Introduction and methods of interpretation

The *Doctrine of Right* is Kant's masterpiece on legal and political philosophy. The work is highly structured and meticulously formulated. In it Kant makes a few simple assumptions he calls "axioms" and "postulates" and from those assumptions the whole doctrine of right unfolds systematically. It unfolds Kant's most mature thoughts on the peace project. As Kant indicates in the Conclusion to the *Doctrine of Right*, the whole aim of that work is to ensure lasting peace.[1] Peace is ensured in Kant's view by securing and protecting individual rights. Thus Kant's most significant contribution to legal and political philosophy is dedicated to the peace project and is about rights and how those rights can be ensured.

Rights can be ensured only in a "juridical state." Kant fathered the idea of a juridical state, which in German is called the *Rechtsstaat*, or in English a state under "the rule of law," a state guaranteeing "due process of law." Unlike authors before, during, or after Kant's time,[2] Kant expands his inquiry beyond the juridical state of one nation to include the juridical state of nation states and the cosmopolitan juridical state. Kant's ideas thus encompass international law to ensure rights globally and cosmopolitan law to ensure world trading relations and permit peoples to offer themselves freely for commerce with one another. Kant indeed is the only author who provides *one* single model designed to ensure peace on the national, international, and cosmopolitan levels.

We would like to express our sincere gratitude to Arthur Laby for patiently reading and critiquing an earlier draft of this *Commentary*.

[1] AA VI, Conclusion, p. 355, ll. 7–9.

[2] Examples are Montesquieu, Rousseau, or Hamilton, Madison, and Jay. Authors, such as Grotius, Pufendorf, and de Vattel, did discuss international law, but no one developed one single system to ensure peace on the national, international, and cosmopolitan levels, as did Kant.

This *Commentary* explains Kant's system of individual rights, starting from the original innate right to external freedom and ending with the right to own property, to have contractual claims, and to have claims from family relations. Kant takes extreme care in developing his basic theory on private law on the external mine and thine. A quick perusal of the *Preparatory Work on the Doctrine of Right* reveals that Kant started again and again from square one,[3] painstakingly trying to write a coherent text on his theory of rights to objects of choice external from ourselves – to physical things, to someone else's choice to perform an action, to family members. No one before or after Kant formulated such radical questions about rights to external objects and provided such fundamental answers. Unfortunately, Kant's main concern does not seem to lie in his readers' ability to understand his often laconic explanations but instead with satisfying himself that he had the theory right and properly expressed. In this *Commentary*, we hope to have unraveled many of the mysteries associated with Kant's theory of rights to external objects of choice.

The *Commentary* also penetrates Kant's idea of the state which provides the apparatus for ensuring these rights. The ideal form of government for Kant is a republic in which the people, from whom all power and sovereignty proceed, are represented. This representation ensures that the state does not become despotic, violating individual rights through wielding irresistible power. Representation is a surrogate for the united will of all of a people in one nation state. If the people's will is united and all lawgiving proceeds from that united will, then the people have consented and thus can be done no wrong by the laws the state adopts and applies. Furthermore, Kant understands the principle of division and separation of powers. He sees all power as flowing from the people, not only the legislative, but also the executive and judicial powers, and conceives of this power as dividing into a trinity of the universally united will of all. The three powers complement one another, but each is subordinate to the other two. It is this combination of coordinate and mutually subordinate powers that constitutes Kant's conception of checks and balances so crucial to a republican democracy. The *Commentary* then applies Kant's ideas of the ideal juridical state to the international level, claiming that Kant foresaw not only one juridical state of nation states as the ideal model for peaceful international relations, but also one juridical state of all peoples

[3] AA XXIII (*Preparatory DoR*), pp. 311–327.

engaged in commercial trade as the model for peaceful cosmopolitan relations.

1. Placement of the *Doctrine of Right* within the *Metaphysics of Morals*

We first pause to consider the placement of the *Doctrine of Right* within the *Metaphysics of Morals* in general and the implications of that placement. Kant's *Metaphysics of Morals* contains (1) an "Introduction to the Metaphysics of Morals," (2) *Metaphysical Principles of the Doctrine of Right*, and (3) *Metaphysical Principles of the Doctrine of Virtue*.[4] Kant thus sees law and ethics as two parts of moral philosophy. The introduction is what in the German tradition would be called the "general part," which discusses issues that are relevant for both specific parts, namely for law and for ethics. Freedom, imputation, personhood, and obligation are a few of these issues.

The *Doctrine of Right* is devoted to individual rights, whereby a right is a moral, and thus a metaphysical concept. I have a right against another person if I have a claim that the other person act or refrain from acting in a specified way and if I can assert this claim against that other person.[5] Kant defines a right by saying that it is a "moral faculty to obligate others."[6] By acquiring a physical thing as mine, I impose an obligation on every person who might come into possession of the thing that he return it to me on demand. Accordingly, I have a faculty on the moral level and can assert a claim based on an obligation I impose on others. I have a right to my possession of the thing. By virtue of my faculty to obligate others, I can rightfully say to any possessor of my property "Return it to me!" and the possessor is obligated to do so. His duty is a legal duty and legal duties, as ethical duties, belong to the moral or intelligible world.

"Moral" in Kant's terminology means non-physical. This meaning comes from Pufendorf's distinction between *entia physica* and *entia moralia*, physical and moral entities.[7] "Moral" thus came to mean non-physical and "physical" to mean non-moral. As Kant notes, what

[4] The *Doctrine of Right* and the *Doctrine of Virtue* both have three parts. We discuss the tripartite division of the *Doctrine of Right*, note 49. The three parts of the *Doctrine of Virtue* are: "Introduction to the *Doctrine of Virtue*," "Doctrine of the Elements of Ethics," and "Doctrine of the Methods of Ethics." See AA VI (*Virtue*), p. 379, ll. 1–2, p. 415, and p. 475.

[5] The decisive characteristic of a right is that "another can require me to act according to the law as a matter of his right." AA VI (*Virtue*), Introduction VII, p. 390, l. 35 – p. 391, l. 3.

[6] AA VI, Division DoR B, p. 237, l. 18.

[7] Pufendorf, *De Jure* I/I/§§2–4/pp. 13–15.

is moral does not belong to the sensible, but rather to the intelligible world. Legal and ethical duties are non-physical or extra-physical entities, and they become cognizable only from the standpoint of the intelligible world.[8] Kant's moral philosophy is thus necessarily a metaphysics of morals because it deals with extra-physical rather than physical entities.

An ethnographer can determine the mores,[9] or customs of a people by observing physical phenomena. Such determination is the ethnographer's description of what goes on in the physical world. Kant, in contrast, is concerned with a metaphysics of mores, that which *transcends* actual mores or customs. The title of Kant's book means exactly that. "Morals" means mores or customs which are transcended by metaphysics. "Morality" is part of this metaphysics and thus one must differentiate between the mores or morals, on the one hand, and morality (and the adjective "moral"), on the other hand. Everything moral is thus part of metaphysics. A right is a moral category. Accordingly, rights are first cognizable when we place ourselves on the terrain of a metaphysics of morals.

Kant similarly distinguishes between laws of nature (scientific laws) and laws of freedom.[10] Laws of freedom, whether juridical or ethical, are called "moral laws"[11] because these laws have metaphysical character. Freedom as a topic of a metaphysics of morals, be it internal freedom or a right to external freedom, is not a phenomenon in the sensible world. An animal that is neither caged nor tied is externally free. The *homo phaenomenon* who is neither caged nor tied is also externally free. External freedom can be perceived empirically, but internal freedom and the *right* to external freedom can be comprehended only within a metaphysics.

Freedom (internal freedom) gives itself laws, which are significantly different from laws of nature. I as a free person (*homo noumenon*)[12] give myself, alone or with others, laws of freedom to which I am submitted.[13] These laws of freedom are not limited to the Categorical

[8] John Stuart Mill speaks of "moral sciences," as opposed to "physical science," to designate what we today call the "humanities." Mill, *System of Logic*, Bk. VI is entitled "On the Logic of the Moral Sciences." In 1863, Schiel translates "moral sciences" as *Geisteswissenschaften* thus capturing the older meaning of the word "moral."
[9] Latin: *mos*, see AA VI (*Virtue*), §40, p. 464, ll. 16–20.
[10] AA IV (*Groundwork*), p. 387, ll. 14–15. St. James speaks of "laws of freedom" (James 1:25) long before Kant.
[11] AA VI, Introduction MM I, p. 214, ll. 13–17.
[12] On the distinction between *homo phaenomenon* and *homo noumenon*, see Chapter 14.
[13] Cf. AA VI, Introduction MM IV, p. 223, ll. 29–31.

Imperative, the highest of all laws of freedom. Kant, particularly in the *Doctrine of Right*, asks repeatedly what laws of freedom our reason dictates. He determines, for example, that a law prohibiting the use of external objects of our choice cannot be a law of freedom because then freedom would rob itself of the use of these objects and the objects would be destroyed in a practical sense.[14] Kant also indicates that a law of freedom can require a person to perform an act required by contract only if the person has agreed to be bound by the contract.[15] According to laws of freedom, the supreme authority of a state can be "no other than the united will of the people itself."[16] As we can see from these examples, Kant formulates laws of freedom to the extent these laws can be cognized *a priori* by reason. They are then called "natural (moral) laws." Not only natural laws but also binding positive laws are laws of freedom in a juridical state. The duty to drive on the right side of the road, which cannot be derived from reason directly, follows from a positive law of freedom called the "traffic code." The traffic code is a part of metaphysics because duties and rights follow from the traffic code. The *Doctrine of Right*, which concerns our rights and legal duties, is thus a part of the metaphysics of morals regardless of whether these rights and duties follow from natural or from positive law.

2. Overall structure of the *Commentary*

Chapter 1 begins with §41 of the *Doctrine of Right*. Section 41 contains the culmination of Kant's theory of private law and prepares for the transition to public law with the postulate of public law in §42. Because §41 represents the totality of Kant's preceding ideas in the *Doctrine of Right* and maps the chart for moving forward, it is especially difficult to unravel but equally crucial to understand. In Chapter 1 we provide a rough descriptive structure for understanding §41 and thus for understanding the basic system of rights Kant portrays. Section 41 tells us what a juridical state (*rechtlicher Zustand – status iuridicus*) is, and contrasts the juridical state to the non-juridical state or the state of nature. We thus first discuss what a juridical state is for Kant, giving its formal and substantive criteria. Kant labels the formal criteria with the three

[14] AA VI, §2; see Chapter 5, section 2.
[15] AA VI, §18, p. 271, ll. 6–14. "The acquisition of a personal right can never be original and single-handed."
[16] AA VI, §47, p. 315, ll. 27–28.

iustitiae, namely the *iustitia tutatrix*, the *iustitia commutativa*, and the *iustitia distributiva*.

Chapter 2 gives our argumentation supporting the structure we have sketched in Chapter 1. Chapter 2 focuses on the three *leges*, the *lex iusti*, the *lex iuridica*, the *lex iustitiae*, as they are used in §41 and occasionally elsewhere in the *Doctrine of Right*. In particular, Kant associates these three *leges* with his versions of the three Ulpian formulae. Accordingly, in Chapter 2 we discuss these three formulae, showing how they tie into Kant's idea of a juridical state and into the structure of the *Doctrine of Right* we claim §41 reveals. A particularly significant set of concepts for Kant's system are "original" and "adventitious." This set of concepts will be examined in depth in Chapter 2 and they will reappear in our discussion of land ownership. An Appendix to Chapter 2 delves somewhat deeper into one historical source of Kant's ideas on the juridical state. Chapters 1 and 2 and the Appendix to Chapter 2 should be seen as one unit in the development of this *Commentary*. It is a unit that is indispensable to understanding the rest of the *Commentary*.

Chapter 3 looks at the idea most central to Kant's ethical and legal philosophy, namely freedom. We first examine what Kant calls the "axiom of external freedom," the axiom from which the *Doctrine of Right* unfolds. To better understand it, we consider internal freedom in both its negative and positive aspects. Kant himself refers to these two aspects of internal freedom as "negative" and "positive." We then claim that external freedom also has a negative and positive aspect, a claim Kant does not expressly make. We argue that the positive aspect of external freedom is the postulate of public law with its command to move to a juridical state. It is dependence on laws governing external freedom that makes us externally free in the positive sense.

Chapters 4, 5, and 6 explicate Kant's ideas on property ownership. Chapter 4 begins with the permissive law of practical reason, which we claim is a power-conferring norm. It gives us the freedom to have external objects of choice as our own and is the substance of the postulate in §2 of the *Doctrine of Right*. In Chapter 5 we move from the permissive law to the central notion of possession for Kant. We also examine possession as one's own and the idea of a right *in rem*, or a right to a physical thing one has against everyone else. In Chapter 6 we continue with the idea of intelligible possession, in particular of land. We examine the original right to a place on the earth's surface, the original community of the land, and the originally united will of this community, using the distinction between the concepts "original"

and "adventitious" we discuss in Chapter 2. We end Chapter 6 with the postulate of public law. Chapters 4, 5, and 6 together thus form another unit of this *Commentary*.

Chapter 7 moves to Kant's theory of the state, examining first the ideal state or the "state in the idea" as Kant calls it. The state in the idea provides the norm for all state constitutions. In particular, Chapter 7 looks at the division of powers in an ideal state. The ideal state constitution is what ensures individual rights and gives us the model for the juridical state in reality. It is the state in reality that we discuss in Chapter 8. Chapter 8 begins with the original contract and focuses on the forms of government in a juridical state. It ends with an interpretation of Kant's position on revolution. We claim that Kant prohibits revolution only in a juridical state but certainly not in a despotic construct that simply calls itself a "state." Chapter 9 examines Kant's theories of international and cosmopolitan law. It builds on what Kant expresses in his Preface to the *Doctrine of Right*, namely that the latter parts of the book follow "easily" from the former.[17] We attempt to take the ideas developed in Chapters 1–8 and apply them to the international and cosmopolitan arenas. We claim that Kant envisioned an international juridical state, much like the individual state of one people. His vision was the juridical state of nation states (*Völkerstaat*) organized under one republican constitution valid for all of the individual nation states in the world. In our discussion of cosmopolitan law we argue that it does not govern the individual's relation to nation states, as is often claimed in the secondary literature. Instead cosmopolitan law governs the right a whole people have to engage in commerce with neighboring peoples. Cosmopolitan law for Kant is indeed the idea of a perfect World Trade Organization. Chapter 9 ends with a discussion of Kant's peace project. We claim that the juridical state, where rights are ensured, and the state of peace are identical.

Chapters 10–14 pick up some loose ends in Kant's theory of the juridical state, namely the idea of public law and its limits (Chapter 10), Kant's theory of contract law (Chapters 11 and 12), of criminal law (Chapter 13), and of the concepts of personhood and imputation (Chapter 14). One might wonder why we do not discuss contract law in connection with Chapters 4–6 on having an external object of choice as one's own. Kant follows his discussion of property ownership with contract law in the *Doctrine of Right*. One might also wonder why such

[17] AA VI, Preface, p. 209, ll. 8–11.

basic notions as personhood and imputation do not come at the beginning of the *Commentary*. Kant discusses imputation in the "Introduction to the Metaphysics of Morals" and not at the end. Finally one might say that criminal law in one nation state belongs most naturally to the discussion of the individual juridical state and not following international and cosmopolitan law. We decided that any in-depth discussion of these important areas of the *Doctrine of Right* would cut the main thread running through Chapters 1–9, namely the idea of the juridical state on the national, international, and cosmopolitan levels. For that reason we have placed them at the end.

In writing this *Commentary* we have employed four approaches to understanding the *Doctrine of Right*. We discuss those approaches in sections 3–6. The first is that Kant's own reference to Euclid's geometry in connection with the *Doctrine of Right* should be taken most seriously when interpreting that work. The second is that Kant's work on the peace project in the *Doctrine of Right* can be interpreted only to a very limited extent by examining his previous work in *Theory and Practice* and *Perpetual Peace*. Large discrepancies exist among these works and it is the *Doctrine of Right* that is Kant's final statement on law and rights. Often the scholarly literature mixes arguments from all three of these works, with perplexing results one does not attain if one assumes that the *Doctrine of Right* is the more mature work and Kant, like others, was capable of changing his mind and improving his theory. The third is that the work of Gottfried Achenwall had an enormous influence on the approach and the vocabulary Kant uses in the *Doctrine of Right*, an influence which has been largely ignored until today. Our idea is not to develop an historical account of the development of natural law from Achenwall to Kant. Instead we examine Achenwall's theories of natural law to see the intellectual climate of the time within which Kant was immersed. It is often focusing on Achenwall's vocabulary that enables one even to take note of some of the expressions Kant repeatedly uses and the meaning he attaches to them. Finally, we consider select authors writing between the early seventeenth to the middle of the eighteenth century, many of whom were more famous than Gottfried Achenwall and with whose work Kant was familiar and who provided some of the background for Kant's own thoughts. What we do not do is engage the contemporary secondary literature in this *Commentary*. Doubtless much can be said about the many books and articles on Kant's philosophy in general and his legal philosophy in particular. Any thorough treatment, however, would demand far more time and

words than this *Commentary* can encompass. We do refer to the relevant secondary literature in our footnotes to make readers aware of what is available on the issues we do discuss.

This *Commentary* is not exhaustive. We do not attempt to interpret any and every word of the *Doctrine of Right*. Still, we do attempt to interpret everything we consider to be important in those of Kant's thoughts which run through the entire book. The main maxim which guided our work was that Kant got it right. If his theory seemed self-contradictory or nonsensical, impenetrable or simply confused, we assumed it was our problem, and not Kant's. We never criticize Kant's ideas in the *Doctrine of Right*, but instead attempt to explain them within a unique and complete, logically consistent, whole. Whether we have been successful must remain to the judgment of our readers.

3. Kant's geometric method

When selecting the methods for interpreting the *Doctrine of Right* it is important to first consider the methods Kant himself uses. The *Doctrine of Right* is not an omnium gatherum of aphorisms. Instead Kant speaks a scholarly language, as he himself says in his Preface to that work. A scholarly language stands in contrast to a popular language. Kant is not interested in popular language, but instead insists "on Scholastic precision, even though that precision has been labeled embarrassing."[18] Kant compares his work in the *Doctrine of Right* to (Euclidean) geometry on a number of occasions, the most detailed of which is in §E,[19] but also, for example, in his discussion of contract law.[20] Kant's work lies within a tradition which includes not only Spinoza with his major work *Ethica More Geometrico Demonstrata* of 1677, but also Pufendorf with his *Elementa Jurisprudentiae Universalis* of 1660. Even the name of Pufendorf's book reminds one of Euclid's *Elements*. Pufendorf's *Elementa* consists of two books, the first of which contains twenty-one definitions and their corresponding explanations and the second of which begins with two axioms and ends with five observations, again with corresponding explanations. Pufendorf obviously had Euclid in mind when developing the *Elementa*, regardless of how Pufendorf's work sizes up in comparison to Euclid's.

[18] AA VI, Preface, p. 206, ll. 24–26.
[19] AA VI, Introduction DoR §E, p. 232, l. 30 – p. 233, l. 23.
[20] AA VI, §19, p. 273, ll. 11–29.

In line with our comparison to Euclid's *Elements*, Kant's *Metaphysical Principles of the Doctrine of Right* contain axioms and postulates. Kant speaks of an "axiom of law" or "axiom of right" (*Axiom des Rechts*)[21] and of an "axiom of external freedom." Kant refers to the "axiom of law" by this name once in the *Doctrine of Right*.[22] There Kant points to an example he had used[23] of having an apple in one's hand which someone else grabs and removes. The actor "with his maxim," Kant writes, "directly contradicts the axiom of law." Kant refers to the "axiom of external freedom" twice by that name in the *Doctrine of Right*.[24] Kant provides no examples, but without doubt, the "axiom of external freedom" refers to the assumption of an original right to freedom, which Kant in the "Introduction to the Doctrine of Right" formulates as follows: "Freedom (independence from another's necessitating choice) to the extent it can coexist with everyone else's freedom according to a universal law is [the] only original right due every human being by virtue of his humanity."[25] The right to freedom implies the "universal law of right": "Act externally so that the free use of your choice [can] coexist with everyone's freedom according to a universal law."[26] The original right to freedom and the "universal law of right" correspond to each other. With my assumption of my original right to freedom I can require everyone else to act toward me according to the universal law of right. We need to understand the entire *Doctrine of Right* as unfolding from this "axiom of external freedom" in conjunction with the postulates in §§2 and 42 of the *Doctrine of Right*, just as Euclidean geometry unfolds from a few axioms and postulates.

One might conclude that the expression "axiom of law" is just another expression for the "axiom of external freedom." Such an interpretation is suggested particularly by the context within which Kant discusses the axiom of law. If I am the "holder" of a thing, meaning I am "physically connected" to the thing (I hold an apple in my hand) and another person "affects" this thing without my consent (he grabs the apple out of my hand) then he affects and abridges my freedom, which is precisely what "directly contradicts the axiom of law." Similarly, the action Kant describes cannot be compatible with my right to freedom (assuming the action is not justified), or stated differently, it

[21] The word *Recht* in German means both "law" and "right" and thus can be translated either way. We discuss this problem of meaning in Chapter 1, section 1B.
[22] AA VI, §6, p. 250, ll. 1–7. [23] AA VI, §4, p. 247, l. 28 – p. 248, l. 7.
[24] AA VI, §16, p. 267, ll. 12–13; §17, p. 268, l. 25.
[25] AA VI, Division DoR B, p. 237, ll. 29–32.
[26] AA VI, Introduction DoR §C, p. 231, ll. 10–12.