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5

Kant's republicanism

5.1 Aim and outline of the chapter

As I have already emphasised several times, in order to provide a proper normative justification of criminal law, we need to turn to normative philosophy: only this can provide the broader normative foundations for our reasoning on criminal law in the subsequent chapters.[242] In this book, we refer to Kant for the necessary political philosophical starting points. Therefore, this chapter will provide an overview of how Kant approached the political philosophical conundrum elaborated in 4.7 above, i.e., his republican political philosophy. This, I will argue, provides us with more robust political philosophical principles, compared to other political philosophies such as communitarianism and utilitarianism.

Furthermore, my argument is based on the premise that Kant's republicanism is preferrable to other versions of republicanism. These different versions are, however, relatable. Therefore, 5.2 will start out by describing the different strands of republicanism and their relation to liberalism (a more familiar notion to Nordic criminal law), before the following sections outline Kant's republicanism. As Kant's political philosophy is a broad and challenging topic,

242 For a similar approach to political philosophy as basis for criminal law, see e.g., Duff (2018a) p. 52 on criminalisation, see also Duff's general recognition of, but also disagreements with, similar views of Thorburn and Chiao at pp. 149–152 in the same book.

I begin by addressing some of the main challenges of interpreting Kant's political philosophy in 5.3. In view of these challenges, this chapter will be restricted to providing (hopefully) a representative, although simplified, account of a selection of key features or themes in Kant's political philosophy. Many of these key themes will be important for our later discussion of the republican criminal law. In 5.4, some overarching clarifications on Kant's usage of the terms *morality*, *ethics*, and *law* are provided. In 5.5, I address the *state of nature* as Kant conceives it, including the innate right to external freedom, and how deficiencies in the state of nature steer us in the direction of the civil state. In 5.6, the main features of Kant's *civil state* are outlined, whereupon the *democratic* dimension is further elaborated in 5.7. In 5.8, we look into Kant's political philosophy as residing between fact and norm, reality and ideal, and how on the one hand, this calls for us to recognise and respect the existing order, leading to a kind of *legal positivism*, while on the other hand, this implies a *reformist drive* and focus. Next, in 5.9, I discuss what drives such progress in Kant's view, which reconnects us to *our responsibility* for this development. The chapter is concluded in 5.10 with some issues that need more elaboration, such as: the *application issue* of Kant's philosophy, the *power dimension* and, finally, what is implied in the *right to force someone into, and to stay in, the civil state*. Together, this chapter and the following chapter on Kant's criminal law cover a fair number of pages. This is necessary not only to facilitate the discussion later in the book, but also to compensate for the absence mentioned of Kant in modern Nordic criminal law scholarship.[243]

As Kant is granted such a pivotal role in this regard, it is reasonable to begin by asking: is Kant's philosophy still relevant today? Is it not an abandoned stage of philosophy's historical progress? This question has many sides to it, including whether one considers the foundational philosophical or transcendental issues of Kant's philosophy decisive to his political philosophy, which we will be concerned with, and, if so, the extent to which these are valid – a subject of debate since its advent. However, while contested, Kant's philosophical project

243 See 2.3–25 above.

is still strongly defended.[244] This goes also for Kant's political philosophy.[245] Kant's continuous relevance for core ideas in, as well as the language of, law, such as human dignity and autonomy, testifies to the impact of his philosophy today. As Ripstein puts it: 'Kant's influence on contemporary political philosophy is indisputable.'[246] Also in contemporary criminal law scholarship, Kant is often seen as a central reference point for the discussions.[247] Kant's influence is also seen in contemporary Nordic legal philosophy.[248] Hence, and also taking into account Kant's absence from Nordic criminal law scholarship for some time, it seems quite reasonable to continue the exploration of his works.[249] First of all, however, it may be helpful to situate Kant within the larger republican tradition in political philosophy.

5.2 The republican tradition in political philosophy

5.2.1 Two strands of republicanism

As mentioned in 3.3, references to republican political philosophy are common in contemporary criminal law scholarship. Several authors apply this

244 See e.g., Höffe (2010).

245 In fact, it is only more recently that the importance of Kant's political philosophy has become generally recognised, see e.g., Brocker (2006) pp. 9–10, stressing the importance here of John Rawls' seminal work *A Theory of Justice* from 1971.

246 Ripstein (2009) p. ix. Pursuing this influence would take us into many different discussions and authors, among them Rawls' political liberalism, see e.g., Rawls (1999) and Rawls (2005), as well as Jürgen Habermas' discourse theory of law, see Habermas (1992), and the Frankfurt school more generally. In Jacobsen (2009a), I connected to such discussions, but consider now that for exploring the normative foundations of Nordic criminal law, we are better helped by going 'back to Kant', in particular in view of recent contributions to and discussions about Kant's political philosophy. Therefore, I will not pursue engagement with Kant in broad philosophical projects such as those of Rawls and Habermas. Doing so also amounts to a research enterprise on its own.

247 I will return to examples of that in the final chapters of the book, see e.g., 6.7 on German criminal law science.

248 See e.g., Eng (2008).

249 See 1.2 above for more explanation.

label as part of their justification of criminal law. By doing so, they connect to one branch of the political philosophical debate on the nature and justifiability of political power, one that differs from, for instance, Bentham's utilitarianism.[250] There are, however, different republican theories in political philosophy, and even different *strands* of republican theories. Briefly outlining the republic tradition in political philosophy helps us to see how Kant is situated within it and, in turn, contributes to clarifying the nature of the republican criminal law theory in Chapters 7–9.

Republican political theory has basically developed along two historical traditions: the Italian-Atlantic and the German.[251] A third approach is also sometimes mentioned, for instance by Yankah, who speaks of an 'Athenian' civic virtue-oriented take related to Aristotle.[252] For now, I will focus on the two main traditions due to their shared engagement with freedom. I will return to their relation to the civic bonds focus of this third approach at a later stage of the analysis.[253]

The *Italian-Atlantic* tradition of republicanism is based in Roman law and its conception of citizenship: free men, as opposed to slaves. Later, it was further developed by medieval thinkers such as Niccolò Machiavelli (1649–1527) as well as Enlightenment thinkers such as Montesquieu in France. The latter, alongside Beccaria, who should also be mentioned in this regard, have often been referred to in criminal law scholarship as well.[254] Disappearing somewhat from the scene, it was then revived by scholars (sometimes termed as 'neo-republican') in the Anglo-American world, notably Quentin Skinner in

250 For a critical appraisal of Bentham's utilitarianism, see Eng (2008) pp. 315–345.

251 Various terms have been used for these two strands of republicanism. Maliks (2009) p. 439, for instance, speaks of the 'Anglo-Saxion version' for what is here described as the 'Italian-Atlantic version', the latter term is useful considering Machiavelli's influence. For the German strand, Pettit (2013) p. 169 uses the term 'Franco-German', due to Rousseau's influence. However, another French author, Montesquieu, is also considered as an important writer in the Italian-Atlantic traditions.

252 See Yankah (2012) p. 267.

253 See 9.4 below.

254 Beccaria is more often considered a utilitarian and an early law-and-economy advocate. However, while not thoroughly elaborated in his key work, *Dei delitti e delle pene* (1764), this starts out from republican perspectives, see further Bois-Pedain/Eldar (2022).

the 1990s, and, more recently further explored by particularly Philip Pettit, building on Skinner's work.[255] The key, at least according to Pettit and other recent contributors to this line of thought, such as Frank Lovett, is *dominion* – freedom from being subjugated to the arbitrary will, i.e., domination by another.[256] To a significant extent, these recent Anglo-American contributions are written in opposition to Thomas Hobbes, notably by challenging his theory of liberty and the view that liberty is simply the absence of 'external impediments'.[257]

The Italian-Atlantic emphasis on dominion is often related to the difference between being a slave and a *free man*, which in turn reflects the Roman origin of this line of thought. As Skinner expresses it: 'The nerve of the republican theory is thus that freedom within civil associations is subverted by the mere presence of arbitrary power, the effect of which is to reduce the members of such associations from the status of free-men to that of slaves.'[258] The Italian-Atlantic line of thought has also been brought into the discussion of criminal law by, among others, Pettit in collaboration with John Braithwaite.[259] Notwithstanding, other scholars have questioned its capacity to contribute to our understanding of criminal law.[260]

The German tradition (a term that downplays its importance in, for instance, the northern parts of Europe) is primarily based in Kant, who describes his ideal state as a 'true republic'. Kant's importance in this regard can be illustrated by B. Sharon Byrd and Joachim Hruschka's claim that Kant

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255 See e.g., Skinner (1997a), Pettit (1997), Pettit (2002). The term 'neo-republican' is used e.g., by Dagger (2011) p. 65.

256 Lovett (2010).

257 See, in particular, Skinner (2008), who describes Hobbes as 'the most formidable enemy of the republican theory of liberty, and his attempts to discredit it constitute an epoch-making moment in the history of Anglophone political thought' (p. xiii). Skinner is, however, for his part sceptical to the use of the term 'republican' liberty and prefers to have called it 'neo-Roman' (p. viii).

258 Skinner (2008), p. ix. This reasoning, which places 'domination' and 'arbitrary power' at its core, reconnects us to the discussion of power in Chapters 3 and 4.

259 See Braithwaite/Pettit (2002). For examples of 'republican' references in criminal law, see 2.3.

260 Horder (2021), for instance, is sceptical to the potential in the republican conception of liberty as advocated by Pettit. See further below in 5.2.2.

'fathered the idea of a juridical state', that is, what in German and other European countries is known as the *Rechtsstaat*.[261] Kant is not the only contributor in this regard. Contributions such as those of Fichte and Hegel, who we will return to, are also important, at the same time as Kant's contributions can hardly be properly understood without considering the impact of Rousseau on his work.

How does this German tradition differ from the Italian-Atlantic strand of republicanism? To begin with, two distinguishing key features can be noted: first, whereas the dominion-idea is central to the Italian-Atlantic approach, the core notion of the German approach is *autonomy*. This notion connects the German approach strongly to Kant, often considered the inventor of (the concept of) morality as autonomy.[262] Second, and relatedly, the two strands of republicanism appear to differ somewhat in their style of approach. Whereas Kant's legal and political philosophy is closely connected to his broader transcendental idealism at the core of his entire philosophical project, the Italian-Atlantic tradition tends to leave such foundational issues behind and thereby seems more pragmatic in style and approach. And while Kant's political philosophy starts out as, so to speak, pre-political, the Italian-Atlantic tradition appears to start out from a specific political context, aiming to provide principles for improving it in line with the idea of freedom as nondomination.[263]

Distinguishing between these two historical pathways of republicanism is important also from the point of view of the philosophy of criminal law. One of the reasons for this is the fact that the adherence to republicanism in contemporary Anglo-American philosophy of criminal law often seems to relate to the recent contributions of the Italian-Atlantic tradition, by reference to Pettit in particular.[264] The German/Kantian approach is decisive for much of German criminal law and, as my discussions aim to show, Nordic criminal

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261 Byrd/Hruschka (2010) p. 1.

262 See the historical evolution in philosophy here in Schneewind (1998).

263 This point should not be exaggerated, one way or another. Kant, for instance, was clearly relating to contemporary political issues and discussions of his time, see e.g., Maliks (2014).

264 See e.g., Chiao (2018). See also Dagger (2011), who, however, also relates to, for instance, Rousseau. However, it should be noted that also Kant's practical philosophy has been influential in Anglo-American criminal law scholarship, something I will return to.

law and criminal law scholarship. So, the distinction between these two republican traditions provides an important piece of the theoretical backdrop for contemporary criminal law scholarship, and therefore for the analysis in this book. But it also has the added value of allowing us to draw insights from both of them, with the potential of an improved account of republicanism.

While there are historical differences, clearly, there is enough common ground to relate these two different branches of republicanism to each other. For instance, they share a commitment to freedom as the central political value and a strong interest in and engagement with its implications for criminal law.[265] In my view, Kant provides us with a better and more comprehensive understanding of freedom than does the Italian-Atlantic tradition.[266] However, this does not exclude the possibility for Montesquieu – whose engagement with criminal law is well reflected in his key work *De l´esprit des lois* (*The spirit of laws)* from 1748 – to offer us valuable insights in the implications of the notion of freedom.[267] Although the present book favours the German/Kantian tradition, I recognise the value and insights in the Italian-Atlantic tradition. This approach, one could say, reflects the history of Nordic criminal law as well.

As I will return to later in the book, we will draw on a similar approach to the contemporary philosophy of criminal law. While criminal law was a subject of interest to Kant as well, his remarks on criminal law leaves much to be desired, suggesting a need to go beyond Kant to carve out a proper republican account of criminal law. This is an enterprise which can benefit from the extensive philosophy of criminal law that has evolved afterward, and partly in relation to deficiencies seen in, Kant. In Chapters 7–9, I will therefore link

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265 The closeness/distance between the two strands of republicanism depends also on how each position is interpreted in this regard. For instance, Ripstein's independence-focused interpretation of Kant's political philosophy may be claimed to lie somewhat closer to the Italian-Analytic branch compared to other, more substantive, autonomy-focused interpretations of Kant. See, for instance, Ripstein (2009) p. 43, where Ripstein points out that Kant's view simply takes the fear of domination beyond the Italian-Atlantic fear of despots to relations among citizens. See in this regard also Arntzen (2020) p. 288.

266 See also e.g., Forst (2013), from the point of view of the concept of justice. While I will stick to the concept of freedom as my focus, this does not exclude justice as a relevant focus on the subject, see e.g., Vogt (2018).

267 For an outline of Montesquieu's views on criminal law, see Carrithers (1998).

my discussion to similar views within the contemporary republican criminal law, even if they connect to Kant to a various degree.

5.2.2 Republicanism and liberalism

Expanding on the initial remarks on republicanism in political philosophy, it is worth clarifying its relation to liberalism. One reason for this is that liberalism is by far a more common term than republicanism in the Nordic context.[268]

Liberalism and republicanism are clearly related. In the German/Kantian tradition, for instance, these terms are often related to each other as well as to the *Rechtsstaat* concept.[269] But it is also clear that both republicanism and liberalism come in many different shapes, and some versions of liberalism seem clearly to be more compatible with (some versions of) republicanism than others, and *vice versa*.[270] The use of such labels depends on how we more precisely understand 'republicanism' and 'liberalism', and on the concepts informing them, such as 'freedom', 'liberty', 'autonomy', 'the rule of law', and so forth. While closely connected to the idea of personal autonomy, which is central also to many liberal views, Kant's conception of external freedom and individual autonomy is not necessarily the same as the conception advocated by some liberals. Hence, Kant is not necessarily to be described as a 'liberal' thinker.[271] Also, in the Anglo-American discussion, there is a certain divide between 'liberal' and 'republican' points of view, for instance in the republicanism of Pettit.[272] Jeremy Horder, however, considers Pettit's republican view of freedom to be a supplement rather than a challenge to liberal theories of freedom, which Horder prefers:

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268 For one example from Nordic criminal law science, see Lernestedt (2003) p. 358. More examples can be found in some of my own previous works, see e.g., Jacobsen (2009a).

269 See e.g., Bielefeldt (1997).

270 See e.g., Fukuyama (2022) pp. 1 ff. on 'classical liberalism', including its relation to e.g., 'neoliberalism', and, in a somewhat different way, Flikschuh (2000) p. 14, differing between 'classical liberals' and 'critical liberals'.

271 See e.g., Arntzen (2020) p. 306. See also e.g., Kersting (2004) pp. 125–126 and Hirsch (2017) pp. 20–21.

272 See e.g., Pettit (2013) p. 175.

> …Pettit's republican theory of freedom should be regarded as in this respect supplementing, rather than challenging, sophisticated liberal theories of freedom focused on personal autonomy. What Pettit's theory adds is a theory of what it means to enjoy 'political' autonomy, alongside personal autonomy. In other words, to play one's full part in a republican state is to be able – on the same basis as others, and in appropriate circumstances in combination with them – to engage in valuable political activity, as oneself (part) author of that activity.[273]

As this discussion illustrates, there is no simple dichotomy between (forms of) republicanism and (forms of) liberalism. To carve out the more precise (understanding of the) relation between liberalism and republicanism that informs the analyses in this book, one option would be to coin a more complex phrase, such as the 'liberal republic of free and equal citizens' or 'a liberal communitarian species of republicanism'.[274]

However, it suffices to say for now that I consider 'republicanism' to be one distinct branch of liberalism. Republicanism is, to begin with, characterised by a concern for the individual and individual rights typical of liberalism in general. But where some liberalists focus on individual rights and have a certain scepticism towards the state and state power, republicans tend to have a more positive view of the state in itself and more emphasis on the need for establishing authorities and institutions for the protection of the equal liberty of all citizens (which will be a central issue in the following analysis).[275] As such, it is at least quite clear that republicanism sits badly with the *libertarian* preference for the 'nightwatchman state'. Furthermore, a key aspect of republicanism of the kind that, with Kant, will be advocated here, is the democratic element, leading some to describe it as a form of 'liberal democracy'.[276] This suggests that, at some level, the people itself must develop its political identity and decide more precisely how 'liberal' this is to be. As such, the republicanism

273 Horder (2022) p. 208.

274 Duff (2018a) p. 8 and p. 188, see also p. 195 on 'liberal'/'republican'.

275 This tension can be illustrated by the question posed by Hirsch (2017) p. 4 in this regard: '*Kein Staat ohne Freiheit oder keine Freiheit ohne Staat?*'

276 See e.g., Weinrib (2019), see e.g., p. 634.

to be advocated here is in one way undetermined with regard to its more specific liberal character, a point to which we will return.

5.3 Some starting points about Kant's political and legal philosophy

The corpus of Kant's writings on politics and law consists mainly of the following works, which will constitute the basis for my readings of Kant: The main work is the *Metaphysics of Morals* (in the following MM). The first edition was published in 1797, the second edition in 1798.[277] But some of Kant's shorter works are also essential for his political and legal philosophy, including *An Answer to the Question: What is Enlightenment?* (1784), *On the Common Saying: That may be Correct in Theory, but it is of no Use in Practice* (1793) and *Towards Perpetual Peace* (1795). In addition, Kant's drafts and lectures, his *Groundwork of the Metaphysics of Morals* (1795, in the following GMM), as well as the three critiques, all provide important premises and, to some extent, passages of direct relevance for his political philosophy. The importance of his general philosophical account is based in Kant's ambition to reach *a priori* insights into the nature and capacity of reason, combined with the strong systematic orientation this philosophy carries with it. But the influence also goes in the other direction. The use of legal metaphors in *The Critique of Pure Reason* (1781/1787, hereafter CPR), such as 'the court of reason', illustrates this.[278]

Despite this rich body of literature, interpretations of Kant's political and legal philosophical writings and views should be conducted with some caution, not only due to the depth of its content. In itself, the relevant text corpus poses challenges as well; reading Kant is not a straight-forward exercise. It is well-known that Kant was not a rigorous writer. Even CPR, the first critique, and the product of Kant's 'Silent Decade', which was revised in a second edition, and generally recognised as a key text in the corpus of Western philosophy, is

277 The second edition from 1798, the year after the work had first been published, contained only marginal changes, see the translators note to Kant (1797/1798). A third edition was published in 1803, but without Kant being involved.

278 On the legal metaphors, see e.g., Møller (2013).

hard to access.[279] Many of his texts on political philosophy are shorter works, sometimes more polemic in style, which also reflect developments in Kant's view on central topics. Important parts of the political philosophical corpus consist of lecture notes and materials, some of which are notes made by his students.

It has also been claimed that the core work in political and legal philosophy, MM, was written at such an old age that Kant may have been impeded by age and dementia by this time. This, which is sometimes referred to as 'the senility thesis', would of course make this key piece unreliable.[280] Born in 1724, Kant was 73 at the time of publishing the first edition of MM. The expected longevity was lower than it is today, and at this point, Kant's capacities were clearly reduced. The senility thesis is, however, contentious and not influential today.[281] Already as a young philosopher, Kant was 'concerned with questions of law and right'.[282] Manfred Kuehn provides a nuanced description of the background for MM and its coming into being, which adds to the difficulties with studying Kant's political philosophy:

> Finally, at the age of seventy-four, in the process of tying things up, he gave to the public this work, which was more comprehensive than the one planned, offering not only an account of all ethical duties but also views on the philosophy of law. Yet, compared to the *Groundwork* and the second *Critique*, the *Metaphysics of Morals* is disappointing. It exhibits none of the revolutionary vigor and novelty of the two earlier works. Indeed, it reads just like the compilation of old lecture notes that it is. Given Kant's difficulties and weakness, it is not surprising that much remains cryptic and that some of the text is corrupt. Kant simply did not have the energy to satisfactorily pull together all the different strands of his argument, let alone polish the work. Indeed, he even had difficulties with supervising

279 Kant was disappointed by the reception of the first edition and even felt the need to popularise the first edition of the work. This resulted in the famous *Prolegomena to any Future Metaphysics That Will Be Able to Present Itself as a Science* from 1783, published two years after the first edition of the CPR.

280 See e.g., Flikschuh (2000) p. 8.

281 See e.g., Flikschuh (2000) p. 8.

282 Höffe (2006) p. 1, see also pp. 4–5.

> the printing of the book. This, of course, does not mean that the work is without interest or even unimportant. The ideas Kant presented go back to his most productive years. It is important for understanding not only his moral philosophy, but also his political thinking. It is indeed a veritable tour de force. Yet, if the work 'make[s] demand upon its readers that seem excessive even by his standards', its creation made demands upon Kant that were even more excessive.[283]

It seems generally recognised today that while MM should be taken seriously, it is in many ways a troubled text. The *Rechtslehre* is at times 'extremely obscure', which may even be the product of errors in the printing process.[284] This calls for caution in reading and interpreting the work. Kuehn also captures this point well:

> Historically speaking, it is just true that it is the final form Kant gave to his moral philosophy. It is also true that the development of a *Metaphysics of Morals* was Kant's ultimate goal throughout most of his philosophical life. But it is far from clear that what Kant ultimately produced is representative of his best intentions and fits unproblematically with his critical moral philosophy as developed in the *Groundwork* and second *Critique*. I think we need to be careful especially when we evaluate its substantial moral doctrines, such as his views on servants… or 'on defiling oneself by lust'.[285]

Even Kant himself acknowledged that parts of MM relating to public right (which include his reasoning about criminal law) were not thoroughly worked out. He states at the opening of the book:

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283 Kuehn (2001) p. 396, quoting Mary Gregor's introduction to a translation of MM (the bracketed 's' is included in Kuehn's text). See in this regard also Hirsch (2017) pp. 24–25 on the development of Kant's views, pointing to the fact that 'sein Rechtsdenken einen langen Reifungsprozess durchlauften hat'.

284 The quotation is from Flikschuh (2000) p. 7, which also discusses Bernd Ludwig's thesis about misprints (p. 9). The difficulties related to accessing the *Rechtslehre* have also been pointed out by others, see e.g., Ripstein (2009) p. x, describing it as 'not an easy work to read'.

285 Kuehn (2010) p. 21 (references to MM at the end of the quote omitted).

> Toward the end of the book I have worked less thoroughly over certain sections than might be expected in comparison with the earlier ones, partly because it seems to me that they can be easily inferred from the earlier ones and partly, too, because the later sections (dealing with public right) are currently subject to so much discussion, and still so important, that they can well justify postponing a decisive judgement for some time.[286]

How much one should make of this is hard to say. But such a disclaimer is untypical for Kant, so clearly there must be some reason for him to write this. Thus, this also contributes to make Kant's political philosophical text corpus challenging.

Another reason to approach Kant's political philosophy with caution is more of a substantial kind. Kant's intellectual orientation is first and foremost towards the fundamental principles of law. At the same time, his writings on politics and law often go beyond the strict analytic/metaphysical *a priori* perspective applied (not least) in the CPR, and into more empirical or anthropological premises.[287] Such premises have often been claimed to have an uneasy place in Kant's philosophical project in general. This is, perhaps, most visible in his political philosophy, for instance in his reflections about the state of nature, which include claims such as: 'Nowhere does human nature appear less lovable than in the relations of entire peoples to one another.'[288] This larger role of *a posteriori* premises is natural given the topic of the political philosophical writings, compared to, for instance, the topics of the first and second critique as well as GMM. As will become clear, Kant still does not clarify how, precisely, his philosophy of law relates to his anthropology. Kant is obviously sensitive towards the development of society, its level of enlightenment and the long-term progress required for society to live up to the ideal of the true republic. But his view of the republic does not tell us clearly how law can encompass social development and how we, as reasoning citizens, can account for and relate to this development. We will return to this challenging aspect of Kant's political and legal philosophy towards the end of the chapter.

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286 Kant (1797/1798) 6: 209.

287 This issue has also been raised with regard to his moral philosophy, see e.g., Frierson (2003) and Louden (2011).

288 Kant (1793) 8: 312.

Furthermore, and related to the two preceding points, Kant's writings cannot be understood without reference to the contemporary political and legal context within which he was writing. For instance, the French revolution and the Prussian state, including the reign of Frederic II, are both important for understanding Kant's writings and the debates in which he engaged.[289] Several of the smaller works mentioned above, for instance, explicitly address the views of other scholars at the time. This context and the purposes of the texts are also likely to have influenced the claims Kant makes and the way in which these claims are presented. Whether and how they can be 'translated' to a quite different societal context is something to which we will return.

Challenges in discerning Kant's viewpoints such as these spill over into the extensive Kant-literature: As Kant's political philosophy contains many contested premises and features, its character is contingent on interpretation, of which there are many. In the following, I aim to identify some key debates in contemporary Kant scholarship. However, since the aim is a simpler one: to point out some key themes or aspects of importance to our discussion of criminal law, I will not delve deeper into them here. I do not provide a systematic and complete literature review, which would be a challenging research enterprise in itself. As a guideline, I have made use of literature that is either broadly acknowledged as central contributions to the Kant discussion and/or contributes to clarifying specific discussions and viewpoints in it.

Furthermore, in this chapter in particular, a well-known problem of translating Kant and discussing his works in English will be pressing: The lack of a proper English term for the German term *Recht*. As often pointed out, this term expresses something more than 'positive law', but it is not aptly translated to 'justice' either.[290] The problem is reflected in the constant challenge to properly translate the German notion of the *Rechtsstaat* into English, where terms such as the 'rule of law' or 'constitutional state' is frequently used, but still unsatisfactory alternatives. Mary Gregor's solution, translating *Recht* as *Right* (capital R), is often applied, for instance by Katrin Flikschuh.[291] That would also give us reason to use the term *Right state* for the *Rechtsstaat*, which,

289 Cf. Maliks (2014).

290 See e.g., Flikschuh (2000) p. 11.

291 See e.g., Flikschuh (2000) p. 11.

when one thinks about it, has some advantages. However, this solution has also been criticised.[292] The term 'Right' does not seem to do the work in English that the term 'Recht' does in German. Hence, it would perhaps be more apt to translate it to 'public justice'. Which solution is best, depends somewhat on the context. My terminology will therefore vary a bit in the following, but I will at all points try to be clear about how I use these expressions.

Already here, however, we should stress the distinction between right, i.e. *the law of reason* – the *Vernunftsrecht*, and *positive law*, that is, the law as enacted by the sovereign.[293] As we will return to, Kant's political philosophy is in a sense an ongoing dialogue between the ideal or 'true' republic, and actual legal orders seen as imperfect interpretations and expressions of this ideal, in an historical process moving towards it.[294] To the extent that Kant is to be characterised as a 'natural law scholar', it is worth stressing that he is not advocating a natural law theory from an axiological premise, deducting a detailed set of 'given' rules and claiming these to be positive law merely by virtue of their character as natural law. Kant would not accept claims such as these.[295] Rather, also in his political philosophy, one might say, Kant sets out a third course between pure rationalism and pure empiricism.

292 See e.g., Kuehn (2010) p. 10 (footnote).

293 Or, in Höffe's terms, 'law that has positive validity' and 'law that has moral validity', see Höffe (2006) p. 3.

294 See e.g., Arntzen (2020) p. 198 on the ambiguity in Kant on the civil state or condition.

295 See here notably Höffe (2006) pp. 8–9.

5.4 Morality, ethics, and law

Kant's practical philosophy concerning morality in a broad sense, The *Metaphysics of Morals*, contains Kant's moral philosophy specifically and Kant's political philosophy more generally. In this regard, Kant relies on a distinction between ethics and (juridical) law.[296] This is in turn closely related to the distinction between the 'inner' dimension of our agency and the 'outer' or external perspective on human agency, such as the actual consequences of our acts in society, for instance in regard to the well-being of other people.[297] The *ethical* point of view is centred on the (required) origin of agency in the free (rational) will, i.e., that we, as rational agents, act *autonomously*. For Kant, moral autonomy is a matter of acting out of respect for the moral law. This is opposed to heteronomous agency, where 'empirical' desires, feelings, inclinations, and needs direct how we act. Such acts do not qualify as ethical actions regardless of whether the outcome of the act is desirable in itself. Hence, the outer consequences of our agency are not in themselves decisive for whether we act ethically. That does not mean that Kant does not recognise the 'real effects' of how we act towards each other and its effects: the very categorical imperative, at the heart of morality, requires us to treat each other as ends, not merely as means for achieving our own purposes, a norm which clearly

296 On the inner/outer distinction, see further Pfordten (2007). Here, we encounter a terminologically important issue: Kant uses the term 'moral' in a broader meaning, as the laws of freedom, distinguished from the (causal) laws of nature. 'Moral' in this meaning covers the autonomous morality of the individual, i.e., ethics, as well as public justice, see Kant (1797/1798) 6: 214 and, e.g., Newhouse (2019) pp. 532–533. See also Hirsch (2017) p. 34 for an overview of Kant's terminology in this regard. However, in contemporary Continental and Nordic scholarship, this is usually spoken of as a distinction between morality and law, which is reflected in the criminal law discourse as well, see e.g., Jung/Müller-Dietz/Neumann (1991). See also Sarch (2019) p. 64, who considers criminal law a 'stripped down analog' of moral blameworthiness. I will follow Kant's terminology here, and the reader should be mindful of Kant's use of the terms.

297 See also e.g., Kersting (2004) p. 14. How Kant more precisely draws the line here is however not obvious. Kant did not clarify this, see further Pfordten (2015), where Kant is ascribed a broad understanding of the 'external'.

has implications for the way we act towards each other.[298] However, fulfilling our ethical duties requires us to do so out of regard for the moral law itself. A consequence of this is that one cannot force others to act ethically.

This also separates ethics from law, the latter a system of positive law, or '*positive right*', as Kant names it.[299] This system of norms is not a matter of the individual's rational self-legislation, but the commands of the legislator, i.e., what the state has 'laid down as right'.[300] Whether we act from reverence for the nature of the rules in themselves or from fear of being reproached for our disobedience, is not decisive, making possible the use of sanctions. This possibility is due to their limited scope compared to ethics: law basically regulates only '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'.[301]

Kant explains the distinction between ethical law and juridical law in the following way:

> In contrast to laws of nature, these laws of freedom are called *moral* laws. As directed merely to external actions and their conformity to law they are called *juridical* laws; but if they also require that they (the laws) themselves be the determining grounds of actions, they are *ethical* laws, and then one says that conformity with juridical laws is the *legality* of an action and conformity with ethical laws is its *morality*. The freedom to which the former laws refer can only be freedom in the *external* use of choice, but the freedom to which the latter refer is freedom in both the external and the internal use of choice, insofar as it is determined by laws of reason.[302]

298 More generally, see e.g., Ameriks (2006) p. 129: 'Even in his most metaphysical mood, Kant surely wants to affirm real effects and real value in what happens empirically – for example, that people are truly helped by us and not merely that there is an impression of being helped – even if he also believes that this requires some kind of non-empirical source.'

299 Kant (1797/1798) 6: 229.

300 Kant (1797/1798) 6: 229.

301 Kant (1797/1798) 6: 230.

302 Kant (1797/1798) 6: 214.

Of these two parts, Kant's ethics have clearly received the most attention, and is easily thought of as the core of his practical philosophy, making the political and legal philosophy an 'annex'. But their relation is more complex, as suggested by, for instance, the fact that Kant discusses the nature of ethical duties in the second part of the MM, *after* having presented his political and legal philosophy. This invites us to reflect a bit more on the more specific relation between Kant's ethical and legal philosophy, a subject which will also be of relevance to us later when we will discuss the nature of criminal law.[303]

One view here is the so-called independence thesis, which claims that Kant's political philosophy can be considered as disconnected from his ethics. The fact that Kant, as already mentioned, clearly distinguishes between ethics and law, allowing the latter to be upheld by means of force, may support this thesis. On the other hand, it is also clear that to Kant, legal norms may overlap ethical norms in significant ways. Also, ultimately, they have a common source in our capacity for practical reason and belong to Kant's concept of morals. Even if positive law is the outcome of external legislation, the question whether this legislation is also in accordance with public justice, is something that we can only clarify by turning to reason's Universal Principle of Right. For such reasons, Kant clearly saw ethics and law to be closely connected, as *parts of a broader system of morals*, with a common source in practical reason, allowing for them to be treated together under that heading and in one work: MM. These points, in my view, speak against the independence thesis.[304] The intimate connection between morality and law can also be claimed by Kant who considered us to have (as we will address in the following section) an obligation to enter into a 'juridical state' to preserve right. As Paul Guyer, who rejects the independence thesis, points out,

> … these are genuine obligations, so not matters of prudence. They can therefore be nothing other than moral obligations, which is possible only

303 See e.g., Brandt (2016) pp. 7–12.

304 For a broader discussion and rejection of the 'Unabhängigkeitsthese', Hirsch (2017) pp. 67–168. See also e.g., Kersting (2004) pp. 37–44.

> if both the content and the necessity of the coercive enforcement of right derive from morality.[305]

The extensive debates on the relation between ethics and law in Kant's political philosophy must be left aside here. In line with what has been suggested, we start out from a conception of juridical law as separate from, but also intimately related to ethics, both part of the broader concept of morals.

5.5 The state of nature: The innate right to external freedom

The starting point for Kant's political philosophy is the state of nature ('state' must not be confused with the 'state' as political arrangement, which we will refer to as a *civil state*). This state of nature is not thought of as a historical fact, but as an idea of reason.[306] This 'state' is not necessarily a war-like condition where everyone is in conflict with one another. Quite the contrary, the state of nature can, and is likely to, involve societal formations.[307] Furthermore, the state of nature, while lacking the institutional features of the civil state, is

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305 Guyer (2016) p. 55. See also Höffe (2006) p. 1, who relates this to the late appearance of Kant's political philosophy: 'Because he saw the foundation of his political philosophy in morals, he exposed the former to the public only after he gained reasonable clarification on the grounding of the latter.'

306 See e.g., Fang (2021) p. 36: 'For Kant, a state of nature is not the starting point of politics; it is just an idea of reason in the metaphysics of right.' See also e.g., Hirsch (2017) p. 211. More generally, on the relevance of the 'state of nature' for republican political theory, see also e.g., Dagger (2011) pp. 52–53, drawing, however, on Rousseau, not Kant. I will elaborate more on the notion of 'state of nature' later on, see 7.3 below. Kant, it may be added, also makes use of the state of nature in CPR, using 'this reference to show how the critique of pure reason provides lawful stability and a peaceful way of resolving conflicts among philosophers', cf. Møller (2020) p. 22. The relevance of the state of nature in that regard must, however, be left aside here.

307 In his conjectural beginning of human history (see 4.7 above), Kant starts out not from a couple in a garden (with reference, of course, to the Genesis) which has 'already taken a mighty step in the skill of making use of its powers', such as walking, speaking and even '*discourse*, i.e. speak according to connected words and concepts, hence *think* … skills which he had to acquire for himself', cf. Kant (1786) 8: 110.

not a state devoid of rights. Most fundamentally, there is one – but also only one – innate individual basic right, the right to freedom:

> *Freedom* (independence from being constrained by another's choice), insofar as it can coexist with the freedom of every other in accordance with a universal law, is the only original right belonging to every man by virtue of his humanity.[308]

Freedom in this sense is called *external freedom*, and in the following, Kant's claim will be simplified as 'the right to external freedom'.

The expression 'external freedom' is closely related to, but still different from, freedom of will and choice in Kant's practical philosophy.[309] For this reason, it is helpful to unpack these different meanings and the relation between them.[310] At the heart of it, there is the freedom of *will* in Kant's meaning of the term, which is central also to the ethical dimension of Kant's doctrine of morals.[311] Freedom of will relates, as we have already touched upon, to our ability to reason: that is to think and engage in discourse. But here we should stress that freedom of will is not whatever we should come to desire but rather (our capacity) to subject ourselves to the laws of reason:

> Autonomy, as Kant understands it, is not mere self-assertion or independence, but rather thinking or acting on principles that defer to no ungrounded 'authority', hence demands principles all can follow. For Kant, autonomy is living by the principles of reason; and reason is nothing but the principle that informs the practices of autonomy in thinking and doing.[312]

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308 Kant (1797/1798) 6: 237. For further discussion on Kant's concept of external freedom, see e.g., Uleman (2004).

309 See also e.g., Ripstein (2004) p. 8.

310 On the different conceptions of freedom in Kant, see e.g., Allison (2006), see also Ludwig (2015) p. 29, pointing out four concepts of freedom in Kant's practical philosophy.

311 See 5.4 above.

312 See e.g., O'Neill (2015) p. 31.

The more we live by the principles of reason, the more we achieve 'positive freedom'.[313] Freedom of will is, in turn, closely connected to *choice* in agency. Kant clearly distinguishes between *Wille* and *Willkür*, the latter usually translated to 'choice'. As mentioned in 4.7 above, it is debated how these notions are to be understood and related to the problem of free will.[314] Not least from a criminal law point of view, it is also relevant to connect to Kant's theory of action.[315] This involves a number of core concepts related to Kant's practical philosophy – reason, desire, choice, and will.[316]

External freedom, for its part, can be summed up as an absence of interference from others as I exercise my freedom of choice.[317] As Ripstein explains it: 'External freedom is a matter of being able to set and pursue one's own ends.'[318] From one point of view, then, external freedom may be said to be a prerequisite for achieving positive freedom or becoming autonomous: External freedom facilitates us to become ethical subjects. External freedom, in any regard, is arguably social, in the sense that its realisation implies a duty for others not to interfere with you and your doings, provided that you do not infringe upon others equal right to freedom. What this concretely implies in terms of what you can and cannot do, is not clear. It depends partly on, in Jennifer K. Uleman's terms, what 'my historical and social milieu' allows for, but also requires 'recourse to guidelines, to practical rules, that go beyond the abstract imperative to protect external freedom'.[319]

313 Kant's distinction between positive and negative freedom has been subject to different interpretations, something which cannot be pursued here. However, it is worth stressing that it should not be confused with Isaiah Berlin's view of negative and positive view of liberty, see e.g., Ludwig (2015) p. 27.

314 See e.g., McCarthy (2009), who considers Kant's use of the term *Willkür* to be more in line with desire than with a free choice, so that 'our free actions can be causally determined by psychological choices', see McCarty (2009) p. 61. For now, at least, this subject can be set aside for our part.

315 Cf. McCarthy (2009).

316 See e.g., Engstrom (2010).

317 See Kant (1797/1798) 6: 230.

318 Ripstein (2004) p. 19.

319 Uleman (2004), quotations from p. 595 and p. 594 respectively.

As mentioned, the distinction between ethics and law connects to the fact that (autonomous) moral action cannot be enforced by others.[320] Hence, while political rights may (seemingly) overlap with ethical imperatives with reference to which kinds of actions it permits, the key issue with political rights is that you may secure these by means of *force*: A right to external freedom is here connected to an authorisation to use force against those who do not respect your innate right to external freedom. As Kant describes it:

> Resistance that counteracts the hindering of an effect promotes this effect and is consistent with it. Now whatever is wrong is a hinderance to freedom in accordance with universal laws. But coercion is a hinderance or resistance to freedom. Therefore, if a certain use of freedom is itself a hinderance to freedom in accordance with universal laws (i.e., wrong), coercion that is opposed to this (as a *hinderance of a hinderance 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 an authorization to coerce someone who infringes upon it.[321]

Here, we connect to a core feature of Kant's political philosophy, one which is also stressed in the literature; the relation between freedom and force.[322] For Kant, the right to external freedom and the right to use force to secure it is more or less two sides of the same coin, or at least inherently dependent on each other. As for instance Byrd points out:

> In Kant's *Introduction to the Theory of Justice,* he establishes an almost mathematical relationship of equality between external freedom and external coercion. It is founded on the idea of the double negation of a cause and effect relationship and through the necessary equality of effect and

320 See 5.4 above.

321 Kant (1797/1798) 6: 231.

322 This is even the title of Ripstein (2009). See also, for instance, Wood (2010) pp. 119–120 and Kersting (2004) pp. 17–18. See also O'Neill (2015) pp. 182–183, who connects this feature of Kant's philosophy to the relation between the principle of Right, by O'Neill described as 'The Universal Principle of Justice', and the social contract aspect of Kant's political philosophy.

> counter-effect in the free movement of physical bodies. His insistence on exact equality has two consequences in addition to equating coercion and freedom. First, if the coercion exerted against a forceful limitation on freedom is too great, then it is no longer compatible but rather itself a limitation on freedom, or wrong. Second, if the coercion is too small, then although not wrong it is ineffective in nullifying the limitation on freedom and the net result is still a reduction of freedom.[323]

Already here, then, we have launched two of the themes most central to the analysis in this book: a basic right to external freedom and the rightful use of coercion to ensure the realisation of this right. But coercion in this regard should not be equated with sanctions of the kind that we find within the legal order, which, of course, are not in place at this stage of the argument. Coercion should rather be understood more broadly as limitations to one's choices. As Ripstein points out:

> This way of setting up the idea of coercion differs from the sanction theory in two key respects; what coercion is, and what can make it legitimate. First, it supposes that although threats are coercive, actions that do not involve threats can also be coercive. An act is coercive if it subjects one person to the choice of another. … Second, Kant's conception of coercion judges the legitimacy of any particular coercive act not in terms of its effects but against the background idea of a system of equal freedom.[324]

The centrality of the basic right to external freedom in Kant's political philosophy relates, however, not merely to its connection to the right to use force to secure it. The right to external freedom is important also because it is the basis for the individual to gain other *acquired* rights in the state of nature, a feature which gives rise to an 'extreme demand of unity' within Kant's system of political rights.[325] Most notable here is Kant's view of the right to property, where the requirement that the acquisition of an object is to be respected by

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323 Byrd (1989) p. 172. See also e.g., Wood (2010) pp. 119–120, and Hirsch (2017) p. 63.
324 Ripstein (2009) p. 54.
325 Ripstein (2009) p. 31.

others immediately presupposes the willingness to respect others in their acquisitions. More acquired rights may emerge with the level of social formation, but as already mentioned, basic acquired rights can also be thought of in the state of nature.

Kant's state of nature, then, is in many ways a normatively 'dense' state of affairs. But it is also riddled with uncertainty in that regard. The rights in the state of nature, innate or acquired, are always uncertain in the sense that each individual can make claims about rights, but there is no public authority to decide on such claims and conflicts relating to them.[326] The problem here goes deeper than simply the lack of effective *enforcement* of rights, even if that is also a problem.[327] While reason may provide us with standards for reasoning, which give rise to a universal principle of right, these do not provide us with clear-cut solutions. As Ripstein aptly points out: 'The problem is not just that the principles are too general – though that, too, is a problem – but rather, that the application of interpersonal norms to facts always generates problems of determinacy'.[328] Hence, with regard to applying rational norms, there are no guarantees that we will arrive at the same conclusions. To this we may add that we as individuals are fairly fallible when it comes to exercising our reasoning powers. And, even if we were to come to the same normative conclusion, our freedom of choice and action is also a freedom to act against the commands of reason, i.e., we can fail or refuse to be guided by reason in our choice of action. Such features leave rights in the state of nature unsecure and vulnerable, that is, a state of injustice. Rights would, eventually, depend on what power you have to secure them for yourself – your 'incidental features of … strength', and even when you are powerful enough to defend your rights by means of force, you may end up doing wrong anyway.[329] Kant clearly acknowledges this power dimension of his moral philosophy as well: 'For, the moral law in fact transfers us, in idea, into a nature in which pure reason, *if it were accompanied with suitable physical power*, would produce the highest good, and it determines our will to confer on the sensible world the form of

326 On the following, see also e.g., Ripstein (2009) pp. 145–181 on the 'three defects in the state of nature'.

327 See Uleman (2004) p. 598.

328 Ripstein (2004) p. 27.

329 The quotation is from Ripstein (2004) p. 27.

a whole of rational beings.'[330] But, as we have seen in Chapter 4, social power is a challenging and fluid issue.

As long as one stays in the state of nature, the uncertainty of rights, at different levels, is unavoidable. Given the fact that the space on this planet is not unlimited, in the absence of a civil society with political authority, we are bound to find ourselves in a social state plagued by competing claims about what is right. None of us has any reason not to follow one's own claims in this regard as one is entitled to protect one's right, even by means of force. Such features of the state of nature are likely to bring us into conflict or at least a need for intersubjective conflict resolution.[331] Herein lies the kernel of a duty to enter into a civil constitution. We are rationally obliged to leave the state of nature and enter into a civil state of public justice with our fellow human beings.[332] Or, in Kant's own words:

> From private right in the state of nature there proceeds the postulate of public right: when you cannot avoid living side by side with all others, you ought to leave the state of nature and proceed with them into a rightful condition, that is a condition of distributive justice. – The ground of this postulate can be explicated analytically from the concept of *right* in external relations, in contrast to *violence* (*violentia*).[333]

In fact, men do each other wrong 'in the highest degree' by remaining in the state of nature:

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330 Kant (1788) 5: 43 (italics added).

331 Hirsch (2017) pp. 210–247 stresses the latter problem as the core problem in the state of nature, see e.g., p. 227: 'Das Problem des Naturzustands ist also, dass dieser sittlich unterbestimmt ist, weil rechtliche Fremdverpflichtung nicht als autonome Gesetzgebung gedacht werden kann'.

332 Hence, 'civil state' in this sense seems to lie close 'civil order', i.e., 'a polity's … normative ordering of its civic life – of its existence as a polity', see Duff (2018a) p. 7.

333 Kant (1797/1798) 6: 307. See also for instance Kersting (2004) pp. 51–52. Notable here is the conceptual contrast between 'the concept of right' and 'violence', which connects us to the discussion of power in Chapter 4. This could be understood precisely as suggested there, that forms of power turn into forms of violence by their lack of justification according to the principle of right. See, however, Varden (2022) about translation challenges in this regard.

> No one is bound to refrain from encroaching on what another possesses if the other gives him no equal assurance that he will observe the same restraint toward him. No one, therefore, need wait until he has learned by bitter experience of the other's contrary disposition; for what should bind him to wait till he has suffered a loss before he becomes prudent, when he can quite well perceive within himself the inclination of human beings generally to lord it over others as their master (not to respect the superiority of the rights of others when they feel superior to them in strength or cunning)? And it is not necessary to wait for actual hostility; one is authorized to use coercion against someone who already by his nature, threatens him with coercion. … Given the intention to be and to remain in this state of externally lawless freedom, men do *one another* no wrong at all when they feud among themselves; for what holds for one holds also in turn for the other, as if by mutual consent … But in general they do wrong in the highest degree by willing to be and to remain in a condition that is not rightful, that is, in which no one is assured of what is his against violence.[334]

This, as Kant elaborates in a note to the text, connects to Kant's concepts of formal and material wrong: While there is no wrong in the interaction between them, they both do harm to the higher duty to enter into a civil society, where each are assured of his rights.[335] The nature of Kant's distinction

334 Kant (1797/1798) 6: 307–308.

335 The footnote concerns the expression 'wrong in the highest degree' and reads like this: 'This distinction between what is merely formally wrong and what is also materially wrong has many applications in the doctrine of right. An enemy who, instead of honorably carrying out his surrender agreement with the garrison of a besieged fortress, mistreats them as they march out or otherwise breaks the agreement, cannot complain of being wronged if his opponent plays the same trick on him when he can. But in general they do wrong in the highest degree, because they take away any validity from the concept of right itself and hand everything over to savage violence, as if by law, and so subvert the right of human beings as such.'

between formal and material wrong is debated, and we will pick up on it in the next chapter.[336]

Kant insists that it is not experience, but the very (intelligible) *possibility* that violations like this may occur that should lead us to into civil society.

> It is not experience from which we learn of the maxim of violence in human beings and of their malevolent tendency to attack one another before external legislation endowed with power appears, thus it is not some deed [*Factum*] that makes coercion through public law necessary. On the contrary, however well disposed and law-abiding human beings might be, it still lies a priori in the rational idea of such a condition (one that is not rightful) that before a public lawful condition is established individual human beings, peoples and states can never be secure against violence from another, 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.[337]

Kant's political philosophy is, then, not founded on premises relating to, for instance, the propensity to evil and conflict in human beings. But even if Kant's reasoning does not rely on premises of that kind, they may give additional reason for the constitution of the state and our obligation to enter into such a project with others.

Only entering into the civil state brings about a 'rightful condition', that is, 'that relation of human beings among one another that contains the conditions under which alone everyone is able to *enjoy* his rights'.[338] The italics are Kant's own and should be noted; the rightful condition – the civil society – does not create the most basic rights, but rather allows us to have these (pre-political) rights (respected) in community with others. Kant adds that

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336 As suggested also by the footnote in Kant (1797/1798) 6: 307, Kant makes this distinction in different settings, see e.g., Kant (1785) 4: 428 on formal and material practical principles: 'Practical principles are *formal* if they abstract from all subjective ends, whereas they are *material* if they have put these, and consequently certain incentives, at their basis.' See on Kant's distinction, e.g., Newhouse (2016), and Hirsch (2017) pp. 305–310.

337 Kant (1797/1798) 6: 312.

338 Kant (1797/1798) 6: 307.

'the formal condition under which this is possible in accordance with the idea of a will giving laws for everyone is called public justice'.[339] Hence, there is a need for establishing (and submitting oneself to) an authority that lays down what is right. As already noted, this is the basis for our duty to depart from the state of nature and enter into a civil constitution wherein the authorities are to lay down the justice and thereby bring certainty to it.

Hence, the fundamental role of political authority is one of translating the laws of reason into rules for the political community, that is; exchanging the law of reason into positive legal rules. But its role goes further than this; it also includes a responsibility to solve societal conflicts by means of these rules, using force if needed, and thereby to assign to each what is his or hers. In doing so, the political power holder becomes the political authority in society. In order to fulfil its role in this regard, however, a number of preconditions must be in place. Most basically, it requires each of us, as individuals, to transfer the right to use 'force with which you could coerce others' to the state.[340] This, thereby, also sows the seed of a power monopoly on behalf of the state, a subject we will return to in Chapter 7.

As we have now seen, at the heart of Kant's political philosophy is the external right to freedom and the need for the state to secure it in order for the individuals to see this right made actual or real. Legal institutions are an essential part of the public constitution of these rights in themselves, or, as Ripstein puts it, 'the consistent exercise of the right to freedom by a plurality of persons cannot be conceived apart from a public legal order'.[341]

The civil state, we should also stress, is for Kant not only a matter of individuals having their rights respected. It is important for the development of the human species in a broader sense: 'If one hinders the citizen who is seeking his welfare in any way as he pleases, as long as it can subsist along with the freedom of others, then one restrains the vitality of all enterprise and with it, the powers of the whole.'[342] As Kant also states in the eighth proposition of his idea for a universal history: 'One can regard the history of the human species in the large as the completion of a hidden plan of nature to bring

339 Kant (1797/1798) 6: 306.
340 See also e.g., Byrd (1989) p. 187.
341 Ripstein (2009) p. 9.
342 Kant (1784b) 8: 28.

about an inwardly and, *to this end*, also an externally perfect state constitution, as the only condition in which it can fully develop all its predispositions in humanity.'[343]

5.6 The structure of the civil state

The (duty to) move from the state of nature into a civil state is, as shown, key to Kant's political philosophy. Kant's political philosophy is not a theory about the evolution of modern states. How the civil state actually came about is largely undescribed. Kant's political philosophy does not, for instance, rely on a naïve conception of a (one-time) social contract as a historical fact.[344] Rather, for Kant, this contract is an idea.[345] The civil state as it exists, Kant seems to think, most likely came about by means of force – as we have already seen, the use of force by others for this purpose, is also legitimate:

> Unconditional submission of the people's will (which in itself is not united and is therefore without law) to a *sovereign* will (uniting all by means of *one* law) is a *deed* that can begin only by seizing supreme power and so first establishing public right.[346]

For 'supreme power', Kant uses the German term '*Machtvollkommenheit*'. In securing this, as Marie Newell states it, the state '*constitutes* the omnilateral

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343 Kant (1784b) 8: 27.

344 On Kant related to other social contract theories, see Kersting (2004) pp. 97–123 and O'Neill (2015) pp. 170–185, the latter stressing the differences between Kant and other social contract theories, viewing this as a strength for Kant's approach.

345 See e.g., Kant (1793) 8: 297 on 'the original contract' as '*only an idea of reason*'. See also 5.5 above on 'the state of nature'. Some would describe the original contract as an 'ideal' for Kant (as well), see e.g., Hirsch (2017) p. 18: 'ein *Vernunftideal* … welches ausschließlich als regulatives Prinzip politischer Herrschaft fungiert'. But, it may be added, Kant is 'occasionally evasive when he speaks of consent, sometimes interpreting it as hypothetical and other times as actual', see Maliks (2009) p. 436.

346 Kant (1797/1798) 6: 372, see also e.g., Hirsch (2017) p. 21 and also Maliks (2009) p. 432, pointing out that 'Kant, despite his contractarianism, shares with Aristotle on a very general level the conception of the state as an organic community existing by nature'.

will: its juridical effect is to unite the wills of individuals present within the controlled territory', which connects us to the democratic aspect of Kant's theory to be discussed in the next section.[347] Power is, however, not merely an additional but rather an intrinsic feature of the state as a legal order.

While the emergence of the state is a factual, historical process, Kant is clear about how it must be organised in order to be(come) a legitimate political power, i.e., a republic. This is one of four forms of government, alongside barbarism, anarchy, and despotism, but at the same time, the only legitimate form of it.[348] Kant offers a form for the republican state. Key to this is the separation of powers. The state consists of the following three 'dignities': The sovereign authority in the person of the legislator, the executive authority in the person of the ruler, and the judicial authority in the person of the judge.[349] However, for Kant, this is not simply an external limitation or structure imposed on political power, but rather an inherent feature of the civil constitution. Kant considers them as similar to the premises of practical syllogism:

> '… the major premise, which contains the *law* of that will; the minor premise, which contains the *command* to behave in accordance with the law; and the conclusion, which contains the *verdict* (sentence), what is laid down as right in the case at hand.'[350]

The legislator, then, has a key role: The executive is '*irresistible*' and cannot be opposed as it uses its power in society. The verdict of the highest judge is for its part '*irreversible*' and beyond appeal. But the basis for both of them is the decisions of the legislator, and in that regard, the legislator is '*irreproachable*' when it comes to deciding what is externally mine or yours.[351] Together, these provide the state with its autonomy, that is; 'by which it forms and preserves

347 Newhouse (2019) p. 537.

348 See further e.g., Varden (2022).

349 Kant (1797/1798) 6: 313–314. See further e.g., Kersting (2004) pp. 134–136.

350 Kant (1797/1798) 6:313–314.

351 Kant (1797/1798) 6: 317. On the legislative authority and its central role, see e.g., Newhouse (2019).

itself in accordance with laws of freedom'.[352] Here, then, it is useful to recall the basic, innate right to freedom that each and every one of us have. In the construction of the republic, this right works constantly as a background premise that we must keep in mind in order to unpack the different parts of this construction.

Apart from the supreme role of the legislator, the three powers complement each other, but they are also mutually subordinate to each other.[353] Their unity is decisive for the state's well-being. The state's 'well-being', Kant emphasises, is not primarily a matter of the citizen's well-being (even if one could consider it a step in that direction). Rather it is about the degree to which the state lives up to its basic principle:

> By the well-being of a state is understood […] that condition in which its constitution conforms most fully to principles of right; it is that condition which reason, *by a categorical imperative*, makes it obligatory for us to strive after.[354]

This is important and connects us to the issue of reform, which we will return to later on: The well-being of the state is not a matter of either-or, but of more-or-less, and we are constantly involved in a process of improving its well-being, and, to the extent that it is in a state of well-being, we should work to preserve that condition. At this point, there seems to be a certain element of dynamics and development in Kant's philosophy, which we will also take up in a later section.[355] This reformist aspect is another key theme in Kant's political philosophy.

Furthermore, as regards the characteristics of the civil state, Kant rejects paternalism as the 'most despotic of all' forms of government, as this treats

352 Kant (1797/1798) 6: 318. See Newhouse (2019) pp. 534–536 for an explanation of how Kant considers the three authorities and their inner relation.

353 Byrd/Hruschka (2010) p. 2.

354 Kant (1797/1798) 6: 318.

355 See further 5.9, and on criminal law reform, see Chapter 9 below.

the citizens like 'children'.[356] Also, his reasoning about a number of legal institutes, such as constitutional law, the tasks of the police, and taxation issues, contributes to shaping his republican political philosophy.[357] Kant, however, also stresses the importance of the general will in his system, which connects to the central place of the legislator in it.

5.7 The general will, democracy, and development

Legislation has its origin in the general will of the citizens, united for this purpose. The key role of the citizens in this regard, according to Kant, relates closely to three fundamental attributes: *lawful freedom*, 'the attribute of obeying no other law than that to which he has given his consent', *civil equality*, 'that of not recognizing among the *people* any superior with the moral capacity to bind him as a matter of right in a way that he could not in turn bind the other', and *civil independence*, 'of owing his existence and preservation to his own rights and powers as a member of the commonwealth, not to the choice of another among the people'.[358] Hence, the general will – the basis for legislation – is the will of all (free) citizens.

How, more precisely, one should understand the democratic aspect of Kant's political philosophy, is debated.[359] While some consider him as anti-democratic, others see him as a radical democrat. A more moderate version is perhaps most accurate. Kant rejects the idea of direct democracy. However,

356 Kant (1797/1798) 6: 317. See here also Kaufman (2007) p. 38, pointing out that Kant 'rejects a political principle which assigns to the sovereign the right and responsibility to determine *for* its subjects what the basis of their happiness should be and to secure that basis *for* the subjects, possibly independent of or contrary to their autonomous willing'.

357 Below, we will reconnect to these starting points regarding the form of the state, see in particular 9.4 where the compatibility of Kant's political philosophy with the welfare state will be discussed.

358 Kant (1797/1798) 6: 314.

359 On Kant and democracy, see e.g., Maliks (2009), considering Kant's republicanism as 'inherently democratic'.

he does stress the importance of representation of the people in the state.[360] He also stresses public use of reason and the general will as the basis for legislation through a representative system, even if it would be limited to those that are (full) citizens, i.e., those 'fit to vote'.[361] As already touched upon, the general will is not a one-time phenomenon in terms of a signed social contract. Rather, as we shall see, the citizens are constantly and actively involved in (re)crafting the legal and political order. In order for the citizens to fulfil their role of exercising public reason, Kant places much emphasis on the freedom of the pen.

As such, Kant envisions an intimate relation between the idea of freedom, the civil constitution with authority to guarantee it, and the people, through their use of public reason. Each civil constitution's 'realization is subjectively contingent', as Kant himself phrases it.[362] Whether, and how, the principle of right should be put into practice, requires consideration and, possibly, legislation provided by the legislative assembly in the relevant situation. Kant's law of reason is not (only) a fixed scheme for organising the state, but a framework for us to self-legislate within the realm of reason. While Kant in his remarks on aspects of public right – e.g., the right to impose taxes – sketches some more specific features of the civil state, the viewpoints mainly concern the system of rights in itself.

As already mentioned: While often considered a form of natural law, Kant's law of reason, thereby, is not deducing from axioms more detailed rules of conduct for citizens (an ambition which natural law theory is often associated with, and which, indeed, is sometimes seen in classical natural law).[363] Rather, a core feature is the need for interpretation and application of the basic demands of reason in terms of exchanging it into a concrete legal order, which, ultimately, is a task for the people. Therefore, we have once again connected to the relevance of application and judgement, a topic which we will return to in several sections below.

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360 Byrd/Hruschka (2010) p. 2.

361 Kant (1797/1798) 6: 314.

362 Kant (1797/1798) 6: 264. This provides an important premise for our later discussion of criminalisation, see 8.2 below.

363 See 5.3 above.

5.8 The authority of law and the importance of its reform

From one point of view, Kant's political philosophy provides a baseline justification for the rule of law. Central to this was, as elaborated in 5.5, the need to remedy deficiencies in the state of nature. Following this, while the actual origin of the civil state is not a central topic for Kant, from the moment the civil state is constituted, it warrants respect. Actually, to Kant, to even question the (factual) origin of the civil state in order to attack it may put it in jeopardy, and this would go against the strong duty to respect and obey one's sovereign.[364] Individuals placing their own judgement over the sovereigns' judgement risk leading society back into the state of nature and must as such be prohibited. One way to understand Kant on this point, then, is this: The duty to enter into the civil state should be seen as containing, or at least being accompanied by a duty *not to return to* a state of nature. This implies that one can be prevented from abandoning the civil state.[365] In other words, the state can use force to keep you in the civil state, as the state itself has charted it through its legislation: Laws are the authoritative expressions of the ruler's interpretation of the law of reason. For the sake of avoiding (a return to) the state of nature, where there is no such authority, we must subject ourselves to the law.

Based on such premises, some have described Kant as a legal positivist. Others, on their part, have contested this labelling.[366] This depends a lot on what one considers as 'legal positivism' in the first place, a discussion that would fall outside of the scope of the discussions of this book.[367] However, Kant's strong emphasis on respect for positive law is still clear, which also implies that the perspective of lawyers are the rules that have been enacted. Kant puts this point very clearly in his *Conflict of the Faculties*:

> The jurist, as an authority of the text, does not look to his reason for the laws that secure the *Mine* and *Thine*, but to the code of laws that has been

364 See Kant (1797/1798) 6: 318.

365 Byrd (1989) p. 181.

366 See e.g., Waldron (1996), compared to Alexy (2019).

367 See however Klein (2021) who discusses Kant as a legal positivist from a number of alternative criteria for 'legal positivism'.

> publicly promulgated and sanctioned by the highest authority (if, as he should, he acts as a civil servant). To require him to prove the truth of these laws and their conformity with right, or to defend them against reason's objections, would be unfair. For these decrees first determine what is right, and the jurist must straightaway dismiss as nonsense the further question of whether the decrees themselves are right. To refuse to obey an external and supreme will on the grounds that it allegedly does not conform with reason would be absurd; for the dignity of government consists precisely in this: that it does not leave its subjects free to judge what is right or wrong according to their own notions, but [determines right and wrong] for them by precepts of the legislative power.[368]

The duty to respect the sovereign, and hence to remain in the civil state, furthermore, implies a rejection of revolutions.[369] While the sovereign may violate the law of reason (according to one's opinion), it is nevertheless wrong to challenge the sovereign's authority and to seek to overthrow it. How, more precisely, Kant is to be read here, is, however, contested. While many claim that he rejects any kind of such a right to resistance, some advocate more nuanced interpretations, for instance that his rejection of revolutions does not apply in a despotic state.[370] In any regard, Kant's political philosophy appears as to have a certain conservative flavour: Like Hobbes, Kant seems to go a long way towards accepting and protecting in-place political arrangements. When combined with the fact that Kant's *Rechtslehre* is part of a larger philosophical project relating to foundations, principles, and boundaries of reason, one might easily get the impression that the Kantian concept of law is metaphysical, static, and conservative.

However, there is more to Kant's political philosophy, which makes such an 'conservative' interpretation far too one-sided. Kantian law also carries a (regulative) ideal for us to (re)form civil society and its political institutions,

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368 Kant (1798) 7: 24–7: 25 (the text in brackets is included in the English translation).

369 For Kant's views on this subject, see e.g., Kant (1793) 8: 297–8:306. See further e.g., Arntzen (1996), connecting the subject to Kant's view of duties to oneself, which is also the central perspective in the analysis in Hirsch (2017).

370 See e.g., Byrd/Hruschka (2010), p. 184.

that is, to bring our legal orders closer to the 'true republic'.[371] Kant clearly sees a need for development and progress, not only in human beings but also when it comes to the level of perfection of actual legal orders. His push for Enlightenment is closely related to both of these aspects. Kant considered the legal order he lived in as lacking in many respects, and it is likely that he recognised that it would stay that way for a long time: The often-quoted remark that 'out of such crooked wood as the human being is made, nothing entirely straight can be fabricated' suggests that both human beings and our legal and political arrangements are riddled with imperfection compared to the state of the 'true republic'.[372] As Kant also puts it: 'Only the approximation to this idea is laid upon us by nature.'[373] Even approximating this idea requires an effort to work our way out of our own immaturity.[374]

In this regard, Kant sees *reform*, not revolution, as the proper way to go about improving the civil state. If displeased with the current state of affairs, one must put one's faith – and patience – in future reforms. Here, 'the true republic' – the greatest possible realisation of each individual's innate right to as much external freedom as is compatible with the equal right of others – should guide the sovereign, which can, hence, also reform itself. But it can also guide its citizens when working for reform, for instance, through public discussion and the 'freedom of the pen'. This reformist aspect of Kant has recently been emphasised in relation to, for instance, constitutional law.[375] As Jacob Weinrib stresses in that regard, this is an important response to a familiar, but misguided critique of Kant's constitutional law theory, and political philosophy more generally, being considered as 'abstract' and 'unpractical':

> Constitutional theorists often claim that the more abstract a theory is, the more it is incapable of articulating the nature of legal and political

371 Kant (1797/1798) 6: 315. See also e.g., Hirsch (2017) p. 311 distinguishing between 'dem Staat in der Idee und dem Staat in der Erscheinung', adding that '[w]ird der Staat in der Erscheinung diesem Ideal gerecht, so ist die Regierungsart *republikanisch*' (p. 318)

372 Kant (1784b) 8: 23.

373 Kant (1784b) 8: 23.

374 See in particular Kant (1784a).

375 See Weinrib (2019) contrasting Kant's public justice paradigm to preservationist and procedural paradigms in constitutional law discourse.

> reform. Because Kant's theory of the state emerges from abstract principles rather than historical or sociological facts, he has become the leading target of this criticism. … Because constitutional reform must respond to the concrete circumstances of an existing society, reform cannot be illuminated by abstract principles. These objections overlook the way in which particularity enters Kant's theory.[376]

We will return to the implications of this reformist aspect for our view of criminal law in Chapter 9, in particular. Already here, however, it is worth noting that reform of and progress in the state develop in tandem with the individual's moral improvement and education. This is well captured by the following quote from Kant:

> We are *cultivated* in a high degree by art and science. We are *civilized*, perhaps to the point of being overburdened, by all sorts of social decorum and propriety. But very much is still lacking before we can be held to be already *moralized*. For the idea of morality still belongs to culture; but the use of this idea which comes down only to a resemblance of morals in love of honor and in external propriety constitutes only being civilized. As long, however, as states apply all their power to their vain and violent aims of expansion and thus ceaselessly constrain the slow endeavor of the inner formation of their citizens' mode of thought, also withdrawing with this aim all support from it, nothing of this kind is to be expected, because it would require a long inner labor of every commonwealth for the education of its citizens.[377]

In this way, the qualities and progress of the state become, ultimately, a matter of the level of enlightenment in society and its authorities, which is an ongoing process of improvement. Kant states in his famous essay *What is Enlightenment?*: 'If it is asked whether we at present live in an *enlightened* age, the answer is: No, but we do live in an age of *Enlightenment*.'[378] This leads us to

376 Weibrib (2019) p. 640.
377 Kant (1784b) 8: 26.
378 Kant (1784a) 8: 40.

further consider how we as a civil society, our political and legal institutions included, can progress further towards an enlightened age.

5.9 How Kant foresees progress towards public justice

From what is said so far, Kant's political philosophy emerges as somewhat dual-tracked, combining metaphysical principles and anthropological premises in intricate ways. As we have just seen, the latter becomes more noticeable when we unpack the reformist dimension of Kant's political philosophy. This invites the question of whether Kant has a particular view of how a concrete, actual civil state can go about fulfilling the normative standards to which it is subject. The best way to answer this question, may be to take a broader look at the nature of Kant's moral philosophy.

To begin with, while claiming to provide a new and improved moral philosophy, Kant did not perceive it in terms of radically changing our moral practices and intuitions. Rather, for Kant, reason is always at work in us, 'guiding' us even when we are not necessarily consciously applying its laws. Hence, we have reason to think that what is actual, at some level at least, is rational, to briefly borrow terms from Hegel.[379] Thereby, we have reason to consider the current legal order as a starting point and foundation as we strive to approximate the true republic, rather than overthrowing it and being brought back into the state of nature. At the same time, philosophy can be very helpful in improving our understanding of reason's commands and our moral practices, of which we may not have a sufficiently clear view. In the *Anthropology Mrongovius*, for instance, Kant talks about 'obscure concepts' and how these dominate our thinking, which also provides us with a neat image of how the principles of morality, for ethics as well as for law, may be better 'illuminated':

379 See Hegel's preface to his Philosophy of Right, Hegel (1821), where it is claimed that '[t]he rational is real, and the real is rational'.

> One could represent the human soul as a map whose illuminated parts [and] the clear, certain, particularly bright parts signify the distinct representations, while the unilluminated parts signify the obscure representations; the latter occupy the greatest space and also underlie the clear representations and constitute the majority of our cognition. In analytic philosophy, I simply make obscure representations in the soul clear.[380]

Moral philosophy is precisely meant to 'illuminate', i.e., to systematically structure and explain how and why we reason and judge in moral matters, helping us to reason better and, thereby, improve ourselves as moral agents.[381] Political philosophy, then, can help us to improve our understanding of concepts such as right and justice and their application, in particular through systematic reconstruction of our actual political practices. Hence, philosophical work on the principles of public justice can be an important driver of reform.

Still, this is not to say that philosophers should do the job for us. Philosopher kings, as suggested by Plato, are not something Kant would support. In the words of Sofie Møller:

> Most importantly, Kant always considers theoretical and practical progress as mutually dependent. Theoretical progress encompasses the progress in the sciences and in philosophy, which expands our knowledge of the world and systematizes our existing cognition. Practical progress comprises the complexities of legal, political and moral progress, which Kant describes as an interdependent development, in which the development of one aspect promotes progress in the others. Kant's fundamental idea is that

380 Kant (1784–1785a) 25: 1221 (the text in brackets is included in the English translation). The title is due to the name of the student, Krzysztof Celestyn Mrongovius, whose notes from Kant's lectures on anthropology this work is based upon.

381 This view is reflected in different parts of Kant's philosophy, also in his logics. See, for instance, Hanna (2006), who defends 'the broadly Kantian thesis that logic is the result of the constructive operations of an innate protological cognitive capacity that is necessarily shared by all rational human animals, and governed by categorically normative principles' (p. ix). But that does not mean that Kant considers humans to always perfectly utilise their protological cognitive capacity.

> the promotion of education and the development of a just civil society will promote the moral development of citizens.[382]

A part of this process, then, is that the people must reform itself, civil society, and its rulers, making the latter facilitate further progress towards the true republic.[383] This kind of approach only makes sense if we presuppose, as Kant does, that we are (already) rational beings capable of applying reason in our thought and agency. Our freedom allows us to act as we chose, but it is our duty to recognise these standards of reason, to make them 'ours', and apply them as principles for our choices *in practice*. Conforming to the principles of public justice is for us as society and the public will to conform to through the political and legal institutions, and the obligation for each individual to contribute. Both ethics and public justice require processes of development and maturing, which each and every one of us must subject ourselves to in order to improve ourselves and the political community in which we live. These are interconnected, but the latter political development may be thought of as particularly challenging. At the individual level, we may imagine a 'wise' individual, who, after a life of philosophical contemplation and practice, to a large degree lives according to the demands of ethics, even in a rotten society. Achieving a state of public justice requires, as we will return to in Chapter 9, long-term, even generational, development in terms of political processes, public discourse, welfare and education, and more, a process challenged by, for instance, individuals' desire and struggle for power. Kant, in this way, may be said to 'democratise' Plato's philosopher king.[384]

Luckily, one may say, to Kant it is not only our rational constitution that commands us to move in this direction.[385] Nature's providence also has an

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382 Møller (2021) p. 130.

383 See here also Varden (2020) p. 313: 'Also, as we continue reforming our system, we will want to develop rather than eliminate public officials' abilities to reason as our representatives, namely by analyzing legal political issues in terms of each citizen's basic rights (innate, private, and public right) and then making space for appropriate concerns of human culture. To do this, we must also strive towards a legal-political culture in which such reasoning is expected and encouraged in public discourse.'

384 See Höffe (2006) pp. 144–149.

385 Here, we connect to the subject of Kant's view of history and historical progress, see e.g., Kersting (2004) pp. 163–168. See further also Chapter 9.

important role to play, and our fate as a species that represents (what we must conceive of as) the culmination of nature has a role to play – the central topic of Kant's 1784 essay on an idea for a universal history.[386] Here, he suggests that it is hardly accidental that humankind has evolved towards state formations. Civil society is 'the end of nature itself, even if it is not our end'.[387] Kant seems to suggest that there is a certain natural drive within human beings to enter into a political order, closely related to our 'propensity to enter into society, which, however, is combined with a thoroughgoing resistance that constantly threatens to break up this society' – our 'unsociable sociability'.[388] We strive for freedom and individuality but also for being in communities with others, and this inclination is key to the development of human culture.[389]

In humankind's progress (as a species) from its self-incurred immaturity and wickedness to enlightenment and humanity, the fate of individuals can play different roles.[390] In Kant's view, our vices, too, play an important role in our development towards rational *humanity*, as his conjecture of the beginning of human history shows:

> Whether the human being has gained or lost through this alteration [into a condition of freedom] can no longer be the question, if one looks to the vocation of his species, which consists in nothing but a *progressing* toward perfection, however faulty the first attempts to penetrate toward this goal – the earliest in a long series of members following one another – might turn out to be. – Nevertheless, this course, which for the species is a *progress* from worse toward better, is not the same for the individual. Before reason awoke, there was neither command nor prohibition and hence no transgression; but when reason began its business and, weak as it is, got into a scuffle with animality in its whole strength, then there had to arise ills and, what is worse, with more cultivated reason, vices, which

386 Kant (1784b).

387 Kant (1790) 5: 432.

388 Kant (1784b) 8:20. This notion is discussed, e.g., in Wood (1991), who clearly shows how this notion relates to premises laid out in many of Kant's works relating to anthropology, history, religion, and morality.

389 Kant (1784b), 8:20–21.

390 On 'self-incurred immaturity' and Enlightenment, see in particular Kant (1784a).

> were entirely alien to the condition of ignorance and hence of innocence. The first step out of this condition, therefore was on the moral side a *fall*; on the physical side, a multitude of ills of life hitherto unknown were the consequence of this fall, hence punishment. The history of *nature* thus begins from good, for that is the *work of God*; the history of *freedom* from evil, for it is the *work of the human being*.[391]

From this, there seems to be only a short step towards expecting that even crimes and our responses to them should play an important role in our strive towards humankind's progress as well, which connects us to Kant's views about crime and criminal law, the topic of the next chapter.

What we have seen so far, is that reforming the law of the state is a complex process for which Kant has no straightforward 'recipe'. It is a process which we do not easily control, but which we are still responsible for bringing forward, whatever point of progress – or backlash – we find ourselves in, by using our capacity to reason. If there is one point where the static, metaphysical and the dynamic, anthropological side of Kant's political philosophy come together, this seems to be it.

5.10 Some important, but not fully resolved issues (?)

We are about to close this general overview of Kant's political philosophy. However, there remain some, notably two, issues that will be important to the further analysis, but where Kant's views are not evident. One is what we may call the application issue, which has several sides to it. The other is the power issue, which includes the question of what is more precisely implied in the notion that the individual can be forced to enter into, stay in, and even be forced to return to, the civil state.

The first issue to be addressed is this: given that one acknowledges the basic principles of Kant's republicanism and considers them philosophically valid, how can their application be understood in a given social-historical

391 Kant (1786) 8: 115

context, regardless of whether it is an individual applying ethical norms, or a legislator applying the principles of public justice? Kant clearly seems to presuppose this kind of application. If not, his political philosophy would have (only) a quite static and, to be fair, in parts, a rather anachronistic character. However, as we have already seen from its reform dimension, this is not an apt description of Kant's political philosophy. However, the application issue proves to be difficult, leading us into other issues pertaining to the nature and importance of its maxims and judgements and questions of to what extent these should be seen as socially situated. This is partly due to Kant not having addressed this issue directly. To be sure, he dedicates the third critique, *The Critique of Judgment* (CJ) from 1790, to the nature of judgements. But this is mainly a matter of taste, beauty, and judgement in arts. It has, at first glance at least, less to say about his practical philosophy.

Some has considered this application issue to be a weak point in Kant's political philosophy. For instance, Heiner Bielefeldt, building on Seyla Benhabibs' works, makes the following claim:

> At times Kant confuses the strictness of the unconditional moral law with the inflexible formulation of a concrete maxim which itself thus seems elevated to a timeless dogmatic truth … What Kant fails to consider is the fact that maxims are not only subjective principles but *historic* principles. They come about and develop within the life of the morally judging individual, depending not only on her personal experience but on the ever-changing social context in which moral action and reflection take place. In other words, moral maxims are inevitably conditioned by time and space and by experience and psychic development of the individual, as well as by the social and cultural environment at large. Hence, a moral maxim cannot represent the moral law once and for all. The *unconditional* 'ought' of the categorical imperative only *conditionally* takes shape through maxims which themselves must therefore remain open to criticism and further development. Succinctly put, the unconditional moral law underlies the entire *process* of generating maxims by employing all faculties of judgment to the service of the self-legislative moral will.[392]

392 Bielefeldt (1997) pp. 535–536.

This, in turn, applies also to the political philosophy. As Bielefeldt points out:

> Kant, however, does not sufficiently consider the particular societal circumstances from which laws are derived and to which they are to be applied. Thus, what I critically remarked earlier with regard to Kant's *moral* philosophy holds also for his philosophy of *right*: he largely fails to take into account the role of judgment and experience for the development of concrete norms. Instead of conceiving the coming about of moral or legal norms in terms of an open historic process, Kant holds norms to be directly deducible from the supreme principles of morality and right, respectively. As a result, his philosophy of right – like his ethics – at times takes on a certain dogmatic shape. An example of this dogmatic tendency is his categorical rejection of any possibility of a right to resistance, a rejection which he thinks can be deduced immediately from the principle of right.[393]

Judging from these viewpoints, Kant's political philosophy needs to be complemented on this point. We are left with the task of clarifying how this affects Kant's political philosophy and, if possible, determining how it can be complemented. According to Bielefeld, the application of Kant's basic political philosophical principles must be adapted to a given context in order to be applied. This would also allow more anthropological and societal aspects in our discussions of law. As we will return to, such perspectives may also be helpful in the philosophy of criminal law.

But we should not dismiss Kant too easily on these issues.[394] Other commentators have seen more potential in Kant here. Ripstein stresses that 'Kant's account of the need for a political state turns in part on the importance of judgement'.[395] Similarly, O'Neill emphasises that:

> Discussions of judgement, including practical judgement, are ubiquitous in Kant's writings. He never assumes agents can move from principles of

393 Bielefeldt (1997) pp. 543–544.

394 Kant is at least certainly aware of the subject with regard to his moral philosophy more generally, see e.g., Kant (1785) 4:412 and Kant (1793) 8: 275. See also Kaufman (2007) pp. 85 for an overview of important contributions to this discussion.

395 See for instance, Ripstein (2004) p. 29 (footnote) on Arendt's claims in this regard.

> duty, or from other principles of action, to selecting a highly specific act in particular circumstances without any process of judgement. He is as firm as any devotee of Aristotelian *phronesis* in maintaining that principles of action are not algorithms, and do not entail their own application.[396]

Relatedly, Bo Fang emphasises the distinction between, on the one hand, Kant's metaphysics of right, and on the other, his *political* philosophy, the '*ausübende Rechtslehre*', argues, in response to the question '[h]ow can the principles of right be realized in experience?':

> Kant claims that to establish a perfect constitution, at least three conditions are required, namely 'correct concepts of the nature of a possible constitution, great experience practiced through many courses of life and beyond this a good will that is prepared to accept it' …. These three conditions correspond to principles, judgement, and decision. The first condition can be provided by the metaphysics of right, whereas the latter two are obviously not contained in the metaphysics of right; instead, they relate to two basic elements of political practice: the political judgement to integrate the principles of right with empirical conditions and the political will to promote the realization of these principles. The construction of Kant's political philosophy should revolve around these two elements.[397]

The question of how far we should go in considering a distinction between the metaphysics of right and the political and democratic aspect of Kant's philosophy can be left open here. In any case, it is clear that we must somehow accommodate a space for politics, reform, and development in Kant's reasoning on law. As later chapters will show, criminal law may provide us with a useful case for doing so.

Secondly, a pressing issue in Kant's political philosophy is the issue of power or force. The centrality of this issue for Kant's political philosophy is unquestionable. The leap from the state of nature to the civil state to a large extent concerns the constitution of an authority with the power required

396 O'Neill (2015) p. 50.

397 Fang (2021) p. 36, quoting Kant (1784a) 8:23 (reference omitted here).

to guarantee rights for the individual. But what does it take for the state to guarantee the rights of the individual? In other words: what kind of power is presupposed as a capacity in order for the state to be able to fulfil this role? This leads us to question whether we can rely on Kant's conceptualisation of power. Kant does not say much explicitly about this, even if some starting points can be found. In the CJ, for instance, Kant states that:

> *Power* is a capacity that is superior to great obstacles. The same thing is called *dominion* if it is also superior to the resistance of something that itself possesses power.[398]

This passage is intriguing as it connects Kant strongly to a central concept of republican thought in general: that of *dominion*, and can also be used to rephrase central aspects of the concept of power as developed in Chapter 4.[399] But Kant does not delve much deeper into the concept of 'power' than this, even though the notion is clearly central to his political philosophy.[400] We might infer from this that power is the kind of empirical, or phenomenal, issue that Kant does not occupy himself much with in his political philosophy.

That might, however, turn out to be an unwarranted conclusion. If we look closer and try to reconstruct Kant's view here, the three branches of the state clearly have important roles in this regard. The legislator must lay down the rights of the individual, and the court must assign to each what is his, i.e., solve social conflicts on (claims about) rights. The executive, for its part, must be able to rule in society on the basis of the rules of the legislator and the decisions of the court. More generally, it is clearly implied that the state must be the ultimate authority, capable of hindering the hindrance of right. The state cannot guarantee rights if it is subordinate to some or groups of its citizens. This must imply a duty to *use* power when needed, to protect and

398 Kant (1790) 5: 260.

399 See 5.2.1 above regarding republicanism. Regarding the concept of power, see 4.4 in particular.

400 See e.g., Kant (1790) 5: 432: 'The formal condition under which alone nature can attain this its final aim is that constitution in the relations of human beings with one another in which the abuse of reciprocally conflicting freedom is opposed by *lawful power* in a whole, which is called *civil society* …' ('lawful power' italicised here).

restore interventions in rights, as well as a duty to *supress* social formations that challenge the state's control in society. This may itself imply a more basic duty for the state to always maintain the *capacity* for control of society. At the same time, the basic right to freedom as the starting point for all individual rights and the need for a political order to protect them, remains. So, there is a strong normative implication on behalf of the state to use these duties of power, control, and suppression to keep us in the civil state, but only insofar as it promotes the external freedom of the citizens and no more than needed for that purpose, as well as to strive to reduce the levels of power applied to increase freedom in society.

With regard to the latter duties, it seems, criminal law may come play a key role, in particular as we elaborate on what it actually would mean to *return to* the state of nature. This we will revisit in Chapter 7, where I will begin by recapturing some key themes from this chapter.[401] For now, at least, this outline of Kant's political philosophy has come to an end. In the next chapter, I will turn to Kant's view of criminal law.

401 See further 7.2 below.