CHAPTER 3

Kant on the General Will Test and the Categorical Imperative Procedure

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According to Kant, it is possible to differentiate between legitimate and illegitimate laws by means of a certain formal procedure. His criterion for the legitimacy of a draft law is whether or not it corresponds to the 'General Will' of a people. The test question Kant has in mind is this: could a people give its consent to a proposed particular law? Let us call this the 'General Will Test' (GWT). The GWT is presented by Kant on several occasions in slightly different formulations (e.g. in RGV 6:98; RL 6:263, 6:314 and TP 8:304). It is sometimes even described as a formal procedure which can be used like a thought-experiment which should be enacted by the legislator who is, for Kant, in principle the people itself, but in fact it is the monarch.[1] Maybe the most prominent passage appears in his treatise *What Is Enlightenment?* (8:39; trans. H. B. Nisbet):

> The touchstone of whatever can be decided upon as law for a people lies in the question: whether a people could impose such a law upon itself.

As the word 'touchstone' (*Prüfstein*) begins to bring into view he is thinking of a formal procedure. In this chapter, I want to explore the question of whether and, if so, to what extent, this test outlined by Kant resembles the universalization procedure of the Categorical Imperative, the CI procedure (henceforth CIP), understood according to the 'Formula of Universal Law' and the 'Formula of a Law of Nature'. I will arrive at the conclusion that the two test processes, the GWT and the CIP, are indeed somewhat similar. They actually have certain properties in common. And these commonalities amount to more than a mere 'family resemblance' in the Wittgensteinian sense. It will turn out that the GWT and the CIT are interrelated in a quite characteristic manner, namely according to a relation

[1] This is clear from *Theory and Practice* 8:305 and especially from the *Conflict of the Faculties* 7:91. In *Idee* 8:23 Kant explains that men need a master who has to impose the General Will on them. Kant sees the 'greatest problem' in the morality or immorality of this master.

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of ideal and non-ideal normativity. The GWT is a specifically attenuated form of the CIP.

By highlighting this, I hope to strengthen my interpretation, developed in my book on Kant's non-ideal normativity.[2] My fundamental idea in this book was, and still is, that the type of normativity presented by Kant in the *Doctrine of Right* and elsewhere in his political and legal writings can be satisfactorily characterized neither by following (what I call) a 'derivation reading', which attributes to Kant the claim that legitimate juridical and political rules must be immediately derived from the moral law, nor by what could be referred to as a 'separation reading', which argues that legitimate political and legal rules are, on Kant's view, *sui generis*, that is, they form an independent kind of normativity. Instead, I claim that normatively valid laws are justified, in Kant's view, by the fact that their content is established in a significantly non-ideal way, by a quasi-CI, namely the GWT. Thus, I maintain an intermediary position between the two well-known camps of the derivation reading and the separation reading.

There has been a large debate among scholars on the question of if and in what sense the CI is present in Kant's description of legitimate juridico-political normativity. The elementary but, as I believe, forceful point I wish to make in this article rests upon the observation of a deep ambiguity: on the one hand, Kant says that, ideally, legitimate right (*Recht*) should be based upon a formal test procedure, while, on the other hand, his concrete procedure – namely the GWT – is considerably weaker than the universalization test of the Categorical Imperative, the CIP, as we know it both from the *Groundwork* and from the second *Critique*.

In what follows, I will first outline some of the main characteristics of Kant's notion of a General Will and then turn to the profound differences that exist between the GWT and the CIP. Starting from § 46 of the *Doctrine of Right*, my main point of reference will be the Universal Principle of Right in § C (Section 3.1). My reading finds confirmation through a close examination of key passages from *Religion within the Boundaries of Mere Reason* and *Conflict of the Faculties* (Section 3.2). Following this, I will develop my interpretation with reference to selections from the second appendix of *Towards Perpetual Peace* in which Kant characterizes his GWT more precisely than anywhere else (Section 3.3). In a final remark, I will add some considerations on a problematic consequence to Kant's idea of right: namely the fact that GWT only ensures that the external liberties of citizens

[2] Christoph Horn, *Nichtideale Normativität: Ein neuer Blick auf Kants Philosophie*, Berlin: Suhrkamp, 2014.

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must be ordered by some rules does not guarantee specific contents as, for example, human rights do (Section 3.4).

3.1 Affinities and Differences between the GWT and the CIP

Kant repeatedly uses the test operation which I called the GWT based on his account of the Rousseauian notion of a General Will (*volonté générale*). Both philosophers see the General Will or popular sovereignty as the foundation of legitimate lawgiving. In contrast to Rousseau's use of the term, however, Kant understands his notion of an *allgemeiner Wille* in the sense of an a priori unified multilateral will.[3] The apriority plays a crucial role in Kant's version of contractarianism, which relies neither on a Hobbesian prudential thought-experiment nor on a Lockean historical scenario. Instead, Kant interprets the General Will as a 'command of practical reason'. The General Will is thus designed to resolve the exeundum issue of establishing a state, that is, the problem of how there can be a legitimate transition from a first acquisition of property, in the context of private right, to a mutually accepted possession, that is, to public right.[4] For Kant, the General Will is what constitutes and legitimizes public right.

The following passage contains some further crucial aspects of his view (RL § 46, 6:313–14; trans. M. J. Gregor):

> The legislative authority can belong only to the united will of the people. For since all right is to proceed from it, it *cannot* do any wrong by its law. Now when someone makes arrangements about another, it is always possible for him to do the other wrong; but he can never do wrong in what he decides upon with regard to himself (for *volenti non fit iniuria*). Therefore, only the concurring and united will of all, insofar as each decides the same thing for all and all for each, and so only the general united will of the people, can be legislative.

[3] But already for Rousseau, the General Will can never be mistaken; see Patrick Riley, 'Rousseau's General Will', in Patrick Riley (ed.), *The Cambridge Companion to Rousseau*, Cambridge: Cambridge University Press, 2001, 124–53. On Rousseau's influence on Kant regarding the General Will and the differences between their usage of it see Patrick Riley, 'Kant on the General Will', in James Farr and David L. Williams (eds.), *The General Will: The Evolution of a Concept*, New York: Cambridge University Press, 2015, 333–49, and Christoph Horn, 'Rousseau und Kant über Gemeinwille und Gesellschaftsvertrag', in Paul Geyer, Volker Ladenthin, and Anke Redecker (eds.), *Rousseau über Rousseau: Beiträge zum 300. Geburtstag*, Würzburg: Ergon, 2016, 31–46.

[4] See RL 6:256 (trans. M. Gregor; slightly amended): 'A unilateral will cannot serve as a coercive law for everyone with regard to possession that is external and therefore contingent, since that would infringe upon freedom in accordance with general laws. So it is only a will putting everyone under obligation, hence only a collective, general (common) and powerful will, that can provide everyone this assurance.'

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According to Kant, all legitimate right must proceed from the United or General Will of the people. So far, this is the Rousseauian principle of popular sovereignty. Each and every citizen must be involved in the process of lawgiving in which the same rules are established for all of them. Justified law must not do wrong to anybody; and the General Will guarantees this since it includes everyone's confirmation. Kant further adds to this the Hobbesian principle that someone is not damaged as long as he has given his consent (*volenti non fit iniuria*).

Now, how close is this to the Categorical Imperative? Note that the General Will as it is described here is that of a concrete people, that is, of a spatiotemporally limited group – and not the omnitemporal united will of humanity at large. This does not contradict the fact that it is described as a priori: the General Will rests on the purely formal (i.e. a priori) idea of the united volitions of a concrete people. Furthermore, it rests upon collective voluntarism and thus points in the direction of a Hobbesian notion of authority conception of law: it takes a concrete authority to establish a law. I understand this aspect likewise in the sense of a historically situated community which chooses laws according to their concretely given situation while the same law could be rejected by another people, living under different conditions. This implies, additionally, that the GWT is a formal procedure by which one can establish highly diverging legal constitutions. Kant explicitly claims, in the Introduction to the *Metaphysics of Morals* (MS 6:224), that a legal order could completely consist of positive laws which go back to the arbitrary choice of the legislator. The lawgiver has an 'authority to obligate others by mere arbitrary choice' (*Befugniß, durch seine bloße Willkür andere zu verbinden*), provided that a preceding natural law authorizes him (MS 6:224, trans. M. J. Gregor):

> So it is possible to think of an external legislation, which would contain only positive laws; but then a natural law would have to precede, which would establish the authority of the legislator (i.e. the power to bind others by his mere arbitrariness).

On my reading, the natural law, which has to precede acts of external legislation in order to fully authorize a lawgiver's arbitrary external legislation, is the innate right to freedom (RL 6:237–8). In accordance with the innate right understood as an a priori rule for appropriate lawgiving, the monarch is obliged to respect the principles of full individual freedom, equality, and self-determination (being *sui juris*) for all citizens.

With the idea that a certain people voluntarily imposes a law onto itself Kant *a limine* excludes the possibility of a self-violation. As I pointed out,

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he quotes the *volenti* formula and thereby, under the condition of the innate right, subscribes to the Hobbesian principle *auctoritas, non veritas, facit legem*.[5] This does not of course mean that he is a legal positivist. On the contrary, Kant remains strongly committed to the classical idea of natural law, which he takes in the sense of an a priori law and identifies with the innate right to freedom. Seen in this way, the procedural and formal character of the GWT, as described by Kant, does not merely result from the principle of non-contradiction applied within a generalization procedure. Rather, the idea is that each citizen must be seen, simultaneously, as the lawgiving author and the obligated subject of a piece of legislation, which might take this or that concrete form – as long as it conforms to the principles of freedom and equality.

When we look at these details, one can see how closely the GWT is connected to Kant's 'Universal Principle of Right' (UPR) in B of the *Doctrine of Right* (RL 6:230; trans. M. J. Gregor):

> Right is therefore the sum of the conditions under which the choice of one can be united with the choice of another in accordance with a universal law of freedom.[6]

In section C, the UPR is taken up as follows (RL 6:230; trans. M. J. Gregor):

> Any action is *right* if it can coexist with everyone's freedom in accordance with a universal law, or if on its maxim the freedom of choice of each can coexist with everyone's freedom in accordance with a universal law.

As both the GWT and the UPR express, right must restrict and enable each citizen to make use of his freedom of choice according to a formal principle that unites all individual ranges of freedom. This thought closely resembles the universalization test of the CIP. Legitimate right, for Kant, has to pass an examination: namely that it must be capable of coordinating everybody's free choice with that of everyone else, according to a general rule. Almost the same holds true for the CIP: it is a formal procedure to select those maxims as morally possible which can be adopted simultaneously by all rational agents.

There is a formulation used by Kant some lines below the UPR, where he provides an articulation of the maxim in a second-person imperative

[5] For Kant's reception of Hobbes see Karlfriedrich Herb and Bernd Ludwig 'Kants kritisches Staatsrecht', *Jahrbuch für Recht und Ethik/Annual Review of Law and Ethics* 2 (1994), 431–78.

[6] RL 6:230: 'Das Recht ist also der Inbegriff der Bedingungen, unter denen die Willkür des einen mit der Willkür des andern nach einem allgemeinen Gesetz der Freiheit zusammen vereinigt werden kann.'

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mood. He calls it the 'Universal Law of Right' (ULR) (RL 6:231, trans. M. J. Gregor):

> Thus the universal law of Right, so act externally that the free use of your choice can coexist with the freedom of everyone in accordance with a universal law [. . .].[7]

This imperative formulation of the UPR, namely ULR, is clearly close to the CIP. Let us compare the UPR with the Universal Law Formula of the CIP (GMS 4:421; trans. M. J. Gregor/J. Timmermann):

> Act only according to that maxim through which you can at the same time will that it become a universal law.

The version put forward in the second *Critique* is as follows (KprR, 5:30; trans. M. J. Gregor):

> So act that the maxim of your will could always hold at the same time as a principle in a giving of universal law.[8]

An initial difference is immediately visible. The term 'maxim' (or 'maxim of your will') in the CIP is replaced by 'arbitrary choice' (*Willkür*) in the ULR. The notion of a maxim (and the 'maxim of your will') refers to the inner freedom of autonomy connected by Kant with the term *Wille*, whereas the concept of arbitrary choice (*Willkür*) is restricted to external freedom. The limitation to external freedom is explicitly discussed in the passage RL 6:231. This can be seen as the second difference: Kant explicitly tells us that the ULR does not commit the agent to an inner motivation. It is, according to Kant, completely sufficient to abide by the law in one's external actions.[9]

A third point is closely related to this. Kant characterizes the ULR in §C of the *Doctrine of Right* as:

> indeed a law, which lays an obligation on me, but it does not at all expect, far less demand, that I myself should limit my freedom to those conditions just for the sake of this obligation; instead, reason says only that freedom is

[7] RL 6:231: 'Also ist das allgemeine Rechtsgesetz: handle äußerlich so, daß der freie Gebrauch deiner Willkür mit der Freiheit von jedermann nach einem allgemeinen Gesetze zusammen bestehen könne [. . .].'

[8] KpV 5:30: 'Handle so, daß die Maxime deines Willens jederzeit zugleich als Princip einer allgemeinen Gesetzgebung gelten könne.'

[9] The relevant quote is this: 'It also follows from this that it cannot be required that this principle of all maxims be itself in turn my maxim, that is, it cannot be required that make it the maxim of my action.'

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> limited to those conditions in conformity with the Idea of it and that it may also be actively limited by others [. . .].[10]

As we learn from this quote, Kant believes that reason does not require from us that we ourselves should limit our freedom due to the normativity of right. Rather, reason presents it merely as an 'idea' that our freedom should be limited according to the ULR and that this limitation should be actively limited by others. We see that, in the case of legal normativity, his point of reference are the citizens of a state, not the *homo noumenon* within us. Hence, the third difference between the Law of Right and the Categorical Imperative is that right always has to be imposed on us by others; it is not our duty to follow the mere idea of right, but only its concrete realization in this or that legal order. Therefore, the right that is meant in the UPR and the ULR must be that of a concrete state, not an abstract right of omnitemporal and universal validity.[11]

And in fact, Kant claims, as we already saw, that the laws legitimately established in a state are always in force in a spatiotemporally limited form; they are the laws of a historical individual state and thus do not require full universality concerning their authors and addressees. Instead, they go back to a concrete voluntaristic will of a people (*de facto* normally by its legislator, i.e. the monarch) and consequently do not apply objectively and unconditionally. This is the fourth difference: the CIP verifies or falsifies certain maxims independently of time and place while the GWT leaves room for contextual circumstances. Positive laws are valid, even if they are strongly suboptimal, by the legitimate authority of the lawgiver, as Kant says, and they must be obeyed as long as they do not directly violate morality (RGV 6:99 fn.; trans. A. W. Wood/G. di Giovanni):

> As soon as something is recognized as a duty, even if it should be a duty imposed through the purely arbitrary will of a human lawgiver, obeying it is equally a divine command. Of course we cannot call statutory civil laws divine commands; but if they are legitimate, their observance is equally a divine command. The proposition 'We ought to obey God rather than men' means only that when human beings command something that is bad

[10] 'ein Gesetz, welches mir eine Verbindlichkeit auferlegt, aber ganz und gar nicht erwartet, noch weniger fordert, daß ich ganz um dieser Verbindlichkeit willen meine Freiheit auf jene Bedingungen selbst einschränken solle, sondern die Vernunft sagt nur, daß sie in ihrer Idee darauf eingeschränkt sei und von andern auch thätlich eingeschränkt werden dürfe [. . .].'

[11] As Flikschuh ('Elusive Unity: The General Will in Hobbes and Kant', *Hobbes Studies* 25 (2012), 21–42, at 34) correctly remarks: 'In contrast to both Rousseau and Hobbes, Kant holds that whereas ethical obligation binds only internally, juridical obligation binds only externally. Importantly, not just enforcement of juridical obligation is external in the juridical domain – the very source of juridical obligation is external to (the will of) the individual agent.'

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> in itself (directly opposed to the ethical law) we may not, and ought not, obey them.

As Kant claims in this quote, the citizens should, on the one hand, regard even the statutory laws of a legislator as quasi-divine ones; on the other hand, they need not and even must not obey those statutory laws that are 'directly opposed to the law of morality'. Obedience to suboptimal laws is seen here as the standard case, disobedience is described as an exception. Note that Kant even admits that the monarch does not have to improve suboptimal laws immediately as long as he accepts that their improvement must be realized in the future.[12]

An important consequence follows from this for the translation of the UPR and the ULR. I quoted Mary J. Gregor's translation in which the original 'allgemein' gets the English equivalent 'universal'. But on my reading, this translation is mistaken; I think that Kant's wording 'nach einem *allgemeinen* Gesetz' should be rendered as 'according to a *general* law'. A universal law would be an omnitemporal one for humanity at large; this is clearly not meant here. Generalization is, for Kant, a legitimate procedure, but of reduced value compared to full universalization.[13] However, even if the correct translation of the UPR and the ULR is then 'in accordance with a *general* law', I still believe that it remains appropriate to speak of a *Universal* Principle of Right and a *Universal* Law of Right – since these formulations are given from a second-order perspective. The UPR and the ULR in themselves are in fact invariant and omnitemporal. We can identify here a fifth difference: whereas the CIP leads to invariant results in the sense of strict universality, the GWT only arrives at a certain generality of rules.

What does all of this mean for the comparison between the GWT and the CIP? The main parallel between the two is their character as formal procedures. We saw that legitimate right, like each appropriate maxim, must successfully pass an examination: juridical laws are correct if and only if the range of everybody's free choice is guaranteed by them according to a general rule. Likewise, maxims are morally permissible if and only if they are universalizable as laws for any rational agent. Juridical laws must be capable of mutually coordinating the individual freedom margins of the citizens of a certain state in an equal, neutral, and unbiased way. Moral

[12] Important passages for Kant's permission that legal improvements might be delayed by the monarchs are *Towards Perpetual Peace* 8:372 and RL 6:321–2.

[13] In the *Groundwork* 4:424, Kant explicitly distinguishes between a strict *universalitas* and a mere *generalitas*. The latter is characterized as a decrease of the full validity of the CI.

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laws must enable an order of action where all rational beings can follow the same rules. At the same time, Kant's description of how the process of establishing normatively correct legislation actually should go is far from what is specified under the CIP. Let me highlight the differences which exist between the two formal procedures in the following contrasting juxtaposition (Table 3.1):

Table 3.1 *Comparison of CIP and GWT*

Moral normativity according to the CIP	Legal normativity according to the GWT
(a) Moral duties are based on individual freedom as autonomy (*Wille*). Every individual subject to the moral law is at the same time the author of morality (following the idea of self-legislation).	(a*) Legal duties are based on freedom as arbitrary choice (*Willkür*), the negative concept of freedom). Lawmaking is usually done by the monarch; the legal subjects are not directly involved.
(b) For moral duties, compliance based on intrinsic motivation is indispensable; they are internally enforced by practical reason.	(b*) For legal duties, compliance out of external obedience to the law is sufficient; they are externally enforced by the authority of a state.
(c) Moral duties are objectively given by practical reason (or by the *homo noumenon*) and addressed to all human beings, even to all rational beings.	(c*) Legal normativity is a mere idea which need not be followed by an individual agent unless he lives in a legal order.
(d) The normativity of moral laws is strict and inescapable. Maxims are always either morally permissible or impermissible.	(d*) Juridical laws can be invalid if they directly contradict the innermost of morality. And they can be suboptimal so that they need improvement over time.
(e) Moral laws are universally mandatory. Their validity is invariant and omnitemporal.	(e*) Juridical laws are generally valid. In legislation, there is room for voluntarism and contextualism.

Thus reconstructed, an important implication of Kant's concept of law is that legal relations do not establish a true omnilateralism since this would imply that all human beings enter into a legal relationship with all others. There is only a constellation of regionally and temporally limited multilateralism.[14] Kant's idea is that a legal order can be justified even if it is no more than a historically situated and contextualized phenomenon.

[14] From this point of view, it is not correct to characterize law, as Arthur Ripstein does, as 'normative omnilateralism'; it is a mere multilateralism, since law is always group-related and spatiotemporally limited and does not exclude associated persons (Arthur Ripstein, *Force and Freedom: Kant's Legal and Political Philosophy*, Cambridge, MA: Harvard University Press, 2009, 24; cf. 183): 'Each of the defects of the state of nature requires an omnilateral authorization to solve it [. . .].' At least, it must be clarified who exactly the 'all' meant by the term omnilateralism are: all members of the legal order? Certainly, they are not all human beings in every place and at every time.

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In addition to this, he also recognizes the necessity of universalizing the juridical relations between all men. This is why, in *Towards Perpetual Peace* and elsewhere in Kant's writings, international law remains to be established even when legal orders in individual states are already existing.

But how is it possible that Kant, the theorist of universality, objectivity, intrinsic motivation, inner coercion, and autonomy, confines the level of juridical and political normativity to a contextual, situated phenomenon? A plausible answer to this question arises from the historical dimension of his idea of non-ideal normativity. If the external conditions allow only a lesser form of realization of what might ideally be mandatory, one has to consider preliminary ways in which one can reduce the full normativity while, at the same time, preserving as much as possible of its core. This is exactly what happens in Kant's conception of right. He is convinced that on the historical path towards a full inner moralization of humanity, external juridification is needed since, once people live under stable legal relations, they can more easily take steps towards morality. And if robust republican legal structures exist on a national level, it is to be expected that a 'League of Nations' (*Völkerbund*) will emerge, an alliance of freedom-oriented states which is seen by Kant as the basis for a moral cosmopolitanism.

This is why I think that the relationship between morality and law, represented by the contrast between the CIP and the GWT, is neither that of an equivocity of the normative concepts employed in both formulas, nor is it based on a mere 'family resemblance', namely, showing some overlapping affinity between otherwise deeply different usages of a term. On the contrary, the CIP and the GWT substantially refer to each other insofar as the latter preserves an important residue of the kind of normativity of the former, whereas full normativity, realized (as we will see in a moment) in an 'ethical commonwealth', would be characterized by the fact that it is directly based on moral law. The relation between the CIP and the GWT is that of normative ideality and normative non-ideality respectively.

3.2 The Ethical Commonwealth as Kant's Ideal of a Moral Community

The topic of Kant's legal and political philosophy is the concrete juridical order, established in a historical state, not the idea of a perfectly moral right. And this is absolutely appropriate. He would be an idealistic dreamer, a *Gesinnungsethiker* in the problematic sense of the word, had he taken full moral normativity, according to the left side of Table 3.1, as the basis of his view on what is required for the legal sphere. Given that

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Kant does not make such a commitment, as we have seen so far, there is good reason for abandoning the derivation reading, which wants to defend the thesis that, for Kant, there is a direct moral basis for legal normativity. As he writes, for example, in one of the posthumously edited notes on the constitution of a legal order (Refl 7961 19:565): 'Whether the constitution requires unanimity. In the idea of good people, yes. But as they are, so much, that others can be forced. According to the principle *exeundum e statu naturali*.'[15] Kant here gestures towards the fact that grounding the normative foundation of a state in the unanimity (*unanimia*) shared among a morally good people would leave us with an entirely utopian outlook. In reality, one must proceed differently: bad as men are, establishing a state of order does only require that the majority force those others who are unwilling into this state, such that all will live in the future under the General Will. Following these considerations, it is clear that the idea of a General Will is not immediately a moral one, a view which is also expressed in *Idea for a Universal History with Cosmopolitan Purpose* as follows (8:23; trans. H. B. Nisbet): 'He [i.e. man] thus requires a master to break his self-will and force him to obey a generally valid will (*einem allgemeingültigen Willen*) under which everyone can be free.'[16] According to the 'Sixth Sentence' of the *Idea*, human beings are so bad that they are in need of a master. This master has to break their individual will and force them under a General Will which then turns out to be the rule according to which the citizens can be free.

What would an authoritative will look like in the case of a genuinely moral community? We are in the fortunate situation that Kant addresses this question explicitly in the 'Third Part' of his *Religion within the Limits of Reason Alone* through differentiating between a juridical and an ethical commonwealth. Note that Kant's ethical community consists of all men without exception; 'the whole human race' should belong to it (6:94). To this universality he adds the moment of intrinsic moral motivation; in the ethical community each individual is genuinely motivated by morality and not merely subject to the pressure of legal sanction. An important further point about Kant's ethical commonwealth is that it is an idealized, but at the same time still concrete, historical community, namely the true church.[17] Kant is not thinking here of an otherworldly moral ideal

[15] Refl 7961 19:565: 'Ob die constitution *unanimia* erfordere. In der Idee guter Menschen, Ja. Aber so wie sie sind so viel, daß andere können gezwungen werden. Nach dem *principio exeundum e statu naturali*.'

[16] I changed Nisbet's translation 'universally valid will' into 'generally valid will'.

[17] RGV 6:101.

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community. Rather, it is introduced as a concrete precondition for preserving the morality of a community (RGV 6:98–9; trans. J. Bennett):

> If a commonwealth is to come into existence, all individuals must be subject to a public legislation, and it must be possible to regard all the laws that bind them as commands of a common lawgiver. For a juridical commonwealth, the mass of people uniting into a whole would itself have to be the lawgiver (of constitutional laws), because the legislation comes from the principle: Limit the freedom of each individual to the conditions under which it can be consistent with the freedom of everyone else according to a common law, and thus the general will sets up an external legal control.

In this passage, Kant formulates a clear contrast between the ethical commonwealth he is concerned with and a juridical one. The former, as the notion of the 'people of God' indicates, lives under the rule of a common (divine) legislator. In the latter, however, the 'mass of people' serves as the lawgiver; such a community is oriented to the principle of the General Will, that is, to the principle that the freedom of each must be restricted in accordance with the freedom of every other. The juridical commonwealth establishes its laws by means of external coercion. But this is precisely not the case in an ethical community. Kant continues (RGV 6:98–9):

> But if the commonwealth is to be ethical, the people as such can't itself be regarded as the lawgiver. In such a commonwealth the laws are all expressly designed to promote the morality of actions, which is something inner, and so can't be subject to public human laws. (In a juridical commonwealth, in contrast, the public laws concern the legality of actions, which is out in the open, visible.) So someone other than the people must be specifiable as the public lawgiver for an ethical commonwealth. But ethical laws can't be thought of as coming originally, basically, from the will of this superior being (as statutes that might not have been binding if he hadn't commanded them), because then they wouldn't be ethical laws, and conforming to them would only be a matter of coerced obedience to the law, not the free exercise of virtue.

Here, Kant emphasizes the differences which exist between a juridical and a purely ethical community: whereas the former is based on the unified will of all people and expresses its laws by means of the authoritarian element of collective voluntarism, the latter is based on inner morality. Morality cannot be regulated by external laws; hence, morality is not the object of a General Will. In the first case, the community of individuals has to follow the principle of legality of actions, in the second, the distinct principle of morality. Kant explicitly claims that, in the second case, the

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people are not the lawgiver. As he adds, the source of moral normativity (moral normative authority) can originate neither from the people, nor from the divine will, even though God plays the role of a 'moral ruler of the world' (*als einem moralischen Weltherrscher*). What Kant means is that the normativity of an ethical commonwealth must be based on a good (moral) will, namely, that which follows the Categorical Imperative instead of that which obeys a General Will.

Shortly after this passage, Kant raises the question of whether one could combine the concept of an ethical commonwealth with that of the legality of statutory laws (RGV 6:99–100). In this case God would still be the legislator, but his laws would be taken as rules for an external order. Kant rejects this theocratic proposal, since it would amount, as he writes, to an aristocracy of priests; such a state would bring in God only externally. He then characterizes his own ethical commonwealth explicitly as 'an institution whose laws are purely inward – a republic under laws of virtue, i.e., a people of God "zealous of good works"' (RGV 6:100).

As Stephen Palmquist rightly points out, Kant describes the ethical commonwealth or invisible church according to the pattern of the four categories which he introduced in the first *Critique*: quantity, quality, relation, and modality. Palmquist gives the following convincing reconstruction:[18]

> *Universality*. The *quantity* of the true church is one.
>
> *Integrity*. The church's *quality* aims at its members' moral edification.
>
> *Freedom*. The *relation* of church members must be free of coercion both (a) inwardly (i.e., members will not exercise control over each other) and (b) outwardly (i.e., the church and political state will operate independently).
>
> *Unchangeability*. The *modality* of the church's constitution is (a) *necessary*, in the sense that these four basic precepts will *never* change, while also being (b) *possible*, in the sense that all *other* aspects of church governance are *always* open to change.

As one can see from these features of the invisible church, Kant interprets it as an ideal universal and invariant community based on morality. Therefore, this passage from the *Religion* provides welcome support of my non-ideality interpretation. If the derivation reading were correct, we would expect that Kant might describe the normativity of a juridical commonwealth precisely in terms of the Categorical Imperative – which he apparently does not. Instead, as we can see, the community directly

[18] Stephen R. Palmquist, 'How Political is the Kantian Church?', *Diametros* 17 (2020), 95–113, at 100.

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based on the CI would be the ethical commonwealth. Kant sees such a community as important, yet it should be restricted to the tasks of an invisible church. If it were institutionally realized as a state, it would adopt the form of a theocracy, that is, a mistaken attempt to implement a divine, morally perfect legislation under historical conditions. The legislation resulting from a General Will, by contrast, involves everyone as author and addressee of the right and is therefore the normatively appropriate way of organizing a state.

But the separation reading, on the other hand, is misguided, too, since it falsely assumes that law and morality are without connection. The link that connects the General Will and the Categorical Imperative lies in the person of the legislator. This can be concluded from those passages in which Kant deals with the GWT as a concrete test procedure to be conducted by the monarch. In the *Idea for a Universal History with Cosmopolitan Purpose*, he claims that 'the supreme leader should be just for himself and yet a man' (IaG 8:22: '*Das höchste Oberhaupt soll aber gerecht für sich selbst und doch ein Mensch sein*'). Kant requires him to possess a 'good will' (ibid.). As this implies, the GWT cannot appropriately be done without inner morality, but it is the monarch who transforms his inner reflections into a concrete set of laws. This again shows how the notion of a General Will encompasses the idea of a non-ideal normativity.

Likewise, in *The Conflict of the Faculties* Kant demands that the monarch follows the obligation to treat his people according to republican principles. In this text, he describes a state organized with regard to the idea of General Will – the citizens being at the same time obedient to the law and legislators – as the Platonic ideal of a *respublica noumenon* (SF 7:90–1):

> The Idea of a constitution in harmony with the natural right of man, one namely in which the citizens obedient to the law, besides being united, ought also to be legislative, lies at the basis of all political forms; and the body politic which, conceived in conformity to it by virtue of pure concepts of reason, signifies a Platonic Ideal (*respublica noumenon*), is not an empty chimera, but rather the eternal norm for all civil organization in general, and averts all war.

As this passage confirms, the normative foundation of any appropriate constitution lies in the natural rights of man, namely, the a priori (innate) right to freedom, and its realization is done by the idea of a General Will. Then Kant continues (SF 7:91):

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> A civil society organized conformably to this ideal is the representation of it in agreement with the laws of freedom by means of an example in our experience (*respublica phaenomenon*) and can only be painfully acquired after multifarious hostilities and wars; but its constitution, once won on a large scale, is qualified as the best among all others to banish war, the destroyer of everything good. Consequently, it is a duty to enter into such a system of government, but it is provisionally the duty of the monarchs, if they rule as autocrats, to govern in a republican (not democratic) way, that is, to treat the people according to principles which are commensurate with the spirit of libertarian laws (as a nation with mature understanding would prescribe them for itself), although they would not be literally canvassed for their consent.

The monarch should not reign, we are told, as an autocrat; instead, he has the 'provisional' duty to rule according to a republican idea of government. This confirms that Kant should not be interpreted on the basis of a separation reading, since the procedure that is prescribed here is clearly an internal one. The concrete legislator, namely, the monarch, has to practice some sort of private thought-experiment in which he should imagine 'how a people with mature understanding would prescribe it for itself' (*wie ein Volk mit reifer Vernunft sie sich selbst vorschreiben würde*). The monarch is only bound to the correct execution of the GWT internally and morally, not externally or legally. We can thus extend our list by a point (f–f*), namely through the opposition of two types of contradiction-in-will procedure (Table 3.2).

The above-quoted passage from the *Conflict of the Faculties* contains important elements of a philosophy of history. The Platonic ideal of a perfect constitution, we learn, is not outside our world, for we can in fact

Table 3.2 *Extended Comparison of CIP and GWT*

Moral normativity	Legal normativity
(f) The CIP is successfully applied if an agent, following their strictly formal process, identifies a maxim as passing the universalist contradiction-in-will test.[19]	(f*) The *GWT* is successfully applied if a monarch, in an imaginative thought-experiment in which he envisions his people as being mature, finds no contradiction in his generalist contradiction-in-will test.

[19] Kant clearly says that the contradiction-in-will test is the fundament of the Categorical Imperative while the contradiction-in-conception test only helps to identify perfect duties (GMS 4:422).

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attain it, namely, through an order based on a General Will. Before we arrive at a concrete example of such a well-organized state (a *respublica phaenomenon*), we have to face 'multifarious hostilities and wars'. I take Kant here to be claiming that the GWT cannot be fully and appropriately applied under contemporary, heavily non-ideal circumstances; for the time being, history has to proceed according to the teleological scheme (as formulated in the *Idea for a Universal History with Cosmopolitan Purpose* (1784) and elsewhere). In the future, however, there will be a historical moment when such a constitution (a *respublica phaenomenon* which is the closest approximation to a *respublica noumenon*) can be established. This, then, will banish all war. We have the duty to enter into such a condition of government, which means that we must follow the *exeundum est e statu naturali*, although such an ideal constitution is still far away. In the meantime ('provisionally'), while the monarchs are often reigning as autocrats, they should, following Kant, rather rule 'in a republican (not a democratic) way'. They have to do this even if, as he admits, the citizens cannot be asked for their consent. Note here that the GWT should be practised by the monarchs as a mere thought-experiment, and there is no right to resistance or civil disobedience against this procedure, since nobody except the king is entitled to practise the thought-experiment or to determine its adequate execution.

The distinction between a *respublica noumenon* and a *respublica phaenomenon* in this passage sheds some light on Kant's view of a non-ideal political normativity, which includes two different aspects. First, concerning the two formal procedures which are testing universalizability and generalizability respectively, it denotes the difference between moral and political normativity. The norms derived from the Categorical Imperative are the ideal version, while the norms taken from the General Will are the non-ideal ones. Second, regarding the implementation, Kant describes degrees of realization of political norms as mediated by a historical process: while we are living nowadays under conditions of a defective *respublica phaenomenon*, future generations may arrive at full version of it (which is then still not a *respublica noumenon*).[20]

3.3 The Transcendental Conception of Public Right as a Form of GWT

I now turn to a text in which Kant presents a very detailed version of the GWT. Notably the GWT is presented here not as a procedure to be done

[20] I am grateful to Rainer Forst for having drawn my attention to this point.

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by the legislator, but instead by a general public. I mean the passage entitled 'Of the Accordance of Politics with Morals according to the Transcendental Conception of Public Right' from *Towards Perpetual Peace* (ZeF 8:381–2). Kant there explicitly speaks of a formal test criterion for public law, namely that of publicity. Let us call it the Publicity Test (PT). He introduces the PT by differentiating between a material and a formal view of public right:

> We may think of Public Right in a formal way after abstracting from all the matters to which it is applied in detail, such as the different relations of men in the State, or of the States to each other, as presented in experience; and this is the way in which jurists usually think of it. But apart from the *matter* of public right, there remains only the *form of publicity*, the possibility of which is implied in every pretension of right; for without such publicity there would be no justice, this being thinkable only as what is publicly declarable, and hence without this publicity there would be no right, as right is only administered or distributed by it.

Kant's idea is that each future element of public right must have a content and a form. Now, we might expect him to say something about the formal aspect of each future element of public right in the sense of the inner coherence of a law or its outer applicability, which itself must be free from contradiction. Instead, he maintains that every claim or pretension to the legitimacy of right must be publicly declared. At first, this seems to be a rather procedural and strictly formal aspect of lawgiving. But what Kant has in mind is a procedure by which the general approbation is tested:

> This character of publicity must belong to every pretension of right; and, as it can easily be judged whether it accompanies any particular case, and whether it can therefore be combined with the principles of an agent, it furnishes a criterion, which is at once presented *a priori* in reason and which it is easy to use in experience. Where it cannot be combined with the principles of an agent, the falsity and wrongness of a pretended right can thus be immediately recognized, as if by an experiment of the pure reason.

In this part of the passage, Kant even explicitly speaks of the PT as a 'criterion' and an 'experiment of pure reason'. He claims that it is an a priori criterion: it helps to figure out whether or not 'a pretended right can be combined with the principles of an agent' (*ob sie sich mit den Grundsätzen des Handelnden vereinigen lasse oder nicht*). This implies that he is not thinking of a concrete political procedure like a public announcement; again, it sounds instead like a thought-experiment. This is confirmed by the observation that Kant characterizes the PT in the following lines as an 'abstraction from everything empirical' (*Abstraction von allem Empirischen*):

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> Abstraction being thus made from everything empirical that is contained in the conceptions of national and international right, (such as the evil disposition of human nature which makes coercion necessary) the following proposition arises, and it may be called the *transcendental formula* of Public Right. 'All actions relating to the rights of other men are wrong, if their maxim is not compatible with publicity.'

Kant speaks of a 'Transcendental Formula of Public Right'. This makes it clear that the PT is a version of the GWT: what he means is that all human beings affected by a pretended law must be able to give their consent. The fact that he does not use the expression 'General Will' may have to do with the extension of the Transcendental Formula which applies both for national and for international law. We can find further evidence for the strong overlap between the PT and the GWT: the idea of a general consent is indirectly present when Kant in the next lines says that by a publicly presented illegitimate law would 'inevitably aroused [. . .] the resistance of all men against my purpose' (*dadurch unausbleiblich der Widerstand Aller gegen meinen Vorsatz gereizt werde*):

> This principle is not to be regarded merely as *ethical*, and as belonging only to the doctrine of virtue, but it is also to be regarded as *juridical* and as pertaining to the rights of men. For a maxim cannot be a right maxim which is such that I cannot allow it to be *published* without thereby at the same time frustrating my own intention, which would necessarily have to be kept entirely secret in order that it might succeed, and which I could not *publicly confess* to be mine without inevitably arousing thereby the resistance of all men against my purpose. It is clear that this necessary and universal opposition of all against me on self-evident grounds, can arise from nothing else than the injustice which such a maxim threatens to everyone. Further, it is a merely *negative* maxim, in so far as it only serves as a means of making known what is *not* right and just towards others. It is like an axiom which is certain without demonstration. And, besides all this, it is easily applicable; as may be seen from the following examples and illustrations of Public Right.

On my reading, under the title of a Transcendental Formula of Public Right, Kant discusses the General Will. The PT is a slightly different version of the GWT.

For my interpretation, it is an interesting detail that Kant explicitly claims that the Formula connects morals and politics. The heading of the passage is formulated as *Of the Accordance of Politics with Morals* (*Von der Einhelligkeit der Politik mit der Moral*). Furthermore, in the last portion of the text, it is said that the Formula is valid both in the ethical and in the legal sphere.

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The PT as a test criterion works in the following way: whenever a maxim, namely the pretended law, can only be successfully established if the legislator keeps it secret, it is illegitimate; whenever the lawgiver can publicly confess his intention without provoking the resistance of all men against his purpose, it is legitimate. This means that the PT, very much like the GWT, is applied to a multitude of concrete people (not to humanity at large) and is intended to ascertain either their protest or their acceptance. The wording by which the PT is formulated also suggests that it is a procedure analogous to the CIP: 'All actions related to the right of other people, whose maxim is not compatible with publicity, are unjust.' It excludes, like a litmus test, all unreasonable legal actions. Kant notes, however, that a people can use the test criterion only *negatively* – a point that is repeated in the treatise *Theory and Practice* (TP 8:304).[21]

In which way should a ruler publicly announce his or her legal maxim? And how is the possible resistance of the citizens to be understood? Given the fact that Kant leaves no room for legitimate civil disobedience or political resistance, one wonders what reactions on the part of the citizens Kant might be thinking of here. He could certainly admit nothing more than a weak form of a written expression of concerns (according to the 'freedom of the pen' as described in TP 8:304). So the only protest against a proposed law would be on the basis of a quite narrow form of freedom of expression. Or should the legislator simply imagine that his announcement causes uncontrolled public anger? In the first case, it seems somewhat far-fetched to speak of a 'resistance of all against my intention'; written concerns are certainly not a kind of general resistance. Moreover, Kant does not explicitly tell us whether he wants to impose on the lawgiver the obligation to announce his intentions publicly in advance, as a matter of principle, in order to then wait for the reaction of the citizens as the test procedure. The PT and GWT as outlined would only make full sense if they were established as formal, constitutionally based, and legally regulated procedures. But even then, one could not be sure; in a regime of terror, even the public announcement of unjust laws might not trigger protest, because no one would dare to object. The problem of the Transcendental Formula seems to be that it presupposes what it is

[21] 'The universal principle, however, according to which a people is to judge its rights negatively, i.e. only to judge what the highest legislature would like to be regarded as not having decreed with its best will, is contained in the sentence: What a people cannot decide about itself, the legislator cannot decide about the people.' On this negative principle see Jens Kulenkampff, 'Über die Rolle des ursprünglichen Vertrages in Über den Gemeinspruch: Das mag in der Theorie richtig sein, taugt aber nicht für die Praxis', *Jahrbuch für Recht und Ethik* 16 (2008), 165–81.

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supposed to achieve: a legally oriented state with a defensively acting legislator and a critical civil society.

However, it is not only the lack of clarity of the GWT procedure (as described here) that must be viewed with scepticism, but also the fact that a non-institutional and uncontrolled test procedure is unlikely to lead to normatively appropriate results.

3.4 Some Critical Remarks on Kant's GWT

The GWT is not directly based on morality, and it is not based on prudential rationality either. We saw that, by taking the General Will as the legitimizing basis of any legal order, Kant does not simply defend the idea of an aggregation of individual self-interested wills as the fundament of a legitimate state. A legitimate state has, as its grounding principles of justification, criteria that share characteristic similarities in common with CIP. The GWT is a reduced or attenuated form of the CIP, formulated to deal with political reality.

Kant's General Will is meant to coordinate the individual freedom ranges of agents in an objective, neutral, and unbiased way, as opposed to coordinating them with respect to each person's interests. It starts from the idea of the innate right to freedom attributed to all citizens. But nevertheless, this does not imply that a state has a directly moral foundation. Instead, the essential characteristic of right is, according to Kant, that each individual's leeway in exercising their arbitrary freedom must be made compatible with all other such exercises, in a formal manner as well as in a generalizable way, by means of law that is justified as legitimate. Let me close with two critical remarks on Kant's notion of a General Will.

(1) *The procedure of the GWT is vague and unclear*. Most of Kant's formulations of the GWT leave it open to which precise test he is referring. Under which conditions can a legislator assume that the hypothetical consent of a people has or has not been given, and under which not? At least four aspects seem to be clear: first, the law to be established must allow for the free arbitrary action of the individual; second, it must coordinate this use of freedom on the basis of a general rule; third, this rule must be something enforceable, that is, it must limit external actions; fourth and finally, it must have the form of a juridical law (i.e. be connected with such moments as promulgation, permanent validity, judicial enforceability, and factual enforcement). However, these four criteria are certainly too underdetermined to be normatively satisfactory. To apply them would not sufficiently limit the range of permissible rules, for rules of

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the type 'Men should have substantive privileges compared to women in political, social, and economic life' and 'Not all citizens of a state should count as active ones, but only those who are economically independent' do also fulfil all the requirements mentioned: they leave room for the free arbitrary action of all, they coordinate it on the basis of a general rule, they are externally enforceable, and they can be established as laws. We can see evidence of this normative underdetermination at work in Kant's own analysis; in RL §46, for example, he does not envisage a full equality of rights for men and women – just as he does not give the full status of active citizenship to those living in economic dependence.

(2) *The GWT is not based on a theory of political and legal goods*. The General Will Test could be constructed in much more plausible form if Kant had integrated into it the idea of political or legal goods. For any citizen who wants to see his or her freedom of arbitrary choice protected, it is relevant that the necessary means to free actions are available. These are one's bodily integrity, physical and mental health, sufficient material wealth, political participation, the access to information and education – among many others. These and many other goods could serve as success criteria for ensuring that the General Will is actually respected. In his purely formal procedure, Kant ignores these goods and, in fact, is even eager to do so, in order to carefully avoid the presence of any empirical and material components in his theory. But the flip side of this formalism, which ends up exposing a weak point in the Kantian theory, is that it remains unable to guarantee the kinds of concrete political and legal goods that, for example, find articulation and justification in and through human rights discourses. Nothing in Kant's theory impedes the monarch from restricting what we see as human rights, as long as he does so in a formally correct way. Additionally, the fact that the Kantian monarch has the right to remain behind and is not forced to guarantee a complete set of freedoms accessible to everyone cannot be clearly formulated in this account either since the notion of a 'full set of freedoms' has strong material implications. Moreover, there are strongly diverging degrees of importance in a list of such freedoms. It makes a difference if a ruler restricts, for example, public opinion by censorship or limits shopping opportunities on Sundays. The Kantian model seems unable to account for such differences.

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