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The Ideal Character of the General Will and Popular Sovereignty in Kant

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Abstract: In this paper, I examine Kant's reception of and solution to the problem of the unity of the political will. I propose that Kant distances himself from the modern paradigmatic foundations of sovereignty principally with his theses of the ideality of the general will (section II) and of the apriority of the justification of popular sovereignty (section III). My interpretative hypothesis is that Kant solves the problem by grounding sovereignty in a conceptual element which is new in the history of political philosophy, i. e. the a priori unified omnilateral will. In section IV, I explain why my reading of the ideality of the general will can respond to seemingly plausible objections arising from Kant's own texts and how it works in the face of concrete political states of affairs.

Keywords: General Will, Popular Sovereignty, Omnilateral Will, Political Body, Legitimacy.

1 The unity of the political body as a philosophical problem

The general topic of this work is an essentially modern problem faced by all political theories that ground sovereignty in a contract: the problem of the unity of the political community. My aim is to analyse how Kant received and solved this problem. In modern political philosophy, the question of the unity of the sovereign involves three defining features. The first is the thesis of the artificiality of the political body – the notion that the unity of the political community is something that needs to be formed and instituted because it is not given by nature. Second, the theoretical point of departure is the multiplicity of individual wills or choices, which are considered to be given to political reflection. Third is the recognition that grounding a unique sovereign agent in this multiplicity is a difficult philosophical problem. These three features are at the core of the theories of the

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two great modern political philosophers whom Kant admired and whose work he received critically: Hobbes and Rousseau.[1]

In chapters XVI and XVII of the *Leviathan*, Hobbes devotes his efforts to refuting the thesis that the people is unified by nature, pre-politically, and that this natural unity is the fountain of sovereignty. By rejecting the ontological possibility of a pre-state political unity, Hobbes makes the most out of the very problematicity of his point of departure in the multitude considered as an irreducible multiplicity in order to show that the unity of the political body can only be the unity of the person of the authorised representative, who is not a contracting party. For his part, Rousseau called the fifth chapter of the first book of his *Social Contract* "One must always go back to a first agreement" ["*Qu'il faut toujours remonter à une première convention*"], which is an explicit formulation of the thesis of the artificiality of the political body. Just like Hobbes, Rousseau is fully aware that the mere aggregation of self-interested individuals will not generate a general will. Rousseau's strategy for solving the multiplicity-unity political problem is, as we know, the opposite of Hobbes's. Rousseau's associative contract gives birth to a political agent that has one will precisely because everyone is required to completely "alienate" everything particular; "the total alienation of each associate and of their rights to the whole community" forms the *volonté générale* because everyone undergoes the inner transformation from an egoist-rational agent into a

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Hobbes's presence in Kant's political thought can already be detected in the marginal notes on Baumgarten's *Initia* from 1764–1768. In the well-known *Reflexion* 6593 (Refl, AA 19: 99 f), Kant mentions Hobbes's *Leviathan*. In his Feyerabend lectures on natural law, Kant distinguishes Hobbes and Rousseau as two authors who surpass all other political philosophers (see V-NR/Feyerabend, AA 27: 1337. I also use the following version: *Abhandlung des Naturrechts Feyerabend*. Ed. Heinrich P. Delfosse, Norbert Hinske, and Gianluca Sadun Bordoni, Stuttgart-Bad Cannstatt 2014 [*Abhandlung NF*], 26). In these lectures, Kant recognises Hobbes's value as author of the thesis that leaving the state of nature is rationally necessary (V-NR/Feyerabend, AA 27: 1382; *Abhandlung NF*, 75).

I cite Kant's work as edited by the Akademie and use my own translations, except for the *Metaphysics of Morals*, where I use the English version: *The Metaphysics of Morals*. Introduction, translation and notes by Mary Gregor. Cambridge 1991 (although I frequently amend Gregor's translation).

moral person guided by concern for the common good.[2] This paper examines how Kant distances himself from these paradigmatic foundations of sovereignty principally with his theses of the ideality of the general will (the topic of the second section of this text) and of the apriority of the justification of popular sovereignty (the topic of the third section).

In section II, I analyse two of the most prominent readings of the Kantian thesis of the ideality of the general will and its role in the Kantian theory of the state. The interpretation offered by Katrin Flikschuh is representative of the most broadly accepted position on the matter. Ingeborg Maus's reading, by contrast, belongs to a less common but more adequate approach to Kant's political philosophy. My analysis of these approaches is followed by my own reading of the ideality of the general will. Here, I wish to underscore that this feature determines how it can operate within concrete political practices, but that this operativeness rests in turn upon the specificity of the Kantian justification of the a priori necessity of a unified will. Before analysing the way in which the ideal general will applies to political practices, it is necessary to study its systematic role within the metaphysics of right and its *a priori* justification. In section III, I propose theses on the systematic relation between the omnilateral will and popular sovereignty. My interpretative hypothesis is that Kant solves the challenge of the unity of the political will by grounding sovereignty in a conceptual element which is new in the history of political philosophy, i. e. the a priori unified omnilateral will. In Kant, the political community constitutes itself from a multitude (*Menge*), but the unity of this multiplicity is given a priori as the condition of the possibility of acquiring rights and guaranteeing the innate right. The systematic thesis I wish to propose is that Kant's solution is satisfactory because his argumentation avoids the insurmountable difficulty of grounding the universal political will in a multiplicity of particular wills (or powers of choice). Kant avoids this philosophical problem because he elaborates an idea of popular unified will by applying an *objective* juridical perspective to the double question of the necessity and validity of positive law. A clear sign of this is that entering the state is not an individual act of self-obligation.

In section IV, I elaborate further on my reading of the ideality of the general will in the face of concrete political states of affairs and explain why it can respond to seemingly plausible objections arising from Kant's own texts.

2 See Rousseau, Jean-Jacques: *Du contrat social ou Principes du droit politique* (1762). In: *Œuvres complètes*. Ed. by Bernard Gagnebin, and Marcel Raymond. Paris 1964. Volume 3, 257–470, 360–362.

2 The political-theoretical meaning of the ideality of the general will

In a recent work entitled "Elusive Unity", specifically dedicated to the question under examination here, Flikschuh treats Kant's general will by analysing certain shortcomings that, from a critical Kantian conception of state legitimacy, affect Hobbes's and Rousseau's theories of the public will. According to Flikschuh, Kant elaborates his concept of a general will to avoid two series of problems deriving from Hobbes and Rousseau. In this framework, Flikschuh holds the following two interpretative hypotheses:

> In the *Doctrine of Right*, Kant follows Rousseau in invoking the idea of a general united will. [A] Yet Kant also agrees with Hobbes that a multitude cannot constitute *itself* into a unity. [B] Nor does Kant speak of popular sovereignty: not 'the people' is sovereign but the ruler in his capacity as head of state.[3]

Flikschuh gives coherence to these two positions with the following thesis on Kant's conception of sovereignty: "the ruler's sovereignty is nonetheless grounded in the *idea* of the general will: he ought to govern in accordance with this idea".[4]

If we pay attention to how these interpretative hypotheses are formulated, we can see that Flikschuh's reconstruction of how the general will operates in Kant (i. e. as a simple criterion in the mind of the government) is flawed due to a series of very specific misunderstandings. In the first place, in the formulation of her basic thesis, Flikschuh makes a category mistake: for Kant, sovereignty is not exercised by the ruler,[5] who is always the executive power, but by the legislative power.[6] The fact that sovereignty corresponds only to the legislative power and the division of powers are two of the criteria that Kant employs to discriminate between legitimate republican regimes and illegitimate despotic ones.[7] Secondly, and more importantly, the theses that [A] Kant did not believe that a people can constitute itself into a political unity (put differently: a people cannot form itself)

3 Flikschuh, Katrin: "Elusive Unity: The General Will in Hobbes and Kant". In: *Hobbes Studies* 25, 2012, 21–42, 22.

4 Ibid. But let us note that it is not sovereignty itself that is based on this idea but rather its legitimacy.

5 Gregor translates "*Regierer*" and "*Regent*", which Kant uses to refer to the executive power, as "ruler".

6 MS, AA 06: 313.

7 MS, AA 06: 316 f; ZeF, AA 08: 352.

and that [B] Kant did not speak about popular sovereignty contradict the Kantian sources directly and literally.

Concerning the first thesis, [A] "Kant also agrees with Hobbes that a multitude cannot constitute *itself* into a unity", in the *Doctrine of Right* we find a central passage that refutes it: § 47. Here, Kant explicitly affirms that the original contract is "the act by which a people forms itself into a state".[8] In chapter 3 of the third part of *Religion within the Boundaries of Reason Alone*, Kant establishes a crucial distinction between the concepts of a juridical-political community and an ethical community regarding the way in which their respective legislators are or become a unity. In the foundation of a juridical community, the constituent legislator is "the multitude that reunites itself into a whole".[9] The basic difference between this community and the ethical community is that in the latter "the people, as such, cannot be considered as legislator".[10] It is noteworthy that Kant's ethical community shares with Hobbes's commonwealth a characteristic that distinguishes it from Kant's juridical state: its lawgiver (both constituent and legislator) is not the community itself but "someone other than the people".[11] In direct contradiction to the ethical community and Hobbes's Leviathan, in Kant's juridical community the people is the legislator, which leads us to the incorrectness of Flikschuh's second interpretative hypothesis.

Before looking into Kant's popular sovereignty in more detail, let us note that these brief indications suffice to show that the opposition between Kant's definitions of the institution of a juridical community and the Hobbesian position, according to which the unity of the political body cannot result from reciprocal association within a popular community, is radical. We simply cannot

8 "Der Act, wodurch sich das Volk selbst zu einem Staat constituirt". In this act, "everyone *(omnes et singuli)* within *a people* gives up his external freedom in order to take it up again immediately as a member of a commonwealth, that is, of a people considered as a state *(universi)*" (MS, AA 06: 315: "[...] alle (*omnes et singuli*) im *Volk* ihre äußere Freiheit aufgeben, um sie als Glieder eines gemeinen Wesens, d. i. des Volks als Staat betrachtet (*universi*), sofort wieder aufzunehmen"). Two remarks: Contrary to what happens in Hobbes, Kant's original contract does not imply relinquishing (all or part of) freedom; it is the act by which freedom is guaranteed. Moreover, this passage opens the question of how the people forms itself. My answer is that the people is the collective subject that enters into the contract and that its formation and the original contract are simultaneous. I will return to these points later on.

9 RGV, AA 06: 98: "Sollte nun das zu gründende gemeine Wesen ein *juridisches* sein: so würde die sich zu einem Ganzen vereinigende Menge selbst der Gesetzgeber (der Constitutionsgesetze) sein müssen".

10 RGV, AA 06: 98: "Soll das gemeine Wesen aber ein *ethisches* sein, so kann das Volk als ein solches nicht selbst für gesetzgebend angesehen werden".

11 RGV, AA 06: 99: "Es muß also ein Anderer als das Volk sein, der für ein ethisches gemeines Wesen als öffentlich gesetzgebend angegeben werden könnte".

relate Kant and Hobbes concerning the specific topic of the unity of the political body. Hobbes emphasises three facts: the political body is not natural but artificial, it does not exist before the state, and it cannot proceed from an association by which a multitude gives itself a unity of horizontal genesis. In chapter 16 of the *Leviathan*, Hobbes develops an entire theory of representation with the dual purpose of definitively refuting the pre-modern and obsolete idea that the people has a natural character and of annulling the theoretical possibility of an associative unity for the political body.[12] In chapters 17 and 18 of the same work, Hobbes attacks the theoretical and normative heart of parliamentarianism, the thesis according to which Parliament represents the people and, consequently, is the seat of sovereignty, by undermining the underlying thesis that the people is a unity whose universality is superior to the monarch's dignity.[13] Hobbes shares with parliamentarian writers (and most of the social contract tradition) the view that authority is instituted by the consent of each person who is under it.[14] The crucial difference lies in the kind of consenting agent at stake, for "everyone" always means a discrete multitude: "the Multitude naturally is not *One*, but Many; they cannot be understood for one, but many Authors".[15] The sovereign must be one; the people cannot exist as a unity, and therefore sovereignty cannot reside in the people. Besides, since the people is not even an artificial person, and since the multitude is an irreducible plurality of individuals, the sovereign represents not the people *stricto sensu* but each particular individual.

In a nutshell, Hobbes does more than simply reject the parliamentarian thesis that the monarch is "*universi minoris*". His strategy is to show that there is no universal greater than the monarch qua sovereign. For Hobbes, the representative is the only possible political universal. In marked contrast to this, in § 47 of the *Doctrine of Right*, Kant states that each contracting part becomes "a member of a commonwealth, that is, of a people considered as a sate (*universi*)".[16] Kant is

12 Here I follow Skinner, according to whom the presence and systematic role of the theory of representation in *Leviathan* (absent in *De Cive* and *The Elements*) serve Hobbes's intention of refuting the parliamentarian writers using their own terms and "discredit[ing] them by demonstrating that it is possible to accept the basic structure of their theory without in the least endorsing any of the radical implications they had drawn from it" (Skinner, Quentin, "Hobbes on Representation". In: *European Journal of Philosophy* 13 (2), 2005, 155–184, 168 f).

13 The exact location of this attack is Hobbes, Thomas: *Leviathan* (1651). Ed. by C. B. MacPherson. London 1968, 237.

14 "Everyone is author", Hobbes, *Leviathan*, 220.

15 Hobbes, *Leviathan*, 220.

16 MS, AA 06: 316: "Glieder eines gemeinen Wesens, d. i. des Volks als Staat betrachtet (*universi*)".

very explicit: "from the viewpoint of laws of freedom", the "universal sovereign" "can be no one other than the united people itself".[17] As the political universal is, in Kant, the people, Flikschuh's second hypothesis ([B] "Nor does Kant speak of popular sovereignty: not 'the people' is sovereign but the ruler in his capacity as head of state") is also false.

This hypothesis does not hold for another simple reason. For Kant, the sovereign is the legislator, and the legislator can only be the people. It is evident, then, that sovereignty is an attribute of the people. Analogously, "popular" is the adjective that properly corresponds to "sovereignty".[18] Put succinctly, in the normative theory of the state in the idea (to use the turn of phrase in § 45) set out in Kant's metaphysics of right, sovereignty corresponds exclusively and strictly to the unified will of the people. This is indisputable in the Kantian sources. Nevertheless, we can expect disagreement concerning not only the application of the metaphysical idea of popular sovereignty in concrete political practices but also a conceptual relationship prior to this application. I am referring to the relationship between popular sovereignty and the legitimacy of positive law within the Kantian normative political system. Maus develops her study on the ideality of the general will by taking this latter relationship into account.

For Maus, Kant's popular sovereignty grounds a procedural theory of political and juridical legitimacy. On her reading, the ideality of the general will primarily means that it is a supra-juridical principle. As such, its normative status is not inferior to that of other rational supra-state principles like the innate right. For instance, Maus holds that "in Kant, the importance of the people's legislative sovereignty is defined not only in relation to the sovereignty-less executive power, [...] but also in relation to the scope of action of positive democratic legislation facing the directives of supra-positive law".[19] One of the consequences of this is that positive law's legitimacy is not determined, as in Locke, by the comparison between the content of effectively sanctioned pieces of legislation and the content of an alleged natural independent moral order. The legitimacy and rightfulness (justice) of positive law must be evaluated on the basis of criteria that spring from the very decision-making process of which the general will is the agent. In this framework, the ideal general will constitutes the formal structure of

17 MS, AA 06: 315, translation amended. ("[Das] allgemeine[.] Oberhaupt[.]", "der, nach Freiheitsgesetzen betrachtet, kein Anderer als das vereinigte Volk selbst sein kann [...].") These indications also refute Ripstein's thesis on the unity of the people in Kant (Ripstein, Arthur: *Force and Freedom. Kant's Legal and Political Philosophy*. Cambridge 2009, 195 ff).

18 Cf. MS, AA 06: 313 f. In § 46 of the *Doctrine of Right*, Kant is explicit about this. I return to this point later on.

19 Maus, Ingeborg: *Zur Aufklärung der Demokratietheorie*. Frankfurt am Main 1992, 148.

the legitimate procedure of legislation, and because of this it operates as the key benchmark for assessing the legitimacy of given political sates of affairs.

Maus's basic thesis regarding the ideal character of the general will can be summed up in the idea that the legitimacy of a legal corpus inheres in the procedure of creation of positive law precisely because this unified will informs the formal structure of that procedure. This also explains why sovereignty is attributed to the people as a unified unity: legislative competence must be ascribed to all who are subject to positive law. Here arises the question posed by Rousseau in chapter 3 of the second book of the *Social Contract*: "Whether the general will can err".[20] Within Kant's *ideal* theory, we can say that positive law is correct if it emerges from a process structured by the idea of a unified general will and also if that unified will is the actual agent carrying out the law-creation process. Put differently, if the law-creation process is realised by a political agent other than the unified will of the people, then it will not render rightful outcomes.

What happens when we leave the realm of pure metaphysics of morals to analyse the meaning of the ideal unified will in concrete political practices? First, on the non-ideal level, we must consider popular sovereignty as a criterion and apply it to evaluating the legitimacy of a given political state of affairs. By so doing, we already necessarily suppose that the general will has fewer chances of erring if the actual sovereign agent is the popular reunited will – collectively unified, not assembled in an aggregative way. Evidence in support of this reading is given in Kant's criteria for distinguishing between republics and despotisms, for instance his classification of a state as despotic when the private will of the ruler usurps and misuses the public will.[21] What I wish to underscore here is that the idea of the general will (the general will as an ideal) cannot function as a mere hypothesis in a thought experiment within the mind of a ruler other than the people itself, for in that case the general will would not be exercising sovereignty in the first place.

Flikschuh endorses the opposite reading[22] in part because she hastily derives the non-reality of the general will from its ideality. Indeed, her hypothesis is that "the decisive difference between Kant on the one hand and Hobbes

20 Rousseau, *Du contrat social ou Principes du droit politique*, 257–470, 371.

21 Cf. ZeF, AA 08: 352.

22 Maybe this happens in liberal readings of Kant in general, for instance in Ripstein, Arthur, *Force and Freedom. Kant's Legal and Political Philosophy*, Cambridge 2009, 198 ff. With this said, Kersting, who thinks that Kant is closer to Rousseau, holds the thesis that the general will is a sort of thought experiment (cf. Kersting, Wolfgang: "Politics, Freedom, and Order: Kant's Political Philosophy". In: *The Cambridge Companion to Kant*. Ed. by Paul Guyer. Cambridge 1992, 342–366, 355 ff).

and Rousseau on the other hand is that for Kant the general united or public will lacks empirical reality – for Kant there is no such *thing* as a general will".[23] For my part, I think that the only thing we can deny is that the general will is a *substantial* unity that exists empirically. That is to say, we are not authorised to deny that it could exist in other ways within concrete political practices. On the same page, Flikschuh presents her central thesis on the meaning of the ideality of the general will as a derivation of the latter hypothesis: "the non-empirical character of the idea of the general united will is best grasped when understood in terms of its status as an *a priori* presupposition of each rights-claiming person".[24] What does a person claiming a right presuppose regarding the idea of the general will, according to Flikschuh? It is undeniable that the ideas of the general will, the republic and the original contract are normative criteria for evaluating the legitimacy of any given political state of affairs. The complexity of the question lies in determining how we are to apply them in practice – they are ideas of reason with objective practical reality, and as such they must apply to objects of experience. The problem I see with Flikschuh's reading is that they are only at work in the mind of the ruler. On Flikschuh's interpretation, they do not even function in a hypothetical fashion in forming the citizen's public judgment (in fact, she speaks of "subjects"): "Subjects must be able to assume that their sovereign does not want to do them any harm; they must be able to assume that he governs in accordance with the idea of the general united will. The ruler gives sign of his juridical trustworthiness by ruling in accordance with the idea of the general united will".[25] But if this is so, then the idea of a general will has no actual practical efficacy regarding the political judgement of those subject to positive law and political authority, because it does not entail their political participation in the first place. Indeed, on Flikschuh's reading, Kant's united will does not even have practical reality insofar as it is not a criterion used in citizens' active political participation. For her, this idea "does not [...] represent the idea of a plurality of co-legislating wills:[26] the public will's omnilateralism is a function, rather, of its capacity to make coercive universal law that is valid for everyone because it takes the rights claims of all equally into consideration" (ibid.). This latter claim is hard to square with certain central (not marginal) passages in Kant's work such as MS, AA 06: 313 f, where omnilaterality is the precise meaning given to the general will: "only the concurring and united will of all,

23 Flikschuh, "Elusive Unity: The General Will in Hobbes and Kant", 38.

24 Ibid.

25 Flikschuh, "Elusive Unity: The General Will in Hobbes and Kant", 41.

26 But in MS, AA 06: 345 (§ 55), Kant equates being a citizen to being a "co-legislating member" of the state and then further equates both to being an end in oneself.

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".[27]

I think that Flikschuh's reading is the consequence of two basic errors that appear in the statement "The idea of the general united will has no empirical reality: it is a criterion of rightful judgment for the ruler as public lawgiver, and does not represent the (hypothetically) real unification of a multitude of wills".[28] The first underlying problem is interpreting the ideality of the general will as if it were an idea in the most common sense of the word (and not in a Kantian sense), confined to the sheer intention of a given ruler. Affirming that the general will does not have empirical reality does not necessarily imply that it could not function as an evaluative, normative and practical standard beyond those extremely narrow limits, for which, incidentally, we lack solid textual evidence.[29] The second problem (perhaps the cause of all the others) is that Flikschuh tends to confuse two different theoretical realms or levels, mixing up the normative-theoretical level with its application in praxis. Thus, Flikschuh fails to discriminate between the systematic role of the general will as an idea within the metaphysics of right and its role within concrete political contexts. Because of this, she fails to see that the popular will is the actual sovereign in Kant's normative theory, not a mere hypothesis in the mind of an ideal legislator. In Kant's normative theory, the united people is the legislator, the supreme power, the absolute authority; it is not a thought experiment.

Taking this into account, we can reformulate the question of whether the united will of the people can err in terms of why Kant's general will has (if it does) a formal structure that bestows a series of procedural virtues on the law-creation process. We can say that the very concept of a legislating general will already analytically contains one specific procedural virtue when it comes to deciding on the coactive norms a group of people will have to obey. I am referring to the fact that the same people who will have to obey that positive law participate in its creation. Nevertheless, there is a normative question prior to the question of what makes the general will the cornerstone of a virtuous law-creation process.

27 "Also kann nur der übereinstimmende und vereinigte Wille Aller, so fern ein jeder über Alle und Alle über einen jeden ebendasselbe beschließen, mithin nur der allgemein vereinigte Volkswille gesetzgebend sein".

28 Flikschuh, "Elusive Unity: The General Will in Hobbes and Kant", 41.

29 I elaborate on this point in section IV, but let me mention here that how the metaphysical idea of the general will works in practice is critical and normative in the sense that we use the supra-juridical principle of popular sovereignty to evaluate whether a given political state of affairs, institution, decision, etc., is legitimate, just and fair. This is what it means for an idea to have practical objective reality in Kant's metaphysical system of Right. I thank Reviewer 1 for reminding me to insist upon the metaphysical character of Kant's entire political enterprise.

All in all, this same structure must be normatively justified. Demonstrating the normative necessity of the general will is the task of the Kantian social contract theory. In the "Public Right" section of the *Doctrine of Right*, there is an important indication in this sense, which sheds light on why the Kantian general will can generate rightful, just and fair positive law: Kant's interpretation of the principle "*volenti non fit iniuria*".[30]

In Kant's and Hobbes's theories, the voluntarist doctrine "*volenti non fit iniuria*" works in opposite ways. While for Hobbes entering the state is an act of individual consent that generates, by means of self-obligation, all subsequent political normativity, for Kant it is not an act of individual consent. On the contrary, it is an unconditional duty that authorises even the use of coercion.[31] Hobbes uses his concept of a self-obligation that generates the state and his theory of representation to sustain the absolute sovereignty of a representative who does not sign the pact and the consequent attribution of legislative competence exclusively to the non-contracting authority. In other words, Hobbes uses the voluntarist doctrine in question to refute popular sovereignty, whereas Kant does precisely the opposite: he uses the doctrine or principle not to justify entering the state but to justify the principle of popular legislative sovereignty. Let us recall the key passage of the *Doctrine of Right in extenso*:

> 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 anyone 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.[32]

30 Sharon Byrd and Joachim Hruschka (*Kant's* Doctrine of Right. *A Commentary*. Cambridge 2010, 144 ff) interpret the Kantian use of the turn of phrase "*volenti non fit iniuria*" in a rather strange way: they hold that it is a reference to a collective and unanimous ideal legislator. According to them, the unified will of the people bears legislative power only in the ideal state and only as perfectly unanimous because the idea that "*volenti non fit iniuria*" cannot apply to those who voted for the winning outcome.

31 Cf. TP, AA 08: 289; ZeF, AA 08: 355; MS, AA 06: 306, 312.

32 MS, AA 06: § 46, 313 f: "Die gesetzgebende Gewalt kann nur dem vereinigten Willen des Volkes zukommen. Denn da von ihr alles Recht ausgehen soll, so muß sie durch ihr Gesetz schlechterdings niemand unrecht thun *können*. Nun ist es, wenn jemand etwas gegen einen Anderen verfügt, immer möglich, daß er ihm dadurch unrecht thue, nie aber in dem, was er über sich selbst beschließt (denn *volenti non fit iniuria*). Also kann nur der übereinstimmende und vereinigte Wille Aller, so fern ein jeder über Alle und Alle über einen jeden ebendasselbe beschließen, mithin nur der allgemein vereinigte Volkswille gesetzgebend sein."

Maus's theses on Kant's political philosophy is condensed in her reading of this passage. According to her, the very concept of a positive law already includes the idea that those who are subject to it must take part in its creation. The possible risk is that positive law may simply reflect the contingent "contents of the voters' consciousness",[33] in which case the content of positive laws would be irreducible particulars in the specific sense of being non-universalisable and contingent, i. e. not satisfactorily justified. However, this is avoided because the popular will carries within itself a series of built-in normative exigencies that ensure universalizability and justifiability for the content of the norms resulting from the law-creation process. For Maus, these exigencies are deliberative and discursive requirements and constraints inherent in a consensus-seeking procedure.[34] In this framework, she proposes that Kant's popular sovereignty is the heart of a law-creation process of which rational law is the outcome and not a (jusnatural) presupposition or prerequisite.[35] The very Kantian concept of rational Right imposes these universalizing constraints and requisites on the concept of a *legislative* will.

Although I agree with Maus that the general will necessarily implies the legislative participation of those who will be subject to a law, I think that what confers validity or rightfulness to the resulting norms is not a set of formal deliberative and discursive requisites. Perhaps a democratic-deliberative reading of Kant is not far from the Kantian sources, especially if we consider Kant's particular conception of the public use of reason, but the Kantian corpus does not support reading Kant's republic as a deliberative democracy. My thesis is that Kant avoids the risk of the "*volonté de tous*" (the risk being that the outcomes of the law-creation process will automatically reflect a myriad of particular, egotistic interests) because the unity of the political body is not an elaboration of an irreducible multiplicity of individual wills. Indeed, Kant addresses the problem of making everyone's freedom compatible with one another (the question included in the very definition of Right) from the objective (i. e. not motivational-subjective) perspective of the validity of positive law. However, I do not agree with Maus that the concept and the principle of Right allow us to analytically derive the thesis that all who are subject to a coactive law must participate in its creation. Kant demonstrates the necessity of this participation only in the "Private Right" section of the *Doctrine of Right*, when he introduces the idea of an omnilateral will to answer the question of how we can acquire rights in a legitimate way. With the concept of an omnilateral will, Kant can demonstrate the *apriority* (normative necessity) of

33 Maus, *Zur Aufklärung der Demokratietheorie*, 156.
34 Ibid.
35 Maus, *Zur Aufklärung der Demokratietheorie*, 157.

the general will that is tasked with legislating valid positive law, and this apriority is the actual ground of the ideality of how it operates in the context of concrete political praxis.

3 The a priori necessity of popular sovereignty

The main ground for my claim that Kant does not construct the sovereign's unity from a discrete multiplicity can be summed up by the fact that Kant does not apply the resolutive-compositive method to any practical (political, juridical or ethical) philosophical object, while most of the social contract tradition to a greater or lesser extent does precisely that.[36] Because of this, he does not adopt the subjective and motivational perspective so strongly connected with this method[37] to justify the rational necessity of the artificial state authority. The methodological standpoint Kant adopts to analyse the state of nature and to justify the practical necessity of positive law is objective. Its objectivity resides, in turn, in the fact that the point of departure is the question of the objective validity of law.[38] My thesis

36 For a good description of the Euclidean-Galilean method and Hobbes's use of it, see Macpherson, C. B., "Introduction". In: Hobbes, *Leviathan*, 9–63, 25–30. The literature on the application of the resolutive-compositive method in political philosophy has been strongly influenced by both Cassirer's and Strauss's thoughts on the matter. Cassirer defines the resolutive-compositive method as a *Begriffsbildung* method based on the epistemological and gnoseological thesis that it is "only when we have broken down a seemingly simple fact into its elements and rebuilt it using those elements that we can understand it" (Cassirer, Ernst: *La filosofía de la ilustración* (1932). Trans. by Eugenio Ímaz. México 1972, 25). Cassirer explains that Hobbes's application of the Euclidian method assumes that the state is a body that behaves like any other physical body and therefore that we can analyse it in the same way that Galileo studied nature. It is evident that Kant does not follow Hobbes's corporeal conception of the political body.

37 For Strauss, the application of Euclid's method in political theory implies the following thesis: "If the form of the state is deduced from its matter, there is a guarantee that no elements enter into the State which are not contained in its matter, man, and finally in the 'nature', understood as matter, of man" (Strauss, Leo: *The Philosophy of Hobbes. Its Basis and Its Genesis* (1936). Trans. by Elsa M. Sinclair. Chicago 1952, 151). Strauss then specifies these axioms: "*the axioms* which Hobbes gains by going back from the existing state to its reasons, and from which he deduces the form of the right state, *are man's natural selfishness and fear of death, i. e., motives* on whose force one can depend in the case of all men under all circumstances" (Strauss, *The Philosophy of Hobbes. Its Basis and Its Genesis*, 151, my emphasis). The basic matter of analysis is these (natural) motivations, which are abstracted from Kant's doctrine of right.

38 The path and direction of the elemental doctrine of right also depend on this objective approach to right insofar as they demand the abstraction of all the particular ends every person is free to adopt (Cf. MS, AA 06: 382).

is that this same point of view informs the argumentative field in which Kant is able to establish the apriority of the united will of the people. Kant's justification of popular sovereignty amounts to showing that from an objective perspective on right, rights and practical interaction, the unity of the political body is necessary a priori. Because of this, Kant's justification of the unity of the political body occurs simultaneously with the justification of the kind of political agent who will incarnate the constituent and law-creation processes. The conclusion we can draw is that the general will's ideal character means, primarily and eminently, that popular sovereignty is a normative principle. In what follows, I briefly reconstruct the path leading to this conclusion.

As we know, the original contract has an ideal status. However, this does not mean that Kant does not define the kind of "act" (Akt) in which it consists. In the contracting original act, "everyone *(omnes et singuli)* within *a people* gives up his external freedom in order to take it up again immediately as a member of a commonwealth, that is, of a people considered as a state *(universi)*".[39] The first outcome of the original contract is thus the self-creation of the popular will as sovereign. How does Kant justify the ascription of legislative competence to the popular will? In the *Doctrine of Right*, the starting point of the justification of this role is the conclusion arrived at in the section "Private Right", that only a positive law dictated by a coactive authority can guarantee subjective rights, both acquired and innate. This seems to be little more than what was implied in the analytical connection between *Recht* and *Zwang*. However, it is only once he has analysed how we can acquire rights rightfully that he is in a position to conclude that there is only one kind of political regime in which innate right is truly protected and where it is possible to acquire and keep ulterior rights. Kant phrases this in terms of how synthetic a priori propositions of right are possible.[40] Let us see why.

The universal validity of acquired claim-rights hinges on the establishment of a juridical condition because the very pretension of the validity of a claim concerning rights already in turn implies the pretension of the validity of the corresponding duties. This relation of correspondence between rights and duties is given in Kant's definition of subjective rights as entitlements to oblige and coerce.[41] Acquired rights therefore pose a problem which the innate right does not, namely, that the legitimacy of the coercion they authorise must be shown (if they are to count as

39 MS, AA 06: § 47, 315. "[...] alle (*omnes et singuli*) im Volk ihre äußere Freiheit aufgeben, um sie als Glieder eines gemeinen Wesens, d. i. des Volks als Staat betrachtet (*universi*), sofort wieder aufzunehmen [...]."

40 See MS, AA 06: 249.

41 See MS, AA 06: 237, 383.

rights in the first place). In order to say that I have an acquired right, it must be shown that there is a corresponding juridical coercive duty. Kant introduces the apriority of the omnilateral will precisely when treating this topic. The omnilateral will is, in fact, the condition of possibility of the validity of any acquired right. I cite the passage *in extenso* to underscore its argumentative structure:

> The only condition under which *taking possession* (*apprehensio*), beginning to hold (*possessionis physicae*) a corporeal thing in space, conforms with the law of everyone's outer freedom (hence a priori) is that of *priority* in time, that is, only insofar as it is the *first* taking possession (*prior apprehensio*), which is an act of choice. But the will that a thing (and so too a specific, separate place on the earth) is to be mine, that is, appropriation of it (*appropriatio*), in original acquisition can be only *unilateral* (*voluntas unilateralis s. propria*). Acquisition of an external object of choice by a unilateral will is *taking control* of it. So original acquisition of an external object, and hence too of a specific and separate piece of land, can take place only through taking control of it (*occupatio*).[42]

From this passage, we can conclude that while the *possibility* of this way of acquiring something is "an immediate consequence of the postulate of practical reason"[43] treated in §§ 2 and 6,[44] its *legitimacy* is proved analytically by mere

42 MS, AA 06: § 14, 263: "Die Besitznehmung (*apprehensio*), als der Anfang der Inhabung einer körperlichen Sache im Raume (*possessionis physicae*), stimmt unter keiner anderen Bedingung mit dem Gesetz der äußeren Freiheit von jedermann (mithin *a priori*) zusammen, als unter der der Priorität in Ansehung der Zeit, d. i. nur als *erste* Besitznehmung (*prior apprehensio*), welche ein Act der Willkür ist. Der Wille aber, die Sache (mithin auch ein bestimmter abgetheilter Platz auf Erden) solle mein sein, d. i. die Zueignung (*appropriatio*), kann in einer ursprünglichen Erwerbung nicht anders als *einseitig* (*voluntas unilateralis s. propria*) sein. Die Erwerbung eines äußeren Gegenstandes der Willkür durch einseitigen Willen ist die *Bemächtigung*. Also kann die ursprüngliche Erwerbung desselben, mithin auch eines abgemessenen Bodens nur durch Bemächtigung (*occupatio*) geschehen".

43 MS, AA 06: § 14, 263.

44 As is well known, the juridical postulate of practical reason is also called "permissible law" by Kant and is formulated in § 2 (in terms of the conceptual impossibility of the idea of an external object's being objectively ownerless, see MS, AA 06: § 2, 246) and in § 6 (in normative terms, as the "juridical duty to act toward others so that what is external (usable) could also become someone's own", ["es Rechtspflicht sei, gegen Andere so zu handeln, daß das Äußere (Brauchbare) auch das Seine von irgend jemanden werden könne"]. MS, AA 06: 252). The literature on the significance of this postulate and permissible law for Kant's political philosophy has become progressively more important over the past few years. The most influential work is Brandt, Reinhard: "Das Erlaubnisgesetz, oder: Vernunft und Geschichte in Kants Rechtslehre". In: *Rechtsphilosophie der Aufklärung: Symposium Wolfenbüttel 1981*. Ed. by Reinhard Brandt. Berlin 1982, 223–285, followed by salient pieces such as Gregor, Mary: "Kant's Theory of Property". In: *Review of Metaphysics* 41 (4), 1988, 757–787; Tierney, Brian: "Kant on Property: The Problem of Permissive Law". In: *Journal of the History of Ideas* 62 (2), 2001, 301–312; Hruschka, Joachim, "The Permissive Law of Practical Reason in Kant's Metaphysics of Morals". In: *Law and Philosophy* 23, 2004,

reference to innate freedom. Indeed, if someone wants to occupy the place I am physically occupying without my consent, they will have to physically hurt me, to exercise violence against my body. But this is useful only for backing an entitlement to empirical possession, not juridical, intelligible possession. Intelligible possession is not sufficiently justified by appeal to the postulate of practical reason and innate freedom alone. As an acquired right, juridical possession cannot be justified by a unilateral act of appropriation, by a unilateral act of an individual's will (or a unilateral will). To validate acquired rights, we must appeal to the concept of an omnilateral will, which has the systematic function of being the condition of legitimacy of an acquired claim-right considered as an entitlement to obligate others:

> [T]he aforesaid will [i. e. a unilateral will] can justify an external acquisition only insofar as it is included in a will that is united *a priori* (i. e., only through the union of the choice of all who can come into practical relations with one another) and that commands absolutely. For a unilateral will (and a bilateral but still *particular* will is also unilateral) cannot put everyone under an obligation that is in itself contingent; this requires a will that is *omnilateral*, that is united not contingently but a priori and therefore necessarily, and because of this is the only will that is lawgiving. For only in accordance with this principle of the will is it possible for the free choice of each to accord with the freedom of all, and therefore possible for there to be any right, and so too possible for any external object to be mine or yours.[45]

As a necessary condition for the validity of positive law, the concept of an omnilateral will united a priori contains in itself the idea of a general will as the only

45–72; and Byrd, Sharon: "Intelligible possession of objects of choice". In: *Kant's Metaphysics of Morals. A Critical Guide*. Ed. by Lara Denis. Cambridge 2010, 93–110. Szymkowiak, Aaron, "Kant's Permissive Law: Critical Rights, Sceptical Politics". In: *British Journal of the History of Philosophy*, 17, 3, 2009, 567–600 presents a detailed analysis that puts Kant's treatment of the concept of a permissive law in its historical context and stresses its originality. More recently, Lea Ypi: "A permissive theory of territorial rights". In: *European Journal of Philosophy* 22 (2), 2012, 288–312 has put the Kantian idea of permission at the centre of the debates.

45 MS, AA 06: § 14, 263: "Derselbe Wille aber kann doch eine äußere Erwerbung nicht anders berechtigen, als nur so fern er in einem *a priori* vereinigten (d. i. durch die Vereinigung der Willkür Aller, die in ein praktisches Verhältniß gegen einander kommen können) absolut gebietenden Willen enthalten ist; denn der einseitige Wille (wozu auch der doppelseitige, aber doch *besondere* Wille gehört) kann nicht jedermann eine Verbindlichkeit auflegen, die an sich zufällig ist, sondern dazu wird ein *allseitiger*, nicht zufällig, sondern *a priori*, mithin nothwendig vereinigter und darum allein gesetzgebender Wille erfordert; denn nur nach dieses seinem Princip ist Übereinstimmung der freien Willkür eines jeden mit der Freiheit von jedermann, mithin ein Recht überhaupt, und also auch ein äußeres Mein und Dein möglich". For the relationship between property and the united will of all, see Pinheiro Walla, Alice: "Common Possession of the Earth and Cosmopolitan Right". In: *Kant-Studien* 107 (1), 2016, 160–178, especially 169–170.

author of valid law. In this way, it becomes clear that the omnilateral will is the answer to the question of the validity of positive law, because the task of a juridical condition is to make the legitimate acquisition of rights possible. Kant also specifies in this passage that the omnilateral will is not the simple sum of particular pacts celebrated among equally particular wills. The unity of the omnilateral will is not the product of the aggregation of a multiplicity of individual acts of consent (unlike the "*volonté de tous*" and Hobbes's pact). Its unity is not n-lateral but rather the outcome of the act by which a multitude of human beings becomes a political community. This also comes to light in a passage that at face value can be read as a positive reception of Hobbes. I am referring to the idea that the *unio civilis* is not a relationship of *Mitgenossenschaft*:

> The *civil union (unio civilis)* cannot itself be called a *society,* for between the *commander (imperans*) and the *subject (subditus)* there is no partnership. They are not fellow-members: One is *subordinated to,* not *coordinated with* the other; and those who are coordinate with one another must for this very reason consider themselves equals since they are subject to common laws. The civil union *is* not so much a society but rather *makes* one.[46]

Let us remember that Kant follows Rousseau[47] in modelling the relationship between the people as a unity and the aggregative collection of individuals who make up the people on the relationship between the "*imperans*" and the "*subditus*"; it is "the relation of a universal *sovereign* (which, from the viewpoint of laws of freedom, can be none other than the united people itself) to the multitude of that people severally as *subjects,* that is, the relation of a *commander (imperans)* to *those who obey (subditus)*".[48]

The apriority of the omnilateral will plays the systematic role of founding the categorical necessity of popular sovereignty, and it does so by showing that

46 MS, AA 06: § 41, 306 f: "Selbst der *bürgerliche Verein* (*unio civilis*) kann nicht wohl eine *Gesellschaft* genannt werden; denn zwischen dem *Befehlshaber* (*imperans*) und dem *Unterthan* (*subditus*) ist keine Mitgenossenschaft; sie sind nicht Gesellen, sondern einander *untergeordnet*, nicht *beigeordnet*, und die sich einander beiordnen, müssen sich eben deshalb untereinander als gleich ansehen, so fern sie unter gemeinsamen Gesetzen stehen. Jener Verein ist also nicht sowohl als *macht* vielmehr eine Gesellschaft".

47 See Rousseau, *Du contrat social ou Principes du droit politique*, 362: "The associates [of the body politic] taken collectively are called by the name of 'people', and severally they are called 'citizens', when considered as participants in the sovereign authority, and 'subjects', when considered as subjected to the laws of the state".

48 MS, AA 06: 315, translation amended. ("das Verhältniß eines allgemeinen *Oberhaupts* (der, nach Freiheitsgesetzen betrachtet, kein Anderer als das vereinigte Volk selbst sein kann) zu der vereinzelten Menge ebendesselben als Unterthans, d. i. des *Gebietenden* (*imperans*) gegen den *Gehorsamenden* (*subditus*)").

there is only one type of political agent with the capacity to legislate in a legitimate fashion. In political terms, the apriority of the omnilateral will serves both to ground the necessity of the state, of the juridical condition, and to show that positive law is rightful if and only if it has been omnilaterally legislated by a collective subject whose unity is associative. More succinctly, the unity of the sovereign people is juridical and political and is not arrived at from an irreducible multiplicity of individuals. In this framework, the ideality of the united will of the people means that for Kant the unity of the political body is not a substantial person. On the contrary, it is a conceptual element that the very idea of valid and legitimate Right obliges us to assume. An ideal general will also implies that popular sovereignty is to be considered a normative, supra-juridical principle that we use to evaluate concrete political contexts.

4 Popular sovereignty, legitimacy and the different formae imperii[49]

Kant held that "any true republic is and can only be a *system representing* the people in order to procure and secure the rights of the all the citizens in the name of the people, by all the citizens united and acting through their delegates (deputies)".[50] Although I cannot exhaustively consider Kant's complex notion of political representation in this paper, it does seem necessary to allay possible misinterpretations that this statement and some of Kant's comments on democracy may cause concerning my reading of Kant as a theorist of popular sovereignty. My theses in this article are not contradicted by these points, and this is so mainly because of the metaphysical character of my account of Kant's understanding of popular sovereignty. Let me briefly comment on this.

First, a few indications about "representation" will suffice to show that the proposition "any true republic is and can only be a *system representing* the people" does not pose a problem for Kant's doctrine of popular sovereignty. Maus has shown that for Kant the representation principle is actually equivalent to the division of powers principle and that, following a linguistic usage common in the eighteenth century, his notion of political representation is much wider than the

49 I thank both anonymous reviewers for their most helpful comments and suggestions on how to improve this article, including the idea of adding this section.

50 MS, AA 06: 341, translation amended: "Alle wahre Republik aber ist und kann nicht anders sein, als ein *repräsentatives System* des Volks, um im Namen desselben, durch alle Staatsbürger vereinigt, vermittelst ihrer Abgeordneten (Deputierten) ihre Rechte zu besorgen".

notion we use today. In fact, it applies to the three powers:[51] even the members of the jury are considered *representatives* of the people.[52] So the very term "representation" is used (a) as an equivalent of the idea of the division of powers, and when it is not used in that sense (b) it is much broader, vaguer and lighter than the idea of representation that lies behind the contemporary concept of, say, representative democracy (which, incidentally, is conceptually compatible with the idea of popular sovereignty). But there is a stronger reason for why the turn of phrase "*system representing* the people" does not contradict the fact that for Kant the people is the legislative sovereign. This is articulated in the rest of the passage:

> But as soon as a person who is head of state (whether it be a king, nobility, or the whole of the population, the democratic union) also lets itself be represented, then the united people does not merely *represent* the sovereign: It *is* the sovereign itself. For in it (the people) is originally found the supreme authority from which all rights of individuals as mere subjects (if need be, as officials of the state) must be derived; and a republic, once established, no longer has to let the reins of government out of its hands and give them over again to those who previously held them and could again nullify all new institutions by their absolute power of choice. (translation amended)[53]

This is one of the few places where Kant seems to be talking about a "republic" as a regime the concrete existence of which is possible when the people actually becomes the legislative supreme power. Note that this latter republic is nonethe-

51 See Maus, *Zur Aufklärung der Demokratietheorie*, 191–202. For a study on Kant's concept of "representation" that goes in a different direction, see Kersting, Wolfgang, *Wohlgeordnete Freiheit*, Frankfurt am Main, 1993, 413–454.

52 MS, AA 06: 317: "The people judges itself through those of its fellow citizens that are appointed as its representatives for this purpose in every particular case by a free election" (translation amended). ("Das Volk richtet sich selbst durch diejenigen ihrer Mitbürger, welche durch freie Wahl, als Repräsentanten desselben, und zwar für jeden Act besonders dazu ernannt werden").

53 The complete passage: MS, AA 06: 341: "Alle wahre Republik aber ist und kann nichts anders sein, als ein repräsentatives System des Volks, um im Namen desselben, durch alle Staatsbürger vereinigt, vermittelst ihrer Abgeordneten (Deputirten) ihre Rechte zu besorgen. Sobald aber ein Staatsoberhaupt der Person nach (es mag sein König, Adelstand, oder die ganze Volkszahl, der demokratische Verein) sich auch repräsentiren läßt, so *repräsentirt* das vereinigte Volk nicht bloß den Souverän, sondern es *ist* dieser selbst; denn in ihm (dem Volk) befindet sich ursprünglich die oberste Gewalt, von der alle Rechte der Einzelnen, als bloßer Unterthanen (allenfalls als Staatsbeamten), abgeleitet werden müssen, und die nunmehr errichtete Republik hat nun nicht mehr nöthig, die Zügel der Regierung aus den Händen zu lassen und sie denen wieder zu übergeben, die sie vorher geführt hatten, und die nun alle neue Anordnungen durch absolute Willkür wieder vernichten könnten."

less compatible with the election of deputies and also, of course, with the division of powers, which leads us to the next point.

Second, when we talk about Kant's republic, we are talking about legitimacy, not institutional design. In this sense, the distinction between *forma regiminis* and *forma imperii* also provides solid evidence in support of my position. The difference between these two ways of classifying political forms is crucially a difference of levels within the theory. Popular sovereignty belongs to the purely metaphysical and normative level of the republican *forma regiminis* (along with the attribution of absolute sovereignty exclusively to the legislative power and the division of powers), while despotic regimes are defined by the fact that they do not respect the principle of popular sovereignty. For their part, all three *formae imperii* concern not the legitimacy of the forms of government but the possible institutional designs states can have, mainly concerning the number of persons who exercise political power. In this Kant follows Rousseau (knowingly or not), which makes it curious that Kant is often suspected of being anti-democratic and Rousseau only seldom so. Rousseau's republic is not straightforwardly what we would today call a democratic state, and indeed he actually defends the position that his normative conception of the legitimate republican regime is compatible with the three traditional forms of administration, namely monarchy, aristocracy and democracy.[54] Let us also remember that Hobbes likewise allows for a "difference of Commonwealths" which "consisteth in the difference of the Sovereign, or the Person representative of all and every one of the Multitude", which difference determines the division of commonwealths into the three traditional political forms (again, monarchy, aristocracy and democracy).[55] With these indications I wish to underscore that we would never say that Hobbes was a democratic thinker just because he considered democracy acceptable so long as it respects the political principles that constitute a strong Leviathan. In the same way, we do not consider Rousseau a defender of monarchy just because he leaves room for it in his conception of legitimacy. Following this, we can ask ourselves: why should we assume that if Kant defended a form of representative republic (although he also defended the direct and actual possession of supreme sover-

54 See Rousseau, *Du contrat social ou Principes du droit politique*, II, VIff. Wolfgang Kersting (*Wohlgeordnete Freiheit*, Frankfurt am Main 1993, 417) is thus wrong to distinguish between Kant and Rousseau with regards to how they divide forms of state. They are closer than usually thought: Rousseau postulates the republic, not democracy, as the ideal legitimate regime.

55 Hobbes, *Leviathan*, Chapter 19, 239. For Hobbes, "the difference between these three kinds of Common-wealth, consisteth not in the difference of Power; but in the difference of Convenience, or Aptitude to produce the Peace, and Security of the people; for which end they were instituted" (Hobbes, *Leviathan*, 241).

eignty by the actual people), he is therefore unable to have a theory of popular sovereignty, when he explicitly held that the people is the origin of every right? And why should the fact that he criticised democracy in the absence of a division of powers (but defended democracy in conjunction with a division of powers) be read in the same way, as evidence that his political system cannot sustain the principle of popular sovereignty?

Third, we can indeed enumerate reasons for why Kant's negative comments on "democracy" in *Towards Perpetual Peace*[56] do not cast a shadow on the fact that he was a theorist of popular sovereignty (although, as with the question of representation, I cannot expect to solve all of the problems associated with the topic of 'Kant and democracy' in this paper). As is well known, Kant criticised direct "democracy" in the absence of a division of powers, which is actually a "non-form", in *Towards Perpetual Peace* but preferred the democratic "form of state" to the other two forms (monarchy and aristocracy) in the *Doctrine of Right*. In this latter work, Kant states that democracy, i. e. the form of state in which the sovereign is the popular reunited will, is more in accordance with Right.[57] Therefore, the first thing we should recognise if we want to analyse Kant's relation to democracy is that he actually favoured it. We must take his position in the *Metaphysics of Morals* (a systematic text philosophically conceived) as having the last word; this is what a thoughtful methodology demands. The position in *Towards Perpetual Peace* is not definitive, and it is inscribed in a work that does not enjoy the same systematicity as the *Metaphysics of Morals*, not to mention the fact that it refers to a notion of democracy, i. e. the ancient one, which greatly differs from our ideas about democratic legitimacy. It is nonetheless noteworthy that in *Towards Perpetual Peace* we even find a principle which Kant articulates in the *Doctrine of Right* as the very explicit "democratic postulate" (as Maus calls

56 ZeF, AA 08: 351 ff.

57 MS, AA 06: 338 f. See also this passage from the preparatory notes to the *Metaphysics of Morals*: VAMS, AA 23: 342: "All civil systems (status civilis) are or autocratic or representative. The first ones are despotic and the second ones are systems of freedom and of the autonomy of the subjects (of the people). [...] Monocracy Aristocracy and Democracy. The representative system of democracy is the system of the society's equality or the republic; the one of the aristocracy, of the inequality because only some together represent the sovereign; the one of the monarchy, of the equality that is the effect of inequality because one (the monarch) represents all" ("Alle bürgerliche Systeme (*status civilis*) sind entweder autocratisch oder repräsentativ. Jene sind despotisch diese sind Systeme der Freyheit und der Avtonomie der Unterthanen (des Volks) [...] Monocratie Aristocratie und Democratie. Das repräsentative System der *Democratie* ist das der *Gleichheit* der Gesellschaft oder die *Republik* das der Aristocratie der *Ungleichheit* da nur einige zusammen den Suverän repräsentiren – der Monarchie das der Gleichheit welche die Wirkung der Ungleichheit ist da einer (Monarch) alle repräsentirt.").

it) that not even the democratic constitution can be imposed against the will of the people.[58] I am referring to *Toward Perpetual Peace*'s fifth preliminary article, which forbids military intervention into other states' political issues on the grounds of the right of every people to decide its constitution by itself.[59] The democratic character of Kant's principle of popular sovereignty is thus reinforced by the fact that he is well aware that the heteronomous imposition of a democratic constitution on a people defeats democracy by violating the principle of popular sovereignty.

Fourth, and closely related to this latter point, I wish to add to these considerations the observation that Kant's theory does not have the problem of having to be compatible with what we today call "democracy", i. e. this is not a problem his theory of popular sovereignty has *stricto sensu* in its own right, and not only because it would be anachronistic to demand of Kant a commitment to our contemporary conception of what a certain political regime should be. A theory of popular sovereignty is not of necessity a theory of democracy in general; not every conception of democracy holds that sovereignty is popular or defends the idea of a general will, and not every existing theory of democracy is compatible with the idea that the unity of the political body is artificial and collective at the same time. For instance, aggregative democracies, both in theory and in practice, are incompatible with my reconstruction of Kant's idea of the general will. They are also incompatible with Rousseau's social contract. But Kant's theory of popular sovereignty is a good theory because it gives us reason to support the position that the mere adding of individual preferences (even when realised through democratic procedures) cannot render legitimate outcomes valid for all. It is self-evident that when talking about "democracy" Kant never meant what we understand by the term today; for obvious historical reasons, he could not

58 See MS, AA 06: 340.

59 I therefore completely agree with Ingeborg Maus ("From Nation-State to Global State, or the Decline of Democracy". In: *Constellations* 13 (4), 2006, 465–484, 474): "Kant's theory of autonomous processes of social self-enlightenment is connected to a principle of constitutional evolution in which 'any legal constitution, even if it is only in small measure lawful, is better than none at all', [ZeF, AA 08: 373] since a republican constitution can only be achieved within 'any constitution at all'. This perspective grounds the whole of Kant's verdict against military intervention into the internal affairs of state. The demand that 'No state shall forcibly interfere in the constitution and government of another state' [i. e. the fifth preliminary article, ZeF, AA 08: 346] is thus precisely not bound to the degree of republicanism this constitution and government have already achieved, but rather implies respect for the integrity of every state having 'any' constitution with a view to its built-in potential to achieve a republic in the future through autonomous learning processes and the actions of its citizens. Even Kant's recognition of the specific paths of social development still refers to the conditions of possibility of popular sovereignty."

have been thinking about constitutional democracies of the sort that exist in our time. This somewhat trivial indication is only part of a bigger point, however, for another good thing about Kant's political philosophy is that it is metaphysical in a post-critical way; that is to say, Kant could never have agreed that some concrete political state of affairs was the actual, complete and perfect instantiation of his republican state in the idea. There has never been, and never will be, a completely legitimate, just and fair state.

From what I have analysed in the previous sections, we can conclude that Kant's strategy for grounding his normative conception of popular sovereignty is to show that the unity of the political body is necessary a priori from an objective perspective on Right, subjective rights and the way we interact externally. By showing this, Kant at the same time demonstrates that we can acquire and keep rights only when they are omnilaterally and reciprocally grounded. This is why, ideally, there is only one sort of political agent who can create legitimate positive law and only one sort of unity the political body can have if it is to legislate valid norms. As a condition for the validity of coercive Right, the concept of an omnilateral will united a priori contains in itself the idea of a general will as the only possible author of legitimate positive law and as a condition of the possibility of acquiring rights in a universally valid way. The unity of the general will, the unity of the political body, is not the product of the aggregation of a multiplicity of individual acts of consent, and it is not the outcome of a multilateral pact, as it is in Hobbes, for instance. For Kant, the unity of the sovereign is the unity of the omnilateral will. All of these theses belong to a metaphysics of morals, which means primarily that popular sovereignty is a normative and political concept that has no empirical referent. What does this radical ideality mean politically? Is it not a contradiction to defend a theory of popular sovereignty and then to insist upon its ideal character?

Kant's theory is a progressive and useful theory of popular sovereignty precisely because it holds that the united will of the people is not understandable as a substantial unity existing in the depths of certain given political communities. Popular sovereignty is a supra-juridical principle that we ought to apply when evaluating the legitimacy, justice and fairness of given political institutions, not something the existence of which confers legitimacy on an existing institutional design. The united will of the people is not an ontological presence that transmits its legitimacy to certain political institutions, whatever they may be (a parliament, a democratically elected president, etc.). But precisely because of this, the people to whom the idea of popular sovereignty refers is not an idea in the mind of the ruler, as I have (hopefully) shown. The general will of the people is a normative standard we apply critically, in the face of political institutions and given factual powers. This is what it means to be a regulative and metaphysical idea of reason

with practical objective reality: not a mere "*als ob*", not a mimetic criterion for the factual ruler to unilaterally appeal to when governing, but a test that anyone affected by the law can apply to the law-creation processes to determine whether the ensuing norms are legitimate, even if they themselves have participated in creating them. Moreover, because it is an ideal principle for critically evaluating given political states of affairs, it cannot be discursively manipulated to excuse illegitimate decisions or actions undertaken by political actors and state institutions. On the contrary, when we see that the "public will is manipulated by the governing persons as if it were his [i. e. the ruler's] private will", we can say that the regime in question is despotic.[60]

My reconstruction of Kant's conception of the general will pays attention to the fact that Kant gave the notion of popular sovereignty a *central* place in his metaphysical system of Right, not a marginal or anecdotal one. This lends a high degree of plausibility to my reading of the Kantian sources. The arguments presented in this paper also explain why the ideality of the general will is a positive aspect of Kant's theory. This ideality does not consist in being an idea in the mind of rulers. It does not entail that a given political actor is entitled to decide unilaterally and then claim that he has followed the idea of a general will. On the contrary, insofar as it is not a substantial entity, the general popular will does not confer legitimacy on just anyone who claims to incarnate it. Perhaps the most we can get by applying the idea of the general will as a critical normative political principle is knowledge about the illegitimacy, injustice and unfairness of the political realities we are evaluating. This knowledge can guide political action, however – if not in the service of creating the ideal republic, then at least in the service of preventing further injustice.

60 "[...] der öffentliche Wille, sofern er von dem Regenten als sein Privatwille gehandhabt wird [...]." ZeF, AA 08: 352.