

## **The Intrinsic Normativity of Law in Light of Kant's *Doctrine of Right***

### ***La normatividad intrínseca de la ley a la luz de la Doctrina del Derecho de Kant***

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#### **Abstract**

This paper claims that a particular interpretation of Kant's legal-political philosophy, as it is presented in his *Doctrine of Right*, provides us with the much needed resolution to the question of the normativity of law, precisely because it brings in a perspective that avoids both positivism and ethicism. This particular interpretation follows a strategy of argumentation that I call the "argument for the intrinsic normativity of law", i.e., the argument that law is defined and justified on its own grounds, without any need to refer to ethics, or rational/enlightened self-interest. This argument highlights the concept of legal person with the innate right to freedom as the necessary presupposition of legal practices, and sets forth a fundamental sense of justice inherent to the concept of law that consists in the reciprocal recognition of legal personality. In the end, I come up with a distinctive conception of law that I formulate as a last resort of normativity in the face of a conflict wherein an ethical solution does not appeal to all parties.

#### **Keywords**

Legal philosophy; normativity; legal person; Kant; Ripstein

#### **Resumen**

Este artículo plantea que una interpretación particular de la filosofía jurídico-política de Kant, tal y como se presenta en su *Doctrina del Derecho*, ofrece la esperada solución de la cuestión de la normatividad de la ley, precisamente porque introduce una perspectiva que evita tanto el

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positivismo como el eticismo. Esta interpretación particular sigue una estrategia de argumentación que llamo “el argumento a favor de la normatividad intrínseca de la ley”, es decir, el argumento de que la ley es definida y justificada por sus propios fundamentos, sin necesidad de referir a la ética o a algún interés propio ilustrado/racional. Este argumento destaca el concepto de personalidad jurídica y el derecho innato a la libertad como la presuposición necesaria de prácticas jurídicas y expone un sentido fundamental de la justicia inherente al concepto de la ley que consiste en el reconocimiento recíproco de personalidad jurídica. Finalmente, propongo una concepción diferente de la ley que formulo como el último recurso de la normatividad frente a un conflicto donde una solución ética no atiende a todas las partes.

### **Palabras Claves**

Filosofía jurídica; normatividad; personalidad jurídica; Kant; Ripstein

## **1. Introduction**

As far as the dominant approaches in contemporary legal philosophy, namely legal positivism and the natural law theory, are concerned, the question of the normativity of law, i.e., the question of what makes laws a *binding* set of rules, leads to a *cul-de-sac*. This is because both of these approaches have instrumentalist views of law. Legal-positivism sees law as an institution in the service of an aptly organised political power, while natural law tradition sees it as an institution in the service of a collective ethical ideal. Allow me to try and encapsulate this problem.<sup>1</sup>

On the one hand, legal positivism designates the family of approaches that deny a necessary conceptual link between the concept of law and some certain universal moral principles. Law is defined not with regard to its content, but with regard to the procedure through which it has been produced. Law is what authorised people say law is, in accordance with established procedures of producing, interpreting and applying laws. Hence, a legal order is in actuality an effective system of power with certain empirically investigable characteristics. As a result, legal positivism can well account for the (procedural or statutory) validity of particular legal norms in a particular legal-political order. However, it does not (and cannot) account for the normativity of legal order as a whole. That is, it cannot account for the question of what distinguishes a legal order from a brute organisation of power in the sense that the former solicits a duty to abide by its rules on the part of those subjected to them.

On the other hand, natural law theory designates a group of approaches that ground the idea of law on some certain objective ethical good. Law is then conceived as an institution for the protection and promotion of a truthful conception of the human good life

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<sup>1</sup> I elaborate on the problem of normativity of law in legal positivism and natural law theory in my recently published work (Demiray 2015).

collectively adapted. There is yet a crucial problem, however, with which such a perspective cannot deal. Even though we take it for granted that there is some objective ethical good, and also agree on what this is, there is still the problem of the justification of external coercion, insofar as external coercion is inherent to the idea of law. This problem seems to be insoluble within the confines of natural law theory, because it explains the normative force of ethical good (or value) on the basis of the force of attraction the ethical good (or value) has, while legal norms necessarily involve the element of compulsion from without. Hence, as far as those who are not already convinced by the ethical good protected and promoted by laws are concerned, there is no justification of law. Laws are a medium for applying external coercion, as either a propaedeutic for those who are not familiar enough with the ethical good to follow it spontaneously, or as a means of excluding those who are assumed to be a threat to the conception of the ethical good collectively adapted.

I think that Kant's legal-political philosophy presented in his *Metaphysical First Principles of the Doctrine of Right* provides the much-needed perspective on the normativity of law in a way that goes beyond legal positivism and natural law tradition.<sup>2</sup> In the initial steps of his legal-political philosophy, Kant distinguishes his programme from both the positivist and the ethicist approaches.

In opposition to a merely positivistic understanding of law, he argues that “a merely empirical doctrine of right” would be like “the wooden head in Phaedrus's fable... [i.e.,] a head that may be beautiful but unfortunately it has no brain” (6:230/23).<sup>3</sup> This analogy suggests that like a head, law has a function to play (i.e., *ergon*), which is essential for its definition, as well as for explaining its normativity. As we will see, Kantian philosophy of right finds a practical end that is constitutive of the domain of law, i.e., the maintenance of the conditions for personal independence in the relational sense.

Equally important, however, is Kant's opposition to the ethicist programme. Kant provides a strict distinction between the domain of right and the domain of virtue, on the basis of a distinction between two forms of lawgiving, namely “juridical lawgiving” and “ethical lawgiving”: “That lawgiving which makes an action a duty and also makes this duty the incentive is *ethical*. But that lawgiving which does not include the incentive of duty in the law and so admits an incentive other than the idea of duty itself is *juridical*” (6:219/20). What follows from this definition is crucially important in delineating the nature of the task we are faced with, in the case of the normativity of legal rules: “It [i.e.,

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<sup>2</sup> In what follows, all reference to Kant will first reference the *Akademie Ausgabe* page numbers, followed by the page numbers of the Cambridge translation of Kant's works included in the bibliography.

<sup>3</sup> In a different place in the same work, Kant also argues that “one can therefore conceive of external lawgiving which would contain only positive laws; but then a natural law would still have to precede it, which would establish the authority of the lawgiver (i.e., his authorisation to bind others by his mere *choice*)” (6:224/17).

juridical lawgiving] is a lawgiving, which *constraints, not an allurements, which invites*” (6:219/20).<sup>4</sup> As we shall see, Kant thinks that, in contrast to moral rules, the authorisation of external coercion is inherent in legal rules, and the major concern for legal normativity is the question of how one can justify the external coercion of a person by another, for the sake of ensuring her compliance with certain rules of action.

Hence, this paper aims to present a Kantian perspective on the normativity of law that goes beyond both the positivist and ethicist approaches. Since there are significantly different interpretations of Kant’s philosophy of law, it will be appropriate to situate my interpretation with regard to the existing literature on Kant’s philosophy of law in advance. On the basis of the presupposition that the debate turns basically over the relation between ethics and law(right), it might be simply suggested that Kant scholars are divided into two camps, namely those who defend the dependency thesis (i.e., the thesis that legal normativity is dependent upon ethics) and those who defend the independency thesis. Yet, this does not do justice to the complexity of the debates, since there are various versions of both positions and positions not easy to fit into both of these camps. I think that as far as the question of the normativity of law is concerned, there are at least five alternative strategies:

1. Ethical argument (Wolfgang Kersting, Gerhard Seel and Paul Guyer): The dependency thesis that Right is defined and justified by Ethics (i.e., deduced either from the CI or the ethical conception of freedom).
2. Argument for the separation of the legal domain from the moral domain (Marcus Willaschek): The radical independency thesis that Right is neither defined nor justified by Morality; it is rather derived from a rational but non-moral conception of autonomy.
3. Argument for the horizontal juxtaposition of right and virtue (Otfried Höffe): The juxtaposition thesis that Right and Ethics are two different spheres of the more general domain of the universal morality identified with the pure principle of universal lawfulness: when this principle is applied to the sphere of personal morality we have the categorical imperative; when applied to the institutional sphere we have the universal principle of law as the categorical imperative of law.
4. Political liberal argument (Thomas Pogge): A pluralist version of independency thesis that Right is defined independently from Ethics, but is justifiable by a plurality of reasonable ethical worldviews, as well as by the standpoint of rational or enlightened self-interest.
5. Argument for the intrinsic normativity of law (Arthur Ripstein and Ernest J. Weinrib): The intrinsic normativity thesis that Right is defined and justified on its own ground without any need to refer to Ethics or Rational/Enlightened Self-Interest.

My paper will not attempt to provide an assessment of these strategies in a comparative fashion. I can only state that exegetical accuracy is not my primary concern

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<sup>4</sup> Italics are mine.

here; and given the question of the normativity of law in contemporary legal philosophy, the argument focusing on intrinsic normativity seems to me the most promising strategy, as it strives after a non-instrumentalist (i.e., intrinsic) normativity of law that has no origin beyond the concept of right, including ethics and prudence. Let me also add that in arguing for the intrinsic normativity of law, I do not demur that law can be embraced and justified from the standpoint of Kantian ethics or of any reasonable ethical doctrine or of rational/enlightened self-interest; however, I contend that law has an intrinsic justification in the first place, which can be presented without reference to any ethical standpoint, including the Kantian ethics of autonomy, as Kant's argumentation in the *Doctrine of Right* suggests.

My paper strives to put forward how Kant's legal philosophy may be understood as developing an account of the "intrinsic (non-instrumentalist) normativity of law, which can resolve the question of normativity of law we face in contemporary legal philosophy. I will follow a line of argumentation that I will call "the argument for the intrinsic normativity of law". I think that this line of argumentation is the axis of the interpretation of Kant's legal philosophy provided by certain contemporary Kantians such as Arthur Ripstein (2009) and Ernest J. Weinrib (1987), as well as by earlier 20<sup>th</sup> century Kantians like Julius Ebbinghaus (1953). In linking my argument to these authors, however, I have to note that my paper does not claim to fit with their substantial arguments, though I will be using Ripstein's arguments, hopefully not in a distorting fashion, at various points in my paper. Rather, it is just guided by the spirit of the interpretations they provide. What I intend to do is to figure out the best account of the normativity of law along the lines of the Kantian argument for the intrinsic normativity of law. In line with this objective, my interpretation of Kant's legal philosophy will lead to a quite new formulation of law, namely "law as a last resort of normativity", for which I, and no one else, should bear responsibility.

In what follows, I will first provide a preliminary definition of Kant's concept of right that will lead us to the understanding of the philosophical task concerned with the normativity of law. In Part III, I will argue that the concept of legal person and her innate right to freedom (i.e., freedom as personal independency) is the grounds upon which the normativity of law rests. Part IV will investigate Kant's argument that the establishment of the innate right of freedom and the assignment of acquired rights are possible only under the aegis of a legal-political order, i.e., a civil condition. In Part V, I will then focus on the complication in the concept of right that comes up under the condition of a legal-public order, i.e., the bifurcation between "what is right in itself" (i.e., the right from a private/individual standpoint) and "what is laid down as right" (i.e., the right from the public standpoint). Part VI will make the claim that Kant's complicated view of right rests upon his understanding of law, which I will formulate as the conception of law as a last resort of normativity in the face of a conflict wherein an ethical solution does not appeal to all parties. Part VII will consider the principles that derive from such a conception of law, which, I think, provide us with a complete picture of the idea of fundamental justice

inherent to the concept of law. I will conclude that Kant's *Doctrine of Right* provides a coherent and solid answer to the question of the normativity of law, at least when it is read along the lines of the argument for the intrinsic normativity of law.

## 2. The Concept of Right and the Basic Task for Legal Philosophy

Kant's legal-political philosophy is undeniably founded upon the concept of right.<sup>5</sup> Right is the constitutive standard of a particular domain of human practice that can be called rights-based relations and can conclusively be realised only in the context of a legal-political order. There is yet a complex relation between right and the legal-political order, which makes the concept of right somewhat ambiguous. Firstly, right as the standard is conceptually prior to the legal-political order in that it both defines and justifies the latter. Yet, secondly, the standard necessarily calls for the establishment of the legal-political order in which there rises the possibility of bifurcation between "what is right in itself" and "what is laid down as right". Thirdly, in the context of a legal-political order, the decisive standpoint of right turns out to be "what is laid down as right", rather than "what is right in itself". If all this sounds over-compressed at this stage, I hope that what follows will expound Kant's concept of right and its relation to the legal-political order.

Kant's account of the concept of right starts by delineating its scope via three criteria, which may be called *externality*, *choice-relatedness*, and *formality* (6:230/23-24). Firstly, right applies to external relations between persons insofar as their actions have influence on each other. Secondly, right applies to the way personal choices, rather than wishes and needs, have influence on others. Thirdly, right applies to the form of mutual relations of choices rather than the matter of choices.

Immediately after presenting these three criteria, Kant provides his concept of right: "Right is therefore the sum of the conditions under which the choice of one can be united with the choice of another in accordance with a universal law of freedom" (6:230/24). This is followed first by "the universal principle of right" formulated as "any 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 the freedom in accordance with a universal law" (6:230/24). Then follows "the universal law of right" formulated as "so act externally that the free use of your choice can coexist with the freedom of everyone in accordance with a universal law" (6:231/24).

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<sup>5</sup> The German term "*Recht*", which is literally translated as right, stands ambiguously for law and justice in English. As we will see, what seems as an ambiguity to the English reader turns out to be an advantage in Kant's legal philosophy, since it leads to the recognition of the fundamental sense of justice as inherent to the form of legality, while also differentiating it from the more ambitious conception of justice as the universal virtue. For a wonderful historical and philosophical elaboration of the distinction between the fundamental-legal sense of justice and the Platonic conception of justice as the universal virtue, see Del Vecchio, 1952.

It might then seem that what Kant is doing in these passages is simply delineating a specific domain of human practice and applying his well-known moral standard, the principle of universalisability, to this specific domain. Yet, the issue is more complicated for two reasons. First, Kant is speaking here of the universalisability of *actions*, rather than the universalisability of maxims that is required by the Categorical Imperative (CI), as presented in the *Groundwork* and the *Critique of Practical Reason*. Besides wish and need, will is also beyond the scope of right. Kant argues that “it cannot be required that this principle of all maxims [i.e., the universal principle of right] be itself in turn my maxim, that is, it cannot be required that I make it the maxim of my action” (6:231/24).

Second, Kant is referring to the concept of freedom in a way that he did not with the CI. Of course, the CI is indissolubly linked to the autonomy of will as the positive determination of the will by the CI. However, the concept of right, together with the universal principle of right and the universal law of right, refers to freedom of choice rather than the will. Moreover, they suggest that any use of freedom of choice is right *prima facie*, and any hindrance of such freedom is wrong *prima facie*. A hindrance of an action expressing one’s freedom of choice turns out to be right only when that action is not compatible with the freedom of all. Kant makes this suggestion explicit in the paragraphs where he presents the principle and law of right:

«Now whatever is wrong is a hindrance to freedom in accordance with universal laws. But coercion is a hindrance or resistance to freedom. Therefore, if a certain use of freedom is itself a hindrance to freedom in accordance with universal laws (i.e., wrong), coercion that is opposed to this (as a *hindering of a hindrance to freedom*) is consistent with freedom in accordance with universal laws, that is, it is right. Hence there is connected with right by the principle of contradiction and authorization to coerce someone who infringes upon it» (6:231/25).

To recapitulate, Kant suggests that, while freedom in the sense of free use of choice is right *prima facie*, right also provides “an authorization to coerce” free use of choice when a freely chosen action presents a violation of the free use of choice of others. Hence, the task of one concerned with the normativity of law should be to engage with these two questions: 1) Why ought we to recognise free use of choice as right *prima facie*? and 2) Can the external coercion of someone by others be justified?

### 3. The Concept of Legal Person as the Lynchpin of Law

To answer the above questions, we should return to what Kant said when stating the first feature of law: right “has to do, *first*, only with the external and indeed practical relation of one person to another, insofar as their actions, as deeds, can have (direct or indirect) influence on each other” (6:230/23-24). Hence, law concerns only relations among *persons*. In the “Introduction to the Metaphysics of Morals”, “person” is presented as one of those concepts that constitute the common ground of the domain of right and the domain

of virtue. Person is contrasted with thing: “A *person* is a subject whose actions can be *imputed* to him... [while a] *thing* is that to which nothing can be imputed” (6:223/16). The same passage also makes a distinction between “psychological personality,” as “the mere ability to be conscious of one’s identity in different conditions of one’s existence” and “moral personality,” as “nothing other than the freedom of a rational being under moral law” (6:223/16). Although moral personality is presented in the strong form, as based on the idea of transcendental freedom of the will, one may argue that this strong definition of moral personality applies only to the doctrine of virtue, and not to the doctrine of right.<sup>6</sup> For the latter domain does not deal with the freedom of the will, i.e., the matter of choice, but only with the formal conditions of choice.<sup>7</sup> This means that moral personality in the general sense should indeed be divided into two: the strong ethical personality and the weaker legal personality. In this weaker legal sense, the concept of a person is a necessary presupposition of legal relation. The concept of law is applicable only to persons, because the judgement concerning a happening as right or wrong presupposes that we are faced with an action or deed that can be imputed to a subject person.

However, what is the basis for this concept of person? It is nothing but “freedom of choice” characterising human choice. Freedom of choice is the “independence from being *determined* by sensible impulses” (6:213/13). As Kant argues, this is “the negative concept of freedom”, which should not be confused with “the positive concept of freedom,” as the ability of the will to subject choice to the supreme principle of morality (6:214/13). There

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<sup>6</sup> I hasten to note that the straightforward distinction I am about to introduce between the concept of legal person identified with the relational kind of free choice as “independence from being constrained by another’s choice” and the concept of ethical person identified with autonomy as “the ability of the will to subject choice to the supreme principle of morality” is suggested but never explicitly argued for in Kant’s *Doctrine of Virtue*. Indeed, it seems to me a matter of fact that Kant thought that freedom of choice in the general (both relational and non-relational) sense, which he defines “independence from being determined by *sensible impulses*”, is conceivable only because human person is undetermined by natural causality in her *noumenal* causality, i.e. in her ability to autonomy as self-determination by the idea of a law of her own reason. This means that the issue of dealing with the relation of law (justice) and ethics from the systematic standpoint of Kant’s practical philosophy as a whole is a very complex, requiring working on how we can conceive the unity of freedom as ethical autonomy and freedom as relational independency. (For a recent reconsideration of the complexity of Kant’s view of the relation between ethics and law, see Baiasu, 2016). The scope of my paper does not permit me to discuss this issue; and I do not presume any position concerning how one can unite Right and Ethics in Kant’s practical philosophy as a whole, except the proviso that this unity should be achieved in a way that would not entail the subordination of Right to Ethics. In what follows, hence, I will not be arguing that Kant actually thought that the concept of legal person and the relational independency is neatly separated from the idea of autonomy. Rather, I will contend, the way presents them in the *Doctrine of Right*, as necessary presuppositions of the legal relation, makes possible to conceive them without referring them back to the idea of autonomy.

<sup>7</sup> “The doctrine of right dealt only with the formal condition of outer freedom (the consistency of outer freedom with itself if its maxim were made universal law), that is, with **right**. But ethics goes beyond this and provides a *matter* (an object of free choice), an **end** of pure reason which it represents as an end that is also subjectively necessary, that is, an end that, as far as human beings are concerned, it is a duty to have” (6:380/146).



is yet another qualification that he omits to make explicit, which his whole argument in the *Doctrine of Right* presupposes. This is that the “sensible impulses” can have two distinct sources, namely intra-personal (natural) impulses and inter-personal impulses. Dealing with intra-personal impulses is a matter of ethics.<sup>8</sup> Insofar as human choice is affected, but not determined, by intra-personal (natural) impulses, the will has the ability to gain the upper hand, by determining the form of choice. In this respect, although freedom of choice is merely the negative concept of freedom, it is also the necessary condition of the positive conception of freedom, i.e., ethical autonomy. On the other hand, human choice is also exposed to inter-personal impulses, i.e., intrusions by other human beings with whom one shares her living space. Since co-existence is unavoidable, affection by others is also unavoidable. However, what is avoidable, and also ought to be avoided, is the *determination* of human choice by the intrusion of others. The doctrine of right exclusively deals with this problem, for law has to do with the external relations between human beings, insofar as their actions “can have (direct or indirect) influence on each other,” as according to Kant’s first feature delineating the scope of the concept of right quoted above.

Hence, we can recapitulate that the concept of a legal person with freedom of choice, on which the whole domain of right is founded, merely designates a being independent from, i.e., not determined but possibly affected by, other persons, in deciding which actions and purposes she will pursue. In this vein, Ripstein argues as follows:

«*independence* requires that one person not to be subject to another person’s choice. Kant’s account of independence contrasts with more robust conceptions of autonomy, which sometimes represent it as a feature of a particular agent. On this conception, if there were only one person in the world, it would make sense to ask whether and to what extent that person was autonomous. Kantian independence is not a feature of the individual person considered in isolation, but of relations between persons. Independence contrasts with dependence on another person, being subject to that person’s choice. It is relational, and so cannot be predicated of a particular person considered in isolation... Kantian independence can only be comprised by the deed of others. It is not a good to be promoted; it is a constraint on the conduct of others, imposed by the fact that each person is entitled to be his or her own master» (Ripstein 2009, 15).

Indeed, Kant himself makes it clear that the legal concept of freedom is merely relational, when he refers to only one “innate right” human beings have: “freedom” in the sense of “independence from being constrained by another’s choice” (6:237/30). This innate right is foundational/constitutive for the legal-political domain, since freedom is the defining attribute of the concept of a legal person, which in turn is the necessary

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<sup>8</sup> To avoid any possible misunderstanding, I would like to underline that many of the intra-personal (natural) impulses are stimulated by, and directed towards, other persons, e.g. sexual desires. To the extent that it calls for the inner discipline of the will, any desire is indeed an intra-personal (natural) impulse and is thus a matter for ethics. On the other hand, inter-personal impulses are only those impulses which are affections brought forth by other persons’ actions over us.

presupposition underlying the concept of legal relation. That means that when the innate right is not established, there is no legal relation. Hence, freedom in the relational sense is justifiable as the inner presupposition of law or the domain of right itself and is thus without any need for strong and dubious metaphysical premises that will invite controversies.<sup>9</sup>

However, one would be entitled to ask what justifies the innate right itself. That is, one can ask for a further justification for what I defend here as the justificatory ground of the whole normative structure of law. Any attempt to provide an answer to such a challenge seems to me a too difficult a task to culminate into a non-controversial resolution. What I can argue, at most, is that the innate right to freedom is practically irrevocable without a palpable contradiction. This is because, as we are about to see below, the innate right to freedom is indeed a general right to have rights, or a right to make claims against others; thus, if I were to renounce the innate right, it would amount to claiming that I am someone who is unable to raise claims against others. This seems to me nothing more than a palpable contradiction.

If we grant that the innate right to freedom is inherent to the idea of legal relation as above, we have to ask the question from the reverse side. Why does freedom as independence in the relational sense require the legal form of relation that necessarily implies the authorisation to use coercion? Referring to freedom as a right implies that it is an entitlement endowing one with the authority to use coercion in its name. Hence, the very idea of “independence from constraint” is concomitant with the entitlement to the legitimate use of constraint. How can this be? That is, why is a certain use of external constraint over human actions expressing their independence necessarily?

Here, Kant’s striking argument is that freedom as independence can be established only under the auspices of legal relations and ultimately of a legal order, i.e., that it is not some state or standard that is conceivable independently of the legal-political order and then used to remodel it. Such an external relation between freedom and legal-political order was suggested by the founding figures of modern political philosophy prior to Kant. Hobbes takes freedom as a natural fact that should be put under the authority of prudence, while Locke takes it as a normative ideal that should be limited by morality. In both cases, we are told that we are in need of the legal-political order as an order restraining natural

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<sup>9</sup> As Howard Williams notes, the critical metaphysics Kant makes use of in his political-legal philosophy is in no way an extravagant or implausible one, but an “immanent metaphysics of experience” (Williams, 2011). It is basically concerned with clarifying (brightening up) the concepts that are constitutive for the human practices. I would add that Kant’s philosophy of law is particularly modest or immanent in that the metaphysical notions such as freedom as independence in the relational sense, property, contract, and etc. can make sense for even those who would be reluctant to buy the full packet of metaphysical notions of Kant’s practical philosophy.

liberty, because the latter is deficient in establishing the conditions of orderly or peaceful co-existence among human beings. On the other hand, Kant suggests that law and freedom as independence are two sides of the same coin, i.e., neither is conceivable without reference to the other. This is a suggestion that leads to a non-instrumentalist justification of law, which refers neither to an argument from prudence (Hobbes), nor to an argument from ethics (ethicist conceptions of law). In what follows, I will present an account of Kant's contention that there is no freedom as independence outside the domain of legal relations and, ultimately, legal order.

#### **4. From the Idea of Freedom as Independence to the Legal-Political Order**

According to Kant, although freedom as independence is the only innate right, it implies various authorisations: the right to innate equality ("independence from being bound by others more than one can in turn bind them"); the right to be one's own master; the right to be beyond reproach (insofar as one does not wrong others); the right to do anything affecting others (insofar as your action does not in itself diminish their entitlements without their consent) (6:238/30). Hence, freedom as independence is indeed a general right to have rights, to be a person endowed with rights, or, as Kant himself said, to be one's own master.<sup>10</sup> In this vein, the innate right is also at the base of all our further acquired rights.

As our own masters, we decide upon our purposes and set out doing them (Ripstein 2009, 14 and 30). The realm in which we exercise our self-mastery is the world we live in, primarily space and external objects occupying said space. Now, we necessarily use a certain amount of space (the unavoidable parts of space that our bodies occupy, for instance) and external objects are usable materials for us, i.e., possible means for our particular purposes. Since, as we have already seen, right does not concern the matter, but only the form of our choices, it can issue neither a direct entitlement, nor a prohibition over such a matter. Yet, precisely because a direct deduction from the mere concept of right concerning the normative status of the matters of choice is impossible, it is reasonable to think that the concept of right issues a general "permissive law" to acquire space and

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<sup>10</sup> According to Kant, acquired rights are all rights we can have in external objects of our choice, and they are of three kinds: (I) (property) rights in corporeal things external to me; (II) (contractual) rights in another's choice to perform a specific deed; and (III) (custodian) rights in another's status in relation to me (6:247/37-38). In line with the purpose of this paper, which is to give an account of the inner normativity of law, I will mostly be speaking of property rights when referring to the concept of acquired rights. This is because property rights are more foundational than the other two groups, as they provide reciprocal rules for individuals interacting separately, while the latter groups provide rules for how human beings can interact interdependently either on a consensual basis or on a non-consensual basis (Ripstein 2009, 66). This means that it is property rights that constitute the basic structure of legal relation as such, i.e., relations between legal persons each entitled to their separate rights. Contractual rights and custodian rights provide the possibility for interdependent interactions only on the presupposition of the basic structure given by property rights in the first instance.

external objects, for this is the only solution that would support our innate right to freedom. In line with this, Kant refers to a “postulate of practical reason with regard to [acquired] rights” as “a duty of right to act towards others so that what is external (usable) could also be someone’s” (6:252/42).

Hereby it becomes clear why freedom as independence necessarily calls for rightful relations among human beings; for while there is a multiplicity of self-masters, the space over which they are to exert their self-mastery is singular. That is, persons “cannot avoid living side by side with all others” (6:307/86); they cannot “shun all society” (6:236/29) not because they have a social nature or that their needs can be satisfied in society, but because their quality as self-masters requires them to make their independence compatible by reciprocally binding rules. Indeed, self-mastery is less a ground for this reciprocal binding than its effect, since it is a relational or contrastive concept, as we saw above.

One should note that the reason why we cannot shun all of society does not directly stem from our innate freedom, but its extensions, our ‘acquired rights’. This is because the loci of the former are our bodies that we do not share with others, while the locus of the latter is the space that we share with the others living in close vicinity. This explains why innate right remains absolute, while acquired rights need to be put under reciprocal limitation from the standpoint of the concept of right. In line with this, the concept of right requires the possibility of a form of co-existence in which persons are restricted with regard to the material purposes they can follow (since they are under obligation to not interfere with that which belongs to others as an acquired right), while not capitulating their attribute as self-masters who are to decide on and follow their purposes on their own.

It is yet one thing to say that acquired rights as reciprocal authorisations and limitations on individuals’ purposive activities should be possible, and another thing to show that they are actually possible. With regard to the latter question, Kant points out three basic problems: (1) the lack of omnilateral authorisation, (2) the lack of assurance for enforcement, and (3) the indeterminacy.<sup>11</sup> We have to dwell upon these problems to see that rightful relations cannot trustfully arise on their own sporadically, but only under the condition of the existence of a *Rechtsstaat*, i.e., a legal-political system of power legislating, executing and judging in individual cases the reciprocal rules of action in light of persons’ innate right to freedom.

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<sup>11</sup> Indeed, Kant neither presents these three problems in a systematic fashion, nor clearly differentiates them. However, his argument for the need of the three separate powers in a legal-political order, namely legislative power, executive power, and legal power, can be traced back to these three distinct problems. For the elaboration of this thesis, as well as for a systematic presentation of these three problems with regard to acquired rights, see Ripstein 2009, 145-181.

Concerning the first problem, we should, at first, note that, in contrast to innate rights, acquired rights have two distinct features. First, external objects are not assigned to specific persons in a priori fashion. Anyone can claim a title in a particular external object. Second, any acquired right requires an assertive action on the part of the subject, who thereby raises the claim that, if another were to interfere with the object in question, it would be wrong. Yet, it is inconceivable that one can unilaterally bind others solely by her own action, for this would violate the freedom of independence. Hence, there should be “a collective general (common) and powerful will”, i.e., a legislative power, under the auspices of which everyone is truthfully entitled to acquire rights (6:256/45). Without this omnilateral legislative will, the claim to an external object would have only a provisional, if it would have any, significance: “a possession in anticipation and preparation for the civil condition [in which such a will has come out]” (6:257/45).

Concerning the second problem, Kant argues that in a condition under which one has no assurance that others will respect one’s acquired rights, it is inconceivable that she can be held to have an obligation to respect theirs. Because “innate equality” and “the title of being one’s own master” are two specifications of our “innate freedom”, it is necessary that our relations concerning the matters of right should be established on the basis of the principle of “reciprocity” (6:256/45). This means that acquired rights, in the genuine sense of entitlements respected by others, can come out only if there is a power that enforces the obligation to these reciprocal rights. This problem can be solved solely by the creation of an executive agent (i.e., a regent of rights) that is public in the dual sense of being derived from the omnilateral will and of acting in the name of the rights of all.

A third problem, namely that of indeterminacy, arises because, although freedom as independence gives all persons authorisation to acquire rights in external objects, such a formal authorisation does not issue substantial determinations “with respect to quantity as well as quality, of the external object that can be acquired” (6:266/53). As a result, disputes among human beings with regard to rights emerge even if they were all doing their best to respect their reciprocal rights. Since “each has its own right to do *what seems right and good to it* and not to be dependent upon another’s opinion about this” (6:312/90), disputes are prone to becoming feuds in which those superior in violence, rather than those superior in rightful entitlement, often gain. For the resolution of this problem, we need again the creation of a legislative power that will flesh rights out. Yet, we also need an independent institution that will be responsible for the impartial application of legal rules and rights to particular individual cases where disputes arise. This is the judicial power.

In these three separate institutions that respond to three problems arising out of the demand the concept of right places on us, the basic structure of the legal-political order (*Rechtsstaat*) is revealed. The legal-political order is the ultimate answer to the question of how it is possible for us to affect others normatively, without determining their normative status in a unilateral fashion. It brings forth a public and externally coerced system of rules

of interaction for “a multitude of human beings...which, because they affect one another, need a rightful condition under a will uniting them...so that they may enjoy what is laid down as right” (6:311/89). In such a system, the scope of purposes an individual may set and pursue might be significantly restricted by the acquired rights of others; however, the quality of the same individual as a purposive being, i.e., as a person, is securely established.

## **5. The Intricate Relation between Right and the Legal-Political Order**

The relation between the concept of right and the legal-political order is more intricate than it may seem at first. I think that three aspects in this relation are identifiable. First of all, it is beyond any dispute that the legal-political order stems from the normative ground provided by the innate right to freedom as an attribute of the concept of a person. From this we can infer that there are two criteria that a legal-political order should meet, if it is not to be a deficient one. The first one is a minimal substantial criterion, according to which there can be no legal norm that violates the innate right to freedom and a person’s ability to acquire further rights: “laws must... not be contrary to the natural laws of freedom and of the equality of everyone in the people corresponding to this freedom” (6:315/92). The other criterion is a formal one, according to which, the way laws are legislated, executed, and applied to particular cases cannot be in the manner of discretionary imposition over people, but must be conceivable as expressions of the will of each person who sets and pursues her own life project as justified by the concept of right. This calls for a representative form of legal-political order with a separation of three fundamental powers, because only such a form can avoid the arbitrary discretionary yoke of someone over some others, and thus the attribute of freedom as independence will remain intact.

The second aspect of the intricate relation between the concept of right and the legal-political order is that the latter has an interpolating role with regard to the former. This is particularly important in the case of acquired rights, since the concept of right suggests only that persons should have the right to acquire rights, and goes no further in specifics. As we have seen, this requires a shared standard for specifics (i.e., procedure, quality, quantity, etc.) of rightful acquisition. This shared standard, which will flesh out persons’ ability to acquire rights, is provided by positive laws of the legal order. Hence, I think that Kant is somehow misleading when he argues that “laws concerning what is mine or yours in the state of nature contain the same thing that they prescribe in the civil condition [i.e., a legal-political order...and] the difference is only that the civil condition provides the condition under which these laws are put into effect (in keeping with distributive justice)” (6:313/90). This should be true only in the sense that legal order takes it for granted that there are original acquisitions of pieces of land and external objects and issues positive rights over them as recognition of their original acquisition. However, what counts as an original acquisition has to be determined by the legal order itself. This means that it

necessarily fleshes out the *natural* rights of persons through the very process of transforming them from provisional claims to conclusive entitlements.

Thirdly, legal order brings forth a crucial bifurcation in the concept of right. This is the distinction between “what is right in itself” (or what is right as every human being “has to judge about it on his own”) and “what is laid down as right” (or “what is right before a court”) (6:297/78). This is not a distinction between natural right and positive right, but one between private right and public right. Kant sees this as a very important distinction that is generally misinterpreted:

«It is a common fault (*vitium subreptionis*) of experts on right to *misrepresent*, as if it were also the objective principle of what is right itself, that rightful principle which a court is authorized and indeed bound to adopt for its own use (hence for a subjective purpose) in order to pronounce and judge what belongs to each as his right, although the latter is very different from the former. – It is therefore of no slight importance to recognize this specific distinction and draw attention to it» (6:297/78).

The distinction arises because the emergence of the legal order represents the emergence of a new “point of view” on the concept of right: alongside the personal point of view, that is designated as “what is right in itself”, a public point of view designated as “what is laid down as right” appears. Again, I think that Kant’s use of words can be misleading. He means to say, “what *can* be laid down as right” rather than “what *is* laid down as right”. This is evident when he argues, in the same passage, that these two different points of view “are true: one in accordance with private right, the other in accordance with public right” (6:297/78). Furthermore, his subsequent discussion of four cases underwrites that the issue is not the distinction of “what is right in itself” from the existing positive laws, but from the very form that any positive law, concerning the cases in question, can take on. In Kant’s own words, “the difference [is] between the judgment that a court must make and that which each is justified in making for himself by his private reason” (6:300/80).

The distinction between “what is right in itself” and “what is laid down as right” that arises in certain cases has important consequences that have been suggested, but not explicitly stated by Kant in this context. First, as far as legal relations are concerned, the point of view that should prevail is “what is laid down as right” rather than “what is right in itself”.<sup>12</sup> Hence, in a legal order, the primary or preemptory locus of obligation in matters of right comes in the form of a public office, authorised to lay down what is right, rather than private reason (i.e., individual ethical consciousness). There is a good functional reason for this: a law determining “what belongs to each as his right” requires “mathematical exactitude” (6:233/26), which is achievable only if “what is laid down as right” is preemptory. As a further consequence, the very fact that “what is laid down as

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<sup>12</sup> Indeed, as we will see, Kant makes this point explicit elsewhere in *The Doctrine of Right*.

right” gets the upper hand in the legal order deepens the distance between right and ethics. Indeed, the cases that Kant discussed in this context, particularly the first two, show that, from the personal point of view, i.e., when private reason is the locus of the obligation, the concept of right naturally enmeshes with that of virtue.

I need to recapitulate Kant’s discussion of these two cases because I think that they provide a deep reservoir of insights into the nature and significance of the distinction between the personal point of view on right and the public point of view on right, which might go unnoticed otherwise. These two cases are that of a contract to make a gift, and that of a contract to lend a thing (6:297-300/78-80). With regard to the first case, Kant asks whether a person can be forced to keep her promise to make a gift to another person, should she abandon it before the time to fulfill it. He suggests that the case is complicated when considered from the standpoint of private reason, since it should be decided on the basis of what the promisor has consented to in promising. This requires taking into consideration her intentions and particular purposes in giving promise. However, the issue is simply resolved from the standpoint of public right, which takes no account of the particular purposes of the parties, but only actions, namely the fact of promise and the promisee’s acceptance of it in this case. Hence, he concludes, “so even if, as can well be supposed, the promisor thought that he could not be bound to keep his promise should he regret having made it before it is time to fulfil it, the court assumes that he would have had to make this reservation expressly, and that if he did not he could be coerced to fulfill his promise” (6:298/79). With regard to the case of a contract to lend a thing, Kant imagines a situation in which a thing that one person borrows from another has been damaged, destroyed or lost. The question is whether it is incumbent on the borrower to bear the misfortune, if there is no prior explicit agreement on doing this. By applying the same kind of reasoning he used in the former case, Kant reaches the following conclusion: “So the judgment in the *state of nature* [i.e., the judgment from the standpoint of private reason], that is, in terms of the intrinsic character of the matter, will go like this: the damage resulting from mischance to a thing loaned falls on the *borrower*. But in the *civil condition* (i.e., from the standpoint of public right], and so before a court, the verdict will come out: the damage falls on the *lender*” (6:300/80).

To put in a nutshell, Kant’s discussion of these two cases suggests that the crux of the distinction between the personal point of view on right and the public point of view on right lies in this: while the latter is only concerned with external action as the expression of a person’s purposiveness, the personal point of view on right requires one to be sensitive to the particular purposes of the others, as well as to their purposiveness (i.e., to their freedom as independence).

The idea that “right in itself” requires one to be sensitive to the particular purposes of others might seem to be contradicting Kant’s fundamental point that right is not concerned with the matter of choices (i.e., particular purposes) but with the form of the relationship of



choice (i.e., purposiveness). Yet, there is indeed no contradiction because Kant thinks that “right in itself”, i.e., private right, is itself problematic if it was conceived to stand apart from, or superior to, the public right, i.e., “right as is laid down”. For insofar as “right” means the recognition of persons’ mere purposiveness, i.e. their status as *independent* beings, it is impossible for an individual point of view to embody the standpoint of right. The very attempt to pass judgment upon right presumes to occupy the place of the omnilateral will, upon which all rights are dependent. Hence, individuals can, at most, embody an *ethical* respect for the rights of others in the sense of an incentive to not favour a party’s rights over the others. In other words, “right in itself” is the standpoint of the decent person who strives to incorporate right into her ethical consciousness. On the one hand, this is more demanding and loftier than “right as is laid down”, since it calls for the overcoming of individuality by individuals themselves. In the absence of a publicly promulgated criteria for the judgement of individuals actions that have influence on others, the standpoint of private right forces individual ethical consciousness to indulge in the consideration of the probable intentions and particular purposes of others whilst engaging in an action, so as to better judge it. On the other hand, it cannot give full justice to the pure standpoint of right, since the recognition of a person’s mere purposiveness can only be symmetrical, that is, since the innate right to freedom is indeed the innate right to equality. Thus, the pure standpoint of right requires a genuinely omnilateral court, completely *detached* from the point of view of individuals. In other words, the very presumption of the capacity to articulate what can be articulated *only* from the standpoint of an omnilateral will by the individual ethical consciousness, defies the standpoint of pure justice that requires a symmetrical recognition of the status of personality.

Now, a public point of view on right requires both to institute a new (supra-individual) subject of judgment and to restrict the very form of the judgment. The public point of view on right is thus a judgment by a public authority from a purely legal point of view. The pure legal point of view suspends any ethical judgment concerning persons’ particular purposes, and judges solely an external action expressing a person’s purposiveness in terms of its compatibility with other persons’ purposiveness. It is the point of view that makes possible to respect human beings as independent persons, when they find themselves in a conflict that they cannot resolve on the basis of a mutual agreement. Indeed, one can say that in a legal-political order, individuals put themselves under the pure legal relation only when they stand before the public court. The pure legal relation is thus a last resort wherein the matter in dispute is resolved solely by virtue of the concept of legal personality (i.e., the quality of human beings as the authors of their external actions) without any reference to ethical personality. Standing before the court is itself evidence that ethical considerations have failed to bring a resolution to the conflict in question.

I hasten to underline that the conception of law as the last resort of normativity when ethical considerations have failed to resolve a conflict does not mean that law is residual to

ethics. It is without a doubt that right is essential and never residual for Kant. Our obligation to be a legal person with rights in a public order of law is essential and unconditional. However, although it is necessary to assume the status of a legal person with rights, it is crucially important to bear in mind that rights are power-conferring norms rather than duty-imposing norms from the standpoint of the right-holder. That is, it depends upon the individual whether or not she will claim or exercise those rights in particular situations and against particular persons. For instance, although I have my innate right to bodily integrity to the point that I am protected from any physical contact without my permission, I choose to not claim my right when my wife drops a surprise kiss on my cheek. Similarly, although I have property rights on my jacket, I might overlook such rights when one of my friends puts on it without my permission. Thus, it is, as it ought to be, only in rare cases we explicitly take a purely legalistic stance in our affairs with others, although our status as a legal person with rights remains dormant, but ready to be invoked, at the background in most cases of human interaction.

## 6. Law as a Last Resort of Normativity

In light of all this, I can now make the claim that underlying Kant's argumentation in the *Doctrine of Right* is an insight into the distinction between the political-legal question and the ethical question. The ethical question is that of the betterment or perfection of character in light of the comprehensive conception (ideal) of the good life persons recognise.<sup>13</sup> Usually and naturally for the kind of social beings we are, ideals of good life persons recognise lead us to unite with others of the same or similar mind, so as to form ethical communities. We can define an ethical community as a social union based on a thick and robust normativity comprising shared ethical values, mutually recognised interests, and common needs. It is thus the medium, the associational context, within which fellows cooperate for the realisation of the same, similar or overlapping ideals of good life. Such a medium or context is of utmost importance for human beings, because ethical normativity makes individuals' life integral and meaningful.

Now, Kant's point in the *Doctrine of Right* is, of course, not to deny the importance of ethical normativity or ethical community. Indeed, in the second part of the *Metaphysics of Morals*, titled the *Doctrine of Virtue*, he presents the general contours of a life leading to perfection of human character in light of the ethics of autonomy he thinks as the genuine form of ethical life. As we see there, Kant thinks, not only self-discipline of the will, but

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<sup>13</sup> The scope of this paper does not permit me to provide an account of how Kant's arguments concerning ethical life and ethical community square with such a formulation of the ethical question. However, I would like to note that I do something that comes close to this in my forthcoming paper "Public Religion and Secular State: A Kantian Approach" where I present a fuller account of Kant's conception of ethical community, drawing predominantly upon his arguments in *Religion Within the Boundaries of Pure Reason*.

also moral education of some fellows by others is an appropriate method in the context of ethical life.<sup>14</sup>

However, Kant's point in the *Doctrine of Right* seems to be that ethical normativity, in general, and ethical community, in particular, is not all that pertains to being a human being in a normative sense. For although ethical normativity is the layer through which human life is made meaningful in the deepest sense, it is unable to bring about a normative solution to a certain facet of human interactions, which I will call the political problem. To make sense of this, think what if an ethical person or ethical community has to come into terms with a "divergent" person, who is not in line with shared ethical ideals or values. If the ethical normativity is the sole point of reference, there are two ways of coping with such a situation. First, you might take the divergent person as an unsteady insider and then try to exert moral education or other forms of social discipline on her, so as to turn her into a decent fellow. Hereby, the divergent person is not recognised as a full-fledged fellow, and there is no true society between you and her, precisely because there is no symmetrical recognition of ethical agency. From your standpoint, she is exposed to a propaedeutic for the ethical life, rather than the ethical life in the precise sense. From her own standpoint, she is exposed to the arbitrary enforcement of a set of ideals, which defies her personal agency. Second, and probably worse, you might take her as an outsider, in which case you would be evoking the image of ethical community as a battleship fighting against the evil-chaotic forces laying outside the ship in the cause of goodness. In both cases, what we find is not a normative (i.e., reciprocally agreeable) resolution, but an apology for employing techniques of power over those who, you think, should be converted into your conception of moral good, or whose detrimental influence on your pursuit of good should be avoided.

To recapture, the truly political problem is the one that arises between parties that seem to be in conflict concerning comprehensive ethical ideals. Were you to try to resolve the problem on the basis of your own set of ethical ideals, this would lead nowhere but to the exertion of power, which would seem arbitrary from the standpoint of the other party. Hence, trying an ethical solution to a truly political problem does not mean working out a normative solution, but the reverse: it is to trust the "judgement" by the play of power.

On the other hand, there is still a normative alternative that can be worked out. It is the path of law founding the civil union, rather than an ethical community. It is based on the reciprocal recognition of the fundamental quality of human beings as persons, i.e., as beings setting and pursuing their own ends, whatever these ends are. Here, we are not talking about the discipline of human character in any sense; and we are not talking about an ethical good that would be considered as the grounds of legal obligations. Instead, as we saw, we suspend any appeal to the ethical good and obligations to be derived from it. What

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<sup>14</sup> That Kant thinks ethical life as a process of discipline of will or soul-crafting in collaboration with fellows becomes particularly clear in *Religion within the Boundaries of Pure Reason*, where he argues for a unique ethical duty to engage in an ethical community (6:97-100/132-134).

remains is freedom as personal independence; and, I think, it is the tremendous achievement of Kant's legal philosophy that such freedom is a solid basis to found on it a normative structure. It would not be legitimate to contend against Kant that his argument amounts to pointing out freedom as the basic good or value, hence to provide an alternative ethical account of law among many others. For it is not a trait of human character to be instantiated or realised. It is just the constitutive principle of the form of legality, which judges human actions insofar as they have influence on each other, rather than their ethical character.

Freedom as personal independence is the essential presupposition all parties to the political problem hold with regard to themselves, insofar as they stand as parties in the political problem. The reason for the political problem is that there are parties setting and pursuing divergent ends. The normative dimension among the parties to a political problem can be constructed merely by the recognition of the same quality they propose in themselves. Such reciprocal recognition should lead to what Kant called "civil constitution" and "civil union", i.e., the political-legal order, as quite distinct from an ethical community.<sup>15</sup> The end of this union is peace<sup>16</sup>, and the means it employs is law, based on the principle of justice as the reciprocal recognition of personality. So, it comes out that a political-legal order is not an entity institutionalising a particular ethical ideal, but a neutral and impartial entity under the aegis of which every individual and ethical community has trusted her independence, in the sense of setting and pursuing their ends individually and associatively, whatever value these ends have from an ethical standpoint.

In this way, law can provide a thinner form of normativity among those who either durably or casually might fail to share a thicker (ethical) form of normativity. This thinner form is fundamental for a decent human life, though never adequate for a meaningful life. After all, from a Kantian standpoint, political-legal relations are not the sphere wherein human life is to be made meaningful. What we should expect from them is, at most, to

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<sup>15</sup> Kant defines the civil condition as the condition "of a society subject to distributive justice" (6:306/85). This should be read as "a society subject to fundamental-legal justice", since Kant did not have the contemporary notion of distributive justice as the distribution of social goods. By the notion of distribution, he just meant the establishment of the innate right to freedom and assignment of acquired rights of persons. As regards the civil union, Kant says that it "is not so much a society but makes one" (6:307/85). Kant does not use the term ethical community in this context, but he mentions societies that may have different forms such as "conjugal, paternal, domestic...as well as many others" (6:306/85). Concerning such societies, he says that though they might be actually compatible with rights, they do not constitute the opposite of the state of nature, if they are not under the aegis of the civil union that is the true opposite of the state of nature. Hence, we should conclude that Kant thinks that in an ethical community that is not under the aegis of the civil union rights can be only provisional. Such a condition is, then, a condition of private right at best, for which the duty to enter into a rightful, i.e., civil, condition holds.

<sup>16</sup> Kant argues that "it can be said that establishing universal and lasting peace constitutes not merely a part of the doctrine of right but rather the entire final end of the doctrine of right within the limits of reason alone" (6:355/123).

provide the background circumstances within which human beings themselves are to make their lives meaningful.<sup>17</sup>

Concerning my interpretation of Kant's legal philosophy as an account of pure legal relation as a last resort of normativity, there is yet a question I should address. Does this interpretation prejudice robust (ethical) forms of normativity among human beings? Does it amount to advice that we should give up ethical ideals such as the Kingdom of Ends, i.e., our striving for the establishment of goodness in the world? Should we ignore Kant's own appeals to this ethical ideal and the highest good as a necessary end for the ethical person? I think the answer to these questions is a straight no! Restricting the scope of law with the relatively modest ideal of justice and the fundamental sense of justice as the reciprocal recognition of personal independence is in no way detrimental to your pursuit of your Kingdom of Ends, or your ethical life in community with others. Conversely, only when a legal-political order in the Kantian sense is established, more intense relations among beings can flourish much more vigorously.

Human beings can wholeheartedly engage in the collective or cooperative projects for particular purposes, once the legal order secures their purposiveness as such. In this vein, we have to understand what Kant meant when he said, "the civil union [i.e., a legal-political order] is not so much a society but rather makes one". Here, the suggestion is that although the standpoint of right in the pure sense is foundational for a genuine society, a society cannot be reduced to a legal-political order because social interactions go much deeper than purely legalistic relations do. In the context of social life, we rarely encounter others as purely legal persons detached from one another. Rather, we usually encounter

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<sup>17</sup> Hence, although Kant is rightly understood as a kind of republican in his political theory, his republicanism seems to me a significantly qualified one. This qualification stems from his insight into the distinction between a civil union and an ethical community – a distinction that is too often overlooked in the republican tradition. Although Kant's insistence that freedom in the political sphere is possible only through laws, and his conception of political-legal freedom as independence rather than simple absence of interference are typically republican, his republicanism embraces liberal tenets, at least, on two points: First, for Kant, it is not only important that persons should be free from arbitrary interferences of other persons. It is equally important that they should be free from interferences of the public authority that cannot be justified by the sole cause of the state, i.e., the cause of making freedoms compatible. Hence, Kant is sensitive against the violation of personal independence by the political-legal authority, as well as by other persons. Second, as closely related to the first one, while other republican thinkers have usually been not very critical of the expansion of political-legal authority into the sphere of civil society, insofar as this is done in the form of general laws and for the sake of the "common good", Kant clearly refutes the robust conceptions of common good. He argues that in the context of civil union, common good can have no meaning other than justice as the establishment of the innate right of freedom and assignment of acquired rights. By turning Cicero's republican motto that *salus populi suprema lex esto* into *salus rei publicae suprema lex est*, he argues that the well-being of the state/the republic is not to do with "the *welfare* of its citizens and their *happiness*", which "can perhaps come to them more easily and as they would like it to in a state of nature (as Rousseau asserts) or even under a despotic government", but only with a constitution that "conforms most fully to the principles of right" (6:318/94-95). For a lucid and concise discussion of Kant's relation to republicanism, see Louis-Philippe Hodgson, 2010.

them as fellows to whom we are attached via shared ethical values, mutually recognized interests and common needs. These means of attachment to others constitute the much thicker normative framework that is essential for us to give meaning to our life. This means that although legal personality is fundamental, it is far from designating an ideal. Human beings should work their legal personality up to something more robust, i.e., to an ethical personality, in order to make their lives complete and meaningful. However, they have to do this on their own through their private, associational, and public engagements. Legal-political order cannot embrace an ethical ideal and then take initiative for their ethical engagements. It is there only to secure individuals' entitlement to set and pursue their engagements.

Hence, the conception of law as a last resort of normativity does not dismiss but encourage the striving for ethical ideals for promoting goodness in the world. What it outlaws is pursuing such ideals via political-legal means; and this interdiction is righteous. For ethics as the discipline of human character is the opposite of any external coercion or non-voluntary submission. However, as we have seen, law is all about external, yet non-arbitrary, coercion. It is about the situations wherein we cannot come into terms on the basis of some shared ethical value, mutually recognised interests or common needs. Thus, to found the prospects for the resolution of such conflicts merely on the ethical ideals is not only unwise, but has morally iniquitous consequences, for it is an invitation to a brutal power struggle among parties that might want to uphold their ethical ideals through institutionalising them in the political legal structure. It is to trust upon the arbitrary "judgement" that is to be given by the play of power. Only the Kantian idea of law as a last resort of normativity based on the mutual recognition of personal independence can provide a threshold of normativity that protects human beings from collapsing into a condition of sheer violence in such situations. This kind of normativity is, of course, not enough to make a human life complete and meaningful; and human beings rightly seek to *go beyond (aufzuheben)* it by their ethical commitments. Yet, they are never permitted to *violate* it.

## **7. The Principles of Law or the Fundamental Idea of Justice Inherent to the Concept of Law**

Having defined the nature of the normative order of law as a last resort of normativity in the face of a conflict wherein an ethical solution does not appeal to all parties, I would now like to address the question of what standards one should derive from such a conception of legal-political order. For this sake, I think, we should draw upon Kant's arguments in two subsections titled "The Right of a State" and "General Remark On the Effects with Regard to Rights That Follow from the Nature of the Civil Union", both of which belong to "Part II: Public Right" of the *Doctrine of Right*. Although Kant proceeds in this context through discussing the substantial problems of political-legal philosophy concerning the

organisation of the legal-political order, and is controversial and even confusing at some junctures, there are important principles that we may extract from his substantial arguments. He defines the legal-political order as a unity comprising three separate powers of legislation, execution and jurisprudence (i.e., the administration of justice), with each power being assigned to a separate public person but working in a complementary or coordinate fashion. He says that “the will of *legislator* with regard to what is externally mine and yours is *irreproachable (irreprehensible)*”, “the executive power of the *supreme ruler* is *irresistible*”, and “the verdict of the highest *judge* is *irreversible*” (6:316/93). This puts the supremacy of “what is laid down as right by public authorities” over “what is right from the standpoint of individual conscience” beyond any doubt. Indeed, a few pages later, Kant argues that subjects ought to obey presently existing legal-political authorities even though what is laid down as right might seem wrong (unjust) from the standpoint of individual conscience (6:319/95). In such situations, subjects may indeed oppose what they see as injustice by complaint, but never by resistance (6:319/95).

Although Kant recognises the legal-political order as normatively independent from individuals’ judgment of “what is right”, he also suggests four principles binding it: (I) a principle concerning the exclusive function of the legal-political order, (II) a principle concerning the form of the legal-political order, (III) a principle concerning the ultimate limit of any legal-political authority, and (IV) a principle guiding the legitimate activities of the legal-political order. The first three are constitutive principles, in the sense that they are the principles that any entity should meet, if it is to count as a legal-political order at all. On the other hand, the last one is a regulative principle, i.e., a principle of perfection that a legal-political order as such should aspire to meeting, but would still count as a legal-political order, albeit a somewhat deficient one, if it cannot completely instantiate a condition in accord with it. The first constitutive principle concerning the exclusive function of the legal-political order should already have been clear: a legal-political order should establish the innate rights and assign acquired rights of all members through reciprocally binding rules. We have also previously visited the second and third principles. The principle concerning the form of the legal-political order states that the legal-political order should be a unity representative of the will of the people and comprise three separate powers, each given to a separate public authority.<sup>18</sup> The third constitutive principle concerns the ultimate limit of the legal-political authority.

<sup>18</sup> At this point, one might object that the second principle cannot be a constitutive one since Kant suggests that a regime violating it is still a state, though a despotic one. It is true that in the *Doctrine of Right*, Kant argues that “a government that was also legislative would have to be called a despotic as opposed to a patriotic government” (6:317/93-94). However, mind that Kant is here talking about the conflation of two powers, namely legislative and executive powers, rather than all three powers. Hence, it seems to me that Kant presupposes the existence of an independent judiciary in this case, without which the regime would be not count as a type of state at all. Moreover, in *Perpetual Peace*, he states that “for any form of government which is not *representative* is essentially an *anomaly [uniform]*, because one and the same person cannot at the same time be both the legislator and the executor of his own will” (8:352/101). I think that it is much more consistent for Kant to formulate the regimes without separation of power as anomalies (i.e., failed

I believe that Kant indicates the ultimate limit of the legal-political authority when he defines the scope of the most supreme power in the legal-political order: the will of legislator is irrefragable *with regard to what is externally yours and mine*. It is true that the authority to enact, execute and interpret acquired rights provides the legal-political authority with the titles of “the supreme proprietor (of the land [and external objects])” and “the supreme commander (of the people)” (6:323/99). Yet, what the legal-political authority cannot claim to be is the proprietor or owner of the people: “a human being can never be treated merely as a means to the purposes of another or be put among the objects of rights to things” (6:331/105). Thus the innate right of freedom, as an attribute of persons, is beyond the scope of the legal-political authority. In other words, we would be faced with no legal order, but a barbaric power, in a case whereby our innate right of freedom, i.e., our fundamental quality as legal-political persons, were denied (Ripstein 2009, 337). If this were the case, it would only lead to a savage violence worse than the state of nature. Indeed, the same form of reasoning should also apply when the legal-political order fails to meet the first and second principles, defined above, since they are also constitutive principles. The only reservation would be that a violation of the third principle would be a more serious and obvious one, while in the case of the other principles there would be some space for disputing whether or not they had been violated. Indeed, in such a disputation, the very principle concerning the ultimate limit of the legal-political authority would be the pole star for sound judgement.

Kant also proposes a regulative principle guiding the legitimate activities of the legal-political authority. This fourth principle is provided in light of the idea of the original contract. This idea recalls that the reason why the legal-political authority is the public (general) will with a binding normative force upon people is that it securely establishes the conditions of their freedom as independence, by making the idea of rights conclusive and effective. Hence, although rights need rules enacted, executed and interpreted by the legal-political authority, those rules should be such that all and each could give their consent to them. In Kant’s own words, “What a people (the entire mass of subjects) cannot decide with regard to itself and its fellows, the sovereign can also not decide with regard to it” (6:329/103). It is important to note that Kant does not require that the people actually give their consent to the rules, but only that the rules should be such that they can be consented to by the people. This underlines that the principle guiding the legitimate activities of the legal-political authority is indeed a principle of perfection on the part of the legal-political authority. While the people may solicit the legal-political authority, they cannot make excuses for resisting or rebelling against it, for a legal order with rules that defy this

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forms of state) rather than despotic states, because “representative” refers here to “omnilateral will”, and the latter requires the institution of three branches of government as distinct offices, as we saw above. This is why I think the representative form consisting in the separation of powers should be seen as a constitutive, rather than a regulative principle of legal-political order from the standpoint of Kantian legal philosophy.



guiding principle is still a legal order, even if it is a deficient one. Such rules still count as “what is laid down as right” and cannot be opposed by reference to “what is right from the standpoint of individual/private reason”. Hence, individuals are still under an obligation to abide by a legal-political order that does not meet the regulative principle. Yet, there is no basis to think that the same would also hold in the case of a “legal-order” that was at odds with the constitutive principles of law. From the Kantian point of view, such entities should rather be regarded as barbaric power structures, worse than the state of nature, as we saw above.

## 8. Conclusion

In this paper, I argued that Kant’s basic text on political and legal philosophy, namely the *Doctrine of Right*, provides an account of the normativity of law from a perspective that is completely intrinsic to the idea of law. This text shows that there is no need to refer to certain human needs, interests or values to ground the idea of law and its normative force upon us. It simply suffices to refer back to the idea of a person in the strictest sense, i.e., the idea of a legal person, as the idea from which the normative structure of legal relations and legal order arise. The legal personality defines, justifies, and demarcates the law as a system of reciprocally binding and externally enforceable rules.

Precisely because it can anchor the idea of law in the principles of right without referring back to any ideal of ethical goodness, Kant’s account of law shows that there is an alternative to the perennial controversy between legal positivism and the ethicist conceptions of law represented by the tradition of natural law. It shows that there is an alternative to seeing law as an institution in the service of either an aptly organised political power, or a collective ethical ideal. This alternative involves taking law as a last resort of normativity among persons who might be significantly at variance in terms of their ethical commitments. It contends that the rationale of law is neither so lofty as the ethical ideals of the Kingdom of Ends, nor so humble and cynical as the allegedly natural desire for order at all costs. Rather, the Kantian alternative I propose figures out a modest but essential source of normativity inherent to the form of law. This source may be captured by two ideas, which Kant seems to have used interchangeably: *peace* as the opposite of arbitrary power, and *the fundamental justice* as the reciprocal recognition of legal personality. On this basis, I think, Kant’s theory of law provides a solid answer to the question of the normativity of law, while the same question designates a *cul-de-sac* for legal positivism and natural law theory.

**Acknowledgments:** This essay is part of the Marie Curie Research project titled “A Kantian Approach to Current Tensions between Modern Law and Religious Commitments”. I am indebted to the European Commission that provided me with such a fantastic research grant. I am grateful to Dr. Sorin Baiasu, the scientist in charge in the said project, who has read the initial drafts of this paper and provided me with his rightful criticisms and invaluable suggestions. I also thank to the

School of Politics, International Relations, and Philosophy (SPIRE) at Keele University for being a wonderful host during my research process, and the Department of Political Science and Public Administration at Kocaeli University for their generous permission for my long-term research.

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