

10th International Kant Congress, "Right and Peace in Kant's Philosophy". Kant-Gesellschaft, Brazilian Kant Society, San Pablo, 2008.

“The Kantian Republican Contract: a Response to Natural Lawyers’ Equilibrium of Competing Individual Rights”.

Valerio Rohden, Ricardo Terra y Guido Almeida (editores),
Marey, Macarena (autora).

Cita:

Valerio Rohden, Ricardo Terra y Guido Almeida (editores), Marey, Macarena (autora) (2008). *“The Kantian Republican Contract: a Response to Natural Lawyers’ Equilibrium of Competing Individual Rights”*. 10th International Kant Congress, “Right and Peace in Kant's Philosophy”. Kant-Gesellschaft, Brazilian Kant Society, San Pablo.

Dirección estable: <https://www.aacademica.org/macarena.marey/37>

ARK: <https://n2t.net/ark:/13683/prUU/2We>



Esta obra está bajo una licencia de Creative Commons.
Para ver una copia de esta licencia, visite
<https://creativecommons.org/licenses/by-nc-nd/4.0/deed.es>.

Acta Académica es un proyecto académico sin fines de lucro enmarcado en la iniciativa de acceso abierto. Acta Académica fue creado para facilitar a investigadores de todo el mundo el compartir su producción académica. Para crear un perfil gratuitamente o acceder a otros trabajos visite: <https://www.aacademica.org>.

The Kantian Republican Contract: a Response to Natural Lawyers' Equilibrium of Competing Individual Rights

Macarena Marey*

We could say that since the first modern juridical theories, the option available to those interested in the philosophical concept of right has been to choose between either explaining state authority (and its necessity), or producing a normative theory capable of offering critical standards to apply to every political state of affairs. This dichotomy underlies the polemics between those positivistic juridical theories that aim to justify state authority and those approaches that hold that we need a moral –though not necessarily ethical- point of view in order to avoid unfair uses of state power.

I think the existence of this option explains in many ways a great part of Kant's political theory. I will contend that one of the main interests Kant had when he reflected on the notion of right was to demonstrate, against modern natural law theories, that the contract by which authority is founded forbids certain uses of state power. Like Rousseau, Kant thought that justice and fairness do not amount to factual institutionalization. Consequently, his undertaking focuses mostly on the problem of political legitimacy. Ultimately, I propose that, within this framework, studying the reasons why Kant denied juridical positivism would cast light on Kant's own programmatic political ideas.

§ 1. In his *De Iure Bellis ac Pacis* of 1625, Hugo Grotius reformed the classical natural law tradition in order to cope with the problems that emerged with the birth of national states as well as with the necessity of finding some kind of tribunal to achieve a peaceful arrangement of domestic and international disputes without calling any substantial credo into play. As an answer to these questions, Grotius took the Aristotelian distinction between particular justice and universal justice¹, interpreted it as a distinction between perfect and imperfect rights and gave it its specific modern features by understanding rights in a

* National Science and Technology Research Council, University of Buenos Aires and University of La Plata, University of Buenos Aires (Argentina).

¹ Justice in its "wide sense" is "virtue entire" (EN, 1129b25) and "the exercise of virtue as a whole [...] towards one's neighbor" (EN, 1130b18). There are two kinds of "particular justice". One of them constitutes "that which is manifested in distributions of honor or money or the other things that fall to be divided among those who have a share in the constitution" (EN, 1130b31ff). The other kind is "that which plays a rectifying part in the transactions between man and man" (EN, 1130b35). We can thus easily see the reason why Grotius took this distinction to mean a discrimination between what we could (anachronistically) call moral and political affairs respectively.

subjective way, that is, as competing individual moral powers that a person *has*.² One of the main questions this distinction poses has to do with the state authority's attributions in matters concerning the distribution of justice: Which is the boundary that has to be set to positive legislation in order not to violate someone's right to use his freedom as he or she pleases, given the fact that we have an unsocial nature and presupposing that we should have to be able to live in community without at the same time being forced to abandon the pursuit of our own ideals of good life? This question becomes more important when we discover that most of the problem of the distribution of justice must be attended to in connection with the way positive law arises, i. e., with its legitimacy.

Grotius' rationalism determines that the dictates of natural law cannot be changed even by God. Thus, an action commanded by it is just in-itself. The natural justice of such an action does not follow from a given will, but from its correspondence with reason.³ So, given that the law of nature does not get its validity from an arbitrary will, one should expect that positive law would also be free of a unilateral or imposed origin. But here Grotius' doctrine sways between rationalism and voluntarism. Since natural law theory reduces the political problem to the compatibility of competing individual rights, we will see that its normative validity ceases operating once authority has been established. Grotius contends that authority is necessary because the state of nature is a state of perpetual clash from which men need to emerge in order to be able to form a community, which, in turn, is what they desire. But the fact that living in community is a dictate of reason means that it cannot be fulfilled without subjection to that very obligation. Thus, obligation can only emerge from a moral power that has, of necessity, to be superior to the state of nature where men retain their subjective rights and, in the last resort, it can only be *imposed*. In this way, rational natural law shows the following content: in order to be able to live in community, you have to submit yourself to authority. State authority is -coherently- understood as the only way to solve the problem our unsociable nature had caused.

Both the lack of a political good beyond the regulation of conflicts between individual rights –which is the only content of natural law- and the fact that binding law gets its ability to command from an element that does not exist in the state of nature -and so is different from the will of those subjected to it-, imply that there is only one kind of obligation that really matters: legal –positive- obligation is the only obligation *tout court*. Once state authority has been established as just in-itself insofar as it comes to solve disputes between individuals –i.e.,

² Cf. Hakoonsen, 1985, p. 240.

³ Cf. *DJBP*, I, I, X.

insofar its existence is commanded by reason-, every law enacted by the will of the superior will be just because it has been enacted by authority.⁴ As civil society originates with the imposition of (unaccountable) authority, this voluntaristic origin will shape the juridical-political sphere and afterwards pass onto it its lack of reciprocal validity. As a consequence, that very rationality that Grotius, unlike Hobbes, ascribes to natural law when he holds that individuals act upon the pursuit of their acts does not suffice to make the acquisition of political rights possible.

Grotius' positivistic voluntarism is radicalized by Samuel Pufendorf, who contends that morality and legality arise at the same time. Yet this common ground does not authorize for Pufendorf the juridical prescription of moral commands: Whatever falls into the domain of private conceptions of the good life cannot be subject to positive law. To support this claim, Pufendorf also makes a distinction between perfect and imperfect duties.

As we have seen, Grotius deepened the separation between the spheres of morality and law after limiting the role of justice to the function of regulating the coexistence of interests. For Pufendorf, this sharp separation is decisive as well. In fact, although he may admit that perfect and imperfect rights and duties do share a common ground, it is not its morality that makes a law valid. Legitimacy comes, again, only from imposition. A law is thus legitimate insofar as it is imposed by the will of a superior who is not responsible for human action. As morality and legality do not exist before this imposition, there is no obligation outside legal obligation. Thus, an action is just as long as it accords with imposed law, be it natural, divine, positive –voluntary- or human.

This framework leads us to conclude that authority is necessary (exclusively) to the extent that it serves to organize communal life in such a way that everyone would be able to carry out what natural law prescribes in a peaceful way. Contractual argumentations are, thus, designed to demonstrate that we need state authority to guarantee a compatible coexistence of competing individual rights. We should also notice that this passage is not meant to grant reciprocity for reasonable moral claims or institutionalize ways for the acquisition of rights different from the natural ones, which amount to those actions permitted to a subject insofar they do not wrong other subjects.

The main consequence we may draw from what we have been summarizing is that the only function left to the natural lawyers' concept of right is the legal use of coercive force. This is so because of the lack of a notion of a common political good and of a moral theory

⁴ For the definition of “voluntary right”, cf. *DJBP*, I, I, X.

that could rationally legitimate citizens' demands or government's decisions. The natural lawyers were responding to the new modern political processes and aimed to avoid falling into a substantial conception of the good, as Thomism did, whilst at the same time trying to refute juridical Skepticism. But they could not help giving birth to a perspective that we could call descriptive and, in certain ways, Hobbesian.

The lack of critical normativity inherent in this juridical positivism is one of the main factors that inspired the Kantian criticisms of theories that deny political praxis a moral and rational foundation. Kant contends that this negation runs together with despotism. Against these postures, Kant will seek for a normative standard to define law according to an ideal of justice. The only way to find "the general standard to know what is just and what is unjust" is to abandon every merely empirical perspective and "to look for the sources of those judgments in the mere reason". This has to be done not only to be able to indicate the fairness of an external law, but also in order to be able to "build up the fundamentals of a possible positive legislation" that is not based upon violence or power.⁵ I propose that if we understand Kant's original contract as a critical response to the Hobbesian consequences of the natural lawyers' position, then we are in a better position to fully comprehend the programmatic content of his political theory. In this sense, I think that the main purpose of Kant's insights into the origin of juridical states is to offer a critical framework for citizens to make their claims legitimate and thus narrow the room left to governments to use them as mere instruments. Clearly, this aim cannot be achieved by merely finding the most convincing methodology to explain state authority and demonstrate its necessity: Kant holds that it is precisely the executive power that has to be restricted by the concept of right in order to reinforce the applicability of the universal innate right to freedom.

§ 2. There is a methodological distinction in Kant's thought that reaffirms the meaning of the pre-eminence of practical reason over theoretical reason and thus allows us to say that for him the perspective of legitimacy is the proper standpoint when studying political matters. This methodological premise can be clearly formulated in Kant's own terms: "*Quaestio facti* is in which way one has come to possess a concept in the first place; *quaestio iuris*, with which right one possesses it and uses it".⁶ From what we have just said, we should expect that this methodological procedure will bring a practical consequence. This appears when we notice that this distinction can be applied to the concept of political authority.

⁵ *MdS*, Ak. VI, 229-230

⁶ *RzM*, Ak. XVIII, 267, Metaphysical Reflexion number 5636.

Kant distinguishes the “practical theory of right”⁷ from “empirical politics”. This latter epithet refers to the mere ability that dictates prudential norms to accommodate oneself to the current political power. The “immoral theory of prudence” comes from considering that the origin of right and its capacity of cohesion are to be found in state power.⁸

It follows from this criticism that for Kant political theory’s proper aim has little to do with the explanation of the origin of authority as a coercive tool to make competing individual rights compatible. For this reason, Kantian legitimacy is not fully explained by just connecting law with the notion of original acquisition and with the consequent principle of obliging others to enter civil society. The act that guaranties the external reciprocity of the obligation to respect private property is, indeed, the condition of the possibility of actions intended to lead to the concretion of an increasingly fair and just constitution to be carried out in a rightful way. However, this does not suffice to make legality legitimate in Kantian terms because it fails to show which is the right or principle upon which improvements are introduced in law. Kant’s theory must indeed explain how we could introduce improvements into right because for him the progressive instauration of the republic is the final aim of every human action given that only in a republic we are able to autonomously develop our dispositions, that is, our freedom.⁹ So, at least *prima facie*, we cannot state that the main purpose Kant holds when constructing his contractual theory is justifying the state in general or finding the most complete solution to the problem of compatibility.

Nevertheless, Kant is not willing to undermine the notion of state authority. In fact, he contends that “a *legal* [juridical] constitution, even if it accords with right in a little degree, is better than no constitution at all”.¹⁰ In this sense, and bearing in mind the basic definition of a constitution as “act of the general will by which a crowd becomes a people”,¹¹ the normative capacity of the constitution could be reduced to the moment of the pact. If this happened, two things would follow that do not seem coherent with Kant’s persistent exigencies of public justification and validity in terms of reasonable acceptability.

i) The decision about the content (and fairness) of positive law would be left to the will of the ruler. In this case, a law would be in accordance with the ideal of justice only if the sovereign decided it out of his contingent will. Besides, law making processes would be unaccountable to the people.

⁷ *ZeF*, Ak. VIII, 370.

⁸ *ZeF*, Ak., VIII, 375

⁹ *Idee*, 5. Satz, Ak. VIII, 22.

¹⁰ *ZeF*, Ak. VIII, 373, footnote.

¹¹ *ZeF*, Ak. VIII, 352

ii) The other possible situation derived from understanding contract only as the birth of authority would be a strong juridical positivism in the sense that once one has given consent to state authority as a member of the united will, one ceases to participate in the law making process, for the underlying definition of juridical society is a condition of positive law, be it legitimate or not.

In both cases, there would be no room opened for critical revision and reformation because there would be no channels for civil political participation, which is one of the basic rights that derives from the definition of juridical freedom as the faculty of not obeying any positive law that one has not been able to give consent to,¹² whether this consent is empirical or hypothetical. But this notion of rational consent could still be limited to the moment of the contract if we did not possess a standard to criticize any given political state of affairs. In fact, although Kant contends that positive law is the only guarantee for our rights, the rational transition from the natural to the juridical state can institute either a republican or a despotic régime. For this reason, a constitution, understood as equivalent to a contract of subjection, can be either republican or despotic.¹³

It seems to follow that the normativity of the republican ideal will no longer be universal if we take the contractual agreement to be no more than the mere exit from the state of nature. So we need to distinguish between two Kantian uses of the term “constitution”: a) “Actually existent constitutions”, even if they happen to be republican, are different from b) the republican constitution understood as the only “rational principle to judge every juridical public constitution in general” in the public use of reason.¹⁴

To the problem of the absence of law or, in other words, the problem of the compatibility between competing individual rights, to which the Kantian and natural lawyers give a similar solution, we must add yet another political problem that appears as a much greater peril than the former: Despotism. This addition constitutes the departure point from the Grotian-Hobbesian tradition. Ultimately, the critical response to injustice introduces a radical change into the contractual agreement. In fact, we can deduce two different rational obligations concerning, respectively, state foundation and law making processes:

- 1) Every individual is under rational obligation to enter the state (in general).

¹² Cf. *ZeF*, Ak. VIII, 350-351, footnote.

¹³ *MdS*, Ak. IV, § 41, 305-306; *ZeF*, Ak. VIII, 352.

¹⁴ Cf. *Gemeinspruch*, Ak. VIII, 302.

2) Within the state, the ruler is under moral obligation to make concrete reforms that correct positive law¹⁵ and citizens are under obligation to strive to realize their right to develop their freedom.¹⁶ These two obligations are meant to be applied upon every political régime.

These latter political duties are the counterpart of certain rights, namely, the ones implied by the principles of freedom, equality (universal juridical dependence) and independence (from other citizen's interference).¹⁷ This complex of rights constitutes the main substance of the republican constitution. As it is grounded on these three principles, the republican is the only régime that derives from the original contract understood as a critical standard. So we are allowed to state that if the contract possesses a regulative status, it is thanks to the possibility of understanding it not only as a mere institution of authority but as an ideal republican constitution that must be progressively established.

The main difference between a despotic régime and a republican one is that, for Kant, in a republican one there is a division of powers that prevents rulers from using the united will as their private will.¹⁸ The unification of the executive and legislative power is unjust because in that case there will be no legal (external) obstacles to hinder the violation of the general will's autonomy. Through this way, we discover that the basic difference between republic and despotism resides, ultimately, in the way the innate right to freedom is understood. The related notion of right, in turn, will be translated into the criterion that will allow us to distinguish Kant's normative-critical political perspective as a response to juridical positivism.

So at this point we return to the Kantian criticism of some of the natural lawyer's positions. Kant denies the Grotian definition of right when he contends that the principle of external freedom cannot be understood as a mere permission. Grotius defined a person's right as "a moral quality annexed to the person, entitling her to possess something or to do something according to right".¹⁹ Given the fact that right is for Grotius "what is not unjust", i.e., what is "not repugnant" to the possibility of community, a right is a faculty or capacity for having something of one's without injuring others. Juridical freedom is here understood as the "possibility of an action as long as it does not injure somebody else". Kant finds this

¹⁵ Cf, for instance, *ZeF*, Ak. VIII, 373, footnote.

¹⁶ Cf, among other places, *WiA*, Ak. VIII, 35 and 39; *Erneurte*, Ak. VII, 86; *Idee*, Ak. VIII, 22.

¹⁷ *ZeF*, Ak. VIII, 349.

¹⁸ Cf. *ZeF*, Ak. VIII, 352, footnote.

¹⁹ *DJBP*, I, I, IV (translation modified).

definition tautological in a normative sense.²⁰ In fact, it does not explain what a just law is, that is, what is that that makes a law just and so rationally binding for me. It only seems to establish what actions are allowed (or, better, forbidden) to me once positive legislation has been enacted. Clearly, such a definition is useful if we want to indicate which actions a subject can carry out within a legal system. Kant holds that this realistic approach is not sufficient to take account of the entire rights held by the persons subjected to state authority. Kant's strategy will be, once more, asking for the right by which laws are enacted. In these terms, juridical freedom is defined as the capacity to obey those laws to which I have given my consent.²¹

§ 3. For Kant, thus, compatibility and material benefits alone must not be the only aim governmental actions should tend to when securing civil rights. As free rational beings, citizens have the right to ask the ruler to account for "the principle upon which they are provided with such benefits".²² The ruler cannot answer by referring to his own conception of happiness because his private ethical end would not necessarily be shared by all and, more importantly, because an ethical end cannot be forced upon another without at the same time implying a violation of her autonomy. So again we need to appeal to the exigencies of reasonable justification. Here, legitimacy, the matter of right, recovers its main place within the Kantian architectonic to shape the important role ascribed to the principle of publicity, which in turn widens the contract's range.

The transcendental standard of publicity serves to indicate "the incompatibility of the maxims of the law of peoples with publicity".²³ But some unjust actions manage to pass this test: Where no separation of powers has been legally stated in the constitution, government's decisions do not need citizens' consent and so the executive power does not need to hide unreasonable maxims to secure the success of the policies they motivate. This is the reason why Kant adds yet another exigency. For publicity to be legitimate it should have to be possible to distinguish under which kind of political order maxims are published. This refined standard of legitimacy is not, thus, positive law. Rather, it consists in a rule to examine if positive law is in accordance with the rational concept of right or, in other words, with the idea of a republican constitution.

²⁰ Cf. *ZeF*, Ak. VIII, 350, footnote.

²¹ Cf., *ZeF*, Ak. VIII, 350, footnote. We can recognize a certain Rousseau's influence not only behind this idea, but also under the Kantian criticism of Grotius' doctrine. These topics, as well as the fundamental differences between Kant and Rousseau, rooted basically in Kant's liberal intentions, cannot be treated here.

²² *Erneuerte*, Ak. VII, 86

For these reasons, we can say that the main mission that Kant has set to his original contract is to establish the possibility for an ongoing, progressive widening of the range of political rights. In order to achieve this task, it is necessary to submit the purposes of the laws to the power of criticism in the public use of reason. This requirement follows from the very definition of the principle of publicity. The “transcendental and positive principle of right” states: “All those maxims that need publicity (in order not to fail in their purposes) agree with right and politics at the same time”.²⁴

Those maxims that can make the actions they intend concrete only by being published in the public use of reason are the ones that “agree with the general end of the public”. The main task to be fulfilled by rulers is to achieve people’s contentment with the state of affairs.²⁵ But this contentment inherently implies an exigency: the maxims of the ruler’s decisions must be accepted by everyone in the public use of reason. In this way, maxims will reflect the “union of everyone’s ends” and will be desired by the common will united by the birth of the juridical state.

§4. We can thus define the motivation that shapes Kant’s theory of right as the aim of offering a universal and rational standard designed to regulate the progressive introduction of improvements in law for the sake of a common good. This sort of ultimate political end consists in the happiness of the members of the state understood as their contentment with a state of affairs, but this contentment can only be valid if it fulfills certain requisites of legitimacy (understood as moral justification)²⁶ and if it can, by that fulfillment, be rational and autonomously accepted by citizens, who have now become members of a community of ends. This regulative ideal, the republican contract, would make an effective civil instrument to demand and get political rights, the acquisition of which hinders the greatest danger state authority involves: That rulers consider men something insignificant “using them as mere instruments for their purposes as if men were beasts”.²⁷ We can easily see then the reason why Kant considers that the regulative ideal of the republican constitution fosters the concretion of perpetual peace. When the moral concept of right works within the state through a legitimate

²³ *ZeF*, Ak. VIII, 384

²⁴ *ZeF*, Ak. VII, 386

²⁵ Cf. *ZeF*, Ak. VII, 386

²⁶ The connection between what we have called “moral justification” and right does not imply that the juridical sphere has an ethical basis. In the *MdS*, right and ethics are both defined as moral -in opposition to natural-legislations insofar as they are both concerned with obligation. The difference between morality and right stands in their specific deontological modality. Cf. *MdS*, Ak. VI, 389. Cf. the purely ethical formulation of the categorical imperative in *GMS*, Ak. IV, 402.

²⁷ *Erneuerte*, Ak. VII, 89.

public use of reason, governmental decisions need to be reasonable if they are to be put into practice. Reasons for waging war are seldom so. This is the reason why freedom within the state is something that needs to be developed –not just made compatible as the natural lawyers’ contractual theories suggest.

References

- Aristotle. *EN: Ethica Nicomachea*, trans. Ross, W. D., in Aristotle, *The Works of Aristotle*, London, Oxford University Press, 1915, vol. IX.
- Grotius, H. *DJBP: De iure bellis ac pacis; The Law of War and Peace*, trans. Kelsey, F. W., New York, Bobbs-Merril, 1925.
- Haakonssen, K. “Hugo Grotius and the History of Political Thought”, *Political Theory* 13 (2): 239-265, May 1985.
- Kant, I. *Kants gesammelte Schriften*. Deutschen Akademie der Wissenschaften, Berlin, 1902-
- *Erneuerte: Erneuerte Frage: Ob das menschliche Geschlecht im beständigen Fortschreiten zum besseren sei*. In *Der Streit der Facultäten in drei Abschnitten*, volume VII, pp. 1-116.
 - *Gemeinspruch: Über den Gemeinspruch: Das mag in der Theorie richtig sein, taugt aber nichts für die Praxis*; vol. IV, pp. 273-314.
 - *GMS: Grundlegung zur Metaphysik der Sitten*, vol. IV, pp. 386-463.
 - *Idee: Idee zu einer allgemeinen Geschichte in weltbürgerlicher Absicht*, vol. VIII, pp. 15-32.
 - *MdS: Die Metaphysik der Sitten*, vol. VI, pp. 103-493.
 - *RzM: Reflexionen zur Metaphysik*, vol. XVIII.
 - *WiA: Beantwortung der Frage: Was ist Aufklärung?*, vol. VIII, pp. 35-42.
 - *ZeF: Zum ewigen Frieden*, vol. VIII, pp. 341-386.