

“ROUSSEAU SET ME ARIGHT” – THE LEGACY OF ROUSSEAU IN KANT’S LEGAL AND POLITICAL PHILOSOPHY AND THE IDEALIZATION OF THE VOLONTÉ GÉNÉRALE¹

Dieter HÜNING²

The subject of my article will be the legal and political philosophy of Immanuel Kant and, in particular, its relationship to Rousseau. Next to Hobbes, Rousseau is, systematically, the most important author engaged by Kant. Naturally, I will not be able to cover Kantian legal philosophy in its entirety here. Rather, I will confine myself to Kant’s doctrine of constitutional law.

To Kant, Rousseau was one of those authors to whom he owed the most in regard to his intellectual biography, and Kant said of Rousseau that he “set me aright”³. This lecture will concern itself with the reception of Rousseau’s principles of constitutional law in Kant’s *Doctrine of Right*. Kant integrates the principles of constitutional law developed in Rousseau’s *Social Contract* into his *Doctrine of Right*, most importantly the indispensability of individual liberty, of equality, of the sovereignty of the people, and the division of powers. I am not going to discuss this extensive adoption of Rousseau’s positions in detail, but will confine myself to a very specific aspect which, however, is of crucial importance to Kant’s *Doctrine of Right*, namely the normative function of the concept of a universal law-giving will.

The thesis I wish to propose here is the following: It is true that Rousseau, too, grants an a priori normative function to the conception of a *volonté générale* in regard to the evaluation of a state’s factual legislation. Yet Rousseau does not sufficiently reflect the relation of this ideal normative function to the factual political circumstances because he does not only lack the philosophical vocabulary for this purpose, but also because he lacks a philosophical theory by means of which he could systematically differentiate between a priori and a posteriori elements.

Due to his consistent idealization, Kant modifies and radicalizes Rousseau’s republicanism:

¹ I am grateful to Sascha Settegast (Trier) for translating this article from German.

² After studying at the Freie Universität in Berlin and the Philipps Universität in Marburg, he received an undergraduate degree in philosophy from the Philipps Universität in Marburg. In 1996 he gets his PhD with the thesis „Freiheit und Herrschaft in der Rechtsphilosophie des Thomas Hobbes“ (Berlin 1998). In 2009 he became Doctor in Philosophy in the University of Siegen with the essay „Philosophie der Strafe. Aspekte der Grundlegung des Strafrechts in der neuzeitlichen Naturrechtslehre“ (Göttingen/New York 2013). Since April 2010 he works as research assistant at the Kant-Forschungsstelle of the University of Trier. He is author of many essays focused on the doctrine of Natural Right in the Modernity, the Philosophy of the Enlightenment and the German Idealism.

³ Immanuel Kant: *Bemerkungen zu den Beobachtungen über das Gefühl des Schönen und Erhabenen*, AA XX, p. 44.

- While Rousseau claims that the sovereignty of the people is inalienable and representation thus impossible,
- Kant asserts that only representation can put into effect and realize the sovereignty of the people and the republic in the first place.
- The reason for this is: Due to its ideal character and due to its necessary opposition even to the empirical will of the unified individuals, the universal law-giving will is only capable of being represented, and therefore the sovereign power can only be exercised in the name of the people, but not by the people themselves.

I. ROUSSEAU'S POLITICAL-PHILOSOPHICAL AGENDA IN HIS BOOK ON THE *SOCIAL CONTRACT*

I want to begin with some preliminary remarks on Rousseau, or more precisely, on his treatise *Du contrat social* or *On the Social Contract*. The first question we need to answer is: What is Rousseau's treatise *On the Social Contract* supposed to accomplish? What is its philosophical goal? A first clue can be gathered from its subtitle, which is: "principles of political right". It is thus a treatise on the principles of constitutional law and serves to answer two main questions in this field:

1. What kind of coercion is of such a kind that it assumes the character of a legal necessity for everyone's will?
2. How does a state need to be constitutionally organized if it is to comply with this rational law qualification of legitimate rule? Rousseau is therefore not investigating the historical genesis of state authority, but the conditions of legal legitimacy pertaining to this authority.⁴

The fundamental problem of the establishment of the state then consists in how to unite subjective freedom with state authority. To Rousseau, this problem is akin to squaring the circle, and, like his predecessors, he believes that it can be solved within the framework of constitutional law contractualism (a contractualist justification of the state). In comparison to the Divine Right of kings, i.e. the theological foundation of the state, contractualism indeed represents a crucial improvement, because the authority of the state is here traced back to the will of those subject to it. But in contrast to his predecessors Grotius, Hobbes, and Pufendorf, accession to the state does not lead to the loss of individual liberty according to Rousseau. According to him, there can be neither an individual nor a collective surrendering of liberty.

Against the Hobbesian variant of the contractualist justification of the state, Rousseau raises the critical objection that Hobbes' conception of the contract did not meet its own aim of working out a concept of political unity different from mere rule by force, and that the unification of liberty and authority attempted by it has failed. In doing so, his criticism is not so much directed against the Hobbesian demand that the submission of the individual will to the will of the sovereign be absolute and unconditional, since the "aliénation totale"

⁴ Karlfriedrich Herb: Rousseaus Theorie legitimer Herrschaft. Voraussetzungen und Bedingungen, Würzburg 1989, S. 120.

also represents a constitutive condition of the “corps politique” according to Rousseau. Nor is the idea of the legislative omnipotence of the sovereign, which is implied in the Hobbesian concept of the state, as such an object of Rousseau’s criticism: There can be no sphere of social cohabitation and of external action that could not be subjected to legal regulation. Already for these reasons, Rousseau’s criticism of Hobbes’ despotism cannot be regarded as merely reprising traditional teachings on tyranny.

But that this submission should be effected by the delegation of one’s own will and the complete relinquishing of one’s own personhood in favor of the will of another which is itself lawless — that is the Hobbesian claim which, in the eyes of Rousseau, turns the contract founding the state into a “convention vaine et contradictoire”.⁵ Similarly, the guarantee of peace and order and the aspect of legal certainty placed at the forefront of Hobbes’ doctrine of constitutional law do not represent a sufficient criterion for legitimacy of the state, especially since the intended legal certainty cannot be realized at all by unqualified submission to the discretion of a single individual: “For, whatever the constitution of a government, if there be a single member of it who is not subject to the laws, all the rest are necessarily at his discretion.”⁶

In summary, Rousseau explains the failure of his predecessors as follows:

“There will always be a great difference between subduing a multitude and governing a society. When isolated men, however numerous they may be, are subjected one after another to a single person, this seems to me only a case of master and slaves, not of a nation and its leader; they form, if you will, an aggregation, but not an association, for they have neither public property nor a body politic. [...] Before examining the act by which a people elects a king, it would be well to examine the act by which a people becomes a people; for this act, being necessarily anterior to the other, is the real foundation of the society.”⁷

The Hobbesian interpretation of the contract founding the state as a pure contract of submission does not create an “association” because it only conceives of the unification of the will of all as a reduction of the plurality of wills to a single will. Such a reductionist determination of the will of the state does in truth not bring forth a concept of the unification of the will of all, but only an abstract negation of particular wills. When Rousseau emphasizes the necessity to differentiate “les Etats légitimes” from mere “atroupements forcés que rien n’autorise”⁸, all of these objections quite obviously aim at Hobbes’ basic constitutional conviction that the mere submission of individual wills to a superior authority (even if it results from an contractual act of will) already creates that quality of political unity which distinguishes the *corpus politicorum* from all other human forms of purposive community. Rousseau counters this with the insight that the will of the authorized sovereign, which is constituted by the contract founding the state, does not, for the individuals subjected to it, effect that unity of the particular and general

⁵ Rousseau: *Du Contrat social* I, 4 (CEuvres complètes. Bibliothèque de la Pléiade, Paris 1964, tome III, p. 356).

⁶ Jean-Jacques Rousseau: *Discourse on the Origin and Foundations of Inequality Among Mankind*, in: *The Social Contract* I, 5, in: *The Social Contract and the First and Second Discourses*, ed. by Susan Dunn, New Haven/London 2002, p. 73 (OC III, p. 112).

⁷ Jean-Jacques Rousseau: *The Social Contract* I, 5, in: *The Social Contract and the First and Second Discourses*, ed. by Susan Dunn, New Haven/London 2002, p. 162 (OC III, p. 359).

⁸ Rousseau: *Du contrat social* (première version), OC III, p. 304.

will which Hobbes had intended with his conception of “*una voluntas*”, and for the reason that “nothing and no-one determines the coercive sovereign himself to this identity”. Thus, Hobbesian constitutional law is unable to accomplish what it had aimed for.

A government that subjects its citizens to such legal limitations on the use of their liberties as are inconsistent with the concept of a potential universal legislation — is a government without legal legitimacy. If the will of the state as constituted by the contract is identified with the particular empirical will of the physical or legal person who in fact holds political power, then it remains incomprehensible how the submission of all can have the character of an obligation, since it only occurs as an undefined submission to the arbitrariness of another. If the citizens have to obey under such conditions, it is not for legal reasons, but merely due to the facticity of the force they are subject to. To the contrary, it is true “that we are bound to obey none but lawful authorities” (“qu’on n’est obligé d’obéir qu’aux puissances légitimes”⁹). Rousseau especially holds Hobbes’ conclusion to be false that if someone wants to be secured in the legal use of his liberty against the arbitrariness of another, he should want to be subjected to the arbitrariness of a third party. As long as the relationship between citizen and sovereign can be reduced to a relationship between master and servant or to the submission to an alien will — since there is no other standard for the state’s legislation than the discretion of the master, i.e. for the substantial organization of the constitutional submission of the citizen — one cannot see anything but “an aggregation, but not an association, for they have neither public property nor a body politic.”¹⁰ Hobbes’ emphasis that this effects the coercive securing of the “civil peace”¹¹ does not change this fact. A state founded upon the principles of rational law does not only have to hold a sovereign coercive power, but it also has to exercise its coercion on a liberal legal basis, “because the essence of the body politic consists in the union of obedience and liberty”¹². Only if it can achieve this accord does the state deserve to be qualified as legitimate rule according to rational law, and only then is it a Republic in the sense of Rousseau. The submission, which Hobbes placed in the foreground, is indeed a necessary, but not a sufficient condition for the constitution of the “*corps politique*”. In particular, this submission is only legitimate if it is conditioned by a law authored by the rational will of the subjected themselves.

The idea that the state of personhood is an indispensable and irreducible foundation for any doctrine of right, on the one hand, and the interlacing of the issue of legitimate state authority with the conditions for the morality of human action, on the other hand, lead Rousseau to the following well-known formula:

“To renounce one’s liberty is to renounce one’s essence as a human being, the rights and also the duties of humanity. For the person who renounces everything there is no possible compensation. Such a renunciation is incompatible with human nature, for to take away all freedom from one’s will is to take away all morality from one’s actions.”¹³

⁹ Rousseau: *The Social Contract* I, 3, p. 158 (OC III, p. 355).

¹⁰ Rousseau: *The Social Contract* I, 5 (OC III, p. 359).

¹¹ Rousseau: *The Social Contract* I, 4, p. 159 (OC III, pp. 355: “*tranquillité civile*”).

¹² Rousseau: *The Social Contract* I, 5, p. 219.

¹³ Rousseau: *The Social Contract* I, 4, p. 159.

With this, Rousseau places the inalienability of legal personhood at the center of his doctrine of the *Principes du droit politique*. This rational law requirement that legal personhood be inalienable means, for Rousseau as much as for almost every other rational law theoretician since Locke, that no-one must submit himself to the will of another as far as concerns the determination of the legal conditions for the use of his liberty, because such a submission would immediately offend against human nature, i.e. against the state of man as a rational being capable of free action. When someone subordinates himself to the will of another and thus turns himself into a pawn at that other's discretion, he literally becomes irresponsible, because he gives up his rights, i.e. he stops being the free and responsible subject of his own actions and thereby takes away their moral quality (in the sense of imputability). Therefore, the submission to the coercive legislation of the state, which is demanded for legal reasons, must not be mistaken for the abstract negation of individual liberty. Although the individuals have to surrender their natural, i.e. lawless liberty, this surrendering is in truth only supposed to represent the transposition of liberty into the legal mode of its exercise: The citizen subject to the laws of the state "may nevertheless obey only himself, and remain as free as before".¹⁴

Thus the solution to the constitutional dilemma — namely, that a merely factual submission cannot represent sufficient ground for the legitimacy of state authority, while it is at the same time the indispensable and constitutive foundation for every form of statehood as such — cannot consist in conceding to the citizens a right of coercion against the sovereign. Rather, Rousseau's solution to the fundamental problem of the concept of sovereignty — of how to "unite the factually with the legally supreme power" — consists in a specification of the legal character that pertains to the submission demanded by reason itself, or respectively in the specification of a rational law criterion for the legislative authority of the state. He extracts this purely rational criterion of constitutional law from the idea of the state contract. The a priori concordant will of this contract cannot have the submission to the discretion of another as its object, since this dependence of the subjective right on the arbitrariness of another represents the very reason for the necessity of the *exeundum*. Hence, a will which, in regard to the determination of the conditions of its legal use of liberty, submits itself to the arbitrariness of a single individual in order to free itself from the arbitrariness of others contradicts itself. The only will in regard to which the will of all can be thought of as a priori unified is, according to Rousseau, the *volonté générale*, i.e. that will which has the legal conditions of external liberty as such for its object. And this will, to submit one's own action to universal laws, is neither capable of being transferred nor represented, and therefore it is the necessary constituents and irreducible requirement for any legitimate rule. Political unity, the organic concurrence of particular and general will, can only be achieved by means of a qualified surrendering of right that is compatible with the original human right to be the subject of free action. It must a submission of the kind by which the individual obeys himself and — — by means of this obedience to self-legislated laws — remains as free as before. With this remarkable formula, which Rousseau uses to identify the constitutional specifics of legitimate submission, we have an answer to the question of how liberty and authority are to be united, and the constitutional squaring of the circle is accomplished — at least in theory. Hence, a principle has been found

¹⁴ Rousseau: *The Social Contract* I, 6, in: *The Social Contract and the First and Second Discourses*, p. 163 (OC III, p. 360).

that specifies a criterion for differentiating this submission or “aliénation totale” from a mere state of servitude. The absolute and unconditional submission of the particular will is then legitimate, if it is a submission to the universal law-giving will of all, i. e. to a will which in turn is itself (at least within the idea of constitutional law) subordinate to a law. Now, this will is nothing but the *volonté générale*, the idea that the will of all is concordant in the legal determination of external liberty. Only a will of this kind, by means of which the exercise of state authority is founded upon everybody’s potential universal will, fulfills the criteria of constitutional legitimacy. This way, Rousseau has – at least theoretically – presented a solution in the *Contrat social* to the problem he had posed himself, namely of how to unite liberty and submission on the level of (rational law) theory, and he did so by assigning not only a justification for the civic duties to the contract founding the state, but also a normative and criteriological function: The principles of constitutional law founded upon a “theory of legitimate rule” (Herb) serve as a “scale” (“échelle”); they function as a priori valid criteria for evaluating existing state constitutions.

II. ROUSSEAU’S LEGACY IN KANT’S PHILOSOPHY OF CONSTITUTIONAL LAW

Let us now move on to Kant. I will primarily refer to his *Metaphysical First Principles of the Doctrine of Right*, which was published in 1797 and represents the most mature and comprehensive version of his philosophy of law. I will attempt to carve out some aspects of the adoption of Rousseau’s philosophy of constitutional law by Kant. This adoption of Rousseau’s philosophy of law is manifest in two points:

1. in Kant’s contractualist justification of the state, and
2. in the normative function of the general will.
3. As a third point, I will briefly address representation as a constitutional principle of the republic.

At the core of my discussion, I will place the “idealism” of Kant’s concept of the state, i.e. the attempt at contributing to the resolution of problems that Rousseau failed to solve by considering the transcendental-philosophical distinction between appearance and thing-in-itself. My thesis in the following investigation is that this transcendental-philosophical distinction leads to a radicalization in the normative function of the *volonté générale* as posited by Rousseau.

II A. KANT AS SUCCESSOR TO ROUSSEAU’S THEORY OF THE SOCIAL CONTRACT –ON KANT’S AMBIVALENT ADOPTION OF THE CHARACTER OF THE CONTRACT

I will now start with the first point of my observations regarding the relationship between Rousseau and Kant, namely with the adoption of the conception of the social contract. In regard to the contractualist justification of the state, i.e. the reduction of the legal coercive power of the state to an original contract, Rousseau is the author who gives Kant his direction.

For Hobbes and Rousseau, the overall legal function of the contract founding the state consists in determining „how a multitude of persons natural are united [...] into one person civil or body politic“¹⁵, or by what act it is legally possible that a people (in the sense of a mere multitude of human beings) constitutes itself as a people (in the constitutional sense of the term). The contractualist justification of the state provides the legal ground for state rule that is still missing, and this in two respects:

- On the one hand, the state contract represents the act by which the coercive power of the sovereign¹⁶ is founded.
- But on the other hand, it also establishes the duty of civil obedience, if only indirectly and conditionally.

At first glance, it seems that Kant endorses this justificatory agenda of constitutional contractualism without any reservations. The following aspects of contractualism relevant to Rousseau have also found their way into Kant's philosophy of constitutional law:

- the indispensability of liberty, which cannot be forfeited even by an illegal act of self-enslavement: “a contract by which one party would completely renounce its freedom for the other's advantage would be self-contradictory, that is, null and void, since by it one party would cease to be a person and so would have no duty to keep the contract but would recognize only force”¹⁷
- the conception of the social contract as an ideal norm of rational law: “the original contract is only the Idea of this act, in terms of which alone we can think of the legitimacy of a state. In accordance with the original contract, everyone [...] within a people gives up his external freedom in order to take it up again immediately as a member of a commonwealth, that is, of a people considered as a state (universi). And one cannot say: A state, man in a state has sacrificed a part of his innate outer freedom for the sake of an end, but rather, he has relinquished entirely his wild, lawless freedom in order to find his freedom as such undiminished, in a dependence upon laws, that is, in a rightful condition, since this dependence arises from his own lawgiving will”¹⁸
- the function of the social contract “as the touchstone of any public law's conformity with right. In other words, if a public law is so constituted that a whole people could not possibly give its consent to it [...], it is unjust”¹⁹

¹⁵ Thomas Hobbes: *The Elements of Law Natural and Politic*, ed. by J. C. A. Gaskin, Oxford/New York 1994, XX, 1.

¹⁶ This is the “*ius imperandi*” (Thomas Hobbes: *De cive*. The Latin Version. A Critical Edition by Howard Warrender, Oxford 1983, V,11), or “*Right of Sovereignty*” (*Leviathan*, ed. by Richard Tuck, Cambridge 1990, XXI, p. 154) or “*the right of Sovereign Power*” (*Leviathan* XXX, p. 240).

¹⁷ “[...] ein Vertrag aber, durch den ein Theil zum Vortheil des anderen auf seine ganze Freiheit Verzicht thut, mithin aufhört, eine Person zu sein, folglich auch keine Pflicht hat, einen Vertrag zu halten, sondern nur Gewalt anerkennt, in sich selbst widersprechend, d. i. null und nichtig, ist.” Kant, RL § 30 (AA VI, S. 28316-20).

¹⁸ Kant: *Immanuel Kant: Metaphysical First Principles of the Doctrine of Right*, (in: *Kant: Metaphysics of Morals*, ed. by Mary Gregor, Cambridge 1991, § 47 (AA VI, p. 315 f.). All English quotations from the *Rechtslehre* are taken from this edition.

¹⁹ Kant: *On the Common Saying: That may be correct in theory, but it is of no use in practice*, in: *Immanuel Kant: The Cambridge Edition of the Works of Immanuel Kant: Practical Philosophy*, ed. by Mary J. Gregor, p. 297 (AA VIII, p. 297).

All these are elements of Kant's theory of constitutional law that point back to Rousseau. But despite this tie to Rousseau's doctrine of the general will, we have to recognize a fundamental change in its function in Kant. The just quoted formula of the "touchstone of any public law's conformity with right" already indicates this fundamental change in the function of contractualism: For Kant's conception of the contract does not have – despite all similarity in formulation – the function of constituting authority. It no longer plays a role in generating the duties of the citizens toward the state. The contract is thus relieved from its function of simultaneously being the legal ground for the citizen's obligation of obedience toward the state: "The authority of the state is not legitimate for the reason that the citizens obligated themselves by a contract".²⁰ Kant justifies the duty of entering into the state of statehood, the status civilis, independently of a contract, by a "postulate of public Right"²¹ that results from practical reason.

What remains of constitutional law contractualism after it was relieved of the problem of justifying the civic duties, is its function as an *ideal act of constitution of the general will* and thus as a *rational law criterion for evaluating the state's legislation*:

"The social contract [...] or the ideal of constitutional law (according to the rule of equality) considered *in abstracto*, without regard to the particular nature of man. [...] The social contract. Or the Public Right as ground for the supreme [public] power. Leviathan or the supreme power as a ground for public law."²²

And in the *Doctrine of Right* it is said that:

The conception of the social contract means such an "act by which a people forms itself into a state [...]. Properly speaking, the original contract is only the Idea of this act, in terms of which alone we can think of the legitimacy of a state."²³

II B. THE NORMATIVE FUNCTION OF THE GENERAL WILL

I will now proceed to the second point, where Kant again proves himself an eager but independent student of Rousseau. This second fundamental point by which Kant places his philosophy of constitutional law in the tradition of Rousseau concerns the ideal normative function of the general will.

Rousseau already had emphasized the normative function of the *volonté générale* by stating, first of all, that the general will as such cannot err because it "is always right and always tends to the public good"²⁴, but that the "deliberations of the people" on the other hand can indeed diverge from this ideal norm, which means that the legislating activity of the unified people is only a necessary, not a sufficient condition for the realization of the general will. The

²⁰ Christian Niebling: *Das Staatsrecht in der Rechtslehre Kants*, Munich 2005, p. 137.

²¹ RL § 42 (AA VI, p. 307).

²² AA XIX, p. 99: „Der Social contract [...] oder das ideal des Staatsrechts (nach der Regel der Gleichheit) in abstracto Erwogen, ohne auf die besondere Natur des Menschen zu sehen. [...] Der social contract. oder das Öffentliche Recht als ein Grund der [öffentlichen] obersten Gewalt. Leviathan oder die oberste gewalt als ein Grund des öffentlichen Rechts“.

²³ RL § 47 (AA VI, p.315).

²⁴ Rousseau: *The Social Contract* II, 3, p. 172.

factual consensus reached in the political “deliberations of the people” may thus indeed diverge from the ideal commitment of the general will to the public good (“l’utilité publique”): Under empirical conditions, the purpose of the unified will is only accomplished approximately – or as Rousseau expresses it:

“Men always desire their own good, but do not always discern it; the people are never corrupted, though often deceived, and it is only then that they seem to will what is evil”.²⁵

A second differentiation concerns the “difference between the will of all and the general will”²⁶, as emphasized by Rousseau: The conception of the *volonté générale*, the general will, is markedly distinct from the merely empirical aggregation of all particular wills, the *volonté de tous*.

In detail, Kant adopted the following aspects of the normative function of the general will from Rousseau:

- the nexus between the universal law-giving will and the principle of the sovereignty of the people: “The legislative authority can belong only to the united will of the people”²⁷, in which case a law can never do injustice to the people.
- the republicanism of the state constitution, which is based on the political principle of separation of the executive power (the government) from the legislative power”²⁸
- the constitutive importance of the principle of liberty within the field of constitutional law, in the sense of a “pure republic [...] that makes *freedom* the principle and indeed the condition for any exercise of coercion” [that freedom is made “the principle, indeed the condition of all *coercion*”].²⁹
- And finally the notion of constitutional law that, under a republican constitution, “the law is placed above man”³⁰, or that it is a “constitution in which law itself rules and depends on no particular person”³¹.

In his treatise on *The Conflict of Faculties*, Kant will provide a systematic foundation to these attempts by Rousseau to differentiate between the ideality of the general will in regard to its normative function on the one hand and the factual acts of legislation on the other. He does so by applying the transcendental-philosophical distinction between appearance and thing-in-itself, in order to differentiate between the *respublica noumenon* and the *respublica*

²⁵ Rousseau: *The Social Contract* II, 3, p. 172.

²⁶ Rousseau: *The Social Contract* II, 3, p. 172.

²⁷ Kant: *Rechtslehre* § 46 (AA VI, p. 313).

²⁸ Immanuel Kant: *Toward Perpetual Peace*, in: Immanuel Kant: *The Cambridge Edition of the Works of Immanuel Kant: Practical Philosophy*, ed. by Mary J. Gregor, Cambridge 1996, p. 324 (AA VIII, p. 352).

²⁹ Kant: *Rechtslehre* § 52 (AA VI, p. 340).

³⁰ Rousseau: *Lettres écrites de la montagne* VI (OC III, p. 811) : „la Loi mise au dessus des hommes”; *Considérations sur le gouvernement de Pologne et sa réformation projetée*: „Mettre la loi au-dessus de l’homme est un problème en politique, que je compare à celui de la quadrature du cercle en géométrie” (OC III, p. 955).

³¹ Kant: *Rechtslehre*, § 52 (AA VI, p. 341).

phaenomenon. The former is regarded as a “Platonic ideal” of the state, the latter as an actual state under the conditions of experience:

“The idea of a constitution in harmony with the natural right of human beings, one namely in which the citizens obedient to the law, besides being united, ought also to be legislative, lies at the basis of all political forms; and the body politic which, conceived in conformity to it by virtue of pure concepts of reason, signifies a Platonic *ideal* (*respublica noumenon*), is not an empty figment of the brain, but rather the eternal norm for all civil organization in general, and averts all war. A civil society organized conformably to this ideal is the representation of it in agreement with the laws of freedom by means of an example in our experience (*respublica phaenomenon*) and can be acquired only painfully, after multifarious hostilities and wars; but its constitution, once won on a large scale, is qualified as the best among all others to banish war, the destroyer of everything good. Consequently, it is a duty to enter into such a system of government, but it is provisionally the duty of the monarchs, if they rule *as autocrats*, to govern in a *republican* (not democratic) way, that is, to treat people according to principles which are commensurate with the spirit of laws of freedom (as a nation with mature understanding would prescribe them for itself), although they would not be literally canvassed for their consent.”³²

But already in the year before, in his *Doctrine of Right*, Kant had described his definition of the state – namely that “a state (*civitas*) is a union of a multitude of men under laws of Right” – as a “state as idea, as it ought to be in accordance with pure principles of Right”³³. According to Kant, this concept of the “state as idea” should serve for the evaluation of “every actual union into a commonwealth”.

The “state as idea”, or respectively the “pure republic”, only contains the notion – purified of all empirical circumstances – of the “self-rule of the people” by means of exercising the legislative authority. Correspondingly, a reflection in Kant’s posthumous papers states that “the idea of a republic” is “only a concept of a completely pure constitution” (AA XIX, 609), which does not feature any particular forms of government. Even more radical and “idealistic” is what we find in the appendix: “A perfectly *rightful constitution* among men [...] must be counted among ideas, to which no object given in experience can be adequate”.³⁴

A further aspect of the distinction between the “state as idea” and the state as appearing is expressed by the concept of the head of the state. In the pure republic, we find an equally “pure Idea of a head of a state, which has objective practical reality. But this head of state (the sovereign) is only an *object of thought* (to represent the entire people)” (VI, S. 338). Since ideas qua mere objects of thought cannot act under empirical conditions, the state as appearing requires a “physical person to represent the supreme authority in the state and to make this Idea effective on the people’s will”.

Correspondingly, the republic as appearing is “the representation of it [i. e. of the pure idea of a republic, D. H.] in agreement with the laws of freedom by means of an example in our experience.” Qua *respublica phaenomenon*, it can take three forms, which however have to be necessarily representative, in order to be practical at all under the conditions of experience:

³² Immanuel Kant: *The Conflict of Faculties/Der Streit der Fakultäten*, ed. by Mary J. Gregor, New York 1979, p. 164 f. (AA VII, p. 90 f.).

³³ Kant: *Rechtslehre*, § 45 (AA VI, p. 313).

³⁴ Kant: *Explanatory Remarks on the Metaphysical First Principles of the Doctrine of Right*, in: Immanuel Kant: *The Cambridge Edition of the Works of Immanuel Kant: Practical Philosophy*, ed. by Mary J. Gregor, Cambridge 1996, p. 505 (AA VI, p. 371).

The unified will of the people cannot be exercised by the people themselves, but only by their representatives.

III. NEITHER MODERATE MONARCHY NOR DIRECT DEMOCRACY – KANT’S PLEA FOR A REPRESENTATIVE CONSTITUTION OF THE REPUBLIC

The last point that I want to discuss in this lecture related to the problem of political representation. This is a point where Kant deviates decisively from Rousseau, by declaring that the representation of the general will is the only possible form of constitution. With this, Kant sets himself up in opposition to the conception of a monarchy moderated by the division of powers, which was very common in the early modern philosophy of constitutional law, as well as to the direct democracy propagated by Rousseau.

In the history of the early modern philosophy of constitutional law, there had been various attempts at overcoming the so-called problem of despotism, i.e. of precluding by means of institutional mechanisms that the coercive power (particularly) of the government takes on a life of its own. The most influential proponents of such an institutional solution were John Locke and Montesquieu, who both argued for a system of checks and balances and divided power, in which the different state authorities were to limit and control each other. As a principle of constitutional law, the separation of powers — which played a central role in the political debates of the 18th century under the headings of a moderate monarchy or, as Kant formulated it, a “limiting constitution”³⁵ — however does not make for a legal-philosophical principle by which to determine the relationship between freedom and authority, or by which to achieve the constitutional squaring of the circle, which was so important to Rousseau. The English constitution, which was praised by Montesquieu and Voltaire as exemplary due to its division of powers, was criticized by Kant as a deceptive “example” of a limited constitution that reveals itself as a mere “disguise which is easily penetrated” and ultimately only consists in a fair facade concealing the “true nature of its constitution”:

This representation of the nature of the case has something delusive about it so that the true constitution, faithful to law, is no longer sought at all; for a person imagines he has found it in an example already at hand, and a false publicity deceives the people with the illusion of a limited monarchy in power by a law which issues from them, while their representatives, won over by bribery, have secretly subjected them to an absolute monarchy.³⁶

Rousseau had claimed that the democratic and sovereign legislating will cannot be surrendered.³⁷ The sovereign political authority, which represents “nothing but the exercise of the general will”, always has to belong to the united will of the people. The reason, which Rousseau states for this, first of all consists in the fact that “while it is not impossible that a single will can concur with the general will in some respect,” this concurrence would be a merely accidental one and thus cannot be permanent.

³⁵ Immanuel Kant: *The Conflict of Faculties/Der Streit der Fakultäten*, ed. by Mary J. Gregor, New York 1979, p. 163 (AA VI, p. 90).

³⁶ Immanuel Kant: *The Conflict of Faculties/Der Streit der Fakultäten*, ed. by Mary J. Gregor, New York 1979, p. 163 (AA VI, p. 90).

³⁷ Rousseau: *The Social Contract II*, 1.

Beyond that, I have already mentioned that Rousseau himself poses the question whether the general will can sometimes be in error. The fact alone that Rousseau poses this question indicates that the constitutional principle of the people's self-legislation cannot guarantee as such that the exercise of the general will by the assembly of the people will always lead to a proper realization of the common good, since there can be considerable differences between "the empirical collective will of the assembled people and the general will".³⁸ Not even successive historical development can, in the eyes of Rousseau, overcome the discrepancy between the rational law requirement that a state of Right be realized, and its inadequate realization in reality.

Kant radicalizes Rousseau's scepticism in regard to the possibility of concurrence between the collective will (*volonté de tous*) and the general will in a stunning way. According to his view, the ideal, rationally universal, and legislating will cannot in principle ever concur with the empirical will even of an invariably united assembly of the people.³⁹ The discrepancy between the ideal constitutional norm on the one hand and the actual realization of the general will on the other hand, can never be overcome.

In order to understand the role that the idea of representation plays in Kant's doctrine of constitutional law, we have to remind ourselves again of the distinction between the "state as idea" and the empirical state, i.e. the actually existing state.

- The "state as idea" or the "pure republic" does not have a representative constitution, but is based on the self-rule and self-legislation of the united people.⁴⁰
- The empirical state, on the other hand, cannot be anything but representative.

At the same time, Kant introduces a systematic distinction between republicanism and representation:

"Any form of government [...], which is not representative, is really an improper form", which is why the democratic self-rule of the people as propagated by Rousseau is in Kant's eyes "necessarily a despotism" because it knows no separation of executive from legislative authority: "But if the kind of government is to be in conformity with the concept of right, it must have a representative system, in which alone a republican kind of government is possible and without which the government is despotic and violent (whatever the constitution may be)."⁴¹

Any true republic is and can only be a *system representing* the people, in order to protect its rights in its name, by all the citizens united and acting through their delegates (deputies). But as soon as a person who is head of state (whether it be a king, nobility, or the whole of the population, the democratic union) also lets itself be represented, then the united people does not merely *represent* the sovereign: It *is* the sovereign itself. For in it (the people) is originally found the supreme authority from which all rights of individuals as mere subjects (and in any event as officials of the state) must be derived; and a republic, once established, no longer has to let the reins of government out of its

³⁸ Rousseau: *The Social Contract* II, 3.

³⁹ Burkhard Tuschling: *Die ‚offene‘ und die ‚abstrakte‘ Gesellschaft. Habermas und die Konzeption von Vergesellschaftung der klassisch-bürgerlichen Rechts- und Staatsphilosophie*, Berlin 1978, S. 301.

⁴⁰ Karlfriedrich Herb/Bernd Ludwig: *Kants kritisches Staatsrecht*, in: *Annual Review of Law and Ethics*, vol. II (1994), p. 465 f.

⁴¹ Immanuel Kant: *Toward Perpetual Peace*, in: *Immanuel Kant: The Cambridge Edition of the Works of Immanuel Kant: Practical Philosophy*, ed. by Mary J. Gregor, Cambridge 1996, p. 325 (AA VIII, p. 353).

hands and give them over again to those who previously held them and could again nullify all new institutions by their absolute choice.”⁴²

The reason for this is: Due to its ideal character and due to its necessary opposition even to the empirical will of the unified individuals, the universal law-giving will is only capable of being represented, and therefore the sovereign power can only be exercised in the name of the people, but not by the people themselves.

CONCLUDING REMARKS

In this article, I have merely discussed one aspect of the relationship between Kant and Rousseau, namely the influence of Rousseau’s *Principles of public law* on Kant’s doctrine of constitutional law. In the fifth book of *Émile*, Kant was able to find some intimations regarding the ideality of the *Contrat social*, as the idea of a “perfect legislation” in which any deviating particular will is supposed to “be nullified”, as well as intimations regarding the discrepancy between the actual state constitutions and this idea of reason. Yet, Rousseau declares at this point, the citizens are obligated to obey even under a bad constitution. A historically contingent deviation of the actual constitution from the idea of reason cannot absolve from one’s obligation to the actual authorities, precisely because the *Contrat social* is the idea of an ideal constitution and not a fact. We know, however, that Kant professed under the influence of his reading of *Émile* that Rousseau also “set him aright” in other respects. In his treatise on “Rousseau and Kant”, which is still worth reading today, Marburg philosopher Klaus Reich interpreted this statement by Kant on his relationship to Rousseau in the sense that Rousseau liberated Kant “from the enthusiasm for *Bildung*, from the obsession with culture, from a false cult of humanity” as well as from the belief that “the dignity of human beings consists in cultural refinement and sophistication”.⁴³

“Rousseau set me aright” – The Legacy of Rousseau in Kant’s legal and political philosophy and the idealization of the *volonté générale*

Dieter Hüning (Trier)

ABSTRACT: The article tries to expose the relationship between Rousseau and Kant with regard to the concept of the general will. In part I, it is analyzed, what is the central theme in Rousseau’s *Contrat social*, i. e. the reconciliation of freedom to authority. Then (in part II) the article is concerned with the question, how Rousseau’s concept of the general will has influenced the constitutional law of Immanuel Kant. In part III it is discussed, how Kant has changed the theory of the general will in order to combine it with a representative constitution of the republic.

KEYWORDS: the constitutional law in Rousseau and Kant, *volonté générale*, idea of the republic, representative constitution.

⁴² Kant: *Rechtslehre*, § 52 (AA VI, p. 341).

⁴³ Klaus Reich: *Rousseau und Kant*, in: Klaus Reich: *Gesammelte Schriften*, ed. by Manfred Baum, Udo Rameil, Klaus Reisinger and Gertrud Scholz, Hamburg 2001, p. 164.

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