The Kantian Legal Turn of 'Republicanism': 'Rightfulness' by a Categorical Right to Justification*

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It is by no means ground-breaking (or even controversial) to say that the global liberal-democratic legal order currently faces existential crises, partially of its own making and partially owing to external actors. Many of these crises revolve around the received understanding of what the law means, and what the law as the basis of a society is empowered to do. In 2020 alone, the public health nightmare of the COVID-19 pandemic has raised questions concerning whether a state can mandate the wearing of facemasks, order its citizens to remain inside and not to congregate, or require compulsory immunisations when a vaccine becomes available. Among others, the United Kingdom's tacit admission that it will break international law in leaving the European Union «in a specific and limited way» (as per the Secretary of State for Northern Ireland)[1] offers further dilemmas chiefly because a state that bases itself upon the rule of law has explicitly declared its willingness to break that law for its own perceived benefit.

It would be incorrect to suggest that legal states do not, as a matter of course, face problems, often of overwhelming nature. Yet the sheer range of threats at the present time makes it nearly unavoidable to feel as though the rule of law itself is in mortal danger. Among many, the influential periodical *Foreign Affairs* even led its September/October 2020 issue with the declaration that «American democracy has never faced so many threats all at once» and, whether or not this claim could be considered hyperbolic, it nevertheless captures a zeitgeist that 'the republic', broadly defined, is 'fragile' and teetering on the edge of destruction[2].

In such a climate, it is advisable, and arguably necessary, to return to the basic elements of what those concepts — the rule of law, the republic, our society and 'way of life' — actually mean. Seeking unprecedented answers to unprecedented problems, however, requires unprecedented approaches. In this instance, I posit that it is worthwhile for the legal historian (as much as

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the public official) to cast their attention to the works of Immanuel Kant – a figure usually associated not with republicanism but with German liberalism. The elision of Kant from the pantheon of republican philosophers, however, ignores the significant attention he paid to the republic and its legal-philosophical foundations. To this extent, Kant's writings on republicanism present the reader with a means to approach the apparently irresolvable problem of the state as an actor against liberty, by demonstrating that the republic operates on a level of 'rightfulness' that is inseparable from its legitimacy. The decisive factor of republicanism is, to Kant, moral autonomy that is built on the a priori reasonableness of human beings and their consequential individual freedom (*Willkürfreiheit*). It is translated into legal terms – though his legal theory (*Rechtslehre*) is part of the introduction of the metaphysics of morals — as the free consensus of intellectual beings to «the state [as] the greatest congruence of the constitution with [...] legal principles»[3]. Thus, Kant's conception of 'rightful republicanism' is the centre of understanding his even today dominant theory of the rule of law.

1. *Cosmopolitan Reasonableness as Internal Revolution-Blocker*

Hardly anyone would attribute Immanuel Kant to the front row of German enlightened republicanism. The German polarisation of liberals and democrats, who were often equated with Jacobins due to their human rights-oriented argumentation, offers no place for the Kantian idealisation of republicanism as the monarchisation of the republic[4]. Conversely, Kant held no understanding of the demands for democratisation that were prevalent in the early Romantic environment of Jena[5]. Largely as a consequence of this, the republic occupied a contentious space in the German state constellation and, by the nineteenth century, seemed to have been disavowed by state reformers as an act of revolutionary upheaval. This was the case even in the 1848/9 discussions in St. Paul's in Frankfurt, where the idea of a German republic never achieved majority support. This was emphasised by the fact that the Left factions in St. Paul's between the extreme *Donnersberg* wing and the more centrist, moderate republicans in the *Deutscher Hof*, avoided explicitly demanding a republic. Any vision of a unitary state with a temporarily- elected Reich Governor (*Reichsstatthalter*) was doomed to fail due to the historical and political weight of German particularism, which supported the persistence of the monarchy.

Republican ideas of freedom as non-domination by civic self-legislation gained a foothold, though, in the emerging Enlightened German bourgeois society and public sphere at the end of the eighteenth century. In the wake of the American Revolution, the coffee shops and literary salons, where the literate public passionately discussed the ideas of the American struggle for independence, began to be politicised. The advent of the French Revolution was welcomed as a practical triumph of the philosophy of the Enlightenment; this was explicit in Kant's *Dispute of the Faculties* (1798), in which the philosophical faculty and the faculty of law argued over the question whether the human race is engaged in

a continuous progress towards betterment; in Kant's argumentation, 'betterment' in this case means the «evolution of a constitution in accordance with the [Kantian] law of nature»[6]. The latter circumscribes the Kantian republican idealisation of the monarchy, constituted by the internal and external rule of law. The autonomy of citizens under laws they had agreed to themselves complemented the citizens' participation in decisions over war. The empirical proof in history (*Geschichtszeichen*, *signum rememorativum*, *demonstrativum*, *prognosticon*) for the moral tendency of the human race towards a republican idealisation of the monarchy was not the French Revolution itself as a «revolution of an ingenious people»[7], but the enthusiastic interest in it by the broad public[8]. Kant's addendum to the academy edition of the *Dispute* notes that «the republican constitution, at least in spirit» does not mean «that a people under a monarchical constitution thereby assumes the right to have it changed, not even only secretly in itself»[9]. Kant's idea of a reformist republicanism, indicated here, has thus far been overlooked in legal historical research, though civic humanism, republican non-domination and self-legislation within a monarchical framework is not a novelty itself, as Robert von Friedeburg's research on early modern free imperial cities has demonstrated[10]. Even when Niccolò Machiavelli argued in his *Ritratti delle cose dell'Alamagna* (1584) that «the power of Germany was based on its cities rather than its princes»[11], the free imperial cities never strove for a free state, but «remained committed to government by counsel and to defence of positive law and custom within a monarchical framework»[12]. The basis of the Kantian reformist approach towards republicanism was its legal understanding[13]. Kant's republicanism, with its complementarian elements of internal and external autonomy by freedom, describes the evolutionary progress towards a world republic in accordance with the universal principles of natural law. Politics was, for Kant, an 'exercised legal doctrine' (*ausübende Rechtslehre*)[14]; consequently, Kant started in his *Critique of Pure Reason* (1781) to develop the political philosophy of a constituted world citizenry (*weltbürgerliche Verfassung*). Reasoning was universal and independent of any religious considerations, and the final purpose (*letzter Grund*) of his philosophy was to be found in the idea of practical reason (*praktische Vernunft*). This was nothing other than a categorical imperative of justification: there is always a right to justification, and justification is independent of specific circumstances, but determined on formal, technical grounds. It is in this sense that the Kantian philosophy is transcendental[15], and at the same time blocks revolutionary upheavals with its cosmopolitan reasonableness.

Examining Kant through the lens of republicanism may, at first glance, seem extraordinary. After all, his work was too prominent in the pre-March liberalism. His rejection of democracy as another form of despotism is also pertinent here. Even if Kant godfathered the human rights' understanding of German constitutionalism, his political philosophy, for which freedom (and not justice) is the central concept, is not limited to the liberal, defence-related, negative freedom addressed against the state. Yet Kant lends himself to a republican re-reading. For one, Kant had much to say, both explicitly and otherwise, about the republic. For another, Kant argued that hu-

man beings are naturally independent, owing to their intellect; as a result, the state, as the embodiment of the 'civil constitution' (*bürgerliche Verfassung*), is «a relationship between free people that (leaving aside their liberty as a whole in their relationship with others) finds itself subjected by compulsory laws»[16], and 'the citizens' state' is a 'purely legal state'[17]. In his idea of a citizen—in the sense of the *citoyen* (*Staatsbürger*), not the bourgeois (*Stadtbürger*) — according to the 1793 treatise *On the Common Saying*[18], (negative) liberal and positive political-republican civil liberties meet. Only the republican self-legislation by free citizens who are equal before the law guaranteed freedom. These were also the elements with which Kant defined his concept of a republic in 'The First Definitive Article' in his work *On Perpetual Peace* (1795):

> The constitution established firstly according to the principles of freedom … (as human beings), secondly according to the principles of the dependence of all on a single legislation (as subjects), and thirdly according to the law of equality … (as citizens),—the only one that arises from the idea of the original treaty, on which all legal legislation of a people must be based, is the republican one[19].

The Kantian distinction between the forms of government (autocracy, aristocracy, democracy) relied on the type of government, being the «way in which the state makes use of its sovereignty of power»[20]. A republican government was a direct contrast to a despotic government[21]. For Kant, the republican form of government consisted of a representative system; his autocracy was the republican monarchy. This kind of state constitution best fits the «possibility of republicanism … since representation therein is the greatest»[22].

The concordance of liberal and republican freedoms is also backed by Kant's interest in dignity. Kantian philosophy revolved inextricably around moral autonomy; the pure and supreme end of the moral law, purified of all empirical motives, was the self-giving will, expressed through the requirement that law is only binding if one has the opportunity to consent and thereby determine that law for oneself. Since man is the creator of his own laws, the duty of the individual to respect the dignity of others follows from this[23]. Morality and dignity were therefore anchored in the self-legislation of the autonomous will. Freedom is therefore the reason for dignity, not its consequence. In Kant's view, human dignity means «moral autonomy»[24], and is both universalised and ambitious. To this end, he identified several central aspects. In the *Metaphysics of Morals* (1797), for example, he notes: «For rational beings are all subject to the law that each of them should never treat itself and all others merely as a means, but at all times simultaneously as an end in itself»[25]. Regarding his virtue doctrine (*Tugendlehre*) therein, Kant continues:

> Only man, seen as person, i.e. as subject of a moral-practical reason, is above all price; for, as such (*homo noumenon*), he is not to be valued merely as means to others' ends, yes, even to his own ends, but as an end in himself, i.e. he possesses a dignity (an absolute inner value), whereby he can make all other reasonable world beings respect him, measure himself against every other of this kind and value him at the foot of equality[26].

Further: «Mankind itself is a dignity, for man cannot take from any man … merely as a means, but must at all times be used as an end, and therein lies his dignity»[27]. Kant's explorations of dignity occurred within the confines of his virtue doctrine,

and not his legal doctrine[28]. It is true that both the doctrine of law and the doctrine of virtue are concerned with autonomous self-legislation, but Kant himself strongly emphasised the central difference between duties of virtue and legal duties, or between morality and legality[29]. Therefore, there is no simple or self-explanatory bridge from Kant's moral autonomy to a legal constitutional principle and, in turn, dignity's inclusion in state legal organisation cannot be justified by merely referring to Kant's practical philosophy, as he himself differentiated the virtuous and legal aspects[30]. The bridge seems to be rightful republicanism. The 'noumenal' free will is translated into the concrete intelligible freedom related to space and time by connecting it with citizenship. Therefore, the Kantian idea of dignity «is status-bound»[31] and emanates from respect and recognition in the social realm as citizen.

This confirms an understanding of Kantian republicanism as the basic idea of the autonomy of persons to be both authors and addressee of the law, and holds in the moral realm as well as in the legal and political spheres. Kantian republicanism puts political autonomy and public justification at center stage and makes the dialectical tension clear between human rights' universal claim to validity and their legal enforceability only based on a particular political community.

2. *'Rightful Republicanism'*

For the translation of the German '*rechtlicher Republikanismus*', denoting the legitimacy of state political structures by consistency with everyone's freedom in accordance with universal law, 'rightful' is more precise than 'legal'; Kant's fundamental concept of right — derived from the categorical imperative among equal and free human beings — was «the possibility of [directly] connecting universal reciprocal coercion with the freedom of everyone»[32]. Coercion as «a hindrance or resistance to freedom» was «connected with right by the principle of contradiction»[33]. Coercion guaranteed the coexistence of everybody's freedom in accordance with a universal law[34]. Conversely, a state that guaranteed everybody's freedom by coercion was built on the consensus by free will of intellectual beings that made the state, being the transition from the natural to the civic status[35].

The Kantian argumentation relied on a tripartite reasoning: freedom, property, republic (state). In the natural state, the rights of freedom and property of equal and free (because a priori rational) people were not yet guaranteed (freedom). Property, which was central to private law, was part of external freedom of action (*äußeren Handlungsfreiheit*), since choice (*Willkürfreiheit*) included the freedom to influence things, services and conditions in the world, otherwise freedom would be meaningless (property). Therefore, according to Kant, there was the reasonable duty (*vernünftige Pflicht*) of all individuals to leave the natural state by uniting their will, thereby creating a public legal order which guaranteed the rights of freedom and property by coercion (state). This line of threefold arguments set a fuse to the public welfare doctrine of Enlightened absolutism, especially as for Kant politics was an «exercised legal doctrine» (*ausübende Rechtslehre*)[36].

The freedom of the individual was the basis of the state, as was also true for the American federalists. For Kant, metaphysics was a system arising out of reason, by cognition *a priori* out of pure rational concepts, not evaluating empirical experiences. Consequently, the Kantian concept of freedom was «a pure rational concept»[37], and it was the centre of his political philosophy, around which all other distinctions orbited. This laid the ground for what I consider the legal turn of republicanism with the Kantian practical philosophy; even the fundamental distinction of right/wrong ('*recht/unrecht*' in general and '*gerecht/ungerecht*' in accordance with external laws)[38] is traced back to the morally autonomous, as rationally gifted freedom. This logical purity allowed Kant to free his republicanism from any moral dictatorship, which was inherent to Enlightened absolutist paternalism and its top-down imposed common good (as state purpose). Kant stipulated that «[a]ny action is right if it can coexist with everyone's freedom in accordance with a universal law, or if on its maxim the freedom of choice of each can coexist with everyone's freedom in accordance with a universal law of freedom»[39]. The moral autonomy of the individual could not be formulated more provocatively than to explain «the universal law of right»[40], not as «demand, that I myself should limit my freedom … just for the sake of this obligation», but as «reason says only that freedom is limited to those conditions in conformity with the idea of it»[41]. Individual freedom is sharply explained to be the «principle and indeed the condition for any exercise of coercion»[42] and therefore the measure of any rightful state legal system by the statement that external freedom, enjoyed in relation to others, requires «the determining choice independently of any empirical conditions … and prove[s] a pure will in us». The Kantian link to equality is anchored in the union of the «choice (*Willkür*) of one … [with] the choice of another in accordance with a universal law of freedom»[43]. This indicates the logical reduction of the state to a voluntary union of people governed by laws; the rightfulness as accordance with universal laws includes non-domination, as the limit to freedom by the conditions of coexistence with everyone's freedom in accordance with it excludes the subjection to the will of another[44]. Due to the a priori approach of reason, the nature of man cannot matter for the legitimation of the state. Nor can the Kantian doctrine of right differentiate between «natural freedom» and «civil freedom»[45]; insofar as Kant understands the civil condition as a «pure rational concept»[46], it is «only … the civil condition [that] provides the conditions under which the [laws concerning what is mine or yours] are put into effect (in keeping with distributive justice)»[47].

Only in the Republic is property peremptory. Kant himself explains his rightful republicanism as follows: «This is the only constitution of a state that lasts, the constitution in which law itself rules and depends on no particular person». The Kantian rule of law was, unlike the French absolutisation into a *suprême être*, not intended to be an end in itself. Instead, it served as «the only condition in which each can be assigned *conclusively* what is his»[48]. The other aspect of the concrete Kantian rule of law is his republican conception of justice, which will be addressed later in this essay[49]. For now, the essential object of the rightful

freedom-driven constitutionalism is the interlinkage of freedom and state union via property. According to Kant, property was a vital human freedom, owing to the fact that it was the state-founding *movens* and because it was a motivator that drove existing states to a constitution of a 'true republic', moving beyond «the old (empirical) statutory forms, which served merely to bring about the *submission* of the people»[50]. Kant's demand to adjust the real states as closely as possible to his republican ideal is conceived as harmonization of the letter (*littera*) of the original legislation with the spirit (*anima pacti originarii*). The end goal of bringing states as near as possible to the ideal state of a true republic is the endeavour to peremptorise property in order to comprehensively secure the human freedom that is thereby realised[51].

Kant's rejection of Locke's working property (*Arbeitseigentum*), a key element in reframing this bastion of liberalism as a republican, is clearly expressed: «Moreover: in order to acquire land is it necessary to develop it (build on it, cultivate it, drain it, and so on)? No!»[52]. Acquisition of property in the Kant doctrine of right happens firstly by its possession, designation, or appropriation, which occurs via the (simulated) agreement of all parties concerned. The last voluntary element determines that peremptory property can only exist in the civil rightful state, or *civitas*, which § 45 of the doctrine defines as a union of a multitude of human beings governed by the law of rights[53]. On the other hand, any original acquisition in the natural state is only provisional[54]. Indeed, Kant explicitly declares this differentiation in the heading of § 15 in Part I (Private Right) of the *Doctrine of Right*: «Something Can Be Acquired Conclusively Only in a Civil Constitution; in a State of Nature It Can Also Be Acquired, but Only Provisionally»[55]. According to Kant, property is acquired through first taking possession (*apprehension*)[56], or through declaration[57], or through appropriation as the act of a general will (*idealiter*)[58]. It is the voluntary element in the appropriation that makes it a «conclusive acquisition»; therefore, the consent-founded appropriation is the peremptory (or, in Kant's wording, conclusive) title of acquisition in the 'civil condition' (*bürgerlichen Staat*), as it is the latter's essence to be «the condition in which the will of all is actually united for giving law»[59]. The fundamental right of people to property drives the comprehensive juridification of interpersonal relationships, and the dynamic of transition from the natural state into the civil state confirms «the final end of public right» to comprehensively legitimate and secure property by the 'rightful condition' «in which each can be assigned conclusively»[60].

Thus property and the state are mutually related[61]. Without property, the state could not be legitimised as a pure rational concept (§ 44); there would be no rational duty to enter the state and to legalise interpersonal relationships[62]. Thus, the natural state is not an antipode of the civil state but its precursor; the transition from natural to civil condition takes place by perpetuating the freedom-based core content of property. The conflictual nature of the natural state — before a public lawful condition is established (§ 44) — arises from the different individual judgments as to 'what seems right and good'. Reason requires the entrance into the state as the civil «condition in which what is to be rec-

ognised as belonging to it is determined by law»[63]. The final end of the state is the legislation and safeguarding of law for the peremptorisation of the individual property of human beings (the 'mine and yours', in other words), which includes both freedom and acquired rights. In this reading, the promotion of the common good is only a secondary effect. Kant alters the Ciceronian doctrine that «the wellbeing of the commonwealth is the supreme law» (*salus rei publicae suprema lex est*), by declaring that «[a] state's well-being consists in [the laws of freedom] being united»[64]. The wellbeing of the state corresponds with its constitution's «conformity most fully to principles of right»[65]. By Kant's logic, the state's goal is not to secure the citizens' welfare nor their happiness, as they are not elements in the line of arguments defining the public good as the accordance with laws of freedom. Yet this freedom's flipside is that man has a duty, by dint of reason, to enter the state. The coexistence of everyone's choice with the choices of others in accordance with the universal principle of right[66] — reframable as the categorical imperative not to treat others in the way other than how you would wish to be treated by them — is only enforceable in the rightful condition of the state, because a law is compatible with everyone's freedom only if it arises from the generally unified will that exists *only* in the state. For Kant, the ideal state, «as it ought to be in accordance with pure principles of right» (*Metaphysics of Morals* § 45) and the actual union, which implements these principles derived from reason in the greatest possible way, is the «true republic» (§ 52).

3. *Representative Republicanism against Democratic Despotism*

«The civil constitution of every state is to be republican»[67], postulated Immanuel Kant in response to the *terreur*. Any democracy for which he blamed the French Revolution, was incompatible with the 'republican constitution'. For Kant,

> democracy…is necessarily despotism; because it establishes an executive power in which 'all' settle things for each individual, and may settle some things against an individual who does not agree with the policy in question. Decisions are made by an 'all' that does not include everyone. In this, the general will contradicts itself and [the concept of] freedom[68].

In order to establish this, however, Kant had to conceptualise that which was rightfully republican, but not democratic. What, then, did Kant *mean* by his rightful republicanism?

In his 'First Definitive Article' *On Perpetual Peace* (1796), Kant continues to 'bill the French Revolution' by explaining that «the democratic mode of government makes [a representative system] impossible, because everyone wants to be in charge»[69]. Representation is at the heart of the Kantian reading of republicanism at the end of the eighteenth century: a republic is a state led by the interests of its people, as opposed to one led by the interest of its dynasty. The representative use of sovereign power relies on «the protection and securing of the law»[70] as the central state purpose or, indeed, its 'holiest purpose'[71]. Against any paternalistic determination of the public good, Kant defines the purpose of the state to be limited to the securing of personal liberties: «The government is not authorised to act or to decree what is not

necessary for the preservation of the rights of the individual»[72]. Any top-down prescription of the public good was the 'most dangerous weapon for despotism'[73], specifically owing to its sole dependency on the Enlightened-absolutist sovereign's discretionary interpretation[74]. For Kant, the consensus of intellectual beings by their free will is what makes the state[75]. According to his philosophical legal doctrine, human beings are naturally independent, owing to their intellect; as a result, the state, as the embodiment of the 'citizens' constitution' (*bürgerliche Verfassung*), is «a relationship between free people that (leaving aside their liberty as a whole in their relationship with others) finds itself subjected by compulsory laws»[76] and defines 'the citizens' state' as a 'purely legal state'[77]. The a priori reasonableness (*Vernunftgegebenheit*) of human rights in the citizen state of the law[78] as «the state of the greatest congruence of the constitution with the legal principles…as according to which we are to strive according to the reasonableness of the categorical imperative»[79] allowed the restricted and rightful[80] 'Republicanism' as contrasted with the unrestricted 'Despotism' that resulted from absolutism[81]. Human liberty was thus the telos of the state and a 'principle for the constitution of a community'[82]. Kant defined 'exterior (legal) liberty' as «the authority not to obey any exterior laws but the one to which I was able to contribute»[83]. This legal idea of equality as subject, in which one was not only subject to but also a stakeholder in the law, rendered traditional estate differences null and void.

Again it must be emphasised that the core element of the legal turn of 'Republicanism' under Kant is representation, in the sense of self-determination of the 'united will' of the citizens[84]. As Kant famously argued in *Metaphysik der Sitten*, «All true republic is and can be nothing else than a representative system of the people, united by all citizens, in order to obtain their rights in the name of the people, through their deputies»[85]. Kantian representation not only meant (externally and institutionally) the establishment of a parliament, but it also addressed how the sovereign power is used, by whomever wields it, to administer the affairs of the state. Kant thus aimed to separate legislation from the will of empowered individuals, transforming it into the self-determination of the 'united will' of all citizens, achieved through the legislative participation of the people who were subjects to power (*Gewaltunterworfene*)[86].

The first precondition of the use of this republican sovereignty was the derivation of all sovereignty from the 'united people'. This required that the sovereignty would be understood as emanating from the people as the true sovereign to whom sovereignty falls when it is removed from the hands of the 'monarchical representative'[87], as had happened in France in 1789[88]. Grounding legislative participation in a transcendental idea of freedom both exceeded and differed from a mere vehicle for the promotion of individual welfare. In the *Dispute of the Faculties* (1798), Kant argued that

> [a] being endowed with liberty [due to his a priori reasonableness] can and should demand in the awareness of his preference over the irrational animal, according to the formal principle of his arbitrariness, no other government for the people, to which he belongs, than one in which the people is co-legislator: that is, the right of men who are to obey must necessarily precede all consideration for well-being, and this is a sanctuary which is exalted above all price (of utility), and

which no government, however charitable it may be, may touch[89].

This right was, admittedly, 'but always only an idea'[90], though an idea that Kant claimed was the ideal and norm underlying all constitutions[91].

Thus formulated, this means that government actions were not to be content-related, but guided exclusively by formal considerations. This corresponded with the Kantian definition of law as the epitome of the conditions by which individual freedom can be brought into balance with the freedom of the others.

4. *Kantian Republicanism's 'Legal Turn'*

Furthermore, Kantian rightful republicanism based on the rational obligation of man to enter the state results from his a priori innate right of freedom. This is only realisable if the limitation inherent in it to be compatible with the freedom of all other human beings is observed and, if necessary, compulsorily enforced. The only basis for coercive measures to ensure freedom is a law that is compatible with the freedom of all human beings and that thereby requires universal consent — the generally united will that exists only in the state. Thus, the obligation to enter the state complements the innate right of human freedom. In addition to the innate right of liberty, Kant relies for the legal imperative of the state on the fundamental right of every human being to property, which serves the comprehensive realization of freedom of action and thus results from the innate right of liberty. In other words, these are two complementary justifications which, taken together, legitimise the state as a comprehensive security instrument of human freedom, within the framework of a metaphysical legal doctrine, emerging from reason. The decisive legal turn 'republicanism' takes in the Kantian philosophy is here embodied in the conclusion that the social contract is relieved of legitimation tasks and has a normative function as an idea of the free association of citizens.

The legal turn of such an argumentation is also present when compared to the works of the American federalists on this point. For the federalists, the social contract served both the legitimation and the limitation of state rule, whose claim to authority is dependent on the consent of the people in terms of reason and extent. If the state seriously violates the rights conferred on it by the people for fiduciary exercise, then — in the view of Alexander Hamilton, John Jay, and James Madison, writing under the collective pseudonym 'Publius' — the people have a right to active resistance or revolution. Kant, on the other hand, categorically rejects an active right of resistance because of the human obligation to live in the state, but grants people a right — and an obligation — to passive resistance for reasons of conscience. Kant's concept overcomes the contradiction inherent in the traditional doctrine of social contract and to which Publius is also subject: the problem that the contract cannot provide the required substantiation because its domination-limiting, resistance-legitimating function counteracts and nullifies the legitimation of the state based upon it. As far as the authors of the *Federalist Papers* (n. 15, Hamilton; n. 51, Madison; n. 55, Madison; n. 76, Ham-

ilton) were concerned, leaving the state of nature is useful, but not necessary.

This contrast has further consequences when comparing American constitutionalism with Kantian legal republicanism. In Kant's monistic conception, the social and power contract coincide; his reasoning of an a priori existing rational legal obligation to enter a civil polity contradicts the Anglo-American reading of power, which is based principally in trust[92]. While in the horizontal perspective the legislature has a prominent position vis-à-vis the other powers, from the citizen's point of view in the vertical perspective one state power is expressed in all three powers[93]. The latter consideration refers to a second aspect of rightful republicanism, where the first, already explained, was the republican use of the power of sovereignty.

5. *Kantian 'Spirit of Republicanism' and the 'Categorical Right to Justification'*

The second aspect of Kantian republicanism is that it concerns the constitution itself and does not determine a specific form of government. Thus, even authoritarian rulers could be considered republican if their rule followed 'the spirit of republicanism' — expressed through a legal order made up of general principles of law (*allgemeine Rechtsprincipien*) crafted through the participation of the people themselves[94]. Kant relied on the 'evolution of a constitution based on natural law' (*Evolution einer naturrechtlichen Verfassung*). By this he meant that public authority gains an ethical quality through Enlightenment, when monarchs recognise their duty 'even if they rule autocratically, to rule yet in a republican way (not democratically), that is to treat the people according to principles which are in accordance with the 'spirit of the laws of freedom' (as a people of mature reason would prescribe them to itself), though, under the characters to be respected, their consent were not be asked'[95].

For Kant, the republic was the only possible form of government, characterised by a rule of law under which the subjects were also citizens. The granting of freedom, equality and autonomy did not separate the citizen subjects from the state; rather, it would cause them to turn towards the state (as the necessary state of being able to enjoy freedom and equality in the first place). In the Kantian republic, which could also be a constitutional monarchy, the people are both the sovereign and the legislator, and this could only be guaranteed by a representative system and a legislative power separated from the executive. Such a republican reading of the second part of the doctrine of right corresponds with a legal reading of Kantian dignity; the essential (legal) meaning of freedom as (moral) autonomy means having a categorical right not to be subjected to norms that cannot reciprocally be justified, which this justification embodied in laws people have consented to via their representatives. The persuasiveness of rulings and judgments is key to the legal understanding of Kantian dignity as moral autonomy; there cannot be any legitimate form of government if not based on structures of effective justification. This is paradigmatic for Kant's practical philosophy in its entirety, which is concerned with finding a lasting solution to 'order' the human condition itself. Instead of dealing with forms of government, Kant

was more interested in the way sovereignty is used to the best of all. Like in the Platonian cave manner, the philosopher explained the fundamental pattern of how societies are organized to their and each individual's best. This is the essence of his rightful republicanism.

His search for lasting harmony had an international reach: eternal peace among and between peoples. Kant's innovations were many; one of the most notable here is the link between the system of government and the state's approach to foreign relations. The Kantian elaboration of the connection between the domestic constitution of a state and its foreign policy builds on the postulation that republics, cooperating with one another, could arrive at a situation of perpetual peace.

A republican understanding of international relations did not originate with Kant. Since the Utrecht agreement of 1713 it was an established topos for the equilibrium of powers. The negotiations ending the War of the Spanish Succession dispelled the traditional rights (of monarchies) as negotiable aims, replacing them with the tranquillity of Europe in an equilibrium of powers as the preferred aim of diplomacy. Among the eleven bilateral treaties signed in Utrecht in 1713, that between France and Portugal was expressive on its aimed «contribut[ion] to the repose of Europe», as joined by the treaty between the French crown and the Estates-General which proclaimed its intention of the «re-establishment of the tranquillity of Europe»[96]. The promotion of Europe's common interest over that of individual dynasties became the overall legitimate aim[97]; no less important a figure as Louis XIV could be seen at Utrecht to «consent willingly and in good faith that all just and reasonable measures be taken to prevent … an excessive power [as] … contrary to the good and repose of Europe»[98].

The interest in Europe as a whole had a seismic impact on the very same power that was not only geographically removed from the continental mainland but fond of its geopolitical distinctiveness. Utrecht was a milestone in European history, not only for the first determination of a European *res publica* — as an equilibrium to the best of all instead of power struggles in dynastic interests — but also for the rise of British voices that Great Britain was an island after all[99]. Britain was the main beneficiary of the Utrecht «formal proclamation of the principle of the balance-of-power as a fundamental condition for peace»[100], allowing its dominance in the Western Mediterranean with the cession of Gibraltar and Menorca and its rise to the pre-eminent European commercial power by the granted monopoly over the slave trade between Africa and Southern America and the establishing of an efficient stock market in London to refinance the war debts in the form of easily traded securities. Others did not profit from the bargaining of power balance in the same way; the Dutch Republic found itself effectively bankrupt, Austria struggled with the Pragmatic Sanction of the same year, designed to ensure the succession of Maria Theresa, and France only had two more years of the reign of the Sun King, with Louis dying in 1715[101]. A long-term peace, let alone an eternal one, was simply not possible; irrespective of concrete political actors, the fact that peace was only to be defined in the abstract, coupled with the looming Anglo-French conflicts in North America as well as the unresolved conflict

between Russia and Sweden, meant that it could only remain an ephemeral illusion.

Kant's innovation on the international scale was again a legal one. His cosmopolitan republicanism transformed the peacekeeping by legal protection of that which is mine and that which is yours into the 'constitutionalisation of international law'. The inter-state legal coordination of 'spheres' of freedom constituted the core of the peace-building function of law, which Kant explained in his text *On Perpetual Peace: A Philosophical Outline* (1795)[102].

6. *The Kantian State of World Citizenship and Eternal Peace*

According to the three definitive articles of Kant's sketch of perpetual peace, a state of world citizenship (*weltbürgerlicher Zustand*) and perpetual peace were attainable under three conditions: First, 'the civil constitution of every state is to be republican', second, 'the law of nations is to be founded on a federation of free states'; and third — aiming at a global republic of republics — 'the law of world citizenship is to be united to conditions of universal hospitality'[103].

The republicanisation of the individual states, in Kant's reasoning, is an act of peacekeeping, because all citizens have a say in war and peace. The first definitive article is a continuation of the previously discussed republican reading of the second part of the doctrine of right, amounting to the categorical right not to be subjected to norms that cannot reciprocally be justified. The transnational persuasiveness of rulings and judgments requires the same level of justification by consent through the individual society's own representatives. The participation of all citizens in the decision concerning war or peace ensures that sovereignty is used to the best of all, both domestically and in transnational affairs.

The 'Second Definitive Article' explains the republicanisation of interstate relations by the fact that

> for relations among states the only reasonable way out of the lawless condition that promises only war is for them to behave like individual men, that is give up their savage (lawless) freedom, get used to the constraints of [public coercive laws][104], and in this way establish a continuously growing [state of nations (*Völkerstaat, civitas gentium*)[105], to which, eventually, all the nations of the world will belong[106].

By equating states with people in the natural state, Kant postulated that the same principle of law forces men into a civil constitution and states to found a 'world republic (*Weltrepublik*, *civitas gentium*)'[107] or a republic of republics. Contrasting 'Grotius, Pufendorf and Vattel etc. (all vexed comforters, *lauter leidige Tröster*)' whose legal theories do not have the 'least legal force'[108], lacking the power of coercion, the law of reason requires a world republic and thus a world domestic law with the power of coercion (*zwangsbefugtes Weltinnenrecht*). Only the republicanisation of the international system of states matches the principles of practical reason, as it 'finally brings the human race ever closer to a world citizen's constitution'[109]. However, the world state must be a republic, otherwise it is a despotic graveyard of freedom. Only this republic could guarantee that the freedom (sovereignty) of one individual republic could coexist with the freedom (sovereignty) of any other republic under a general, coercive law.

The 'Third Definitive Article' *On Perpetual Peace* among states established 'the idea of a world citizenship (*Weltbürgerrechts*, *ius cosmopoliticum*)' as the third necessary prerequisite of an enduring republican peace by defining it «[as] necessary to complete the unwritten code of both civil and international law on public human rights in general, and thus on perpetual peace»[110]. Kant explains the world citizenship as a

> right to visit (*Besuchsrecht*), that all men have to offer themselves as potential members of any society. All men have this right by virtue of their common possession of the surface of the earth, where (limited by its surface area) they can't spread out for ever, and so must eventually tolerate each other's presence. Originally no one had more right than anyone else to any particular part of the earth[111].

In his plea for the juridification (*Verrechtlichung*) of international relations, Kant did not mention any coercive public authority (*zwangsbefugte öffentliche Gewalt*) that would guarantee the right to world citizenship as a human right to asylum[112]. However, from the 'necessary complementary character' of both the constitutional law of the individual republics (of the first definite article) and the international law of the republic of the republic (of the second definite article), the conclusion can be drawn that public human rights may also restrict the internal sovereignty of the individual republics. This conclusion is reinforced by reading Kant's explanation that «the community … among the peoples of the earth … has gone so far that a violation of rights in one place on earth is felt by all»[113].

This triad of the three definitive articles made it clear that Kant did not hold republican governments themselves as sufficient to bring about perpetual peace: universal hospitality (*ius cosmopoliticum*) and a world republic (*civitas gentium*) as a federation of free states were necessary complements to enact perpetual peace. The 'Preliminary Article' framed this peace according to six key prohibitions: tacit reservations for a future war in peace treaties; dominion over another state by inheritance, exchange, purchase, or donation; standing armies; national debts as means of foreign policy; violent interferences with another state's constitution or government; and war crimes. The latter were defined by Kant as «acts of hostility that would make mutual confidence in the subsequent peace impossible: e.g. the use of assassins (*percussores*), poisoners (*venefici*), breach of capitulation, and incitement to treason (*perduellio*) in the opposing state»[114].

7. *The Kantian Republican Conception of Public Justice*

In addition, rightful republicanism relies on public justice, where justice is justified and, in that justification, seen to be done. According to his *Introduction to Legal Doctrine* (§C), the coexistence of everyone's freedom with everyone else's freedom «in accordance with the a universal law»[115] denoted the Kantian idea of justice that needs to be read in a justificatory way, translating (universal) human dignity as moral autonomy into operational legal terms. As Hasso Hofmann and Rainer Forst have argued, the Kantian notion of justice is not related to goods, but to the personal status, «to be respected as a subject of justification»[116].

The first consequence of this respect-related approach towards justice is

the need of legal protection by independent, ordinary courts, which guarantee citizens freedom: «[The state of nature] would still be a state devoid of justice (*status iustitia vacuus*)», Kant explained in the second part of the *Doctrine*, «in which when rights are in dispute (*ius controversum*), [if] there would be no judge competent to render a verdict having rightful force»[117]. The negation of the categorical imperative[118] triggers the law of punishment, attributed to judicial power in accordance to general, previously found laws. Kant defines the courts as 'public justice'[119], as their guiding tool is the principle of equality[120]. If the universal principle of law is the organisation of everybody's freedom of choice under the equality of all as morally autonomous, rationally gifted beings, justice is seen to be done as justified in front of ordinary courts. Legal equality was expressed as the ordinary competence that was inherent to all legal matters; the constitution of the courts thus has to be an equal one. The courts could not be set up by reference to the differences of the people but only in accordance with local attachment. This is also because everybody must have the same claim to equality; if not, then the very principle of equality is itself unequal. In this understanding, no one is inferior to the point that his access to the judge is rendered more difficult than it is for anyone else. Similarly, nobody is so superior that it would be impossible to obtain justice against him with the same amount of certainty and swiftness[121]. It is by the respect for one's dignity by equal access to justice that Kant explains justice in legal, and not moral, terms as «protecting justice (*iustitia tutatrix*), mutually acquiring justice (*iustitia commutativa*) and distributing justice (*iustitia distributiva*)»[122]. Kant referred to his judicially-focused distributive concept of justice as «the most important amongst all legal matters»[123] of civil society. In this sense, the equality of citizens was «the equal claim to the protection of the law for everybody»[124], grounded on the compromise between the legal conditions of universal freedom in accordance with the general legislating will. This lies at the heart of the legal reading of Kantian dignity and the essential (legal) meaning of freedom as (moral) autonomy: having a categorical right not to be subjected to norms that cannot reciprocally be justified (laws you have consented to by your representatives). For the reading of respect as authority worthy of receiving justification, the emphasis lies on the justifiability of justice. This reading is consistent with the Kantian centre of rightfulness. His practical philosophy lacks an abstract idea of justice, as the *idea* of justice does not count, but only its real *practice* under the universal law of equality. This is exactly the point of the legally competent judge; it is therefore not by chance that the constitutionalisation of court constitutions was put on the political agenda by the Kant disciple Feuerbach[125].

Conclusion

The strength of this line of argumentation (to understand justice primarily as a claim to be respected as a subject of justification) is that it accords with the other legal political consequences of Kantian dignity as moral autonomy. There cannot be any legitimate form of government if not based on structures of effective justification. The legitimation of property rights by the state

and, reciprocally, the legitimation of the state by the perpetuation of property follows the logic of human dignity, requiring 'a right to justification' for every human being. If one contrasts the Kantian three-step cascade freedom, property, state with the transition from nature to state according to the federalists, the radical legal turn of the Kantian (republican) civil state becomes clear: it disposed of both the contract and the corporation. Kant moved the frame of reference for what is meant by republic away from the mere bargaining for power and between powers, explaining it as prerequisite for perpetual peace between peoples. As a result, he pioneered an effective rereading of Utrecht (not to be led by the interests of dynasty, but of its people) within a monarchical framework, which set the tone for the typical German top-down constitutionalisation of the long nineteenth century.

This understanding of Kant is not only pertinent for liberalism, but also for republicanism. The impact of his philosophy on constitutional history and contemporary issues cannot be evaluated without the conclusions presented here: that the autonomy of people as both authors and addressees of legal and political decisions implies a right to public justification —an aspect worthy of discussion especially in times of 'pandemic regulatory fever'.

* This essay is dedicated to Hasso Hofmann (died 21 January 2021), whose *Repräsentation* (n. 84) and *Einführung in die Rechts- und Staatsphilosophie* (n. 115) have been my 'most faithful study companions'.

[1] G. Parker et al., *UK Government Admits It Will Break International Law over Treaty*, in «Financial Times», 8 September 2020, <https://www.ft.com/content/a20e7822-468f-4671-8e82-9dc5b5f353d8>, October 2021.

[2] S. Mettler, R.C. Lieberman, *The Fragile Republic*, in «Foreign Affairs», September/October 2020, <https://www.foreignaffairs.com/articles/united-states/2020-08-07/democracy-fragile-republic>, October 2021.

[3] U. Müßig, *Reason and Fairness: Constituting Justice in Europe, from Medieval Canon Law to ECHR*, Leiden, Brill, 2019, p. 225, n. 260.

[4] Cf., the German Jacobin Georg Forster, who argued that the establishment of a free republican constitution in order to allow «that lying image of happiness [as the goal of life is] to be exchanged for human dignity [...] as the true signpost of life», cited in P. Hölzing, *Republikanismus in Deutschland, Kant, Forster, Schlegel*, in T. Thiel, C. Volk (ed. by), *We the People, Die Aktualität des Republikanismus*, Baden-Baden, Nomos, 2016, pp. 229-258 (232).

[5] Cf., F. Schlegel: «republicanism [...] is necessarily democratic», F. Schlegel, *Versuch über den Republikanismus*, in F. Schlegel, *Kritische Friedrich-Schlegel-Ausgabe*, vol. VII, ed. Ernst Behler, Paderborn, Schöningh, 1966, pp. 17, 25. Cf. Hölzing, *Republikanismus in Deutschland*, cit., pp. 229-258. See also C. Jamme, H. Schneider (ed. by), *Mythologie der Vernunft. Hegels ältestes Systemprogramm des deutschen Idealismus*, Frankfurt a.M., Suhrkamp, 1988, esp. with reference to Hegel, Hölderlin and Schelling.

[6] I. Kant, *Streit der Fakultäten*, section II, n. 7 (*Wahrsagende Geschichte der Menschheit*), in I. Kant, *Werkausgabe*, vol. VI, ed. W. Weischedel, Frankfurt a.M., Suhrkamp, 1977, p. 360.

[7] I. Kant, *Streit der Fakultäten*, section II, n. 6 (*Von einer Begebenheit unserer Zeit, welche diese moralische Tendenz des Menschengeschlechts*

beweiset), p. 358.

[8] *Ibidem.*

[9] *Ibidem.*

[10] R. von Friedeburg, *Civic Humanism and Republican Citizenship in Early Modern Germany*, in *Republicanism. A Shared European Heritage*, vol. I, *Republicanism and Constitutionalism in Early Modern Europe*, ed. M. van Gelderen, Q. Skinner, Cambridge, Cambridge University Press, 2002, pp. 127-145.

[11] Friedeburg, *Civic Humanism*, cit., pp. 125-145.

[12] Ivi, p. 144.

[13] Hölzing, *Republikanismus in Deutschland*, cit., p. 236.

[14] G. Volker, *Ausübende Rechtslehre. Kants Begriff der Politik*, in G. Schönrich, Y. Keto (eds.), *Kant in der Diskussion der Moderne*, Frankfurt a.M., Suhrkamp, 2002, pp. 464-488.

[15] In lieu of many: J. Schwartländer, *Der Mensch ist Person: Kants Lehre vom Menschen*, Stuttgart, Kohlhammer, 1968, pp. 163 ff.; B. Giese, *Das Würdekonzept. Eine normfunktionale Explikation des Begriffes Würde in Art.1 Abs.1 GG*, Berlin, Duncker & Humblot, 1975, pp. 35 ff.; W. Wolbert, *Der Mensch als Mittel und Zweck*, Münster, Aschendorff, 1987, pp. 14 ff., pp. 27 ff.; J. Hruschka, *Die Person als Zweck an sich selbst. Zur Grundlegung von Recht und Ethik bei August Friedrich Müller (1733) und Immanuel Kant (1785)*, in «Juristenzeitung», 1990, 1-15; H. Bielefeldt, *Zum Ethos der menschenrechtlichen Demokratie*, Würzburg, Königshausen & Neumann, 1991, pp. 23 ff.; K. Bayertz, *Die Idee der Menschenwürde: Probleme und Paradoxien*, in «Archiv für Rechts- und Sozialphilosophie», 81, 1995, pp. 468-469; R.A. Lorz, *Modernes Grund- und Menschenrechtsverständnis und die Philosophie der Freiheit Kants*, Stuttgart, Boorberg, 1993, esp., pp. 119 ff., pp. 125 ff., pp. 271 ff.; S. König, *Zur Begründung der Menschenrechte: Hobbes – Locke – Kant*, Freiburg, K. Alber, 1994, pp. 247 ff.; C. Enders, *Die Menschenwürde in der Verfassungsordnung*, Tübingen, Mohr Siebeck, 1997, pp. 189 ff.; H. Folkers, *Menschenwürde—Hintergrund und Grenzen eines Begriffs*, in «ARSP», 87, 2001, pp. 329 ff.

[16] I. Kant, *Über den Gemeinspruch*, part II, (*Vom Verhältnis der Theorie zur Praxis im Staatsrecht, Gegen Hobbes*), in *Immanuel Kants Werke*, vol. VI, *Schriften von 1790-1796*, ed. E. Cassirer, Berlin, Cassirer, 1923, p. 373; U. Müßig, *Recht und Justizhoheit: Der gesetzliche Richter im historischen Vergleich von der Kanonistik bis zur Europäischen Menschenrechtskonvention, unter besonderer Berücksichtigung der Rechtsentwicklung in Deutschland, England und Frankreich*, Berlin, Duncker & Humblot, 2009, p. 280.

[17] Kant, *Über den Gemeinspruch, part II, 373.* Kant defines the attributes of state citizens ('1. The liberty of each part of society as a human. 2. The equality of the same with the others as subject. 3. The independence of each part of a common entity, as citizens') with the *a priori* predominant reason and thereby as human rights. Cf. also Kant, *Metaphysische Anfangsgründe*, 39.

[18] «That may be correct in theory, but it is of no use in practice», Kant, *Über den Gemeinspruch*, part II, p. 151.

[19] I. Kant, *Zum Ewigen Frieden. Ein philosophischer Entwurf*, in *Immanuel Kant: Werkausgabe*, vol. VI, cit., p. 204.

[20] *Ibidem.*

[21] Ivi, pp. 204-205.

[22] Ivi, p. 207.

[23] I. Kant, *Grundlegung zur Metaphysik der Sitten*, part II, § 25, in G. Wobbermin, P. Natorp (eds.), *Kants gesammelte Schriften (Akademieausgabe)*, vol. VI, Berlin, Königlich Preußische Akademie der Wissenschaften, 1907, p. 278. The quoted version is from the later reprint, *Werkausgabe*, vol. IV, ed. W. Weischedel, Frankfurt a.M., Suhrkamp, 1977. See also H. Hofmann, *Methodische Probleme der juristischen Menschenwürdeinterpretation*, in I. Appel, G. Hermes (eds.), *Mensch – Staat – Umwelt*, Berlin, Duncker & Humblot, 2008, p. 62; G. Irrlitz, *Kant-Handbuch: Leben und Werk*, Heidelberg, J.B. Metzler, 2010, pp. 473 ff., esp., pp. 474, 476.

[24] Cf. Kant, *Metaphysik der Sitten*, part II, pp. 434 ff. Especially T. Gutmann, *Würde und Autonomie. Überlegungen zur Kantischen Tradition*, in «Jahrbuch für Wissenschaft und Ethik», 15, 2010, pp. 7 ff., pp. 11 ff. See also P. Unruh, *Der Verfassungsbegriff des Grundgesetzes*, Tübingen, Mohr Siebeck, 2002, p. 349.

[25] Kant, *Metaphysik der Sitten*, part II, cit., p. 433; see also Kant's formulation of the categorical imperative in the form of the so-called *'Zweckformel'* in the same, p. 429.

[26] Ivi, §11, pp. 434-435.

[27] Ivi, §38, pp. 462-463.

[28] Cf. K. Seelmann, *Menschenwürde als Würde der Gattung – ein Problem des Paternalismus?*, in A. von Hirsch, U. Neumann, K. Seelmann (eds.), *Paternalismus im Strafrecht: Die Kriminalisierung von selbstschädigem Verhalten*, Baden-Baden, Nomos, 2010, pp. 242-243 ff.; H. Hofmann, *Recht und Kultur. Drei Reden*, Berlin, Dunker & Humblot, 2009, p. 29. These three lectures on Hofmann's part were organised by the present author.

[29] R. Ruzicka, *Moral, Naturrecht und positives Recht bei Kant*, in H. Holzhey, G. Kohler (eds.), *Verrechtlichung und Verantwortung*, Stuttgart and Berne, Haupt, 1987, pp. 141 ff.; K. Kühl, *Die Bedeutung der Kantischen Unterscheidungen von Legalität und Moralität sowie von Rechtspflichten und Tugendpflichten für das Strafrecht – ein Problemaufriß*, in H. Jung, H. Müller-Dietz, U. Neumann (eds.), *Recht und Moral: Beiträge zu einer Standortbestimmung*, Baden-Baden, Nomos, 1991, pp. 139 ff.; H. Dreier, *Kants Republik*, in «JZ», 2004, pp. 746 ff.

[30] Hofmann, *Methodische Probleme*, 54, cit., pp. 61 ff.; H. Dreier, *Demokratische Repräsentation und vernünftiger Allgemeinwille: Die Theorie des amerikanischen Federalists im Vergleich mit der Staatsphilosophie Immanuel Kants*, in «Archiv des Öffentlichen Rechts», 113, 1988, pp. 469 ff.; R. Gröschner, A. Wiehart-Howaldt, *Menschenwürde und Sepulkralkultur in der grundgesetzlichen Ordnung: die kulturstaatlichen Grenzen der Privatisierung im Bestattungsrecht*, Stuttgart, Boorberg, 1995, pp. 36 ff., p. 39.

[31] J. Habermas, *The Concept of Human Dignity and the Realistic Utopia of Human Rights*, in «Metaphilosophy», 41, 2010, p. 475 (n. 19).

[32] Kant, *Metaphysik der Sitten, Introduction*, § E, cit., p. 339.

[33] Ivi, § D, pp. 338-339.

[34] *Ibidem*.

[35] Ivi, pp. 326-327. Cf. Müßig, *Reason and Fairness*, cit., p. 224.

[36] Volker, *Ausübende Rechtslehre*, cit., pp. 464-488.

[37] I. Kant, *The Metaphysics of Morals, Metaphysical First Principles of the Doctrine of Right, Introduction to the Metaphysics of Morals*, III, ed. M. Gregor, Cambridge, Cambridge University Press, 1996, p. 14. The author acknowledges here the authority of Gregor's edition of Kant's work, but also refers to the original German when the English translation has not sufficed.

[38] Kant, *Metaphysics of Morals*, § B, p. 24, cit.: «Right is therefore the sum of conditions under which the choice of one can be united with the choice of another in accordance with a universal law of freedom».

[39] Ivi, §C, p. 24.

[40] Pointedly in § C: «When one's aim is not to teach virtue but only to set forth what is *right*, one may not and should not represent that law of right as itself the incentive to action», ivi, p. 25.

[41] Ivi, §C, p. 25.

[42] Ivi, part II (*Public Right*), § 52, p. 112.

[43] Ivi, § B, p. 24.

[44] Pettit, among others takes that as argument for a republican reading. Cf. P. Pettit, *Republicanism: A Theory of Freedom and Government*, Oxford, Clarendon Press, 1997, p. 178.

[45] Kant, *Metaphysics of Morals*, § 45, cit., p. 90.

[46] Ivi, § 44, p. 90.

[47] *Ibidem*.

[48] Ivi, § 52, p. 112. Emphasis in Cambridge translation.

[49] The connection becomes clear in ivi, § 44, p. 90: «as long as the acquisition is only provisional it has not the sanction of public law, since it is not determined by public (distributive) justice and secured by an authority putting this right into effect». And *ibidem* «the description of the natural state of a state of devoid of justice (*status iustitia vacuus*), in which when rights are in dispute (*ius controversum*), there would be no judge competent to render a verdict having rightful force».

[50] Ivi, § 52, p. 112.

[51] C. Wawrzinek, *Die ‚wahre Republik' und das ‚Bündel von Kompromissen: Die Staatsphilosophie Immanuel Kants im Vergleich mit der Theorie des amerikanischen Federalist*, Berlin, Duncker & Humblot, 2009, p. 114.

[52] Kant, *Metaphysics of Morals*, part I (Private Right), § 15, cit., p. 52.

[53] Ivi, § 45, p. 90.

[54] Ivi, § 15, p. 52, and § 44, p. 90 (Cambridge-edition).

[55] Ivi, § 14, p. 51.

[56] Ivi, § 14, p. 51: «The only condition under which taking possession … conforms with the law of everyone's outer freedom (hence a priori) is that of priority in time, that is, only in so far as it is the first taking possession».

[57] Ivi, § 10, p. 47: «Giving a sign (declaratio) of my possession of this object and of my act of choice to exclude everyone else from it».

[58] Ivi, § 14, p. 51.

[59] Ivi, § 15, p. 52. From the same: «Conclusive acquisition takes place only in the civil condition».

[60] Ivi, § 52, p. 112.

[61] Ivi, § 44, p. 90; W. Kersting, *Eigentum, Vertrag und Staat bei Kant und Locke, in* M.P. Thompson (ed.), *John Locke and Immanuel Kant*, Berlin, Duncker & Humblot, 1991, pp. 109-134, esp., p. 131.

[62] Kant, *Metaphysics of Morals*, § 15, cit., p. 51: «A civil constitution, …, is still objectively necessary, that is, necessary as a duty».

[63] Ivi, § 44, p. 90.

[64] Ivi, § 49, p. 94. Cf. Marcus Tullius Cicero, *De legibus libri tres*, ed. Clinton Walker Keyes, London, Heinemann, [1929], 1959, III p. 8.

[65] Kant, *Metaphysics of Morals*, § 49, cit., p. 95.

[66] Ivi, § C, 24.

[67] Kant, *Zum Ewigen Frieden*, cit., p. 434.

[68] *Ibidem.* Beatrice Heuser identifies Jonathan Bennet's translation, *Towards Perpetual Peace*, as the superior English treatment of Kant's text. See B. Heuser, *Brexit in History: Sovereignty or a European Union?*, London, Hurst & Company, 2019, p. 260 (n. 40); I. Kant, *Towards Perpetual Peace: A Philosophical Sketch*, ed. Jonathan Bennet, 2017 <http:/www.earlymoderntexts.com/assets/pdfs/kant1795_1.pdf>, October 2021.

[69] Kant, *Zum Ewigen Frieden*, cit., p. 434.

[70] W. Traugott Krug, *Über Staatsverfassung und Staatsverwaltung: Ein politischer Versuch*, Königsberg, Göbbels und Unzer, 1806, p. 7.

[71] G.F. Kolb, *Justiz (Deren Unabhängigkeit und Hauptgrundlage ihrer richtigen Organisation)*, in C von Rotteck, C.T. Welcker (eds.), *Das Staatslexikon*, vol. VIII, Altona, Hammerich, 1846, p. 27.

[72] [T.W. Broxtermann], *Demophilos an Eukrates: Ueber die Gränzen der Staatsgewalt und ein gewisses, in der Constitution vom Jahre 3 nicht enthaltenes Mittel, die Freyheit der Beherrschten gegen Anmaßungen der Beherrscher zu sichern*, Germanien, 1799, p. 44.

[73] Kant, *Über den Gemeinspruch*, cit., pp. 145-146; K.H. Gros, *Lehrbuch der philosophischen Rechtswissenschaft oder des Naturrechts*, 1802, p. 167.

[74] [Broxtermann], *Demophilos an Eukrates*, cit., p. 32.

[75] Kant, *Metaphysik der Sitten*, cit., pp. 21-22.

[76] Kant, *Über den Gemeinspruch*, part II, cit., p. 373. For further details cf. Müßig, *Recht und Justizhoheit*, cit., p. 280.

[77] Kant, *Über den Gemeinspruch*, part II, cit., p. 373. Cf. also Kant, *Metaphysische Anfangsgründe*, cit., p. 39.

[78] Kant, *Zum ewigen Frieden*, cit., p. 434.

[79] Kant, *Metaphysische Anfangsgründe*, part II, section I § 49, cit., p. 124; Kant, *Streit der Fakultäten*, cit., p. 404.

[80] Within the scholarship on Kant, 'rightful' (*rechtlich*) appears to be used interchangeably with 'juridical' (*juridisch*). Cf. Kant, *Metaphysics of Morals*, cit., p. 21 (n. b).

[81] I. Kant, *Anthropologie in pragmatischer Hinsicht abgefaßt*, in *Immanuel Kants Werke*, vol. VIII, cit., p. 225.

[82] Kant, *Über den Gemeinspruch*, part II, cit., p. 374.

[83] Kant, *Zum Ewigen Frieden*, Annotation 1, cit., pp. 434-435.

[84] H. Hofmann, *Repräsentation: Studien zur Wort- und Begriffsgeschichte von der Antike bis ins 19. Jahrhundert*, Berlin, Duncker & Humblot, 2003, pp. 411 ff.

[85] Kant, *Metaphysik der Sitten*, I, § 52, cit.; Kant, *Metaphysics of Morals*, cit., pp. 112-113.

[86] Kant, *Metaphysik der Sitten*, I § 46, cit., p. 136.

[87] Ivi, § 51, p. 167.

[88] Ivi, § 52, p. 170.

[89] Kant, *Streit der Fakultäten*, section II, n. 6, in *Immanuel Kant—Politische Schriften*, ed. O.H. von der Gablentz, Cologne and Opladen, Westdeutscher Verlag, 1965, p. 159.

[90] *Ibidem.*

[91] Ivi, section II, n. 8, Gablentz, pp. 162-163. Cf. also Kant's "First Definitive Article", as per *Kleiner Schriften zur Geschichtsphilosophie, Ethik und Politik*, ed. K. Vorländer, Hamburg, Felix Meiner, 1959, pp. 126-127.

[92] Wawrzinek, *Die ‚wahre Republik'*, cit., p. 311.

[93] Ivi, pp. 342-344.

[94] Kant, *Streit der Fakultäten*, part II, n. 7, cit., pp. 358-359.

[95] Ivi, part II, n. 8, p. 364.

[96] H. Duchhardt, *Frieden im Europa der Vormoderne: Ausgewählte Aufsätze 1979-2011*, Paderborn, Ferdinand Schönigh, 2012, p. 71.

[97] Heuser, *Brexit in History*, cit., p. 129.

[98] A. Osiander, *States of Europe, 1640-1990: Peacemaking and the Conditions of International Stability*, Oxford, Clarendon Press, 1994, p. 137.

[99] See, e.g., Heuser, *Brexit in History*, cit., p. 131.

[100] Osiander, *States of Europe*, cit., p. 133.

[101] Spain retained the majority of its Empire and recovered remarkably quickly. On this and the Spanish War of Succession see H. Duchhardt, *From the Peace of Westphalia to the Congress of Vienna*, in B. Fassbender, A. Peters (eds.), *The History of International Law*, Oxford, Oxford University Press, 2012, pp. 643 ff.

[102] All subsequent English translations rely on Jonathan Bennet's translation, cited previously.

[103] Kant, *Zum Ewigen Frieden*, cit., pp. 204, 208, 213.

[104] Here, Bennet translates the term as 'public law'. This, however, ignores the coercive aspect of it, as expressed by the *Zwang* - prefix of Kant's *'öffentlichen Zwangsgesetzen'*.

[105] Here, Bennet's use of 'superstate' appears anachronistic.

[106] Kant, *Zum Ewigen Frieden*, cit., p. 212.

[107] Ivi, p. 213. Bennet does not translate this on p. 9 of his edition.

[108] Ivi, p. 210.

[109] Ivi, p. 214.

[110] Ivi, p. 216.

[111] Ivi, p. 214.

[112] Ivi, p. 213.

[113] Ivi, p. 216.

[114] Kant, *Präliminarartikel Zum ewigen Frieden*, cit., p. 200. These six precepts are also to be found in Bennet, with slightly differing translations, at Kant, *Towards Perpetual Peace*, cit., pp. 1-5.

[115] Kant, *Metaphysics of Morals*, §C, cit., p. 24. H. Hofmann, *Rechtsphilosophie nach 1945. Zur Geistesgeschichte der Bundesrepublik Deutschland*, Berlin, Duncker & Humblot, 2012, p. 36. As a general principle of rights, the organisation of freedom appears under the law of the equality of all.

[116] R. Forst, *The Justification of Human Rights and the Basic Right to Justification: A Reflexive Approach*, in «Ethics», 120, 2010, pp. 711-740.

[117] Kant, *Metaphysics of Morals*, § 44, cit., p. 90.

[118] Ivi, p. 105. Cf. also Kant's *Metaphysical First Principles of the Doctrine of Virtue*, IX (What is a Duty of Virtue?), in the same, p. 157: «The supreme principle of the doctrine of virtue is: act in accordance with a maxim of *ends* that it can be a universal law for everyone to have».

[119] Kant, *Metaphysics of Morals*, cit., p. 108.

[120] Ivi, p. 105 (Cambridge-edition, transl. Mary Gregor): «But what kind and what amount of punishment is it that public justice makes its principle and measure? None other than the principle of equality (in the position of the needle on the scale of justice), to incline no more to one side than to the other».

[121] Müßig, *Reason and Fairness*, cit., p. 226.

[122] Kant, *Metaphysics of Morals*, § 41, cit., p. 85.

[123] *Ibidem.*

[124] K.E. Mangelsdorff, *Ueber die Gleichheit der Menschen im Stande der Natur und der Gesellschaft* (1793), p. 21. Cf. also 'equality before the law and the judge', per C. von Rotteck, *Constitutionen; constitutionelles Princip und System;*

constitutionell; anticonstitutionell, in C. von Rotteck, C.T. Welcker (eds.), *Das Staatslexikon*, vol. III, Altona, Hammerich, 1846, p. 532. Welcker also defines independence in terms of civil legal equality: «All citizens have the holiest, undeniable legal claim to the preferably impartial and correct or preferably just decision in that judicial matter». C.T. Welkker, *Cabinets-Justiz, Cabinets-Instanz; Trennung und Unabhängigkeit der richterlichen Gewalt von der regierenden und der gesetzgebenden*, in C. von Rotteck, C.T. Welcker (eds.), *Das Staatslexikon*, vol. II, Altona, Hammerich, 1846, p. 784. Cf. also Müßig, *Reason and Fairness*, cit., p. 221 (n. 238).

[125] Ivi, pp. 227 ff.