Kant and

the Limits of Civil Obedience

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Received: July 1997

Abstract

For philosophy, to pay society its due respect is to attend it, i.e., to examine it critically within the limits society sets on philosophy. And philosophy, thus equipped, draws up the limits of society in turn. We shall formulate an answer to the question, "To what extent does our respect for society allow for civil disobedience?" For the examination at hand, we shall use a Kantian model of society. The Kantian model describes society in terms of a system of laws. Following Kantian lines, we shall argue that, on the basis of a hypothetical social contract, citizens are subject to coercive laws of the state. For Kant it is a moral duty to obey the law, thus framing civil obedience in moral terms. Thus it may seem dubious whether, within the Kantian framework, there exists any leeway for civil disobedience at all. We pursue this issue along three different lines of argument. First, we claim that the head of state cannot possess absolute authority without internal inconsistencies. Secondly, the conflict between moral and positive law puts us in an unresolvable dilemma. We can only *hope* for a future reconciliation between moral and positive law. Thirdly, this hope constitutes, as we shall see, a duty that demands our public involvement. Respect for the laws of society does not mean mute subordination; quite on the contrary, it commands us to speak out for social reform.

Keywords: Kant, civil disobedience, political philosophy, moral philosophy, moral person, teleology, sign of history, hope, principle of publicity.

1. Introduction

> All resistance against the supreme legislative power ... is the greatest and most punishable crime in a commonwealth, for it destroys its very foundations.

Kant's general position is characterized by a strong suspicion of any form of civil disobedience. Kant does not seem to allow any challenge of legal authority, e.g., rejecting the right of revolution or rebellion even when the head of state has violated the contract which originally sanctioned his legitimate claim to power. Nonetheless, it is our central claim in this article that there exist Kantian limits to civil obedience.

At times discrepancies will appear between our claim of what Kant's position *should be* and what it actually *is*. To deal with such discrepancies, we may introduce a distinction between Kant's position and a Kantian position. We shall use the word *Kantian* for either anything that Kant explicitly maintains or for something that follows from his general position --- even if in his writings he holds the opposite. We shall say that a certain claim is *Kant's* position only when it is evident and indubitable that he defends it. This distinction allows us to put Kant's thoughts in a coherent form, even though he himself never expressed such claims so clearly. In this article it is our aim to find the Kantian limits to civil obedience. We shall follow Kant's writings diligently, but we shall not try to brush possible inconsistencies aside.

The argument that we want to put forward is that Kant's absolute claim for civil obedience depends on two important presuppositions. First, Kant treats the sovereign as identical to the constitution. This enables Kant to argue against the legality of dethroning the sovereign; if we were to depose the sovereign we would break the law, and breaking the law is an inconsistent action, as the maxim underlying that action is not universalizable. Secondly, Kant presupposes that there exists only a single set of harmonious laws that demand our obedience. If there were to exist a strict autonomy, any form of disobedience would necessarily *not* be sanctioned by anything in favor of it. A single set of autonomous laws would not sanction any form of disobedience. However, by finding the limits of the application of these two assumptions, we shall analyze several ways that Kant accomodates or could have accomodated certain forms of civil disobedience.

Kant himself notices a tension within the first assumption, generated by the fact that the sovereign is of a human nature. How can a mortal represent the ideal character of the law? It is clear that the empirical sovereign can be only a symbol of sovereignty. To resolve this tension Kant suggests a distinction between the physical and moral character of the head of state. The physical aspect of the head of state is the particular mortal individual who the sovereign *is* at the moment, while the moral character of the sovereign indicates the sovereign in the function of sovereign. Because the argument of inviolability pertains only to the sovereign in the function of sovereign, there exists the possibility of a physical change of sovereigns without any Kantian principle being violated.

The second part of our argument will aim at the tension in the claim that there exists only a single set of harmonious laws. Kantian philosophy recognizes, besides the validity of the positive law, also the absolute validity of the moral law. What if the moral law and the positive law are in conflict? We shall argue that there is no *a priori* principle that can synthesize these two laws. The civilian has to apply her judgment in each particular case to resolve the conflict. This means that there exists a fundamental heteronomy of civil and moral law, which makes civil disobedience (as motivated by obedience to the moral law) an inherent possibility within any state.

Although there exists no constitutive synthesis of moral and positive law, Kant argues for a regulative synthesis: it is our duty to hope that one day moral and positive law will coincide. Not only is it our passive duty to hope for such improvement, but duty calls upon us to act as well. We shall argue that for a Kantian civilian it is a duty to reason freely and to criticize laws that are not in harmony with the transcendental principles of the state. There is no guarantee that our criticism will result in improvement of the constitution, but publicity is the only hope for any moral improvement of the law.

2. Obedience and the Categorical Imperative

We shall now investigate the two-fold root of the claim that all citizens have to obey the laws of the state. Kant claims that in addition to an enforceable obligation we also have within us a moral obligation to obey the law. The reason for this fact emerges from Kant's Critical philosophy. Nicholson argues, explicitly recognizing the importance of Kant's *moral* philosophy to his *political* writings, that

> Kant's position on resistance is a similar application of the Categorical Imperative, though he uses that terminology only occasionally. ... The maxim upon which the resister acts cannot be conceived as a universal moral law without contradiction. For example, is it right to resist a tyrannical sovereign? The maxim of the proposed

> action would be: "whenever it can prevent injustice and oppression, I shall resist the sovereign." When this maxim is universalized, it contradicts itself; it is willed that there be justice (by ending the sovereign's unjust actions) and simultaneously that there be no justice (by denying the sovereign the authority which is the necessary condition for justice).

The Categorical Imperative conditions all actions, and a citizen should therefore test her act of disobedience to the law against this criterion. Kant's arguments against disobedience often involve an appeal to *pure practical* considerations. That human beings have to obey the laws of the state, he says, is "a requirement of pure reason." Nonetheless, the idea that the Categorical Imperative prohibits all instances of disobedience depends on two important presuppositions, both of which we shall challenge in the second part of this article.

First, it assumes that there is a single set of harmonious, i.e., non-contradictory, moral rules, because if we could find a pair of contradictory rules, then, on the basis of the Categorical Imperative alone, each maxim could be argued to be non-universalizable and thus the action immoral. Most commentators take this assumption for granted. What if a human being could be subject to contradictory laws? The tension lies in the fact that the system of positive law *ties* a plurality of *free* human beings together into a unity. Kant says, "A civil constitution is a relationship among *free* men who are subject to coercive laws, while they retain their freedom within the general union with their fellows." The system of laws demands strict obedience of the subjects of a state, because that is what makes them *sub-jects* of the state; but herein may lie the seeds of a possible conflict. Kant retains freedom only within the limits of the union, which leads to the possibility of disharmony between morality and the laws of the state.

Unlike other moral duties, the moral duty to obey the laws of the state is enforceable. Its coerciveness is indeed peculiar to this duty, but this does not mean, as Beck suggests, that positive law is for Kant "prior in its claims." Neither does its empirical nature make positive law subordinate to morality as Reiss claims. The coerciveness of the laws of the state indicates that they are prior to moral laws in empirical implementation and that non-observance invalidates them. We shall discuss this issue in sections four and five.

The second assumption underlying the prohibition of disobedience to the sovereign is that the head of state is identical to law as such. Kant relies on the association of these two concepts in the arguments against revolution or rebellion. Kant rejected any form of rebellion by defending the legality of authority on an *a priori* basis. He argued that disobedience to the authority of the head of state cannot be a right, because if it were, then there would have to be a law permitting the abrogation of the constitution --- which is a contradiction. This argument relies on the fact that the head of state and the constitution are identical. We shall assess this presupposition carefully in the next section.

We have shown in this section that it is a moral duty to obey the law. In this sense we agree with most commentators. However, they usually did not acknowledge that there are at least two presuppositions underlying such a view. In the subsequent sections we shall make these assumptions explicit. In both cases there emerges some kind of regulatory vacuum that makes room for Kantian disobedience.

3. Disobedience to the Head of State

Head of State

Although Kant explicitly rejected much of Hobbes' position, he adapted several Hobbesian principles for reasons not always very clear or convincing. In this section we specifically want to discuss the status of the head of state. In the previous section we sketched the view of an absolute legislator, who embodies, as it were, the law in herself. We shall suggest here that *Kant's* head of state is a curious mixture of a bit of Hobbes and a bit of Rousseau and we claim that the latter is closer to the *Kantian* position.

The chapter in *Theory and Practice* where Kant argues for a Leviathan-like position for the head of state has surprisingly as its subtitle: "Against Hobbes." However, not seldom Kant seems to be deeply influenced by Hobbes; for example, concerning the concept of an *original contract* and the exceptional position of the head of state, or the sovereignty-transfer effected by the contract and the implications of these ideas for the issue of obedience.

Kant deduced his idea of the state from the *a priori* form of the concept of the state. This concept included the idea of a *social* or *original contract* among the members of the state. Hobbes had recognized the impossibility of a transfer of rights by all the members of the community, because the people have to hand over the rights to someone who essentially has to stay out of this contractual transfer. Hobbes called her the Leviathan. Kant appropriates this view when he argues:

> Man's equality as a subject might be formulated as follows. Each member of the commonwealth has rights of coercion in relation to all the others, except in relation to the head of state. For he alone is not a member of the commonwealth, but its creator or preserver, and he alone is authorized to coerce others without being subject to any coercive law himself.

As Williams correctly notices, "here Kant leans towards the Hobbesian view of sovereignty." Moreover, the argument for the exceptional position seems to rely heavily on picturing the social contract as a historical event. From the point of view of the origin of a contract it might well be implausible, or even impossible, that those who gave their consent to it would comply with their agreement if there were no coercive power outside the contract which could enforce its observance, but that does not provide any justification of such coercive authority as such. It seems that Kant confuses the motivation of obedience with its justification. Indeed many of his commentators warn us not to make this mistake.

In another instance Kant's writing suggests a similar move, in which he employs the original contract not just as an idea of reason, but, in fact, as a historical occurrence. The case concerns whether people have a right to depose their ruler if she has violated the original contract. Kant argues that they have *not* and "the reason for this is that the people, under an existing civil constitution, has no longer any right to judge how the constitution should be administered." This comes very close not only to passively accepting, but also actively justifying a paternalistic government. The argument seems hardly concordant to the general tenor of Kantian thought. The call, *Sapere aude!,* appeals to everyone to use her judgment. Moreover, the very idea that the constitution is based on the General Will of all the members of the state indicates that the original contract does *not* in an *a priori* sense abrogate the people's right to judge the constitution; rather it actually locates sovereignty in the will of that same people. Thus, whereas some of Kant's writings suggest a paternalistic Hobbesian view of sovereignty, a more Kantian attitude would adopt a Rousseauean stance, because the original contract should be taken as an idea of reason rather than as a historical event. However, one drawback of the Rousseauean view of sovereignty is that it leaves unspecified the question of authority, i.e., the practical implementation of the General Will. It will be our task to follow Kantian thought further to see what resolutions it may offer for this problem.

Is the Head of State a Moral or Physical Person?

Kant insists on clarifying how the head of state in the modality of *sovereign* can legitimately claim her authority. He admits that there is a problem, which resides in the fact that

> man is *an animal who needs a master*. For he certainly abuses his freedom in relation to others of his own kind. And even although, as a rational creature, he desires a law to impose limits on the freedom of all, he is still misled by his self-seeking animal inclinations into exempting himself from the law where he can. He thus requires a *master* to break his self-will and force him to obey a universally valid will under which everyone can be free. But where is he to find such a master? Nowhere else but in the human species. But this master will also be an animal who needs a master. Thus while man may try as he will, it is hard to see how he can obtain for public justice a supreme authority in a single person or in a group of many persons selected for this purpose. For each of them will always misuse his freedom if he does not have anyone above him to apply force to him as the laws should require it. Yet the highest authority has to be just *in itself* and yet also a *man*. This is therefore the most difficult of all tasks, and a perfect solution is impossible. Nothing straight can be constructed from such warped wood as that which man is made of.

The human nature of the head of state is a true difficulty for Kant. Why should we obey another human being who herself remains outside the contract? Hobbes had solved the problem by creating an artificial creature, the *Leviathan*, for the enforcement of social rules. Kant, of course, did not have access to such a solution. Reiss suggests that Kant resolved the problem by turning to a moral perspective; it is the subject's *duty* to believe in the essential righteousness of the sovereign. But this rests on a misreading of Kant. First of all, believing in the essential righteousness of the sovereign cannot be a duty, because it can be falsified empirically. Kant explains --- in the case of the duty to believe in progress --- that a certain proposition cannot be a duty if it can be falsified, because what *is* can never determine what *ought*. Secondly, Kant never says that it is a duty to believe in the sovereign's goodwill but only that "the non-resisting subject must be able to assume that his ruler has no *wish* to do him injustice." And an assumption is for Kant certainly not the same as a duty.

The argument that Kant does employ to prove that there can be no coercive rights against the head of state is a *reductio ad absurdum*; "if he too could be coerced, he would not be the head of state, and the hierarchy of subordination would ascend infinitely." This argument seems rather desperate, and relies entirely on the assumption that the *regressus ad infinitum* is a contradiction. Kant thus fails to justify a certain human being's entitlement to transcendental, absolute authority.

What Kant, in fact, does is to accept the unqualified identification of the head of state with the constitution as such. In so doing Kant confuses physical power with transcendental authority, and we shall claim that this is unkantian. In order to resolve the issue of the human nature of the head of state, we shall introduce an important Kantian distinction. We take Kant's own words as a significant hint: In the text where Kant excludes the sovereign from the coercive obligations as written in the social contract, we find,

> The only exception is a single person (*in either the physical or moral sense of the word*), the head of state.

This sentence is crucial. We believe that Kant must have seen the objection that we have raised in this section --- i.e., that sovereign and constitution are not identical --- and that he therefore made an important Kantian modification to the exceptional position of the head of state in the form of this so-called riddle, or actually these two riddles: "*in either the physical or moral sense of the word*." The first riddle is whether the whole clause within the parenthesis refers either to the singleness of the person or to the person as person. Williams believes the former, namely that the clause "in either the physical or the moral sense of the word" applies to the *singleness* of the head of state. He says that "the souvereign need not merely be one person, it may be a group of individuals." This seems quite unconvincing first from a textual point of view, because the clause follows the word "person" rather than "single", and second because it is quite unintelligible that singleness could have a moral sense. Morality is a property of a rational creature not of some abstract entity. We, therefore, believe that the clause refers to the modality of the person. We shall show that the tension between the human nature of the sovereign and her transcendental status can be alleviated if we assume that only when taken in a moral sense does she stay out of the contract.

We shall now try to resolve the second riddle: what does the distinction between a physical and moral person mean? From the passage quoted above we learn that Kant thought that every human being, even a possible sovereign, is warped wood. From a *physical* or empirical point of view everyone needs a master. This suggests that the sovereign taken in a physical sense cannot be an exception to the contract. The head of state as a private (or in Kant's terminology, "public") person is subject to the same laws as everyone else. However, when we take the sovereign in the *moral* sense of the term, that is, the sovereign *as giving the law to herself* (and to those who are subordinate to her, the people), or, the sovereign *in the function of* a sovereign, regardless of who she is, she cannot by any *external* force be coerced by the law because she gave it to *herself*.

Notwithstanding Kant's own words, to identify the status of the head of state with the transcendental status of the law --- i.e., *not* to distinguish the physical reality of the head of the state and the moral ideality of the law --- is to commit a fallacy. The head of state is just an empirical human being in the need of her own master. Moreover, if we were to assume that head of state and law are one and the same, then the death of the sovereign would be identical to revolution. Therefore the death of the sovereign would not be allowed, which is clearly absurd. The Kantian point of view resolves these issues by recognizing the distinction between the sovereign and the sovereignty of the law.

Rebellion in the Moral vs. Physical Sense

Kant's argument against rebellion argues actually for the absolute sovereignty *of the constitution*. This hidden restriction has important consequences for the sovereignty of the head of state. We have already indicated that Kant's argument has the structure of a *reductio*. Rebellion cannot be a right because, if it were a right, then it would be either an innate or an acquired right. Since freedom is the only innate right, rebellion must be an acquired right. This means that there should be a law containing the right of rebellion; but a law entailing the destruction of law is an internal inconsistency. Therefore, rebellion cannot be allowed.

It is important to see in what sense Kant defines rebellion in this argument. Under the assumption that rebellion is an acquired right, that is, allowed by the law, rebellion *taken as the abrogation of law* is what causes the internal inconsistency. The argument leaves the possibility of dethroning of the sovereign untouched. In this section we shall consider this issue using the distinction between moral and physical sovereignty from the previous section.

The prohibition of rebellion in the *moral sense*, i.e., what we call an act against the universality of the laws by making an exception for oneself in breaking a law, remains unconditional. However, there seems to be leeway for certain actions against the *physical* phenomenon of the head of state. The head of state in her moral or official function should legislate according to the General Will of the people, so that her function is purely representative. Representation is not merely a picturing of the interests of the majority, because "the aim is not, as it were, to make people happy against its will, but only to ensure its continued existence as a commonwealth." So a merely unhappy state of mind among the majority of the people in a state can never be a valid ground for legitimate rebellion, because to ensure happiness was never the task of the sovereign in the first place. It is the task of the sovereign to secure the continuity of the commonwealth, that is, of its existence and of the principles that constitute it. These principles are

> firstly, the principle of *freedom* for all members of a society (as men); secondly, the principle of the *dependence* of everyone upon a single common legislation (as subjects); and thirdly, the principle of legal *equality* for everyone (as citizens). It is the only constitution which can be derived from the idea of an original contract, upon which all rightful legislation of a people must be founded.

Thus the observance of these three principles is essential for a state to be a commonwealth. It is also a necessary condition for the legitimacy of the sovereignty of the head of state, a legitimacy that she derives from the idea of an original contract. She would lose her legitimate authority if she either endangered the continued existence of the state or violated the principles of the original contract. In either case there may exist a legitimate ground for deposing the head of state.

For two reasons Kant disagrees with the conclusion that this might justify a rebellion. First, according to him, it falsely assumes that the original contract has taken place in reality and that both parties sanctioned it. Secondly, there is no independent authority that can test whether the head of state has indeed violated the original contract, so that the *legitimacy* of any rebellion is undecidable. "For if we suppose that [the people] does have this right to judge [how the constitution should be administered] and that it disagrees with the judgment of the actual head of state, who is to decide which side is right?"

These are serious objections, but we believe that there is a Kantian response to both of them. We should indeed be wary of confusing the idea of an original contract with a historical event. The head of state does *not* derive her legitimate authority from an original contract; but its legitimacy stems from the fact that it is *as if* the people gave their consent to be ruled according to the principles of freedom, independence and equality. It is not a fallacy at all to infer that the head of state loses her legitimate appeal to authority, if she violates these principles --- even if the people submissively comply, do not complain at all and she reigns until the end of her days. The sanctioning of the original contract is not a historical event; on the contrary, it is a continuously recurring event. At each moment the contract demands that both parties sign, but the only pen and ink to be used are the people's observance of the law and the sovereign's respect for the transcendental principles of the state. Because there is no historical appeal to a conference of sovereign and subordinates, the original contract is legitimized only by sustained reciprocal observance.

Secondly, who, in the case of a conflict between the head of state and the people, is to decide which side is right? According to Kant, "every state contains three powers (or authorities): sovereign, executive, and judicial. ... *Every* state must have these three powers or law is impossible: there would still be a state of nature." It seems that in the case of a conflict between the sovereign and the people about the interpretation of a possible violation of the principles of the original contract, it is the task of the judicial power to mediate and finally decide which side

is consistent with the law. Indeed the citizens of the state could bring a case to court to ask for jurisdiction about the issue whether or not a certain legislative action of the sovereign challenged her legitimacy to rule. The judicial power of the court would have the jurisdiction to present a final judgment. The verdict of the court could have several forms: it could put right on the side of the head of state, or it could declare her controversial legislation to be illegitimate because it conflicts with the General Will --- in which case she is required to replace the law in question. In the most extreme case the court could depose the head of state from her rule. She would become an ordinary citizen and another sovereign would be appointed. The concept of the division of powers keeps the 'rebellion' within the limits of the constitution and no lawless state of nature results. While its physical appearance changes, sovereignty in the moral sense remains uninterrupted.

In addition, that the head of state possesses the sovereignty only in a moral and not in a physical sense suggests a solution for the problem of succession. Kant never solved this problem satisfactorily. His conception of absolute rule practically prohibits the head of state from dying. However, if we were to replace physical vulnerability of the sovereign by her moral invulnerability we would create a concept of sovereignty free of inconsistencies.

4. Postponement of Morality

Some critics have argued that Kant fails to connect his later works, the political papers, with his Deontological theory of morality. Still others have tried to reconcile both aspects on a higher plan. The universal character of the moral law within Kant's philosophy has misled several critics to believe that the individual should always observe the moral law even at the cost of political obedience. Reiss, for instance, in his attempt to find the "limits of obedience to government" writes:

> To observe the law is a duty, but no one should be compelled to comply with laws which require him to commit immoral acts. For instance, a government does not have the right to compel anyone to lie, to commit murder or to subscribe to religious beliefs which he does not hold. Indeed, it is our moral duty not to abide by such commands.

Thus Reiss decides the conflict between morality and legality in favor of the former. One should never act immorally, whether it is legal or not.

Such a decision is rash and misses numerous subtleties. To explain this point, we shall first give a comprehensive picture of these subtleties. On the one hand there is the demand on the citizen to obey positive law, while on the other the moral law conditions the actions of the individual. Obviously, there is a problem if these two sources of authority are in conflict. "Both obligations are rational and natural," according to Beck. But the problem reaches deeper, because even assuming that moral law and positive law for some reason would always harmonize, still it would allow a fundamental heteronomy of authority.

What we want to put forward here is, if not controversial, at least polemical. First of all, we believe that for the experiencing subject the possible contradiction of moral and positive law is a real one *without* a Kantian resolution. Although in the case of an actual conflict an individual has to give priority to one of the two, this does not mean that she synthesizes them on a higher level. We claim that an agent confronted with a law of the state that demands that she commits an immoral act has two rational strategies that tell her to do two different things. For that reason, secondly, we believe that there is no real general solution to the problem of heteronomy of

authority because Kant's response allows tension between the two set of laws to remain. The individual can only apply her judgment to decide what to do if the law calls upon her to act immorally. The issue of heteronomy and the importance of judgment will be studied in the next section in which no synthesis of the conflict is found. The issue of the infalsifiability of a duty that Reiss overlooked in "**Is the Head of State a Moral or Physical Person?**" will culmulate in a further tension between morality and legality that will be resolved in "***Nature's Secret Plan for Humanity***." We shall see in the following sections how Kant places this tension in a moral-historical horizon to come to a regulative, though not constitutive, synthesis: it is the duty of every individual to hope that one day the conflict will be resolved and morality will reign.

Unresolvable conflict

Kant did not intend the Categorical Imperative to *prescribe* all the actions of the human subject. The Categorical Imperative is a logical condition constraining those actions --- although there is controversy about this issue --- in the sense that it is the prohibition of making an exception for oneself. This argues against those who have overestimated the status of the imperative; the Categorical Imperative cannot be decisive about the content of an action. On the other hand, the Categorical Imperative *conditions* all human actions. This argues against those who have underestimated the scope of the imperative. Those people refuse to integrate the three perspectives of a human being --- moral agent, political agent and world-citizen --- into a full picture of a human being. It is essential to study the internal relationships among those perspectives. We shall investigate the relationship between moral law and positive law, and consider whether a Kantian individual should give priority to either one of them.

We return to Reiss's words at the beginning of the section because, despite our criticism, they are not as faulty as we may have suggested. The first observation that a government should not compel its subjects to commit immoral acts is certainly Kantian. "The Kantian republic respects the liberty (‘freedom under law') that is essential to moral activity, enforces some of the ends (though never the incentives) of morality and provides a context of legal security within which acting from good will is not benevolent folly..." Certainly, positive law that is based on the moral law will evidently not be in conflict with morality, but although the head of state stands as any human being under the universal demands of the moral law within herself, there is no necessity that she will actually legislate accordingly.

Reiss second point is more interesting. He hypothetically places himself in the position where the government actually does compel him to act immorally. In that case, he claims, it is his moral duty to resist compliance. Although Reiss does not say it in so many words, we take this to mean that moral law has precedence over positive law. This claim is erroneous. There is little evidence for such a view. On the contrary, the view that Kant would have the moral law be decisive over positive law is based on a misunderstanding of the nature of both moral and positive law. The essential characteristic of the positive law is its coerciveness, whereas the moral law is unenforceable. Therefore, the moral law can never adequately justify resistance to the positive law.

The moral law is valid even if it were the case that, in all of history, one could not find one instance in which it was observed. The validity of the moral law has, therefore, nothing to do with its actual observance or violation. With respect to positive law the case is different. Since coerciveness is part of the essence of positive law, only actual observance of the law validates it, while violation not only disregards the law, but even invalidates it. Therefore, when a subject is faced with a conflict between the demands of her moral being and her political being, the only alternative that she has available without disrespecting or invalidating any law, is to comply with

the law of the state. That Kant did not think that morality had priority in the case of conflict becomes clear when we look at an example he gives. He describes the case of a soldier who is called upon to kill. Kant argues that it would be "very harmful" if the soldier were to disobey. Even stronger than the example that Kant provides us is simply the Kantian observation that arguments on both sides of the conflict remain strictly valid and that no side cancels the other. If we treat the issue as if one law has some kind of universal precedence over the other, then we would make an uncritical move. We have to conclude that there exists a strict Kantian heteronomy of law: moral law vs. legislation of the state.

When moral and positive law are in conflict, there is no Kantian necessity to obey the positive law. In that case there exists the Kantian possibility of civil disobedience in the act of following the moral law, under the condition that one is prepared to accept the legal repercussions of one's actions. Because the heteronomy is fundamental, there is an immanent possibility of disobedience. This situation resembles the antinomies in the *Critique of Pure Reason*. Both positions, the legal position and the Deontological moral position, have their legitimate claims to be observed. However, reason can bring them into conflict with each other. It depends on the judging subject whether to choose in favor of the one or the other.

The role of judgment is essential in these conflicts. There cannot be a hierarchy of principles, otherwise the system would relapse into a *regressus ad infinitum*. Judgment here is one that moves from the particular to the universal without the universal being present, i.e., a reflexive judgment. In the third *Critique* Kant appeals to this judgment that is not simply subjective, but one that appeals to a *sensus communis*, i.e., a judgment that is characterized by an *Erweiterte Denkungsart*. In this way the subject resolves the conflict, even though at a transcendental level no synthesis has been found. There is no instantaneous synthesis of this conflict. In the next section we shall argue that the only possible synthesis lies in the future and that the future, because hidden from us by an epistemological barrier, has essentially a moral dimension.

To conclude this section, we claim that there is a genuine role for the human subject when she confronts a legal demand to commit a moral crime. Instead of a universal priority of either moral or positive law, in some cases one must obey the laws of the state, while in other cases the moral law should reign. The essential heteronomy of moral and positive law creates the inherent potentiality of civil disobedience.

Nature's Secret Plan for Humanity

We have seen that no *instantaneous* synthesis of the conflicting moral law and the law of the state exists. If there exists *any* kind of synthesis at all, then it should be an essentially historical one, or, in our words, a *postponed* synthesis. A postponed synthesis is completely new to Kant's usual scheme in both the first and second *Critique*. There the syntheses are always instantaneous, or perhaps better, non-temporal. The *Critique of Judgment* creates a new concept that serves as mediator between the two poles of the conflict: teleology. We shall argue that nature's so-called "secret plan" for humanity brings the conflict between moral and positive law to a truce on a higher level without, as Beck and Axinn seem to suggest, resolving the conflict; the individual can never know a unique Kantian answer to a disharmony between morality and legality from first principles.

To reintroduce the problem we shall now briefly turn to the famous case that has been well-discussed among Kant scholars: the apparent paradox of his appraisal of the French Revolution on the one hand and his rejection of any revolution in general on the other. This has been the subject of long debates, but it seems that Kant scholars have come to a certain level of

agreement about the treatment of this problem. Besides the so-called technical solution that claims it was not a real revolution, because Louis XVI had given up his sovereignty before the 'revolution' took place, there is a more substantial way of addressing the issue. We should not consider Kant a supporter of the revolution --- he denied that explicitly --- nor should we interpret his writings on the topic as an unqualified eulogy of revolution. He deplored the individual acts of terror that were part of the revolution, of which regicide was perhaps the most morally despicable. As Atwell correctly remarks, "It is not the Revolution nor its outcome ... which gives Kant reason for inferring that 'the human race has always been in progress toward the better and will continue to be so henceforth'; it is instead the universal and disinterested sympathy on the part of those who had nothing personal to gain by the Revolution. *This sympathy is then a sure sign of a moral predisposition in man which in turn indicates continual moral progress throughout human history*." Most commentators seem to share this position; we shall take it as our point of departure.

Kantian philosophy condemns the French Revolution in so far as it acted against the legal authority of the moment because it represents an act that refuses to accept the coerciveness of the laws in which it takes place. Any revolution contradicts the concept of law and therefore has an underlying self-contradictory maxim. Moreover, Kant is well aware that the actors in the French Revolution were not driven by moral incentives while they were breaking the law. In fact, the actual revolution led to a lot of bloodshed. The actors in the revolution did not violate only the positive law, but also frequently violated the moral law. Kant realized at the time that the revolution might not lead to any positive results. In fact, recent historical-legal studies have shown that, in contrast to other European nations and the USA, the actual introduction of a constitutional state (*Rechtsstaat*) in France came only a century after the revolution.

However, the fact that the revolution published its principles in which it recognized the sovereignty of the people and the need for a republican constitution, and the fact that so many people who were only outside spectators and could not expect any personal gain by what was going on, sympathized with these principles, constituted for Kant a *hope* of future harmony between the constitution of the state and the moral law.

This hope might at first seem, Kantianly speaking, unjustified, because there can be no empirical proof of moral progress. Mendelssohn argues accordingly and defends the opinion that, throughout history, the level of morality remains constant. Kant opposes that opinion by using the distinction between the empirical and the practical realms. He points out that the hope for progress is not empirical optimism and, as Galston says, "the possibility of the disappearance of the human race from the face of the earth cannot be ruled out... Nor is it impossible that all civilization and culture could be annihilated through the devastation of a world war. Ultimately the affirmation of progress is motivated not by empirical or theoretical but by moral considerations." In *Theory and Practice* Kant points out what these moral considerations are:

> I base my argument on the inborn duty of influencing posterity in such a way that it will make constant progress (and I must thus assume that progress is possible), and that this duty may be rightfully handed down from one member of the series to the next. History may well give rise to endless doubts about my hopes ... But so long as they do not have the force of certainty, I cannot exchange my duty...

From a moral stand-point we have to believe in progress. The nature of this duty does not concern the empirical reality but, rather, our understanding of it. Our cognitive faculties require a purposeful understanding of nature, because the whole constitution of our faculties is teleological. This does not mean that we can actually point out events of progress in history. "It is one thing to say: the production of certain things of nature, or even of entire nature, is only possible through the agency of a cause that pursues designs in determining itself to action. It is a

perfectly different thing to say: By the peculiar constitution of my faculties the only way I can judge of the possibility of these things and of their production is by conceiving for that purpose a cause working designedly."

On other occasions Kant speaks of progress in another fashion; *as if* a secret mechanism traps humanity in a steady trend upwards. Moreover, the example of the 'society of devils' in *Idea for a Universal History* seems at first to suggest that nature has actually some kind of secret plan to subordinate ultimately even the most selfish group of people to the moral law. However, this is not what Kant means. His reply to Mendelssohn provides us with the clue to understand the example of the 'society of devils' and Kant's view on our inclinations. It is not that our inclinations actually aim, consciously or unconsciously, towards improvement, but, when we are "confronted by the sorry spectacle not only of those evils which befall mankind from natural causes, but also of those which men inflict upon one another, our spirits can be raised by the prospect of future improvements. This, however, calls for unselfish goodwill on our part, since we shall have been long dead and buried when the fruits we helped to sow are harvested." The devils themselves are not fit for a civil society under coercive laws. How can that be, when the law demands unconditional obedience? But even if the devils are in constant battle and they "do not tire of it --- for they are fools --- *the spectator does.*" Thus, we, the spectators of such a society, are inspired to enter into a constitutional state and to hope for moral improvement.

In the final analysis we see that the mechanism of nature and the duty to believe in progress are identical. That nature is purposeful and that the future bears in itself moral improvement are teleological assumptions, which cannot be proven empirically. They are regulative principles for our faculty of cognition and they cannot be constitutive for resolving the heteronomy of the moral and the political law. The dialectic between the moral perspective and the political perspective is never subsumed (*aufgehoben*) in the perspective of the world-citizen. The latter functions as an ideal limit to which we hope the other two will converge.

At this point it almost seems that we are left with an impasse. Because both moral and positive law have their own legitimate claims the search for their synthesis in section three was fruitless; now we find only a regulative and not a constitutive reconciliation between them, when we attempted a historical approach. We conclude that it is our duty to hope for a solution of the conflict, but we cannot be certain that the solution will ever be accomplished empirically. This may seem to convict the civilian to passivity and submission but in the next section we shall see how a certain duty demands from her active involvement with the course of history. It will be shown that the epistemological limit to knowledge of empirical progress does not abrogate the citizens' duty to publicize their opinions about the law.

5. Duty of Publicity

Deduction of the Principle of Publicity

Although Kant remarks in *Perpetual Peace* that the principle of publicity is "like any axiom, valid without demonstration," it is our opinion that Kant actually derives it. The principle of publicity is an important concept in Kant's political philosophy. It refers to what is commonly known as the 'freedom of expression' or the 'freedom of the pen.' There have been all sorts of claims about the status of this principle. Some have claimed that publicity is a merely unenforceable right, others have added that it is the government's moral duty to allow its subjects the freedom of expression, and Kant writes that citizens are "entitled" to utter criticism

on unjust legislative actions of the sovereign. We shall investigate the shady realm of rights, entitlements and duties, and how the principle of publicity modifies obedience.

The *supreme* principle of all legislation is the General Will. The sovereign tries in her legislation to represent the General Will, but like any empirical legislator she may err. The sovereign can never be taken as the *ultimate* principle of legislation, and Kant necessarily concludes, "the general principle, however, according to which a people may judge negatively whatever it believes was *not decreed* in good will by the supreme legislation, can be summed up as follows: *Whatever a people cannot impose upon itself cannot be imposed upon it by the legislator either*." This does not mean that legislation should be based on the principle of the happiness of the people, but on the fact that it would be possible for the people to agree that the law is in harmony with the principles and the continuity of the state, no matter how painful it might be for them to do so. This requires that laws should be open to the scrutiny of the people. If after public analysis the law appears to be in the interest of the state, then the people should accept the law. However, if the law does not meet this standard, then the people have the right to criticize this law in public. Laws need publicity to be just laws. Publicity is a fundamental right of citizens against the sovereign.

Kant says "I maintain that the people too have inalienable rights against the head of state, even if these cannot be rights of coercion." Publicity is such an inalienable right, and even though it is not enforceable, it has a specific status. Kant calls it the "*transcendental formula* of public right." He means that no law can be just if the sovereign cannot bring it before the judgment of the public. Publicity is a necessary condition of right. This is not a new principle because the principle of publicity is actually a corollary of the principle of universality within Kant's moral philosophy. In moral philosophy the Categorical Imperative provided a similar negative test: an action is immoral if its maxim cannot be made into a universal law, a law that applies to everyone. It goes however too far to call the principle of publicity a *mere* corollary of the Categorical Imperative, as Nicholson does. In the rest of this section we shall elucidate the role of the principle of publicity.

Progress and Publicity

Publicity goes beyond the Categorical Imperative in the sense that it is not only the standard of morality and justice, but also carries in itself the germ of moral progress; something that the Categorical Imperative does not do. Kant connects the idea of moral progress and publicity in several places. The sovereign should be able, in the light of public debate, to correct legislation where necessary, so that the state would be reformed in the direction of a lawful, republican system. Moreover, it would be self-defeating for the sovereign to shun reform. "A secretive system of politics could ... easily be defeated if philosophy were to make its maxims public, would it but dare to allow the philosopher to publicize his own maxims." In the essay "*What is Enlightenment?*" Kant makes it clear that publicity is not merely a right, but that it is the condition of all rights and moral development. "The public use of man's reason must always be free, and it alone can bring about enlightenment among men."

We should, however, be careful to specify the precise qualities of publicity. It is true that progress and publicity are intimately related. We did *not* argue that nature possesses a secret plan or teleology, but that it is our *duty* to believe in progress. Progress is, therefore, not a simple empirical concept. "For Kant, history does not end in the present, but extends into the future, and the goal of history is both political and ethical. Unless men are free to use their reason in public the progress of human enlightenment cannot continue. There cannot be any history without the philosophical awareness which enables us to discern the direction of history."

If publicity is absent, it is *a priori* possible that dogmatic thought or despotic rule could obstruct the implementation of the ideal of a moral state. We have, however, a moral duty to believe in moral progress, and for that reason we have also a duty to use our reason publicly. We conclude that publicity is not only a fundamental right, but also a fundamental duty.

Kant himself acknowledged the obligation to use our critical faculties. Specifically in the essay *What is Enlightenment?*, Kant expresses forcefully that we should not voluntarily stay in a state of muteness and he explicitly states that it is "...the duty of all men to think for themselves." The celebrated expression, *Sapere aude!*, in the same essay is grammatically an imperative, and thus indicates an obligation. Reiss writes, "... the rights of the subjects cannot be enforced by the process of law. Their principle right is that of being able to criticize the government in public through writing. This right, 'The freedom of the pen,' is 'the sole palladium of the rights of the people,' the watershed dividing republican states from those which are not. While the people must suffer injustice without resisting it, they have a right to voice their opinion freely, and it is in the long run, even their duty to do so." Thus the conclusion is that Kant recognized the duty of publicity, but an important question remains: For *whom* is it a duty? For each individual or for humanity in general?

Several commentators have claimed that we ought to distinguish among "perspectives" or different modes of being in order to be able to give a consistent account of Kant's philosophy. Such distinction is helpful, but to cut the human subject in mutually exclusive parts without seeing them as intrinsically united in one and the same person is misguided. That is exactly what Axinn attempts to do. He finds himself in the predicament of being unable to ascribe moral progress on the one hand and unsociableness and evil on the other to the same human being. He therefore concludes, "because [Kant] takes us [individuals] to want inconsistencies, to be simultaneously social and unsocial, he safely concludes that as individuals we are not apt to gain all that we seek. ... He sees mankind [however] through history pursuing the goal of a perfectly moral world and making progress toward that. He paints a picture something like the invisible-hand effect that Adam Smith made such a distinctive part of his *Wealth of Nations*."

Should we therefore conclude that progress and publicity are only duties for humanity *as a collective*? No, we should not. It seems that Axinn has confused the empirical concept of progress, which is absent in Kant's entire philosophy, with the moral concept of progress, i.e., the duty to believe in progress. We cannot say that humanity as such is actually moving in the direction of a morally perfect world. It is only our cognitive faculty that interprets certain empirical events as signs of progress but each individual has a duty to make her ideas public.

> It is absolutely impermissible to agree, even for a single lifetime to a permanent religious constitution which no-one might publicly question. For this would virtually nullify a phase in man's upward progress, thus making it fruitless and even detrimental to subsequent generations.

This means that publicity is not merely an issue for mankind as a whole, but for each person individually. Not only are we entitled to freedom of expression, but we also have the moral duty to express our ideas. Elsewhere, Kant expresses this two-fold root of publicity, inclination and vocation, i.e., right and duty, in the following words:

> Thus once the germ on which nature has lavished most care --- *man's inclination and vocation to think freely* --- has developed within this hard shell, it gradually reacts upon the mentality of the people, who thus gradually become increasingly able to act freely. Eventually, it even influences the principles of governments, which find that they can themselves profit by treating man, who is more than a machine, in a manner appropriate to his dignity.

Specific Nature of the Duty of Publicity

It is a moral duty for everyone to voice her opinion about matters of the state, but it is not an ordinary duty because it carries in itself the germ of hope for moral improvement. This means that the duty of publicity has a degree of self-reflectiveness and is, in a sense, more urgent than any other moral obligation. It is our aim in this section to specify this statement further.

We shall imagine the case in which a state practices censorship over its citizens. Thus, each citizen finds herself confronted with two opposing duties. On the one hand, she should obey the law, which tells her not to speak out, while on the other hand the moral law calls upon her to voice her opinion. Which option should she choose?

Neither Kant's writings nor his personal life are very helpful in shedding light on this conflict. When, in 1794, the censors of the Prussian state told Kant not to lecture anymore on religion, he indeed complied. "If republican views or the public criticism of the government get suppressed Kant counsels patience, arguing that we should act as if the spreading of these ideas could not be arrested." But we *cannot* leave progress to nature because, first, there is no such concept of empirical progress in Kant's philosophy and, secondly, we can only hope for natural progress *if* public opinions do get expressed.

Initially it might seem that we are dealing here with the kind of problem that we discussed in section four. It is indeed true that here are two legitimate claims on the individual, a moral claim and a legal claim, and that, therefore, only judgment, rather than any Kantian principle, can solve the dilemma. In this case, however, there are certain specific considerations that have to be part of the judgment, which are lacking in Kant's own prudential civil obedience. Whereas the soldier who has received the order to kill can hope for a future without war *and* still obey the order, the citizen who is silenced by the censors *cannot* sit back and obey *and*, at the same time, hope for moral improvement of the state. Because only if there is active public criticism in matters of the state, can we hope for gradual reforms of the state by the sovereign toward a republican constitution. For that reason, the public spokesperson *cannot* have the hope that the future will bring any improvement, if she does not break the law on censorship and criticize openly.

Whether we should ascribe it to cowardice or shrewdness, we shall probably never know, but Kant himself practiced patience toward the censorship to which he was subject. On the other hand, it is not the case that one should necessarily resist any infringement of one's freedom of expression. Although the duty to express one's criticism of the legislation of a state is a transcendental duty, in the sense that it is the condition of all other moral obligations, in each situation only judgment has the final say in deciding whether to obey that duty or to submit oneself to censorship. And, although Kant indeed chose the latter in 1794, in his lifetime he planted many seeds to develop ways in which we can rationally disobey the orders of the state.

References

Arendt, H.,1982, *Lectures on Kant's Political Philosophy,* Chicago: The Harvester Press,

Atwell, J. E.,1971, "A Brief Commentary" in *Journal of the History of Ideas*, XXXII, pp. 433-6,

Axinn, S.,1971, "Kant, Authority, and the French Revolution" in *Journal of the History of Ideas*, XXXII, pp. 423-32,

Beck, L. W.,1971, "Kant and the Right of Revolution" in *Journal of the History of Ideas*, XXXII, pp. 411-22,

Dondorp, P.,1994, *1776, 1789 en de wortels van de moderne rechtsstaat* [*1776, 1789 and the roots of the modern constitutional state*], technical report, Amsterdam: VU Department of Law,

Hobbes, T., 1651 [1962], *Leviathan*, ed. M. Oakeshott, London: Collier Macmillan Publishers,

Kant, I.,1784, *Idea for a Universal History* [*Idea for a Universal History with a Cosmopolitan Purpose*], in Reiss 1991, pp. 41-53,

1784, *What is Enlightenment?* [*An Answer to the Question: 'What is Enlightenment?'*], in Reiss 1991, pp. 54-60,

1787, [1969], *Critique of Judgment*, trans. J. C. Meredith, Oxford: Clarendon Press,

1794, *Theory and Practice* [*On the Common Saying: 'This May be True in Theory, but it does not Apply in Practice'*], in Reiss 1991, pp. 61-92,

1794, [9. Aufl. - 1991], "Ueber den Gemeinspruch: Das mag in der Theorie richtig sein, taugt aber nicht fuer die Praxis", in *Schriften zur Anthropologie, Geschichtsphilosophie, Politik und Paedagogik 1*, pp. 125-72, Hrsg. von W. Weischedel, Frankfurt am Main: Suhrkamp,

1796, *Perpetual Peace*, in Reiss 1991, pp. 93-130,

Mertens, T.,1990, *Kritische filosofie en politiek: Kant en de oorlog* [*Critical Philosophy and Politics: Kant and War*], Nijmegen: Gerard Noodt Instituut,

Nicholson, P.,1976, "Kant on the Duty Never to Resist the Souvereign" in *Ethics*, LXXXVI, pp. 214-30,

Rawls, J.,1972, *A Theory of Justice*, London: Oxford University Press,

Reiss, H.,1956, "Kant and the Right of Rebellion" in *Journal of the History of Ideas*, XVII, pp. 179-92,

1991, *Kant, Political Writings*, trans. H.B. Nisbet, edited with an introduction and notes by H. Reiss, Cambridge: Cambridge University Press,

Williams, H. L.,1983, *Kant's Political Philosophy*, Oxford: Basil Blackwell.