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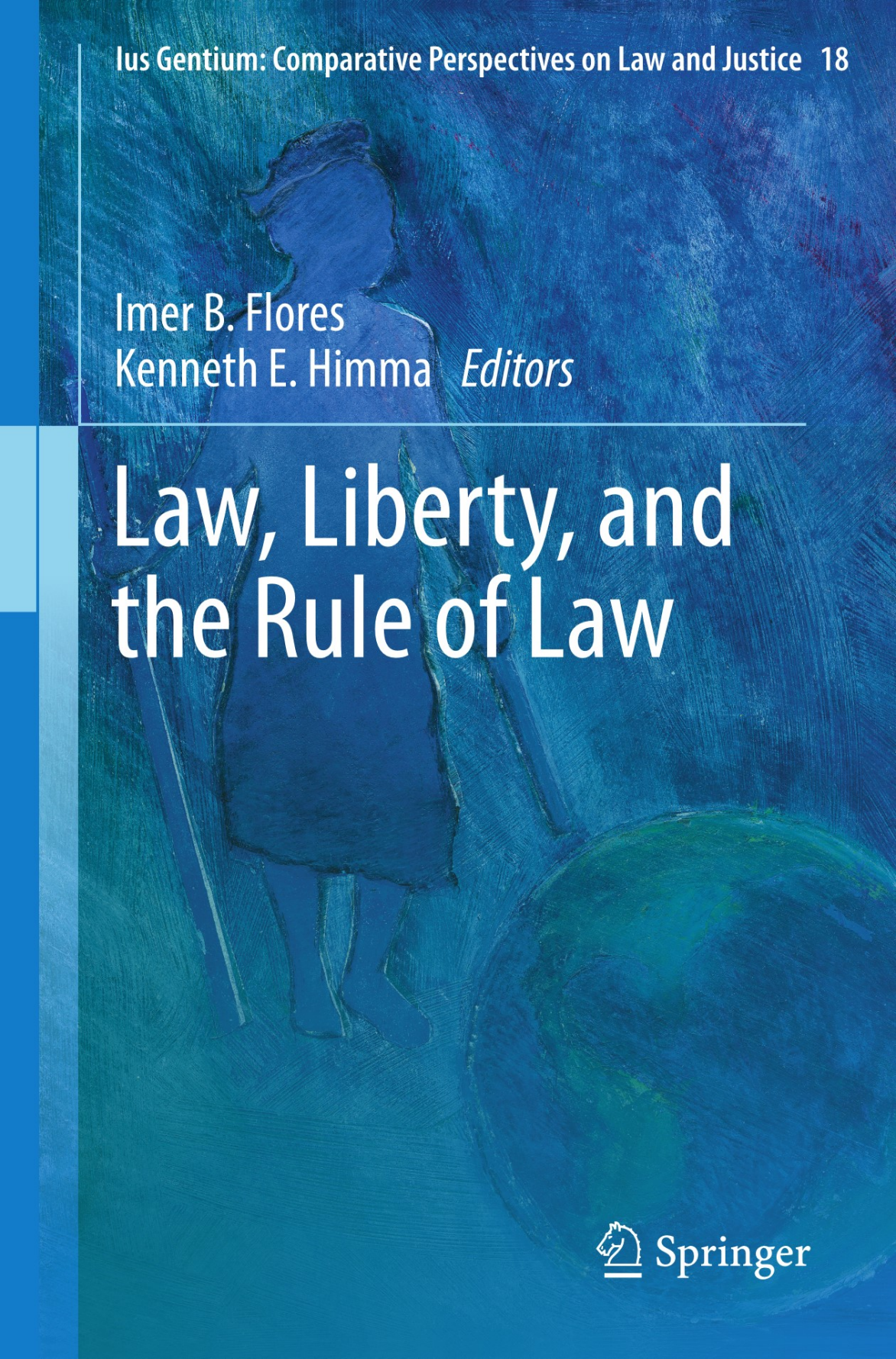

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Chapter 4
Kantian Re-construction of Intersubjectivity Forms: The Logic of the Transition from Natural State to the Threshold of the Civic State

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4.1 Introduction

Immanuel Kant,[1] would undoubtedly like people to conduct their commonwealth – *das gemeine Wesen* – in the form of a "society based on norms of virtue" (1910, VI, 94).[2] He even considers the formation of such an "ethical commonwealth" the task which the members of the human race must face and treats it as an order of reason. He warns politicians, using a dramatic tone, against attempting to bring such a polity by force: "Woe betides the legislator – says Kant – if he wishes to bring about through coercion a polity directed to ethical ends!" (1910, VI, 96). This objection, however, is not only an opposition to the *method* of implementing a system based on norms of virtue; to be exact, it is not merely a protest against violence. Kantian objection is more fundamental in nature – it is an objection to the attempt to mix the political polity with a polity based on principles of virtue or ethical ends. Any attempt to give priority to the latter, thus imposing such principles on a politically constituted polity (the only form of which – compatible with reason and worthy of acceptance – is, according to Kant, the *republic*), which can only occur under the conditions of a civic state.

Republic is necessary in order to conduct commonwealth in accordance with the absolute indications of practical reason, and has its foundation in the idea of "original contract". This form of polity constitutes a pattern of polity for all modern countries of the Western world; namely, the countries with a liberal-democratic political system. And, it is precisely this polity system, this political form of organizing and conducting

[1] Works of Immanuel Kant are quoted after the issue of the Prussian Academy of Sciences (with some exceptions) in my own translation.

[2] "[*E*]*ine Gesellschaft nach Tugendgesetzen*".

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commonwealth that should be granted – as Kant stated – priority over all other forms of organizing a polity. This Kantian postulate is valid in our times.

To help us to understand this primacy of the republican polity, as well as the concept of original contract, which constitutes the basis of this polity, one should primarily reconstruct Kant's logic of reasoning: the logic of ascending from the most elementary forms of intersubjectivity to the most sublime form of commonwealth, from the standpoint of human finitude and limitations, namely "ethical commonwealth". Nevertheless, it is the republican form of commonwealth, rather than the most sublime one, that is of paramount importance. This study will present only one, yet crucial, aspect of this path, the culmination of which is a civic *state* with a public normative authority: a civic *polity*. In turn, the only form of a civic polity consistent with the principles inferred *a priori* from the concepts is a *republic*.

4.2 *A Priori* Versus Empirical Knowledge of the Forms of Intersubjectivity

Kant is familiar with different forms of human coexistence, *i.e.* various forms of intersubjectivity. He is also perfectly aware that various "propensities for community", which includes *feelings*, can constitute a "sensual" bond that connects people within these different forms of intersubjectivity. This way of perceiving intersubjectivity, through the prism of different "propensities for community" is an empirical way to comprehend intersubjectivity. It undeniably fulfils the premise that we are beings who belong to an empirical order, an order of sensible system of nature and, as such, we are creatures filled with feelings, emotions or inclinations. However, as we know (or at least, as Kant believes), it is not just this fact that determines our specificity and the dignity characteristic of man. It establishes our simultaneous membership in noumenal order of nature, *i.e.* the order in which we find ourselves as creatures capable of representing a supersensible order of nature – due to our rational power. Such an order can be constituted by means of our norm-giving will. Anthropology as a form of empirical knowledge, as presented in the *Anthropology from a Pragmatic Point of View* (1910, VII, 117–334), cannot tell us what forms intersubjectivity *shall* take. In order to satisfy our membership in a noumenal system of nature and in order to not merely describe the forms of intersubjectivity but to be able to identify those forms which *shall* occur, there is the need of a different knowledge, with a different attitude, namely not empirically but *a priori* proceeding knowledge.

4.3 Intersubjectivity Viewed in Terms of "State" and "Polity"

Kant does not (obviously) apply the notion intersubjectivity. In order to refer to various forms of intersubjectivity, he makes use of such concepts as "society" (*Gesellschaft*) or "commonwealth" (*das gemeine Wesen*). Kant characterises these different forms

of "community" or forms of "commonwealth" by means of characterising "state" (*der Zustand*) and "polity" (*Verfassung*), which we deal or should deal with. What is that state and what is this polity? "State (*status iuridicus*) is [such] relation of the arbitrary will to the arbitrary will of others, by virtue of which everyone is capable of rights". Kant says that each such state must, in turn, be somehow constituted. It needs a form; a "polity" which is nothing else but the *state* which deals with the relationship of *combining* or *unifying* arbitrary will of one and arbitrary will of other. This unification (polity), can have a "purely objective" existence; it can exist "in the sense of the highest principle of possible states"; or it may be something "subjective", *i.e.* it may simply be "an act of arbitrary will" (1910, XXIII, 239). In other words, the polity (*i.e.* the state in which arbitrary volitions must be combined) may take one of two forms: (i) a state imposed by arbitrary will, which occurs in the form of *common will*, but this unification is then of subjective character; or (ii) it may have the status of an *idea* or *concept* of "combined arbitrary will", namely combined in a way which is completely unconstrained, yet, dictated by reason – such a unification would have an objective character.

4.4 Law and Freedom as the Fundamental Categories of Determining Intersubjectivity

These forms of intersubjectivity, which can be only determined by *a priori* proceeding knowledge, should primarily be taken into consideration. They also represent a major concern of Kant's practical philosophy. The thing that immediately hits the eye when looking at these Kantian insights is that these forms of intersubjectivity are perceived by Kant from a particular perspective; namely, from the perspective determined by two categories or two concepts: the concept of law[3] and the concept of freedom.[4] The latter is by no means merely a coincidence. Only by virtue of the freedom and ability to present the law, human beings belong to the noumenal system of nature. However, this means that any form of developing intersubjective relations is considered and classified in terms of mode of freedom and kind of law, which deal with, or rather, which we *are to deal* or *should deal with* in a case at issue.

In order to name and characterise these forms of human coexistence have to be explained firstly the modes of law and the kinds of freedom that can and must be discussed here. Likewise, it should be added that different modes and kinds of law and freedom determine these different states – understood as specific types of the relationship in which arbitrary volitions remain to each other. These states, in turn,

[3] The word "law" is used here deliberately in an ambiguous way, in order to cover both: the notion of "right", "entitlement" (*Recht*) and the notion of "norm" (*Gesetz*).

[4] "Freedom is in fact *ratio essendi* of moral law, while the moral law is *ratio cognoscendi* of freedom" (1910, V, 4fn).

demand to be manifested in a certain form of polity. They require such forming that arbitrary will of the one and arbitrary will of the other will be unified.

Let us start with "varieties" of freedom. Kant commences with the elementary "variety" of "authority" or "capacity" in terms of which freedom is rightly understood. He begins, therefore, with inherent freedom as a possibility to act; without freedom – perceived in an elementary way – it is not possible to imagine any other forms of freedom. These forms of freedom are derived by Kant from this very elementary concept of freedom by taking into account the conditions that must be fulfilled for a given pattern of freedom to be of a real character, rather than being merely a requirement of reason. From this basic concept of freedom, *i.e.* the possibility to act, reason leads us to conclude that this freedom could not be of viable character if my freedom did not match or, more precisely, if it did not harmonize with the same freedom of another agent by means of coercion exercised unilaterally, but it would rather harmonise while remaining "under the governance" of a certain norm, that is a rule which is superior in relation to our particularistic rules (*i.e.* the maxims of our actions) and it in the same way restricts my and your external freedom. Therefore, according to Kant, one's freedom – perceived as the possibility to act – should be interpreted in relation to the same freedom of others.

Of fundamental significance (determining the specificity of the whole Kantian thinking about "commonwealth" and therefore about intersubjectivity) is the awareness that the commonwealth is only possible under the conditions of certain frameworks. It distinguishes this thinking from all antagonistic concepts, glorifying conflict and struggle. The governance of this polity consists of nothing else but the unity of differing arbitrary wills under the rule of the common norm. Kant is, undoubtedly, fully aware of the existence of antagonisms and a clash of one arbitrary will with the other. The latter takes place on the empirical level, on the level of sensual system of nature, which we also belong to. However, due to our noumenal nature we have to look at ourselves as beings who are above those conflicts and struggles. This is the level at which it is feasible to imagine the conformity of arbitrary volitions. Without the existence of such a framework, where there is harmony between differing arbitrary wills, it is not possible to pursue one's own freedom. This freedom is conceived as the opportunity to pursue one's own life and one's own vision of prosperity. The conflict and the clash of particularities are inevitable. It does not mean, however, that we should not be able to provide a standard where opposing external freedoms remain in harmony. Going beyond the conflict, and ordered by reason, this harmony of external freedoms is only achievable under the rule of a particular norm. Furthermore, this norm is revealed to us by insight into the very concept of freedom and is, therefore, superior to this conflict and "sociability" (1910, VIII, 20).

Before going on to a brief characterization of "higher" kinds of freedom and, simultaneously, forms of intersubjectivity, it is necessary to explain areas of Kant's understanding of law. When referring to law, it is important to remember that the single word *law* covers both terms used by Kant: *Recht* and *Gesetz*, which are by no means synonyms (though in conceptual layer they are used by Kant as complementary concepts). The need to eliminate this ambiguity implies apt proposal to express the term *Gesetz* by the word "norm". The word *Recht* is ambiguous in German

because it stands both for the system of regulations existing in certain conditions or juridical provisions as well as (or even primarily) for *entitlement*. On the one hand, there is a reference to that juridical order and to patterns of behaviour regulated by these provisions, passed by the relevant authority. On the other hand, there is a reference to "entitlement", which is understood very broadly. The latter can stand for entitlement, which has its basis in certain juridical regulations or norms, but also (or even primarily) an inherent entitlement based on "the norms dictated by reason" (*Vernunftgesetze*), *i.e.* on *dictamina rationis*.

4.5 The Basic Forms of Intersubjectivity in Natural State

Kant, as has already been noted, was aware of various forms of intersubjectivity existing on the empirical level. However, what interested him in particular were those forms of intersubjectivity which were called to be brought into existence by a norm-giving reason. Each of these forms is a certain embodiment of law (understood primarily as an entitlement but also as a norm) and freedom. How do these forms look like?

4.5.1 Fundamental Freedom and Its Rational "Adjustment"

Kant does not consider these forms in terms of time or history, but in a logical order which can also correspond to genetic order. However, this issue of correspondence is not essential at this time. What is crucial, on the other hand, is Kant's reasoning which leads from a situation where *one is somehow left to one's self with one's inborn entitlement to make use of one's external freedom*. In this situation, one is in fact left to one's self. However, reason can easily formulate the most general, the most basic norm that should govern this freedom. As Kant claims, reason derives this *a priori* knowledge from the very concept of freedom. This norm is as follows (1910, VI, 230):

> Right [or *legitimised*] action is every action which can coexist, in accordance with a certain universal norm, with the freedom of any [man], or it is [such action] that arbitrary volition of every [man] – in accordance with the maxim of that action – when complying with a certain universal norm, can coexist with the freedom of every [man].

This fundamental norm can also be expressed in the form of the following imperative: "act externally in such a way that the free use which you are making with your arbitrary volition, could – whilst adhering to a certain universal norm – coexist with the freedom of everyone". This imperative was derived from the concept of freedom and it is nothing else, as Kant believes, than the explication of the *elementary condition of compliance of the notion of freedom with one's self* and the latter condition is a restriction of freedom – understood as the arbitrary volition – by a requirement of

compliance of the use made by man of his arbitrary will with the same use made by others from their arbitrary volition. Compliance to this imperative does not have to (unlike purely moral imperatives) result from regard for the norm expressed in the imperative. Therefore, it does not entail any "moral compulsion" to follow it. However, it carries another important detail conveyed to us by reason, namely, "in accordance with its idea, my freedom is limited to [acts feasible when meeting] these conditions and may also be actively limited to them by others" (1910, VI, 231). The first norm dictated by reason and concerning our freedom (what is meant by the latter, of course, is an external freedom, namely our arbitrary volition) is, therefore, a certain imperative peremptory information on a peculiar fundamental entitlement vested both in me as in my partner in intersubjective relationships; it is not only the entitlement to act but, above all, to resist someone who hinders the activity in accordance with the above principle. This is, in turn, equivalent to the legitimization to exert coercion upon him.

The abovementioned elementary form of intersubjectivity can be defined by the inherent entitlement to make external use of the possibility to act. Concurrently, it may be defined by awareness of the existence of an overarching principle, a particular norm which reason makes freedom subordinate to. One might say that, under this form, I know what conditions must be met when making use of external freedom. Besides the pressure that another person may exert on me (if he is strong enough to do that) or the coercion which I am entitled to exert due to the norm dictated to me by reason, there is nothing here that would guarantee the implementation of my innate entitlement. Additionally, there is nothing that would (with the exception of my reason) determine my right (understood as entitlement) and resolve the dispute concerning that right. Under these circumstances, everyone is one's own "rudder, sailor and ship", everyone is the judge for oneself, and the executor of one's entitlements. Such a situation is characteristic to natural state.

4.5.2 Acquisition and Its Principle – The Need for a Transition to Legal Status

The character of the abovementioned state is by no means changed by the second – next to the innate right of making use of external freedom – crucial fact that Kant focuses on when reconstructing the logic of forms of intersubjectivity: *i.e.* the need to deal with the use of external objects; the need to be in possession of something. In the case of this form of intersubjectivity, the object of arbitrary volition (that both arbitrary wills make a claim to) enters into the relationship between me and the other object of arbitrary volition. The conditions of exerting pressure on another person undergo a change in this situation. The condition of coercion, in a manner consistent with the norms of freedom, has (as its object of arbitrary volition) the same object that we took into our possession (1910, XXIII, 277):

> When it comes to having a particular thing – external in relation to me – I cannot in compliance with the norms of freedom exercise coercion against others in a different way than only

> when all others, whom I can enter into a relationship with, agree with me on this matter, namely only through the will of others reconciled with my will, it is only then in fact that I compel everyone – in line with norms of freedom – by means of their own volition.

In order for me to exert pressure on another person, in accordance with the norms of freedom, a change of conditions must exist. Their arbitrary will wishes, against my will, to: make use of my property; or, of the object of my arbitrary volition, I have to resort to a "united will of all"; or, as we might say, to "the will of all united with my own will". In other words, the will of those for whom the same thing is – or may be – the object of their arbitrary volition. What is needed, therefore, is to have and to acquire a reconciled arbitrary will. This follows the fact that "entering into possession", namely "acquiring" (*Erwerbung*) (which takes place at the level of developing the forms of intersubjectivity) imposes a certain obligation on others. It is a commitment "to do something or refrain from doing something", and it is manifested only at the moment of "entering into possession": "this obligation was not imposed on them prior to that act of mine" (1910, XXIII, 219), as Kant observes. Such an obligation may arise, however, only if the other party assumes such obligation: without *assuming* the obligation, we cannot speak about the existence of commitment; as Kant says: "there can be no commitment *vis-à-vis* anyone apart from the one that was assumed by this person itself" (*omnis obligatio est contracta*)". This means that "entering into possession", entailing the imposition of an obligation on the other, can take place in no other way than "through united arbitrary will of those who (by means of acquisition-entering into possession) create an obligation and conclude a contract with each other (*sich wechselseitig contrahiren*)" (1910, XXIII, 219).

The foregoing deliberations provide another imperative and another principle that should govern intersubjective relations. People inevitably enter these relations while an arbitrary will is unavoidably aimed at external objects and the need to acquire these goods or enter into their possession: "the primary principle (*Princip*) of any acquisition is the rule of limiting every (even unilateral) arbitrary volition by the requirement of compliance with possible universal unification of arbitrary volition [oriented] at the same object" (1910, XXIII, 219).

It is only under this form of intersubjectivity that the relations which people enter into among one another become legal relations. It is at that moment when a community is created. Thus it is a certain form of intersubjectivity in which legal or juridical regulation of both arbitrary freedom and the acquisition of these becomes indispensable.

4.5.3 Peculiar Duality of Legal State

Even though, by its very nature, it is of a legal character, this "acquisition", namely "entering into possession" of external objects, will be "temporary" in nature, rather than "peremptory" in nature (*vid*. 1910, VI, 256ff, 264ff, 267), until the principle of the abovementioned state becomes the principle which *actually* governs the reality: until the "legal status" (which for now is a deontic state) becomes reality. This state,

that is legal in status, is a peculiar one in comparison to all other states and all other forms of intersubjectivity. In contrast to all other states, obtaining this state (or form of intersubjectivity) is a necessity which an external norm-giver and executor of this duty is entitled to enforce. In other words, even if we do not want to enter a legal state – whether it is us or someone else – according to a norm dictated by reason, we can be compelled to reach this state as much as we can compel the other to go to legal status.

Before we focus on a certain peculiarity of what is referred to as "legal status", we should briefly explain what is meant by the right when we speak of "legal status". This is, generally speaking, understood by Kant as "such a relationship between people which contains the conditions under which everyone is able to *exercise* their right [*i.e.* entitlement]" (1910, VI, 305fn). Right, conceived as entitlement, entails "being in the possession of arbitrary will of another person [standing for] […] the possibility of inducing him in accordance with the standards [concerning] freedom by means of my arbitrary will to a certain action"; right can be therefore referred to as "an external property within causality of another person" (1910, VI, 271). When characterizing right, construed undoubtedly as the entitlement which corresponds obligation, Kant points out and firmly emphasises that this right applies only to a purely formal compliance between one and the other arbitrary will; thus, the wishes and needs, as well as the matter of arbitrary volition, remain outside the area of interest (1910, VI, 230):

> The concept of right [*i.e.* entitlement], in so far as it relates to the obligation corresponding with it (*i.e.* its moral concept) concerns, *firstly*, only the external and practical relation of one person towards another, as long as the activities of these people – as actions actually taking place (*facta*) may (directly or indirectly) exert influence on each other. *Secondly*, it does not stand for the attitude of arbitrary will [of one man] to the *wishes* of another (and thus also to its very need), as for example in activities defined as charitable or ruthless, but rather for the attitude to the *arbitrary* will of the other. *Thirdly*, in this mutual relationship of [one and the other] arbitrary will, we do not take into account the *matter* of arbitrary volition (*Willkür*), *i.e.* the aim which each of them wants to achieve together with the thing that s/he desires, for example, we do not ask whether someone can also have the benefit from the goods they are buying from me for trading purposes or not, we merely ask about the *form* of mutual relationship of volition (*Willkür*), as far as this volition is considered to be unencumbered and about whether the conduct of one of the two parties can be reconciled with the freedom of the other on the basis of a universal norm. Right is therefore a set of conditions under which the arbitrary will of one [man] can be reconciled with the arbitrary will of another, according to a certain universal norm [concerning] freedom.

The intersubjectivity that Kant refers to when speaking about legal state (about a certain relation that must take place as a necessity dictated by reason) is such intersubjectivity whose constitutive moment is a purely formally defined relationship of compatibility between differing arbitrary volitions. When looking from the perspective of deontic form of commonwealth (arising at this stage of its logical and rational reconstruction), feelings, sympathies, needs or goals of particular people, whose deeds are interdependent due to their mutual influence, remain irrelevant or they merely play a secondary role.

On the basis of a certain universal standard, the peculiarity of the legal status is the imperative to win the arbitrary will of the actors who mutually interact and is the

dual character of this state. In other words, *de facto* exists in two forms. On the one hand, the legal status means the reconciliation of differing arbitrary volitions in accordance with a universal norm. As such, it entails the departure from natural state. On the other hand, however, an indispensable condition of departing from the natural state is to arrive at a specific reconciliation or unification of arbitrary will, namely, "a really universal unification carried out in order to establish norms" (1910, VI, 264). This fact, the unification due to the determination of norms, constitutes a hallmark of properly construed legal status, which is a real contrast to natural state. Opposition to this is civic state or, more precisely, legal-civic state.

4.5.4 Departing from the State of Private Law and Arriving at the State of Public Law (Explanation of Peculiarities)

The abovementioned peculiarity of this state (or rather its duality) was described by Kant in the penultimate chapter (§ 41) of the first part of *The Metaphysical First Principles of the Doctrine of Right*; a chapter dedicated to private law, with the title: "Transition from Property in Natural State to Property in the State of Law as such".[5] In order to identify this duality or peculiarity, it is necessary to reconstruct Kant's description of this (logical) transition.

Kant's point of departure is the abovementioned most general definition of legal status. According to this definition, legal state (*der rechtliche Zustand*) is "such a relationship between people, which includes the conditions under which the man is able to *exercise* right" (1910, VI, 305fn). According to the requirements of his metaphysical thinking,[6] Kant goes on to identify the formal principle which is constitutive for this state, *i.e.* to identify the "formal principle of this state being feasible". Considered in the light of "the idea of universally norm-making will", this principle is called "public justice". The principle of public justice, in turn, can be divided into three sub-principles, or rather we can speak of three components of public justice, distinguished by three modes (modalities) of "possession of objects ([understood] as the matter of arbitrary volition)" for the possession to "correspond to norm". These three modalities are as follows: *possibility* – when it comes to possession of things in compliance with norm; *reality* – when it comes to the same possession of things in accordance with norm; and finally, *the necessity* – when it comes to possession of things in compliance with norm. Accordingly, as Kant states, public justice "can be divided into *protective* justice (*iustitia tutatrix*), justice in

[5] In the translation of M. Gregor: "Transition from What Is Mine or Yours in a State of Nature to What is Mine or Yours in a Rightful Condition Generally" (Kant 1999, 450).

[6] What is meant by the above is a modern metaphysical thinking, applied to a specific area, namely to the sphere of *praxis*, that is to the question of commonwealth and the problem of human activity; it is by no means a coincidence that the lecture in law that is referred to is titled: *The Metaphysical First Principles of the Doctrine of Right*.

mutual acquisition [*i.e.* reciprocal] (*iustitia commutativa*) and *distributive* justice (*iustitia distributiva*)" (1910, VI, 306). A crucial, somewhat qualitative difference can be observed between the latter component of public justice and the first two components. This difference, however, only becomes visible and understandable in light of Kant's further argumentation. Here he continues on to analyse (while departing from the determination that state should be defined as a state which is not a legal status) which state should be considered as being in opposition to natural state. However, before we discuss these distinctions concerning non-legal state, as well as the one opposed to the natural state, we should indicate this crucial difference between the component of public justice, which referred to as distributive justice, protective justice and justice in mutual acquisition.

While differentiated due to "*possibility* (when it comes to possession of goods in compliance with norm)", what does protective justice consist of? In other words, what is actually determined by the norm which constitutes the precondition of protective justice? As Kant states, in the case of protective justice, the norm "determines only what conduct, by reason of its form is, looking from the inside, a *legitimate* behaviour (*lex iusti*)". In the case of the second component of public justice (namely, in the case of justice in *mutual acquisition*) norms (which similarly, as in the former case, guards a specific entitlement and ensures the possibility of exercising it by everyone) determine "what else, being the matter, shall also be subject to external normalization, *i.e.* what is [another] reason why the state of possession is [the state of possession] of a *legal nature* (*lex iuridica*)" (1910, VI, 306). As compared to the abovementioned forms of public justice, a very important difference becomes apparent with the transition to the third component of public justice. In the case of distributive justice, norms determine (1910, VI, 306):

> [W]hat particular ruling of the tribunal is in a particular case, in light of a certain norm (*unter dem gegebenen Gesetze*) adequate in relation to this norm, *i.e.* what is *valid*, final (*lex iustitiae*) and in such case the tribunal itself (*Gerichtshof*) is treated as the state *justice* and [when] one can ask – as the most important thing of all juridical cases – if the existence of such [*i.e.* state justice] can be spoken of or not.

While in the case of the first component, the norm itself determines the *form* of conduct only in relation to which it is *legitimate* (*recht*). In the case of the second component, the norm determines why the state of property, as a certain *matter*, may be of *legal character* (*rechtlich*); *i.e.* it meets the requirements to be externally subject to normative regulation. Finally, in the case of the third component of normative justice, the norm determines something that is placed at a qualitatively different level because it is placed at the level of a binding resolution (which is not necessarily valid or final) and a resolution of why "the ruling of the tribunal [issued] in a particular case is in the light of a particular norm adequate in relation to the latter"; in other words, why it is *valid or final* (*Rechtens*).

The specific character of this kind of public justice and peculiar implications, connected with the latter, are revealed as a result of Kant's use of the principle of opposites twice. However, the first opposition that Kant applies was *oppositum*

contradictorie.[7] The second, *oppositum contrarie.*[8] That former opposition was used by Kant to determine non-legal state. Such state which is not legal is the one in which there is no distributive justice. This very state is defined as the *state of nature* (*status naturalis*). The second opposition, on the other hand, was applied by Kant in determining the state which should be opposed to the state of nature. Kant criticizes Achenwall's view according to which *social state* constitutes the opposition of the state of nature. It is not the social state which, according to Kant, could be reasonably referred to as an artificial state (*status artificialis*): placed in the antipodes of the state of nature – defined by Kant as such state in which there is no distributive justice. The state which constitutes actual opposition of the state of nature, is a civic state (*status civilis*), understood as a state of "community in which distributive justice rules". So it follows that we are indeed dealing with social state, with the community. But the factor that organizes this community is a special form of the principle of public justice – referred to as the principle of the legal state. As noted by Kant, the difference between this community and any other communities that may exist in the state of nature and can be "communities meeting the entitlements [of the members of this community]" (referred to in Kantian terminology as *rechtmäßige Gesellschaften*), lies in the fact that the norm requiring (in *a prioric* manner) participation in a given community does not apply to any of these communities. It is only the community in which distributive justice is the predominant one. Accordingly, participation in only this variant of "legal state" can be determined as a duty "of all the people who can enter into (even contrary to [their] own will) in legal relations with one another". Therefore, only this legal state may be referred to as "being a legal state as such" (1910, VI, 306).

If compared through the prism of three components, or three varieties of public justice, three of the abovementioned states (the state of *nature*, *social* state and *civic* state) can be classified as follows: "The first and second state can be referred to as the state of *private* law, and the third and the last one – as the state of *public* law" (1910, VI, 307). Kant emphasizes that in the case of the public law state, people are no more burdened with more responsibilities than those already imposed at the level of the private law: "the matter of private law is the same in both cases". The difference, however, is that "the norms of public law relate […] exclusively to legal form of human coexistence (to the system), due to which these norms must necessarily perceived as public" (1910, VI, 306).

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[7] *Oppositum contradictorie*, namely under the principle of contradiction, what can be also meant by the latter is the contradiction on the basis of *oppositum privative*, that is, on the basis of opposing, on the one hand, the lack which should not take place, on the other hand, property corresponding with this lack (*das Entgegengesetzte das nach Weise eines nicht sein sollenden Mangels und des entsprechenden Habens*) (*vid*. Schütz 2006, keyword: *oppositio*).

[8] *Oppositum contrarie* or *oppositum diametraliter*, namely oppositions on the basis of the greatest distance between two things in the same kind or species (*das Entgegengesetzte das nach Weise des größten Abstands zweier Dinge innerhalb derselben Gattung oder Art*) (Schütz 2006, keyword: *oppositio*).

This transition from private law to public law is, according to Kant, the postulate arising from the very private law in the natural state: "when remaining in a relation of inevitable coexistence with all others, you should depart from it [*i.e.* the natural state] and go to legal state, namely the state of distributive justice". According to Kant, the reason for such a transition "can be analytically derived from the concept of right (*Recht*) [being the entitlement that one has] in an external relation, [which constitutes] the opposition of [the concept] of violence (*violentia*) [in external relation]" (1910, VI, 307). This reason is clearly presented by Kant in § 42 of *The Groundwork for the Metaphysics of Law*. The reasons presented by Kant should be discussed in more details and thoroughly analysed.

The primary thesis in this paper is as follows: as long as the first party does not guarantee refrain from interfering in the subject of possession of the second party, the latter is also exempt from the obligation to refrain from interfering in the subject of possession of the former. The interpreter of this argument who assumes a different approach to Kant, and treats moral precepts, such as the Ten Commandments, as his point of departure could probably become indignant at this (alleged) exemption of this actor from moral obligation: for example, with the seventh commandment. This objection, however, may only present itself as justified on the basis of a particular pattern of thinking. For example, they believe intersubjective order is secondary to individuals, perceived to be equipped with the Decalogue, or having other strong moral backbone. On the basis of this thinking, external order and the behaviour of others seem to be irrelevant; the only thing which is crucial is to follow one's internal moral compass. It is on the basis of these moral actors that moral community is created. Legal provisions shall indeed be created, on account of those in whom this moral compass is defective and, therefore, must be either deterred by a system of penalties or subject to moral rehabilitation. Kantian thinking differs in this aspect. Kant foresaw the possibility of disposing a similar compass to the moral one: namely, reason. What has been pointed as a precondition of possession is mutual acceptance of this possession or ownership; Kant highlighted the principle which shall govern my conduct. At the same time, Kant was perfectly aware that the focal point, when determining the ethical basis of intersubjective relations, may not be sought in the moral properties of the individuals who enter into relations with one another, but in the normalization of these relations. These relations are dictated by reason according to the logic used in the formation of these relations; not so much through the individuals equipped with moral Decalogue, but through the interests that ensure others will not violently interfere in what does not belong to them. Thus, it is the internal logic of intersubjective relations which constitutes the source of intersubjective normative order. Although the latter will generally correspond to individual moral precepts (*v.gr.* with the seventh commandment), it does not have to be based on these commandments but rather on the norms dictated by reason. Such norms exist where the external freedom of one party corresponds with intersubjective relation of the other party.

The parties should, therefore, be interested in the transition from the state of private law to the state of public law. While remaining in the first state with one another, they remain in a state of "*äußerlich gesetzloser Freiheit*": a "freedom

deprived of regulations in the external dimension" and, since they choose to remain in that state, "they do not act unfairly *vis-à-vis each other* if they fight with each other". As Kant notes, "[what] applies to one of them, shall also apply to the other, as if it was agreed between them" (1910, VI, 306). They do not act unfairly *vis-à-vis* each other because there are somehow in the state of "harmonizing" their arbitrary volition with each other. At the same time, however, Kant states that "what they do amounts to the highest iniquity by the fact that they want to live and remain in this state which is by no means a legal state, *i.e*. [it is such state] in which the ownership of no one is protected against violence [of others]" (1910, VI, 308).

Alongside the objection presented by Kant, a significant feature of this argument is that this "highest degree of iniquity" does not consist of a certain "wicked" deed *vis-à-vis* your neighbour. Generally, in this state, we cannot talk of individually committed wickedness. Instead, it rather consists of a refusal to join a deontic form of intersubjectivity. Moreover, this iniquity is not committed by the individual but by all those who do not intend to undergo a transition to the legal state, despite the fact that (even contrary to their own will) they enter into legal relations with each other.

4.6 The Basic Forms of Intersubjectivity in Civic State

According to Kant, the condition of citizenship is a legal status "where public norm-making authority exists" (1910, VI, 255, in the title of the chapter). As Kant notes, it is the civic state, perceived in this way that constitutes the opposition to natural state. Opposition to the *natural state,* therefore, is not the *social state*, as held by Gottfried Achenwall (*vid*. 1910, VI, 306)[9] and criticised in this context by Kant. It is a particular form of legal state in which the unification of arbitrary will (in accordance with a certain norm) shall take place due to a specific purpose; namely, on account of norm determination. Such unified will constitutes the source of *public law*, referred to as "the set of norms which, in order to create legal state, need to be commonly known".[10] *Public law* is not a system of norms designed for a specific, intrinsically unified community, be it by: blood, a common faith, the past, a common

[9] As Kant writes in his notes: "Natural state (*status naturali*) cannot be contrasted with social state (*Sociali*), just like parents cannot be contrasted with children; such distinctions cannot be undertaken. Communities can also exist in *statu naturali*, with the only difference, namely [there] is no public justice, which constitutes the guarantee for everybody of their lawful state [*i.e*. adequate in relation to their entitlements]" [in original version: "Der *status naturalis* kann nicht dem *Sociali e.g.* Eltern und Kinder entgegengesetzt und so die Eintheilung gemacht werden. – Denn *in statu naturali* können auch Gesellschaften seyn nur daß es keine öffentliche Gerechtigkeit giebt die jedem seinen rechtmäßigen Zustand sichert"] (1910, XXIII, 261).

[10] In contrast to them, the norms which in the community such as family or religious community, stipulate the entitlements of particular members of these communities, do not have to be commonly known.

language, living in a common territory, or due to common, substantively specified interests. Public law is (1910, VI, 311):

> [A] system of norms designed for certain people (*Volk*), *i.e.* a certain number of people or for a multitude of peoples who – on account of remaining in mutual interactions – need a legal state to ensure their participation in the legitimate order; namely such legal state in which the sovereignty [over them] shall be exercised by the will uniting them, [*i.e.* they need a] system (*constitutio*).

When the latter state is perceived by us through the prism of the relationship in which individuals remain in relation with one another, this state can be defined as a *civic state* (*status civilis*). In turn, as Kant suggests, the sum of these units, perceived from the perspective of its relations to its own component members, can be referred to as *the state* (*civitas*). On the other hand, when we look at the state through the prism of its form, *i.e.* when we perceive it as a certain whole "unified by common interest of all to be in a state of law", the term that should be given to this whole will be "*das gemeine Wesen* (*res publica latius sic dicta*), namely "common being" or "republic in the broader sense" (1910, VI, 311).

The form of intersubjectivity, which has been characterized following Kantian logic of (re)-constructing these forms, is now the state which is defined as "unification of a certain number of people under legal norms". At the same time, one must bear in mind that legal norms (*Rechtsgesetze*) (in contrast to moral norms – *Moralgesetze*, *moralische Gesetze*) are those in which norm-making is external. For this reason, this form of intersubjectivity in question has a peculiar feature (albeit shared with previous forms of intersubjectivity [re]-constructed by Kant), namely the fact that the participation in this form of intersubjectivity, understood as adherence to legal norm, may even be forced on a person against his arbitrary will. It can be a kind of "consolation" that this coercion stems from reason. At the very least, it should stem from reason and the freedom which was lost because this constraint only turns out to be truly regained in this form of intersubjectivity. We will encounter coercion stemming from reason when these legal norms, under which unification of a number of people takes place, will be "a priori necessary norms, *i.e.* interpreted *per se* from the concepts of external law (but they will not be posited norms [or established by statute])". The state which is in such a way conceived, namely the one in which "*a priori* necessary norms" are prevailing ones, is a state whose form is "a form of state in general, *i.e.* it is the state in the *idea*", or such "as it should be under pure principles of law".[11] In spite of various attempts to depreciate thinking in terms of deontic being, such perceptions of the state as the idea should not be underestimated. As Kant notes, "Such ideas can be treated as guidelines (*norm*) in case of every actual unification [of people] into common being (and accordingly, inside this unification)" (1910, VI, 313).[12]

[11] In a translation of W. Hastie: "The Form of the state is thus involved in the *Idea* of the State, viewed as it ought to be according to pure principles of Right" (Kant 1887, 165).

[12] In a translation of W. Hastie: "and this ideal Form furnishes the normal criterion of every real union that constitutes a Commonwealth" (Kant 1887, 165).

This very idea, that some act by which "the people constitute themselves in the form of the state", is known as "original contract" (1910, VI, 315), *contractus originarius*. Only when relying on that original contract it is possible to establish among people "a civil and thus completely lawful system (*Verfassung*) and a commonwealth". Although this is merely the idea of reasoning, and the original contract should not be treated as a certain fact, it is, nevertheless, a concept that has "unquestioned (practical) feasibility: it imposes on every norm-maker – provided the latter wants to be a citizen – the obligation to establish their rights in the way that they may result from the unified will of all the people, and to perceive every subordinate entity – provided he wants to be a citizen – from such perspective as if he, together with others, gave his consent to such will. This is indeed the touchstone of the legitimacy of any public norm" (1910, VIII, 297).[13]

In light of this, we reached the final comment on the first and most crucial of the two phases of improving the forms of intersubjectivity; a phase in which this improvement is realized mainly because of the need: to ensure the best possible conditions for implementing external freedom; and for improving that (perceived) intersubjectivity as intersubjectivity which serves as the best arrangement of intersubjective relations.

The second and, at the same time, latter stage of improving the forms of intersubjectivity is somewhat different. The primary objective of this stage is neither perfecting the possibilities of realizing external freedom, nor improving intersubjectivity for its own sake. Its primary goal is the development of the abovementioned intersubjectivity on account of the intention to improve human beings in the moral sense; or at least, to remove obstacles to man's self-perfection – *i.e.* removal of everything what weakens human willingness to confront evil intentions of wicked principles at hand. Since this factor, which weakens human positive forces is not "rough nature", but the people, "to whom he is related and bound" (1910, VI, 93), what should be therefore changed is the shape of that community; and, more precisely, what is meant here is that similarly like the man has risen *vis-à-vis* legal-civic state, in opposition to the state of nature, man should now ascend from the state which is, from an ethical standpoint, an ethical natural state, to "ethical-civic state", namely start functioning in ethical common existence, that is such which is based on moral laws, or laws of virtue.

This form of common existence, although higher in relation to political form of common existence and dictated by reason, cannot replace the former. This is due to the fact, *inter alia,* that unlike the political form of common existence (in which one is compelled to participate), in the case of ethical common existence the norms of virtue are not supported by coercion. Therefore, coercion is out of question.

[13] And in another translation: "has undoubted practical reality; for it can oblige every legislator to frame his laws in such a way that they could have been produced by the united will of a whole nation [*Volks*], and to regard each subject, in so far as he can claim citizenship, as if he had consented within the general will. This is the test of the rightfulness [*Rechtmäßigkeit*] of every public law" (Kant 2003, 79).

4.7 Conclusion

Two aspects of Kant's doctrine of forms of common existence deserve special emphasis. Thus, so do the levels or stages of constructing the intersubjectivity. Firstly, examples of constitutive character in the forms of intersubjectivity are *a priori* the principle or idea (*i.e.* the aforementioned idea of the source contract). Secondly, strict separation of the political form of common existence from ethical form of common existence is required. On account of the intellectual confusion prevailing in the minds of contemporary politicians (among them also some Polish) and many commentators, the knowledge of Kant's writings would certainly help to cope with the aforementioned turmoil and would aid prioritization of rules and principles over the will of empirical majority. Furthermore, it would undoubtedly dampen the desire to realize the moral purposes by means of political instruments. Familiarity with Kant's view would presumably also allow a determination of the legal-political forms of intersubjectivity from any other forms, which are not indispensable and lack innovation, and which differentiates them from political form, which is necessary and constructed.

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