save the people from themselves.

the rightful rule of law, the possibility of *factual* misuse leads in actual practice to the current detachment on a *formal* level of these concepts in actual practice from all legal structures, thereby leaving individual private rights as the only relevant standard. This standard is then 'guaranteed' by the magistrates of positive law, who, on this interpretation, are somehow not exposed to the same risk of potential misuse of power. This inverts the original hierarchical relationship between the united collective legislative will of the people and the state apparatus which is only entitled to govern according to laws. Sovereignty is no longer allocated in the citizens' exercise of a public use of reason. It is now usurped by the state apparatus itself, and the public use of reason is replaced with this as an ideal that is exercised by the administrators of justice in the manner of a thought-experiment. Authority thus authorises itself.

Kant's basic insights and republican-democratic points are completely contrary to such a paternalistic conception of law and politics. He knew that an abandonment of the concept of popular sovereignty would also dissolve the rightful character of state sovereignty, since the despotic state apparatus in such a case would have reallocated all legal authority and political decision-making within the state apparatus itself. In such a system, the different branches of government may balance or cancel each other out, but there would be no separation of powers in principle, let alone limitations to their exercises of might. All regulations, limitations, and even obligations are here internal to the system itself, a system which executes its own orders only in somewhat different guises.

In keeping with Maus (1994; 2011), I contend that the current development at both the state level and the international level seems to drag us back into more or less pre-modern legal structures from which the Enlightenment philosophy of right sought to emancipate mankind. Instead of addressing the entire legal constructs of Locke, Rousseau, Sieyès, and Kant, we pick bits and pieces of their political texts to adapt these to our own preformed perceptions of justice, while we uncritically abide with legal orders that subscribe to the pre-modern juridical frameworks of, say, Montesquieu and Fichte. The almost complete lack of attention to this aspect of legal and political thought is simply stupefying. From being what I consider by far the most important concept and achievement of Enlightenment legal and political philosophy, the normative concept of sovereignty has undergone a structural transformation, so that it now is only presented as a mere factual entity almost eviscerated from the topography of right and justice that it itself once transformed.

c) On the actuality of an international legal order

As these Kantian deliberations on the necessity and possibility of worldwide rightful relations now draw to a close, I offer some final reflections on the actuality of such an international legal order. In the light of the concerns raised here in the epilogue, it might seem impossible to realise Kant's peace project in actual politics, however necessary it may be as a goal. But this does not challenge the main position of the thesis: it is also possible to realise in actual life the legal, moral, ethical, and political obligations that practical reason imposes upon us as necessary. For Kant, there is, and always will be, an *a priori* duty to establish the perfectly rightful condition of republican rule, perpetual peace, and cosmopolitan law that survives all contingent circumstances. This is his unquestionable and uncircumventable point of departure for our human condition of inter-subjective, practical relations. Nonetheless, it hardly needs to be pointed out that there is at the same time an unlimited range of actual scenarios that make a full realisation of this categorical imperative more or less likely. Considered from the Kantian legal perspective that I have applied in this dissertation, what can and should be the last word on the actuality of an international legal order?

Naturally, the practical realisation of international law has come a long way since Kant formulated his peace project on the eve of the eighteenth century.[599] The gradual and ongoing establishment of a global public sphere that addresses rights violations worldwide has clearly gained in momentum, providing a necessary feature of a future realisation of the cosmopolitan condition he envisioned. Despite occasional shortcomings and setbacks, attempts to establish international legal institutions have also made a positive contribution to this goal. Both these central and indispensable components of Kantian international law – the non-institutionalised and the institutionalised global public sphere – have definitely moved forward over the course of the more than two hundred years that separate us from Kant. In several fields, there have certainly been developments in the right direction. The approximation to worldwide rightful relations in diverse areas such as culture, health, communication, and science has evidently taken great strides, at least in terms of establishing common or even universal standards for an increasingly united and interdependent global community.

Whether and to what degree this global community corresponds to the Kantian ideal of a true cosmopolitan community remain fairly open questions. But as I have tried to indicate in the epilogue and in parts of the dissertation, considerable doubt attaches to several of the recent developments with regard to the centre of my investigation, namely the specifically

[599] For a fine overview of the theoretical and practical influence of Kant's philosophy of peace, see Eberl (2008).

legal components. In this context, both the non-institutionalised and the institutionalised public spheres appear at the national and the international levels to be exposed to severe dangers that stem from changes within as well as outside their respective realms.[600] Some of this seems intrinsically connected to highly complex and profound processes of juridification (or even 'mere' constitutionalisation); other aspects seem related to a current increase in the use of force in the international domain. Unfortunately, I believe that taken as a whole, these present developments cannot be regarded as helping to bridge the gap between Kant's peace project and its realisation in actual politics.

Whereas the non-institutionalised global public sphere has, from a Kantian viewpoint, in one sense already realised its formal features, its material content of ever more inane media coverage along with privatised processes of communication and interaction makes it ever less fit to fill its essential and essentially public functions.[601] At the same time, international legal institutions have established a rights regime that, materially speaking, could have been praised as a great achievement, were it not for its great lack of rightful formal features, which I have criticised above in my remarks on the structural transformation of the concept of sovereignty. Considerations of space mean that this is not the place to follow all of these threads to their origins and their natural ends. However, a quick look at the sorry state of affairs in the current international climate can help us grasp the main deficiencies that I contend it harbours, when compared with Kant's perfectly rightful legal construct of a cosmopolitan community.

First of all, it must be emphasised that the present development of ever more supra-state juridification and law-enforcement can justify itself only on the basis of a movement towards the ideal of a world republic. Kant's other rightful juridical model of a voluntary, confederative league which *per se* cannot authorise supra-state coercive measures (or other constitutionalised legal arrangements) appears to have been almost irreversibly overtaken by the course of historical events. But, as we have seen, this situation in which the international community is somewhere between a state world of still sovereign states and a world state with

[600] Without purporting to present any exhaustive sociological or political analysis, I note that these developments can be seen to occur partly because of changes in social areas that are difficult to direct through legal and political activity as such (culture, ethics, religion, etc.). But they also occur because of developments in social and legal domains where changes can be attributed directly to developments within law and politics – above all in the economy and the domains of law and politics themselves. These in turn can be seen to make an impact on the more or less purely social realms that can resist the system imperatives only in a stubborn and ultimately futile manner.

[601] But even if the non-institutionalised global public sphere to a certain degree already can and does address rights violations all across the world, these particular instances are far from indicative of an established global public sphere that is one universal political entity capable of addressing and correcting its institutional other half on anything near to a sufficient day-to-day basis. As the supra-state institutions currently run off with the development of international law, the already vast difference between the two spheres can only increase.

one, republican constitution cannot, on Kantian grounds, be taken as a sign of progress from one provisionally rightful legal order to a legal order that grants global justice in a perfectly conclusive manner. As I have suggested above, the present development can and must rather be said to make the realisation of international law and worldwide rightful relations hover somewhere between two theoretically coherent legal models – one that is already more or less made obsolete by actual practice, and one that still lacks almost all the signs and requirements of global republican rule according to universal laws of freedom.[602]

Nonetheless, on the clear provision that what lies behind the current processes in the international realm is in fact the normative end of worldwide rightful relations through always ongoing processes of gradual legal institutionalisation, the road that is now being taken is the road towards a world republic. For Kant, the basic presupposition of this approximation too is that it takes place in a completely voluntary manner. No state or people can be forced to enter such a constitution by other states, let alone by its own state apparatus. Contrary to scholars like Byrd & Hruschka, it must be affirmed that there can be no Kantian right to coerce either states or peoples to enter a republican union – and this is true at both a national (cf. 6:340) and an international level (cf. 6:349). Again, there is, for Kant, no international permissive law that could justify a forceful anticipation of the world state, as some commentators believe one can. Fortunately, the bellicose and utterly immoral claim that, since the forceful establishment of state law in the past does not pose a problem of justification to states here and now, our concern for a forceful establishment of world state law can be similarly alleviated (cf. Byrd & Hruscka 2008: 627) is a minority position.[603]

The contemporary international situation, which I hold to be characterised by a clear increase both in juridification and in the use of force, has, of course, not reached such heights. Nonetheless, the at times complete lack of proper legal (not to mention republican) grounding of activity beyond one's already designated realm of freedom and jurisdiction certainly poses almost insurmountable challenges to Kant's peace project. Here, I can give a brief account of this development and of its dangers along the two intertwined, but still distinguishable lines

[602] Such a factual realisation of the normative idea of global rule of law with equal freedom for all fails to live up to its name: it remains an unaccountable legal order with inconsistent and hence basically arbitrary enforcement of ideals, instead of laws. At its best, it can in fact aspire to something akin to an international law regime (insofar as it shares some of its material features). At its worst, it is not much more than what classical Enlightenment theories of international law always set out to avoid, namely the unbounded expressions of the will of state executives let loose on a global scale, and entirely dependent upon the beneficence of each cunning statesperson.

[603] For instance, a world state proponent such as Cavallar is still, at least for the most part, perfectly aware of the lack of justifiable coercion involved in a realisation of such a model (cf. Cavallar 1999: 122).

that I have already indicated: the ongoing increase in international juridification and a similar use of force beyond one's designated rightful sphere of action.

With regard to the latter, I do not pretend that my affirmation about an increase in the use of force in the international realm is undisputed in the empirical sciences that give us an overview of actual events. Without doubt, the number of fatalities in violent conflicts since the end of World War II has markedly decreased, although the growing percentage of civilian casualties in that figure is of course alarming.[604] However, the number of total (i.e., internal or inter-state) conflicts has clearly been on the rise in the same period. A decrease in the direct aftermath of the Cold War then gave way to a new escalation on the eve of the twenty-first century, to yield a record-high 2004, in which a third of the states of the world were directly involved in one or more violent conflicts. This steady rise indicates a doubling of the number of states at war[605] and more than a tripling of the number of active violent conflicts since the end of World War II. These figures can be interpreted and/or categorised in various ways,[606] but the number of wars and states involved in violent conflicts shows no signs of more than temporary decreases. Although the sum total of human fatalities is clearly on the way down, I believe the sheer number of wars and warfaring states in the late twentieth and early twenty-first centuries indicates an increase in the use of force in the international realm and, crucially, also of actors who pursue their purposes and seek their rights in what for Kant is an evidently unrightful manner.

Without going into much further detail on a topic that already has been addressed: this development has also seen an increase in a certain justification for wars and warfare, namely the protection of human rights through humanitarian interventions. As I noted above, the proponents of this justification frequently have clearly different views about whether and how legal institutionalisation is normatively relevant for such a course of action. Whereas Tesón in all essence remains in an international realm of power politics where force can be exercised without due legal process, Habermas is insistent on the strict necessity of the latter procedure. In fact, this is what international law and worldwide rightful relations are all about. Against scholars and state leaders of the former mould, it must be objected that without law, we move into an international realm of mere might and moral beneficence. Kant diagnosed this state of affairs with great precision when he wrote in the peace essay that it leaves us horribly exposed

[604] References to numbers are from the 2008 and 2012 executive summaries of *Peace and Conflict*.
[605] Although the editors do not use this term, war (civil or inter-state) is a correct description of these events.
[606] I am, for instance, in some disagreement with the editors' apparent categorisation of the US- and NATO-led wars in Afghanistan and Iraq – which contributed to the record-high 2004 percentage of states engaged in war – as internal state conflicts (since the summaries do not report one inter-state conflict for the relevant time period).

to all those who know how to use the three formulae *fac et excusa*, *si fecisti nega*, *divide et impera* (cf. 8:374 f.) – a description of actual international events that is as valid now as it was then.[607]

If the attempt at some kind of mediation through legal institutions is nonetheless made in such a state of basically lawless affairs, these proceedings are a theatrical show, since the actors involved will not recognise the outcome if it differs from their own opinion. The actual proceedings are usually entirely void of the universal and reciprocal character that is inherent in law, and are thus no legal procedure or law in the first place, however much the actors try to persuade uncritical public spheres of the contrary, and even succeed in doing so.

On a related note, we now hear calls – often based on the observation that democracies do not fight each other – for the international community or the UN to instate a hierarchical world order[608] along an axis of democracies and non-democracies, granting the former states a privileged legal position in the theory and practice of international relations.[609] Such a stance would only separate itself in degree from what was customary in sixteenth-century warfare and colonialisation with its two sets of rules: one set for Christian nations fighting Christian nations, and one set for Christian nations fighting pagans. Here, the UN Charter prescribing the "sovereign equality" of all states (United Nations (1945); Chapter 1, Article 2.2) would no longer be recognised as international law. If the alternative lies between such an international state of affairs and Habermas' project, the latter is to be infinitely favoured.

There are, however, also considerable normative-democratic challenges to proposals like the one Habermas presents. This certainly sets out to hinder a development towards the use of lawless external freedom in the international realm by binding and guaranteeing lawful freedom in a multi-level legal cosmopolitan order, but it is also possible to criticise this model from a Kantian normative perspective, as I have done above. The ongoing processes of intra-, inter-, and supra-state juridification to which Habermas subscribes also follow a logic that

[607] The three maxims translate into English roughly as follows: act now, justify later; if you commit a crime, deny it; and, divide and conquer.

[608] Even an otherwise careful Kant scholar such as Cavallar falls into this category when he fails to take into account the normative and legal implications of his claim that totalitarian states simply should not be recognised as legal entities (cf. Cavallar 1999: 120). Tesón (1998: 25) is, as we have seen, an advocate of giving self-professed liberal states a privileged role in international relations (and of reforming the UN to this purpose).

[609] In addition to the above objections: the very notion of a hierarchical world order without a world state cannot be squared with Kant's concept of law and its inherent distinction between a legal and a mere social condition. Whereas the social condition operates with a hierarchical normative categorisation of human beings (or states) into friends and foes, a categorisation that is unrightful from a legal perspective, the legal union operates with a specifically juridical (and rightful) hierarchical categorisation of human beings into law-abiding and criminal subjects of law, in order to overcome the impossibility of rightful coercion (and thus lawful external freedom) in a mere social condition. For Kant, only a legal condition – in this case a world state that replaces state sovereignty with an irrevocable (or non-voluntary) federal membership in a world state – can instate a rightful hierarchy between human beings.

hands still more power and authority to the state apparatuses (i.e., the executive and the judiciary) and their dynamic interpretation of laws, again much to the detriment or even the inversion of the original normative legal construct in Kant, which clearly allocated supreme authority and sovereignty to the legislative union of citizens.

In contradistinction to Kant's republican model, Habermas, as we have seen, endorses a liberal, multilevel constitutional order in the international sphere. His main reason for doing so can readily be supported, namely to attempt to establish and realise democratic institutional practices even beyond democratic states, when their political processes and deliberations are now gradually losing their normative imprint as the effects of globalisation set in. As citizens we can, of course, discuss which juridical model is best suited to the current climate. There is, however, at least one theoretical aspect that I hold to be not sufficiently elaborated and that I have not addressed thus far. This concerns the implications of the process of juridification itself, regardless of which level of law that this takes place at, and regardless of the laudable end of putting together a world vision that is an alternative to mere power politics. Brunkhorst has correctly emphasised in this context that there is also a certain dialectical process inherent to the ongoing attempts at juridification and constitutionalisation that can be seen in political practice to counteract these in an important and perhaps also surprising way. I do not disagree with his claim that: "Mit fortschreitender Verrechtlichung der Weltgesellschaft scheint auch im dialektischen Gegenzug die *Entrechtlichung durch Recht* und die *Dekonstitutionalisierung durch Konstitutionalisierung* fortzuschreiten" (Brunkhorst 2011: 337).

For Brunkhorst, one possible implication of the efforts at international juridification is that they lead instead to de-juridification; in a related way, international constitutionalisation leads only to de-constitutionalisation. On this point, he is completely in line with my Kantian-inspired critique of the structural transformation of the concept of sovereignty, which has similarly catastrophic normative-democratic consequences. In Brunkhorst's view, through our ongoing efforts to establish the constitutional democratic rule of law at the supra-state level (and solidify it at the state level), we are also in danger of realising the exact opposite. This is due to an inherent feature of the efforts, of which Kant too was aware: the increase itself in processes of juridification, democratisation, and/or constitutionalisation which proceed too far and too fast can only uncouple these processes from the political spheres that were supposed to be promoted by these efforts. Hence, one achieves, in a seemingly paradoxical manner, the exact opposite of what was intended. For Kant, the same process was in play regarding the world republic. Although the model is theoretically consistent, contingent circumstances from

within (or outside) the system will nonetheless cause it to lose all its republican features in the premature attempts to realise it in practice.[610]

Let me briefly elaborate this point: current processes of juridification, democratisation, and constitutionalisation at both the national and the international levels seem at present to be realised through an increase in the latitude of action for the state apparatuses of executive and judiciary, at the corresponding expense of a still more disempowered public sphere, above all of the legislative union of citizens. The sheer amount of laws and regulations that attempt to further delineate and guarantee the equal rights of all individuals (at the national, regional, and/or global levels) itself leads to a necessary expansion of the state apparatuses. This takes place not just in terms of the number of state functionaries, but also in their latitude of action to adapt and apply the increasing number of laws and regulations to an increasing number of cases and plaintiffs.

Of course, this may grant each person his or her own in a more individualistic and/or precise manner. But it also formally empowers the state apparatuses to take what are basically political decisions within a still more expanded and fragmented rights system[611] that now can and indeed must be dynamically adjusted by the very ones who were supposed to act only according to the letter of the law, not to re-interpret its spirit. Such a stance may do justice to the concept of human beings as legal subjects, but it fails at the same time to recognise what should be the first principle of any decent philosophy of right, namely that man is a political being too. From our Kantian legal perspective, it can come as no surprise that it is the state apparatuses (rather than the people) that lead the ongoing processes both within and beyond the no longer sovereign states towards ever more so-called juridification, democratisation, and constitutionalisation today, which in turn are dictated by the imperatives of an economy sector that has been let loose on a global scale.[612]

I cannot discuss adequately here how these contemporary developments contribute to significant alterations or even inversions of the absolutely fundamental legal relationships between the universal and the particular, the public sphere and the state apparatus, the people and the state, legal rights and moral or indeed legal beneficence, autonomy and heteronomy,

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[610] Maus, too, makes the same point with reference to Kant: "Die Weltrepublik wird abgelehnt, weil sie allein aufgrund ihrer globalen Ausdehnung den Charakter einer Republik verlieren muß, insofern weder weltweite allgemeine Gesetzgebung von der gesellschaftlichen Basis gesteuert, noch die Bindung globaler Exekutivfunktionen an die Gesetze von unten kontrolliert, noch überhaupt die Durchsetzung globaler Gesetze gewährleistet werden kann" (Maus 2011: 289).

[611] Cf. Brunkhorst (2011: 337), with reference to Koskenniemi (2001).

[612] The sum total of this development would then not only be accompanied by the current increase in laws permitting the administration (exeutive and judiciary) to adapt 'principles' of 'law' in particular cases as it sees fit. It would also mean the victory of the faculty of law over the faculty of philosophy in actual political practice.

freedom and coercion, the normative and the mere factual, the public and the private, etc.. But the dialectical process to which Brunkhorst refers, inherent to all legal and political activity, must be included in our endeavours to fulfill Kant's peace project. Unless we become aware of the changes to the legal and political systems that are caused by changes also within these systems, we are bound to repeat attempts at realising worldwide rightful relations that actually counteract the normative end for which the efforts were begun in the first place. To avoid this and instead attain a perfectly rightful condition of freedom through the rule of law, it would not only be a good start to reinstate and empower the legislative authority of the people in the non-institutional and the institutional, parliamentary dimension as the sovereign of both state and international law. It is also a normative obligation.

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