

ANDRÁS BRAGYOVA*

Kant and the Constitutional Review Kantian Principles of the Neo-constitutionalist Constitutionalism

Es ist süß sich Staatsverfassungen auszudenken.
*Kant: Streit der Fakultäten*¹

Abstract. Kants political and legal theory is now thought to be one of the most important contributions to the theory of modern constitutionalism. The paper is an attempt to distil the fundamental principles of constitutional law as implemented in modern constitutional review from the writings of Kant. It examines the idea of the constitution as a social contract and its relation to popular sovereignty. Second, the principles of “republican constitution”—liberty, equality and independence (autonomy)—follow. These principles condense the essence of what we now call fundamental constitutional rights. Third, the transcendental maxim of legislation, that is, the publicity is analysed; the principle of the publicity of legislation is (under various names like equality, public reasoning and discussion, freedom of speech) fundamental for modern constitutionalism (or neo-constitutionalism). Constitutional courts are organs of the “public use of reason” so important for Kant and revived recently by Rawls. The last section is a discussion of the relationship of morality and constitutional government. Kant regarded the law as a coercive order a precondition for moral autonomy but he did not qualified constitutional principles “moral”. Thus, the Kantian interpretation of constitutionalism does not support the moral reading or interpretation of the constitution; instead, the principles of the “lawful” constitution are based (like the maxims of morality) on practical reason.

Keywords: Kant, constitutional review, constitutionalism, constitutional rights

I. INTRODUCTION

Writing about the relationship of Kant and constitutional review of legislation as we know it today is literally an anachronism: Kant is not the theoretician of constitutional review, since in his age and for him it was simply non-existent.² Still, Kant has a lot to say for constitutional review and I hope this will become manifest from the following lines. Kant’s political and legal philosophy was for a long time neglected as the symptom of his elderly

* D.Sc., judge, Constitutional Court of Hungary, H-1015 Budapest, Donáti u. 35–45; research professor, Institute for Legal Studies of the Hungarian Academy of Sciences, H–1014 Budapest, Országház u. 30.

E-mail: bragyova@jog.mta.hu

¹ “It is a pleasure to invent constitutions for ourselves.” Still, he continues: the attempt of the people to realise them shall be punished. (SA XI 366.)

² Fichte, a follower of Kant (at least he thought he was), in his *Natural Law* of 1796 deduces the necessity of constitutional review. See Fichte, J. G.: *Grundlage des Naturrechts* (Hrsg.: Medicus, F.), Leipzig, 1907, 175 skk.

spiritual weakness according to the familiar disrespectful remark³ of the otherwise Kant-admirer Schopenhauer. Even the neo-Kantians as Stammler and implicitly Kelsen accepted this view. Nowadays they are regarded as a major part of his work. It suffices to mention the political philosophy of John Rawls, who relies on Kant, furthermore, the philosophy of Jürgen Habermas and Ottfried Höffe as well as of János Kis in Hungary.⁴

The recent rediscovery of the legal philosophy of Kant was undoubtedly supported by the widespread acceptance of what I propose to call substantive constitutional review. By substantive constitutional review I mean the examination of the *legal* validity of legal substance, i.e. legally binding, permitted, etc. conduct based on constitutional justifiability, while the standard of constitutional justifiability is substantiated by fundamental constitutional rights and other constitutional principles defining the substance of law.⁵ Putting aside details of legal history, it is important that constitutional review is a relatively new development, since it appeared gradually in the form familiar today in Europe mainly after the II World War (and much earlier in the United States which remained a solitary phenomenon for a century or more). Present-day substantive (or content-based) constitutional review is conceptually closely related to the rational law cultivated also in the age of Kant, on which he delivered lectures at university.⁶ In modern substantive constitutional review, which in the following I will call neo-constitutionalism⁷, several issues, which in the age of Kant and in the following centuries for a long time were discussed as matters of natural or rational law, that is, philosophical matters “within the boundaries of pure reason”, are in our days adjudged by constitutional courts as positive issues of constitutional law. Present-day constitutions incorporate “*lauter Prinzipien a priori*” [a priori principles] as legal principles and if the constitution is regarded as part of the legal system (which is the prerequisite of constitutional review), it will be also applied as positive law. A consequence of this is that during reasoning in constitutional review similar issues need to be adjudged by similar arguments like formerly the followers of the natural law school did. The followers of the rational law school including Kant—as the *Streit der Fakultäten* proves—examined these issues theoretically as philosophical ones (as issues of practical reason), whereas today in neo-constitutionalist constitutional review these issues need to be settled via legal reasoning.

³ Schopenhauer, A.: *Die Welt als Wille und Vorstellung I*. In: Schopenhauer, A.: *Sämtliche Werke*. (Hrsg.: Freiherr von Löhneysen, H.-W.), Frankfurt am Main, 1986, I. 707. (The parody of the Kantian style). For a similar opinion see Arendt, H.: *Lectures on Kant's Political Philosophy* (ed.: Beiner, R.). Chicago, 1992, 8.

⁴ See Kiss, J.: *Vannak-e emberi jogaink?* (Do We Have Human Rights?) Budapest, 1986 (3rd ed., Budapest, 2003).

⁵ Ferrajoli, L.: *Diritto e ragione. Teoria del garantismo penale*. Bari, 2000, 904 skk.

⁶ See data and resources on page XXI skk. in the foreword to the edition of *Metaphysik der Sitten*. In: Vorländer, K.: *Philosophische Bibliothek*. Hamburg, 1959. The course books used by Kant (Baumgarten, Achenwall) can be found in the volumes Akademie Ausgabe. Deutsche (formerly Königlich Preussische) Akademie der Wissenschaften zu Berlin. Berlin, 1900, (AA) XIX skk. Cf. Busch, W.: *Die Entstehung der kritischen Rechtsphilosophie Kants*. Berlin, 1979.

⁷ This appropriate term in this sense is primarily applied in the legal literature of Neo-Latin countries. See, e.g. Carbonell, M. (ed.): *Teoría del neoconstitucionalismo. Ensayos escogidos*. Madrid, 2007.

What in Kant's age was subject only to the "Verfassungsrichterstuhl der Rechtsvernunft"⁸ (the constitutional court of legal reason), in many legal systems in our days it is subject to the jurisdiction of constitutional courts, therefore, it is conceived as positive law. Simultaneously, a lot has changed: positive law has a greater role in the concept of *Rechtsvernunft*, hopefully not to the detriment of *Vernunft*. At any rate, legal reasoning and decision-making have more institutional, procedural and substantive constraints than philosophical and pure rational legal reasoning. At any rate the ultimate controlling role of practical reason in legal reasoning cannot be given up.⁹

The relationship between practical (including legal) reason and present-day constitutional review is not accidental: the theory of modern constitutionalism originates in the Enlightenment and Kant is the greatest philosopher of the Enlightenment. Therefore, it is the provisional negligence and not the re-discovery of Kant's legal philosophy that is astonishing. In Kant's legal and political philosophy we can find the fundamental principles of the modern constitutional state and neo-constitutionalist constitutional law. In the following, I will examine some of the related issues analysed by Kant, which are foundational in contemporary constitutional theory, as well. I will neither engage in a Kant exegesis, nor in the interpretation of Kant, but in the paraphrase of some of his thoughts.

The first issue to be examined will be the concept of the constitution as a social contract, the second one will be our meaning of the principles of the "republican constitution", then I will analyse the maxim of legislation and its relation to constitutional review. Finally, while examining the thinking of the greatest moralist of all the times, we cannot fail to mention the relationship of the constitution and morality. Needless to say, however, for order's sake let me mention that a great many of Kant's relevant thoughts will be disregarded.

II. THE CONSTITUTION AS A SOCIAL CONTRACT

For Kant, the concept of the constitution is not an idea of positive law, but a *Vernunftidee* [an idea of reason], that is, it is not subject to written law, or, in Kant's terms, empirical (or statutory) or positive law, in other terms to experience, therefore, it is not an issue pertaining to the faculty of law (that is, the jurisprudence of positive law). Accordingly, Kant does not apply the concept of the constitution in our terms. There is nothing special about this, since in that era and for a long time subsequently the constitution was not primarily a legal, but a normative political concept. The constitution became the object of empirical legislation, which is Kant's term for positive law, via the constitutional charters in Kant's age, at the end of the 18th century.¹⁰ Written constitutions, such as the French constitution of 1791 were not legal constitutions: they were rather political principles derived from a political philosophy and written down in a solemn charter. This was entailed by the natural law or rather the rational legal conception prevalent in that age, according to which evident legal principles just as the rules of logic need not be, or as others think, must not be enacted as

⁸ Kersting, W.: *Wohlgeordnete Freiheit*. Berlin, 1984, 222. (3rd ed., Paderborn, 2007); and Kersting, W.: *Der Geltungsgrund von Moral und Recht bei Kant*. In: Kersting, W.: *Politik und Recht*. Veilerwist, 2000, 304 skk. The following considerably differs from the construction of Kersting.

⁹ This is the meaning of Alexy's so-called "*Sonderfallthese*", according to which legal reasoning is a special case of practical reasoning as construed by Habermas, R. A.: *Theorie der juristischen Argumentation*. Frankfurt am Main, 1978 (1983), 32 skk., 263 skk.

¹⁰ Troper, M.-Jaume, L. (eds): *1789 et l'invention de la constitution*. Paris-Brussels, 1994.

statute-law but at most they can be solemnly declared.¹¹ What in our days we designate as constitutional or fundamental rights, in the age of the Enlightenment they were valid not on grounds of positive law, but out of practical reason. According to Kant, positive law has always and only contingent content and has nothing to do with the validity of the necessary—and for this reason non-contingent—principles of law.¹² No matter how we conceive of the legal nature of the constitutions of the 18th–19th centuries, they were indisputably not designed to be applied by the judiciary, since such courts did not exist and that was no mere chance.¹³

For Kant, the concepts of the state and the constitution are of course related, since the constitution determines the form of government and the relation of state powers. However, its foundation is the “Ursprünglicher Vertrag”. As he formulates: “Der Akt, wodurch sich das Volk selbst zu einem Staat konstituiert, eigentlich aber nur die Idee derselben [...] ist der ursprüngliche Kontrakt, nach welchem alle ... im Volk ihre aussere Freiheit ausgeben ... seine Freiheit überhaupt in einer gesetzlichen Abhängigkeit, d.i. in einer rechtlichen Zustand ... zu finden; weil diese Abhängigkeit aus seinem eigenen gesetzgebenden Willen entspringt.” [The act, or rather its mere idea, by which a people constitutes itself as a state consists in the original contract, according to which the people resigns its external freedom, so that it should find its freedom in dependence on the law, i.e. in the condition of the law.] (SA VIII 434) Of course, the idea of the social contract is not the invention of Kant, whereas, the pure normative application of the social contract as a regulative idea may derive from him, at least in its radical form. Kant had excellent “anthropological” knowledge (see e.g. SA XII 399), he did not believe that any kind of contract constitutive of a society could have really obtained. On such grounds he associates the concept (idea) of the constitution with the idea of the social contract and defines the constitution as a *pactum unionis civilis* (SA XI 144). He literally sets forth in “Eternal Peace”: “Verfassung ... welche aus der des ursprünglichen Vertrags hervorgeht” [constitution deriving from the original contract] (SA XI 204). As we see, Kant explicitly considers the constitution to be a social contract.

By conceiving the constitution as an idea, Kant regards the people which constitutes itself in the constitution as an ideal people. Since the people does not exist before (and without) the social contract, it cannot reason about the origin of the supreme power (SA VIII 437). Thereby, he articulates the foundational idea of constitutionalism: people’s sovereignty dissolves in the constitution, since the *Volkswille* and the *Souverän* are qualified as mere *Gedankending*, which “keine objektive praktische Realität hat” [the people’s will and the sovereign are mere thoughts, which do not have any objective practical reality] (SA VIII 461). Thus, the constitution absorbs the sovereignty of the people through transforming it into an idea. According to Kant, we can distinguish two elements in the constitution: the establishment of the political constitution or constitutional law, the rules of government and

¹¹ The term of *déclaration* clearly implies *the acknowledgement of the already existant* more explicitly than the Hungarian term of “nyilatkozat”: The Declaration of Human and Civil Rights of 1789 as its text elucidates only openly acknowledges, but does not constitute the always existing (and persisting) rights. See Troper, M.: *La déclaration de droits de l’homme et citoyen en 1789*. In: Troper, M.: *Pour une théorie juridique de l’Etat*. Paris, 1994, 317 skk.

¹² This is how we can construe Kant’s remark on the concept of law of lawyers in the *Kritik der reinen Vernunft*, as it is pointed out by Bódog Somló. Somló, F.: *Juristische Grundlehre*. 2nd ed., Leipzig, 1927, 52 skk.

¹³ The *jury constitutionnaire* as conceived by Sieyès has miscarried in practice. Pasquino, P.: *Sièyès et l’invention de la constitution en France*. Paris, 1998, 193.

“the legal condition” (*Rechtszustand*), especially in the republican constitution (which I shall discuss separately). For Kant, the constitution is the foundation of the validity of the law (to use modern terms); therefore, the concept of the constitution is closely related to Kant’s concept of law. This concept is dual: on the one hand, the contents of law ensures the reconciliation of the *external freedom* of individuals, which I shall examine in the next section. On the other hand, according to Kant, law is based on coercion (“Befugnis zu zwingen” SA VIII 338): without coercion no positive law can exist. However, coercion in this case means the *legitimacy* of the use of coercion, not its actual application.

The conception of the constitution as a social contract facilitates the understanding of the link between the constitution and people’s sovereignty (as the substance of the constitution). Kant conceives the constitution not simply as the establishment of social life *unter Rechtsgesetzen*, that is, under the rules of law but he identifies the people with those who unite on the basis of such a contract. People’s sovereignty is the criterion of the substance of the correct (just) constitution, but it cannot manifest itself in the practical activity of the people. The constitution as a social contract and popular sovereignty in the representative—according to Kant’s and the contemporary general terminology: republican—constitution are essentially identical. Kant repudiates democracy, by which he means direct democracy, whereas, he considers representational and necessarily constitutional democracy to be a necessary element of a lawful (that is just) constitution.

These thoughts proved to be very productive in modern constitutional theory especially in the neo-constitutionalist school of thought in constitutional law, as well as in modern political philosophy, which is according to Rawls the theory of constitutional democracy.¹⁴ In terms of constitutional law, the conception of the constitution as a social contract provides an acceptable theory, which is legally interpretable, that is, applicable in constitutional legal reasoning as to the interpretation of people’s sovereignty under constitutional law. The construction of the popular sovereignty in modern constitutions as a social contract has many advantages. On the one hand, neither the people as the subject of the social contract, nor the social contract or the idea of the constitution are empirical concepts. This conception results in several important consequences as to the substance and interpretation of the constitution. The most important of these with regard to the modern neo-constitutionalist constitutional practice is that only such an interpretation of the constitution complies with the substance of the constitution, which also complies with the constitution construed as a social contract. That is, the ultimate criterion of truth as to the interpretation of the constitution consists in the fact whether the result of the interpretation is acceptable as the substance of the constitution as a social contract.¹⁵

Another advantage of the construction of the constitution as a social contract is that it clearly articulates that the constitutive and foundational concept of constitutional democracy is the equality of those living in unity of title in the constitutional state. It follows, then, that popular sovereignty and constitution are not simply normative but meta-normative concepts.

¹⁴ Rawls, J.: *Political Liberalism*. New York, 1993, XXVII., 135. And see Kis, J.: *Alkotmányos demokrácia* (Constitutional Democracy). Budapest, 2000.

¹⁵ Let’s see an example instead of further explication. If I do not know whether I am a homosexual or not, whether I am a man or a woman, would I accept the discrimination of homosexuals or women under the constitution as the substance of a social contract, that is, such an interpretation of the constitution, according to which, e.g. the limitation of the political rights of women is constitutionally justifiable. Therefore, the ultimate standard of the correctness of the interpretation of the constitution is whether the result of the interpretation could be an independent constitutional norm.

That means that the popular sovereignty cannot correspond to any empirical-social fact: the constitutional people as a sovereign exists only in the constitution, or rather in its idea.¹⁶ The notion of the constitutional people implies ideal unity of the titular of the constitutional powers (the *pouvoir constituant*) and each person subject to the constitutional law and order *ut singuli*. Which at the same time determines the constitutional relationship between the *collective people*, which can only be a majority, and *the people as a set of free individuals*. The collective people in the political constitution of constitutional democracy can manifest itself only in a voting and decision-making procedure: majority decision replaces unanimous decision which is impossible in practice. Consensus in modern constitutionalism is replaced by the parts of the constitution which are excluded from majority decision and not revisable by constitutional amendments. These include primarily fundamental rights (such as the complex of legal positions unconditionally due to each individual), which cannot be limited by majority legislation, furthermore, the fundamental rules of the constitution, without which the constitution could not persist. In this perspective, majority voting is but a technical device and not the essence of constitutional democracy.

In modern legal systems the constitution has two fundamental legal functions: the constitution is the legal foundation of the legality of the legal system (formally, the highest source of law): this is the minimally necessary constitution for the persistence of the legal system. The second, and in neo-constitutionalist legal systems the basic function of the constitution is the legal determination of the contents of the law. In this latter role, the constitution determines the mandatory and prohibited substance of the law: the norm-principles, which must justify the norms regulating the conduct of the individual in the legal system.¹⁷ The constitutional norm-justifying principles, in particular the constitutional rights can be considered the content of the constitution as a social contract (even if they are simultaneously principles of political philosophy or of natural law). I construe fundamental rights or constitutional rights as the complex of legal positions guaranteed for each member of the society, which can be acknowledged as legal positions due to each person by all rationally thinking persons in a society. This elucidates the contrafactual character of the constitution as a social contract. The social contract theory is a thought experiment aiming at the justification of a social condition or complex of norms (the constitution in our case). It is a thought experiment questioning whether ideally rational and fully informed persons would accept the constitutional norms or the social condition established under the constitution.

The conception of popular sovereignty as a social contract demands constitutional justification in two distinct steps. The first step is the justification of *the content of the constitution*, that is, the constitutional rights and other *constitutional properties* of the society. A justification may consist in the Rawlsian abstraction from the social status of the

¹⁶ János Kis attributes considerably more reality to the sovereignty of the people, than I do. See Kis, J.: Népszuverenitás. A klasszikus tan és kritikája (People's Sovereignty. The Classical Doctrine and Its Critique). *Politikatudományi Szemle*, 15 (2006) 1, 5 skk.

¹⁷ For the sake of simplicity, I will not deal with the organisational parts of the constitutions determining the form of government, that is, the political constitution in the strict sense. If the constitution is part of the positive legal system, the same applies to its organisational rules and to its norm-justifying norms. Kant's explications about the political constitution do not add anything to that of Montesquieu (*trias politica*); therefore, they have only historical significance. We need to note that Kant was a subject of Frederick the Great, a fact he mentions with some irony [Weischedel, W. (Hrsg.): *Studienausgabe*. Frankfurt am Main, (SA) 1977. XI 267].

individual upon the selection of fundamental constitutional norms (behind “the veil of ignorance”),¹⁸ or else in an ideal discourse-situation as proposed by Habermas. By the *constitutional properties* of a society I mean all the properties of a society which cannot be but unique and the same for each and every member in a society. Examples of constitutional property are the legal system, the form of government (a state can not be a monarchy and a republic at the same time), the system of ownership, territory, etc. The second grade of justification consists in the application of the social contract embodied in the constitution, which in neo-constitutionalist legal systems adopting constitutional review equals the legal construction of the constitution. Here I cannot engage in a detailed justification of theory set out in outlines above. Suffice it to say that the constitution does not consist of rules of conduct, but of norms about norms, therefore, constitutional review consists in the interpretation and application of constitutional norms in the examination of the constitutionality of the norms of the legal system.

III. PRINCIPLES OF THE REPUBLICAN CONSTITUTION: FREEDOM, EQUALITY AND “INDEPENDENCE”

Kant held that the *telos* of human history is the achievement of the constitutional state (vollkommene Staatsverfassung) (Ideen zu einer allgemeinen Geschichte in weltbürgerlicher Absicht. SA XI 33, 45) making possible the full expansion of the capabilities of mankind. Kant explicates in three of his works that a constitution of full value can be but the republican constitution (SA VIII 432 skk; SA XI 144 skk; 204). The Kantian republican constitution based on reason is very close to the neo-constitutionalist constitution, since the republican constitution is not a political constitution (it is not concerned primarily with the *forma imperii*). It is a legal constitution, which “aus dem reinen Quell des Rechtsbegriffs entsprungen” (derives from the pure source of the concept of law). Thus, Kant distinguishes the political constitution (though he does not designate it as such) from the legal constitution, which in his time existed only as rational or natural law. In Kant’s age and for a long time afterwards, in terms of positive law, constitutions were at best mere political constitutions, whereas the legal constitution obtained as a political or natural legal principle.

The republican constitution is the constitution about the contents of the legal system. According to Kant, the essential content of the legal system is *a certain kind of freedom*: “Das Recht ist also der Inbegriff der Bedingungen unter denen die Willkühr des anderen nach einem allgemeinen Gesetze der Freiheit zusammen vereignet werden kann.” [Law is therefore the set of conditions, under which the freedom of one can be united with that of the others under the general laws Freedom.] (SA VIII 337) The other element of the concept of law, the distinctive feature of positive law, is the relationship with coercion (Befugnis zum Zwingen): law entails the limitation of freedom. The other element of the concept of positive law, what Kant designates as the publicity of law, is public law (öffentliches Recht=public law) “Inbegriff der Gesetze, die einen allgemeinen Bekanntmachung bedürfen, um einen rechtlichen Zustand hervorzubringen.” (SA VIII 429). In our terms, the “lawful condition” for Kant can be described as the existence of the legal system, since the meaning of the Kantian “Gesetz” is norm in our terms.¹⁹ Therefore, without the publicity (promulgation) of the norms of the legal system no positive law can exist. We need to note,

¹⁸ Rawls, J.: *A Theory of Justice*. Oxford, 1971.

¹⁹ See Stemmer, P.: *Normativität*. Berlin, 2008, 155.

however, that for Kant, certain principles of private law and constitutional law, not to mention morality, are *a priori* given for practical reason and as such, do not need publication at all.

The first principle of the republican constitution is freedom, so far as according to Kant, man has a single innate and simultaneously positive right: “*Freiheit* (Unabhängigkeit von eines anderen nötigen Willkühr), sofern sie mit jedes anderen Freiheit nach einem allgemeinen Gesetz zusammen bestehen kann” [Freedom (independence from the coercive arbitrariness of others), so far as it can persist jointly with the freedom of everyone else on grounds of general laws] (SA VIII 345).²⁰ This concept of freedom is extremely interesting from the point of view of the neo-constitutionalist theory of constitutional review. As it is clear from the quotation, for Kant freedom includes several fundamental rights, such as equality, the protection of privacy and freedom of speech, which can be deduced from the Kantian concept of freedom from the outset. In other words, the Kantian concept of freedom implies the entirety of fundamental rights to be guaranteed for all in the lawful condition (that is, in the legal system of constitutional state). In terms of contemporary constitutional law, Kant here discusses fundamental constitutional freedoms or constitutional rights. These are “innate” rights, and as such that they are due to each person equally and that freedom (that is, fundamental rights) does not have to be “acquired” or “deserved” like ordinary rights under any legal system.

It is manifest so far that Kant considers constitutional freedoms, in other words fundamental rights, to be the legally necessary (by which Kant means obligatory) content of the legal system.²¹ Modern constitutional review does the same: the constitutional review of legislation is a means to protect constitutional rights taken over from rational law or if one prefers, natural law.

In strict terms, we cannot claim that modern constitutional courts reviewing legislation “enforce” constitutional rights as mandatory contents of legal norms, since these *categorical legal principles* are meta-norms *about* the norms of conduct of the legal system. The determination of the standard of goodness or justifiability (frequently identified with justice) of legal norms used to be the function of natural law, also shared by Kant. For the rationalist thought the principles commanded by reason are categorical, as the famous categorical imperative is. Being categorical means that neither the mandatory force, nor its validity may rationally be challenged. (The categorical imperative is, according to Kant, synthetic *a priori*. See e.g. *Grundlegung der Metaphysik der Sitten*. SA VII 49, *Kritik der praktischen Vernunft*. SA VI 49, 67.) There are categorical, unconditional legal principles²² included in the Kantian concept of freedom, that are valid without positive law-making as the standard of the correctness of law, but they do not form part of positive law. Constitutions regulating the content of legal order contain (mainly in the forms constitutional rights) the standard of justification of legal norms, not unlike the natural law. The relationship between the sub-constitutional law and the constitutional principles is conceptual and derivative. A good case demonstrating such a justificatory reasoning in constitutional law is justification the

²⁰ H. L. A. Hart formulates almost in so many words. Hart, H. L. A.: *Are There Any Natural Rights?* In: Waldron, J. (ed.): *Theories of Rights*. Oxford, 1984, 77 skk.–however, without mentioning Kant.

²¹ According to Kant, the obligatoriness (*Verbindlichkeit*) of conduct consists in its normative necessity in present-day terms.

²² On the term see Höffe, O.: *Kategorische Rechtsprinzipien*. Frankfurt am Main, 1995.

limitation of fundamental rights as applied in many European constitutional jurisdictions. Constitutional review essentially decides on the constitutional validity (admissibility) of norms including norms governing the conduct of citizens, not about the interpretation and application of norms of conduct or primary norms.

In Kantian constitutional theory, as mentioned above, the rational state establishes the legal condition (*Rechtszustand*) among its citizens. Legal freedom consists in lawful freedom and an equal subjection to law: legal freedom is protected by state coercion (SA VIII 338) through the enforcement of the law. This is the constitutional concept of freedom in the 18th century prevalent until the mid-20th century, classically formulated by Montesquieu: anybody subject only to law is free.²³ According to the modern concept of law under constitutional law, law *as expression de la volonté générale* has two basic properties: it is a general rule, and is deemed to be accepted by people through its adoption by a representative organ, like the Parliament. This conception does not distinguish the between constitution and the ordinary law, thus it excludes by virtue of conceptual necessity the possibility of an unconstitutional law. The constitution is a set of rules about the law-making, including the sources of law; any law adopted in a regular procedure is necessarily constitutional.²⁴ This constitutional theory locates the guarantee of the correctness of the law in the legislative procedure: the law-making procedure (its publicity and discursive nature) is regarded as sufficient to ensure a reasonable outcome. Today, the main argument against modern, especially neo-constitutionalist constitutional review is the reasonableness of the legislative procedure, and the argument that the legislation is better suited for the proper interpretation of the constitutional rights than the judicial procedure of constitutional review.²⁵ This argument, to be sure, does not contradict to the maxim of legislation, which Kant describes as a “blosse Idee der Vernunft” [mere idea of reason] (SA XI 153).

According to Kant, the third element of the republican constitution following the equality of citizens is what he calls *Unabhängigkeit*, which is especially interesting from our point of view. Kant, like the French constitution of 1791, distinguished active and passive citizens and secured political rights exclusively for citizens with self-sufficient economic-social existence. On the basis of his examples, it is obvious that only citizens who are their own masters (*sui iuris*) owing to their property or by virtue of their profession may be *citoyen* with the right to vote in legislation or the elections. However, they are to be considered equal whatever the difference among their properties may be (SA XI 150; as well as VIII 432). Kant was not an early adherent of the welfare state; rather, in his notes he

²³ Montesquieu: *De l'esprit des lois*, XI. 3 (ed. Pléiade II. 395.): “La liberté est le droit de faire tous que les lois permettent”. Cf.: Bragyova, A.: Alkotmány és szabadság: a szabadság alkotmányos fogalma (The Constitution and Freedom: the Constitutional Concept of Freedom). *Fundamentum*, 7 (2003) 3–4, 5 skk. and Bragyova, A.: The constitutional concept of the freedom of the individual. *Archiv für Rechts- und Sozialphilosophie (ARSP)*, 91 (2005), 379–408.

²⁴ Jellinek, G.: *Gesetz und Verordnung*. Tübingen, 1887 and Carré de Malberg, R.: *La loi, expression de la volonté générale*. Paris, 1931.

²⁵ In modern Anglo-Saxon literature, the most famous defendant of this view is Jeremy Waldron (e.g. *The Dignity of Legislation*, Cambridge, 1999 and *Law and Disagreement*, Oxford, 1999). These views were already discussed in 19th century and later French and German literature. A characteristic opponent of constitutional review is Lambert, E.: *Le gouvernement des juges*. Paris, 1921, especially, 224 skk. In recent continental theory, Habermas and his followers, e.g. Ingeborg Maus are sceptical as to substantive constitutional review. See Maus, I.: *Zur Aufklärung der Demokratietheorie*. Frankfurt am Main, 1992.

appears to be (one could say) a forerunner of Hayek: “Die Wohltätigkeit kann nur auf Kosten der Unterthanen ausgeübt werden.” [Public welfare is possible exclusively at the expense of the subjects.] (AA 23. 354) Here I cannot discuss the relationship of the welfare and the constitutional state; suffice it to say that the welfare state is the consequence of the radical implementation of the Kantian principles of the constitutional state. The principle of equality and the maxim of legislation (to be discussed below) and the idea of the constitution as a social contract make the welfare state conceptually inevitable. The freedom and the autonomy of the individual depend on social conditions: those not possessing the conditions of freedom and autonomy could claim, on the basis of the principle of equality the same conditions others have. Not for Kant, since as he says independence is in part (but only partially) *acquired* and not innate right, like freedom. At the same time, it is problematic to postulate a rational individual who would accept that his independence (social non-dependence) is subject to contingency, in Kant’s terms, empirical social circumstances. In today’s constitutional democracies, the equality and independence of the citizen has become inseparable, while in Kant’s age they were still separable.²⁶

Kant and generally the Enlightenment were not democrats in our terms. They accepted the representative system based on the separation of legislation and executive power (which Kant as the authors of the *Federalist Papers*²⁷ call republican), but they did not accept democracy based on the participation of the empirical people as a whole. The requirement of *Unabhängigkeit* [by the German term Kant means personal and financial *non-dependence* (*sibisuffitientia*)] excludes a great part of the empirical people from among active citizens. Modern constitutional democracies are in an ideal case and in Kantian terms simultaneously republican and democratic constitutional systems, which Kant and his contemporaries held impossible. Nevertheless, Kant’s is right in claiming that constitutional democracy can exist only as representative democracy; however, representative democracy presupposes the social freedom of the individual, which requires the guarantee the minimum of the social-economic independence of the individual (*pace* Kant, who regarded external freedom as independence from others’ coercion). In other words: constitutional democracy (and here one must agree with Kant) requires the freedom of the *cives* as individual not subject to the power of others, which simultaneously requires a kind of “social democracy” (to use Tocqueville’s term). Today, an influential trend of modern liberalism, called republicanism postulates that freedom is grounded on the non-subjectedness to the power of others.²⁸ The same is implied by Kant’s concept of “non-dependence”. True in Kant’s case it lead , to the exclusion of those subject to the power of others (such as wage workers and servants) from among active citizens. Still it is possible to argue on the same ground in the contrary direction as many supporters of modern constitutional welfare rights in fact do.

IV. THE MAXIM OF LEGISLATION AND THE CONSTITUTIONALITY OF THE LAW

²⁶ Luf, G.: *Freiheit und Gleichheit. Die Aktualität im politischen Denken Kants*. Wien, 1978. 150 skk.

²⁷ Wright, B. F. (ed.): *The Federalist*. Cambridge, 1972, 133, 150. (No. 10.,14.; the author of both is Madison, J.).

²⁸ See Pettit, Ph.: *Republicanism*. Oxford, 1997 and Spitz, J-F.: *La liberté politique*. Paris, 1995.

In the former section we saw that the freedom of the individual in a constitutional state consists in her being subject exclusively to general and public rules of law. Therefore, the procedure of legislation, the content of the law and its general validity are fundamental in maintaining constitutional freedom. The freedom (autonomy) of the individual can be exercised so that it should not conflict with others, thus, equal individual autonomy for everybody can be guaranteed only by equal limitations imposed upon each others' freedom—and this is the function of the legal order. Also, this is the source of the maxim of legislation. By the concept of the maxim Kant means “the subjective principle of action” (*Willkühr* = choice, empirical will), which the actor makes the rule of his own action (Rechtslehre Einleitung IV, SA VIII 332). Therefore, the maxim of legislation as the principle determining and justifying all actions is either correct or incorrect. The maxim of the law is identical with the principles justifying legislation as an action. On these grounds we can analyse Kant's explications on the maxim of legislation.

According to this maxim, the legislator has to make law (=norm), which *could* derive from the whole people and which can be regarded by each subject (at law), as if he approved of it. “Denn das ist das Proberstein der Rechtsmässigkeit eines jeden öffentlichen Gesetzes. [The criterion of the lawfulness/correctness of all public law.] (SA XI 244) In *Zum ewigen Frieden* Kant formulates the transcendental formula of public law, that is, law-making to be proclaimed and applying to all,²⁹ which he designates as the principle of publicity. As he sets forth: “all actions related to others' rights are unlawful (*unrecht*), if their maxim does not tolerate publicity”. Thereby, Kant unites the idea of the social contract with the concept of the rational justifiability of the norm (long before Habermas and Rawls). As for Kant, the law is lawful, i.e. correct, if it complies with the maxim of legislation and the transcendental formula of publicity,³⁰ otherwise lawful law would be a tautology.

For Kant, the ultimate identity of the two formulas, i.e. rational admissibility and publicity derives from the concept of reason. Kant associates rationality with publicity. The fundamental concept of Kant's philosophy is reason (*Vernunft*), the use of which is generally public, just as in science.³¹ The society can never be deprived of the right of the public use of reason, i.e. thinking as he formulates in his writing “An Answer to the Question: What Is Enlightenment?” (SA XI 55). The consent of the subject (of law) is not a real consent—this is provided by the participation in the law-making of the representative organ (Parliament). The standard (criterion) of the justifiability of the law is that the rational subject at law would have made (adopted, accepted) the same law if he had the necessary knowledge.³² This reformulated maxim of legislation is closely related to the discourse theory of Habermas, according to which rationality is identical with the norm (or other statement) acceptable in the ideal discourse-situation. The law (the legal norm) is rationally acceptable,

²⁹ Das öffentliche Recht ist der Inbegriff öffentlicher Gesetze (d.i. solcher die durch einen machthabenden Gesetzgeber allen denen eine Pflicht obliegt verkündigt werden). AA 23. 347. [Public law implies the entirety of public laws to be mandatorily proclaimed by the legislative power.]

³⁰ The transcendental nature of the formula postulates that its validity does not depend on empirical circumstances, which could influence the decision of the legislator, such as economic or practical, etc. considerations, but it needs to be applied to these.

³¹ As many have noticed, Kant usually draws a parallel between the activity of reason and that of the judge or the legislator, but we must restrict ourselves to a note. This by all means implies the publicity or public justifiability of judgement (by which Kant also means cognitive statements).

³² There is a slight difference between the two formulas, since according to the latter one, several admissible versions are possible.

if the participants of the ideal discourse, which excludes coercion and is conducted under ideally good conditions, would have adopted it as a reasonable norm. Clearly, the main difference between the concepts of reason of Kant and Habermas is that Kant examines the rationality of arguments, whereas Habermas examines the procedure of reasoning, i.e. the relationship of arguments and compares the force of arguments, which in an ideal case facilitates the success of “zwanglose Zwang des besseren Arguments” [the forceless force of the better argument].

In modern political and legal philosophy, the discourse theory of Jürgen Habermas and the political liberalism of John Rawls are directly and admittedly related to Kant’s principle of publicity. In *Political Liberalism*, Rawls applies the anglicised term of public reason and considers the constitutional court—in the form the US Supreme Court—as its main forum. Habermas considerably departs from Kant (and in this respect, from Rawls too), since he defines the public use of reason to be a social institution (procedure). The difference between the two views is manifest in their attitude towards majority decision-making, and its proper role in modern constitutional democracy. The Kantian standard is counterfactual: the reason examines whether the subjects would have adopted a norm. This is the requirement of the rational justifiability of a norm, the decision on which depends on the correct use of reason. In the discourse theory of Habermas, especially in *Faktizität und Geltung*, discourse consists in communicative action and as such, embedded in a social context. On the other hand, the concept of the ideal discourse situation is as normative as Kant’s maxim of legislation. According to Habermas, “Gilt nur das Recht als legitim, das aus der diskursiven Meinungs- und Willensbildung gleichberechtigter Staatsbürger hervorgeht”.³³ [Only the law is legitimate, which derives from the discursive formulation of the opinion and will of equal citizens.] In the same work, Habermas expounds: “Discourse theory explains the legitimacy of the law via the legally institutionalised procedural and communicational conditions.”³⁴ Habermas also needs to explain what Kant does not: in a procedural democracy protecting a set of fundamental rights (Habermas calls this “System der Rechte”), especially the rights of minorities? Habermas also accepts the principle of publicity, since in void of modern communicational rights it is impossible to make legitimate law (Kant calls this *rechtmässig*), however, he regards both the principle of publicity and people’s sovereignty as discourse and procedure.

From the point of view of constitutional theory, the relationship between rationality and public justification is the most important. In politics, the use of reason is collective and public: constitutional rights and constitutional decision-making procedures, such as political participation rights, elections, legislation and the entirety of communicational rights as safeguards of the freedom of the social communication process as a whole facilitate political decision-making based on public reasoning and debate. It is a crucial issue in the justification of constitutional review whether discursive democracy as a procedure—including the principle of publicity, which, like its counterpart, the categorical imperative is formal in the sense of being devoid of content—is sufficient to guarantee the constitutional rights, freedom and equality, which are also foundational for Kant. Majority decision cannot be deduced from the principles of discursivity and publicity, but it’s a practically necessary procedural rule (at least as *second best*) in the legislative procedure. This is expressly acknowledged by Kant in *Gemeinspruch* (SA XI 152–153). In practice, democratic collective self-legislation

³³ Habermas, J.: *Faktizität und Geltung*. Frankfurt am Main, 2. Auflage, 1992, 492.

³⁴ *Ibid.* 499.

(*Selbstgesetzgebung*)³⁵ is based on the majority principle, although the theory of discursive democracy requires considerably more than the (political) majority of legislation in the interest of the establishment of democratic legitimacy. Although, “the democratically legitimate formation of opinion and will” is impossible without constitutional rights, and it is based on constitutional rules of procedure, they are *ex definitone* insufficient to protect the rights of the individual against the majority. Thus, a discursive-rational procedural constitutional democracy also needs the judicial protection of the constitution. It is impossible to justify satisfactorily procedural rules by other procedural rules, nor can the content of the law be justified by the correctness of the law-making procedure. The constitution understood as a social contract in Kantian terms is capable to justify both.

Constitutional democracy is impossible without appropriate institutions and rules, thus the constitution conceptually (and historically) precedes democracy. Trivially, democracy is a constitutional regime: it cannot exist but through democratic constitutional norms. The function of ensuring the impartial observation of procedural rules rationally cannot be entrusted exclusively to the participants of the procedure. The procedural justification of constitutional review is based on this insight. For Habermas, the principle of publicity is a subsidiary principle in terms of the judicial construction of the constitution since the *content-based* criteria of legitimate, i.e. constitutionally valid law are to be found in the set of fundamental rights (*System der Rechte*). Fundamental constitutional rights are legal positions of the individual defining for the legislator part of the content of law entailed by the maxim of legislation. In this sense, fundamental rights are a sort of positive natural law not subject to legislative disposal not guaranteed by the procedure of constitutional democracy.³⁶ For those who are familiar with neo-constitutionalist or just modern constitutional law, the requirement of “rational (i.e. public) justification” is not a philosophical, but a legal dogmatic term. In applying the constitutional equality rule most constitutional courts use the principle of public justifiability as a test of reasonableness of classification by the legislator.³⁷

Constitutional review is a lawful way to exercise the right of resistance against government. Kant rejected the right to active resistance against the “*unrechtmässig*” (unjust or unlawful) power; even if it infringed the maxim of legislation.³⁸ But he did not reject resistance through public argument and reasoning. As he wrote in the *Dispute of the Faculties*: “Why hasn’t any sovereign dared to say that he didn’t recognise any right of the people against himself?” (SA XI 359). The answer is: because the principle of publicity is an indispensable element of the legitimacy of legislation. Since the principle of publicity necessarily includes the possibility of public *räsonnieren*, we can infer that Kant recognises *resistance via reasoning*. Kant, who always expressed his appreciative views about Hume’s

³⁵ Grundlegung der Metaphysik der Sitten [Groundwork of the Metaphysics of Morals] (SA VII 63).

³⁶ Maus, I.: Freiheitsrechte und Volkssouverenität, *Rechtstheorie*, 26 (1995) 507–562. Here for lack of space we cannot introduce the immanent limitations of procedural democracy. For a part of the relevant literature see Bragyova, A.: Alkotmánybírászkodás és demokrácia (Constitutional Review and Democracy). *Acta Juridica et Politica*, 55 (1996), 135 skk.

³⁷ Bragyova, A.: Egyenlőség és alkotmány (Equality and the Constitution). In: Lamm, V. (ed.): *Van és Legyen a jogban. Tanulmányok Peschka Vilmos tiszteletére* (Is and Ought in Law. Studies in Honour of Vilmos Peschka). Budapest, 2000.

³⁸ Spaemann, R.: Kants Kritik der Widerstandrechts. In: Batscha, Z. (Hrsg.): *Materialen zu Kants Rechtsphilosophie*. Frankfurt am Main, 1976, 347.

works and called him “a man of sharpest wit” in the *Prolegomena* (SA V 116), might have agreed with the statement of Hume, according to which “[i]t is ... only on opinion that government is founded.”³⁹ He understood very well that the greatest limitation of political power is publicity or, in modern terms, public opinion. Thus, we can understand Kant’s explications, namely, that resistance has one lawful means, which he calls “*Freiheit der Feder*” (SA XI 161, XII 409) and this means the freedom of the press, naturally, the reasoning press. The freedom of the pen is “das einzige Palladium der Volksrechte” [the only safeguard of people’s rights] (XI 161), which as a freedom is the control (Prüfung) of the scientific propositions in science and of “the correctness of the judgement” of the state power, the monarch in politics (XII 409). Thus, according to Kant, there is no monarch, or *a fortiori* any political power and decision-maker, that would not be in need of the constant criticism of “the correctness of its judgement”.

For Kant, the “freie Rechtslehrer, d.i. die Philosophen” [free legal scholars, i.e. philosophers] (SA XI 363) are to protect natural rights by public reasoning which they address to the state with due veneration (*ehrerbietig*). In Kant’s age, the protection of what we now call fundamental rights devolved on *free* legal scholars, who—according to the *Streit der Fakultäten*, where he claims that only the lower, that is, the philosophical faculty is free, whereas the others, such as the faculty of law is bound by positive regulations (SA XI 280–287)—could only be philosophers, not lawyers. This is a consequence of the Kantian idea of rational law: the constitutional rights constitutive of the positive legal system in neo-constitutionalism were generally not considered to be positive legal rights in the 18th–19th (and in a large part of 20th) centuries, even though they were incorporated into the constitution.⁴⁰ It was publicity—public opinion—that protected the constitutional rights, which corresponded to the judgement of the educated general public emerging in the age of Kant.⁴¹

The modern public sphere (analysed masterfully in well-known book of Habermas),⁴² is far cry from the reasoning public consisting mainly of the educated middle and upper classes of the 18th century. The ideal discourse situation of Habermas—closely related to the Kantian principle of publicity, since ideal discourse consists in the public use of reason—cannot be identical with modern political public, let alone the empirical public opinion. Therefore, modern constitutional review can be regarded as the forum of the public use of reason⁴³ which enforces the maxim of legislation, if the empirical political legislator failed to do so. Hence, it is reasonable to claim that modern constitutional review consists in the institutionalisation of publicly reasoning resistance, which is always permissible in Kant’s terms and which we can designate as reasoning resistance. This conception derives directly from the principle of publicity presented above. This is a forceful corroboration of the procedural justification of constitutional review, which can be accepted by Habermas as well as the democrats rejecting constitutional review.

³⁹ Hume, D.: *Essays*. In: *The Philosophical Works of David Hume*. Edinburgh, 1826, Vol. III, 31.

⁴⁰ This is summarised perfectly in Duguit, L.: *Traité de droit constitutionnel*. Paris, 2nd ed., Tome III., 1923, 566 skk.; and Troper: *op. cit.*

⁴¹ Tönnies, F.: *Kritik der öffentlichen Meinung*. Berlin, 1922.

⁴² Habermas, J.: *Strukturwandel der Öffentlichkeit*. 1962 (new ed.: Frankfurt am Main, 1990); on the principle of publicity: 178 skk.

⁴³ In this issue, Rawls is more far-reaching than Habermas, who is more trustful with regard to procedural-discursive democracy. See, e.g. Rawls, J.: *Political Liberalism*, *op. cit.* 212 skk.

As it is clear from the Hufeland-review (SA XI 809), Kant concurred with Hobbes that nobody is obliged to obey coercion. Therefore, the state needs to be able to crush physical opposition by force or convince the subjects about the “legality” of its power (legitimacy in our terms). A state or government bound to protect and observe fundamental rights can use only limited force against its subjects (citizens); therefore, it can exist for a longer period only if the citizens bear at least benevolent indifference towards it. Of course, the machinery of the power of the state can function further on without this, but only as long as coercion (and the efficiency of the threat of its application) actually enables it to do so. Therefore, the legitimacy of the constitutional state is positively based on the limitation of the lawful use of force thus giving the priority to the communicative power against the coercive one.

V. CONSTITUTION AND MORALITY

To conclude, I wish to discuss the question of constitution and morality with the help of Kant. According to the idea of the constitution in Platonic terms (that is, in reality never perfectly realised) which is in accordance with the natural rights of man, everybody bound by the law (norm) is simultaneously a legislator on equal footing with others. For Kant this is the *respublica noumenon*, the transcendental norm of all constitutions (SA XI 364). The realisable form of the *respublica noumenon*, i.e. the *respublica phaenomenon* is the republican constitution. The republican constitution is conceived as a version of the state (“Vereinigung einer Menge der Menschen unter Rechtsgesetzen”) [the association of men under of law] (SA VIII 431), in which the constitution is “oberste formale Bedingung (conditio sine qua non) aller übrigen äusseren Pflicht” [the principal formal condition of all external obligations] (SA XI 144). In my terms, the legal system for Kant primarily and practically consists in the inevitable limitation of freedom of conduct, the primary objective of which is the protection of the external freedom of the individual (including property). The constitution and the legal system are morally necessary for the individual primarily because they establish the external conditions of moral life: the “bürgerliche Gesellschaft” [civil society] cannot exist without a *Staatsverfassung* [a constitution] (SA XII 687).

Kant’s conception of mankind was sufficiently pessimistic so that he could not conceive a society without legal force and political power. Therefore, the political society, i.e. the constitutional *Rechtszustand* is not based at all on the morality of the participants, but on practical necessity and rationality. Therefore, “Das Problem der Staatseinrichtung ist, so hart wie es auch klingt, selbst für ein Volk von Teufeln (wenn sie nur Verstand haben), auflösbar.” [The problem of the foundation of the state, however harsh it may sound, can be solved by even a people (if it has understanding) consisting of devils] (SA XI 224). The foundation of the existence of the state (for Kant, that implies the law and order and public laws) is not a moral or other high motive, which devils would lack, but it is practical necessity conceivable merely by understanding (Verstand) and not by reason (Vernunft) including also the moral a priori. Therefore, law accounts for not the morally, but the practically necessary conduct, which “Mechanism der Natur durch selsbsüchtige Neigungen ... von der Vernunft zu Mittel gebraucht werden kann...” (SA XI 225).” “Die Natur will unwiderstehlich, dass das Recht zuletzt die Obergewalt enthalte.” [Nature irresistibly wants law to possess the supreme power]. Let me add that Kant’s works on legal philosophy mostly deal with a part of the *metaphysics* of law—the title of his legal theory is *Metaphysische Anfangsgründe*—and by metaphysics Kant means a priori knowledge. Besides, Kant admits the legitimacy of “purely empirical legal theory”, undoubtedly with

the limitation that it resembles the wooden head in the tale of Phaedrus, namely, it can be beautiful but unfortunately it does not have a brain (SA VIII 336). In one of his reflections, he clearly distinguishes the empirical-political (we could say contingent) elements from the rational ones (deriving from reason) in constitutions. As he formulates that: “Staatsklugheit ist bloß auf empirische Prinzipien gegründet, Staatsrecht auf rationale. Man vermengt die Bedingungen der ersten bei dem Begriffe einer Staatsverfassung überhaupt mit dem letzteren.” (R. 6855. AA XIX 181) [The theory of governance is based on purely empirical principles, whereas constitutional law is based on rational ones. In case of the general concept of the constitution of the state, the conditions of the first one are united with these of second one.]

Kant’s work on the philosophy of religion, *Die Religion innerhalb der Grenzen der bloßen Vernunft* (Religion within the Limits of Reason Alone) is most instructive from the present point of view, since here Kant’s standpoint is clearly expressed: the legal condition (*rechtlich-bürgerlicher* or political *Zustand*) is at the same time an *ethical state of nature*. In the state of nature everybody is simultaneously one’s own legislator and judge (SA VIII 753): in the legal order the state of nature persists with regard to morality. We can add that if it did not persist, the autonomous moral life in Kant’s terms would be impossible. Since moral virtues are duties towards ourselves, exclusively we can be our own judges in these issues. According to Kant, the State is not a moral, but a legal community; therefore, the constitutional State cannot be a moral community either. This precludes the moral interpretation not only of the constitution, but of law altogether. For Kant, the moral community (*ethisches gemeines Wesen*) can only be conceived as “Volk Gottes” (the people of God) “und zwar nach Tugendgesetzen” (viz. only on grounds of moral laws) (SA VIII 757) where there is no place for external force. Religion consists in the recognition of our duties as divine commandment (SA VIII 762, 788), whereas virtue consists in the voluntary fulfilment of moral duties (SA VIII 526). It is only God who knows whether the individual was guided in the voluntary accomplishment of his moral duty by the motive of the respect for moral duty alone, or by also something else (and for Kant the conduct is not moral in the latter case).

Thus, according to Kant, the constitution establishes merely a *Rechtszustand*, but not an “ethical” community based on virtue. The establishment of an ethical community, the moral constitution proper cannot be the objective of the constitution. Moreover, Kant warns against the legal enforcement of virtue (moral conduct) in the following paragraph of *Religion innerhalb...* “Wehe aber dem Gesetzgeber, der eine auf ethische Zwecke gerichtete Verfassung durch Zwang bewirken wollte. Denn würde dadurch nicht allein gerade das Gegenteil der ethischen bewirken, sondern auch seine politische Untergraben und unsicher machen”. [Woe is the legislator, who intends to implement a constitution directed at ethical objectives by force. In doing so, he would achieve not only just the opposite of the ethical, but he would also undermine and shake the political constitution.] (SA VIII 754) As he explicates, it is the legal force that protects (external) freedom and thereby maintains the ethical natural state, necessary for the existence of autonomous moral life. However, the ethical natural state differs basically from the legal natural state, to which the command of *exeundo est e statu naturali* applies. For Kant “alle politischen Bürger” exist in an ethical state of nature (*ethischer Naturzustand*) which is at the same time the constitutional-legal condition.

Thus, for Kant, the constitutional-legal condition is *simultaneously* moral state of nature: the moral, but not the legal, freedom of each and every person is complete in this condition. The legal meaning of constitutional rights, the *Rechtszustand*, as we have seen is

triadic for Kant: freedom, equality and independence for the propertied citizens (*cives*). These rights are political in the sense that they can be construed exclusively as constitutional rights, as part of a social contract. In other words, these are not moral rights but the constitutional properties of a society based on legal principles, which establish the external conditions of moral and social autonomy. Nevertheless, these attributes are not moral for at least two reasons. First, the constitutionally guaranteed freedom of the collectivity of individuals promotes the coordination of their conduct *affecting others* under general coercive laws. In morality, however, everyone is simultaneously legislator and judge: this is the ethical state of nature guaranteed in a constitutional condition of the law. The intervention of the legislator, which transforms moral duty into legal duty, inevitably destroys the moral nature of the conduct, since it is not any more based on autonomous (inner) legislation.⁴⁴

At the same time, for Kant, not all constitutions are just (*rechtsmässig*). It is helpful as to the translation of the terms *rechters* or *rechtsmässig* that Kant frequently adds the Latin equivalent of the terms: *iustum*. It is altogether clear that Kant does not refer to any kind of positive lawfulness in connection with the “lawful” constitution, but he means a constitution which corresponds to reason and is based on the practical use of reason. In this constitution it is primarily the transcendental principle of publicity that can guarantee the agreement between morality and public law (SA XI 244 ff.). This principle, which I discussed in the previous section, is simultaneously ethical (pertaining to the doctrine of virtues) and legal (affecting the rights of man). In the quoted place Kant discusses the people’s right to resistance, which cannot be positive law from the outset.⁴⁵ Therefore, the content of the constitution *may be* in harmony simultaneously with morality and law, but the constitution itself is not a moral institution. The combined effect of the principles of the republican constitution and the transcendental formula of publicity facilitates that in the modern constitutional state the legal system be rational without being exclusively or primarily a moral state. The idea of law, which consists in guaranteeing external freedom for each individual, is incompatible either with the legal enforcement of morality or with individual happiness as an objective of the state (Antropologie in pragmatischer Hinsicht SA XII 686). Both of these would limit the autonomy of the individual to a greater extent than absolutely necessary. One is tempted to say that the moral principles determine the proper scope of the law: it ought not invade into the properly moral sphere of individuals, the latter being reserved for the working of autonomous moral life.

Thus, the principles of the republican constitution are legal, not moral principles. The modern, especially the neo-constitutionalist constitutional state may closely resemble what Kant considered to be “the constitution in accordance with man’s natural rights” (Streit der Fakultäten SA XI 360). Modern constitutions usually include the principles of the Kantian republican (lawful, that is, just) constitution as constitutional rights, and principles. If so, the constitutional rights can hardly be regarded as moral principles in Kantian terms, since the constitution is not a moral institution, either. Simultaneously, Kant identifies a close relationship between morals (*Sitten*) and the principles of the constitutional state. This relationship, however, does not pertain to morality but it is part of the practical reason. For Kant, as we saw, the principles of the republican constitution can be recognised and accepted

⁴⁴ For a similar view: Dreier, H.: Kants Republik. In: Gerhardt, V. (Hrsg.): *Kants Streit der Fakultäten*. Berlin, 2005, 134 ff.

⁴⁵ Scheffel, D.: Kants kritische Verwerfung des Revolutionsrechts. In: Brandt, R. (Hrsg.): *Rechtsphilosophie der Aufklärung*. Berlin, 1981, 178 skk.

through (the necessarily collective) use of reason, just as morally correct conduct can be recognised by the use of reason. Therefore, the legal nature of constitutional rights is not based on their moral content but on practical rationality.

* * *

Nearly all the works of Kant quoted above are available in several excellent English editions. Still, I quote Kant's works from the standard German editions, giving my own translation. I do so not by reason of disrespect for the translators, but simply because I used these texts. The quoted passages are easily identifiable and controllable in the standard English translations. The German texts are quoted from the *Studienausgabe*, except when the quoted text cannot be found there; in that case I quote it from the *Akademie-Ausgabe*.