

KANT ON SOVEREIGNTY

ALESSANDRO PINZANI

CNPq Universidade Federal de Santa Catarina - Brazil

alepinzani@hotmail.com

Abstract: This paper aims at explaining Kant's concept of sovereignty as defined in the *Doctrine of Right* as well at showing its relation to the idea of republicanization and of political progress. Since Kant emphatically claims that sovereignty (intended as the power of legislating) belongs solely to the united will of the people but, at the same time, does not want the people to intervene directly in the process of decision making, we shall distinguish between the *real* and the *actual* sovereign (respectively: the people and the head of state), as well between a *synchronic* and a *diachronic* concept both of the "united will" and of "the people". By doing this, it will become clear in what sense Kant claims that every republic is necessarily a representative political system.

Keywords: Kant; Republic; Sovereignty; Representation; General Will.

In *The Metaphysics of Morals*, Kant identifies sovereignty with the power of legislating, which – as he emphatically claims – belongs solely to the people. It is an expression of the general will and constitutes the higher power in the state, since the other two powers, namely the executive and the judiciary, derive from it. With regards to this point, Kant writes that "every state contains three authorities within it, that is the general will consists of three persons (*trias politica*): the sovereign authority (sovereignty) in the person of the legislator; the executive authority in the person of the ruler (in conformity to law); and the judicial authority (to award to each what is in accordance with the law) in the person of the judge" (6:313). The language is almost theological and reminiscent of the definition of the Holy Trinity as a single substance (in this case the general will) in three persons.¹ The executive and judicial powers are therefore mere personifications of the sovereign power itself, since they derive their authority from it (both the ruler and the judge apply the law created by the sovereign, even if in different contexts and ways). This "political theology", so to speak, becomes, a few lines later, a political logic, since Kant compares the three powers to "the three propositions in a practical syllogism". The legislative corresponds to "the major premise, which contains the law of [the united] will" of the people, the executive corresponds to the "minor premise, which contains the command to behave in accordance with the law, that is the principle of subsumption under the law", the judicial power corresponds to the "conclusion, which contains the verdict (sentence), what is laid down as right [*Rechtens*] in the case at hand" (ibid.).

This triadic scheme is no novelty in the *Doctrine of Right*. Kant first uses it when he introduces the three pseudo-ulpianian rules in the "general division of duties" and correlates them with three different kinds of laws: the *lex iusti*, the *lex iuridica* and the *lex iustitiae* (6:236 f.). In

¹ Wolfgang Kersting speaks of a "Trinitätskonstruktion" (KERSTING, 2004, 135).

paragraph 41, while speaking of the “transition from what is mine or yours in a state of nature to what is mine or yours in a rightful condition generally”, i.e., the transition from a state of nature, in which private right is valid but not sanctioned by a public authority, to a legal state, in which this public authority exists, Kant connects three different concepts of justice (protective justice, justice in acquiring from one another and distributive justice) to the possibility, actuality or necessity of possession of objects (6:306). They also correspond to the three abovementioned kinds of laws and, therefore, to the three pseudo-ulpianian rules, which seems to constitute the architectonic chore of the whole *Doctrine of Right* (as I tried to show elsewhere: see Pinzani 2005).

The political trinity of legislative, executive and judicial power also corresponds to a practical syllogism in the sense in which the three abovementioned concepts of justice express the possibility, actuality or necessity of property. A law expresses a mere possibility, since it does not deal with particular cases, but has a general content, according to the concept of law typical of modern political theory (a concept by which most laws in our contemporary state would be nothing but governmental decrees). A law would, for instance, foresee that the sovereign may collect a specific tax to sustain an army in wartimes, but would not specify the amount of money that every subject is expected to pay; at most, it could specify the ratio according to which different classes of citizens should be financially burdened. This general provision would encounter its actual application only through a governmental decree, i.e., through the action of the executive power. What was just possible becomes real: *wirklich*. The judicial power finally gives the character of necessity to a law by enforcing its application through sanction of the violation of the governmental decree.

According to Kant, the three powers are moral persons and have complex relationships to each other. They “are, first, coordinate with one another”—that is, “each complements the others to complete the constitution of a State”. They constitute the state in the sense that the latter can exist only if these three authorities are present in it. Secondly, “they are also subordinate . . . to one another, so that one of them, in assisting another, cannot also usurp its function”. Kant obviously refers to the well-known theory of the separation of powers; more precisely, he refers to the theory of the separation of the functions of governing, which does not imply a separation of the instances which exercise those functions. I shall come back to this point later.

With regard to this relationship of subordination, Kant claims that each authority “has its own principle, that is, it indeed commands in its capacity as a particular person, but still under the condition of the will of a superior” (6: 316). This is quite a remarkable observation. Of course, the executive and judicial powers act only in obeying to the will of their superior—that is, the legislative, which is considered the sovereign power. The legislative itself is that superior, it is the sovereign: why should Kant say that each authority is subject to the will of a superior, including, therefore, the legislative power? This makes sense only if we separate the *actual* sovereign, the instance which is actually exercising the legislative power, from the *real* sovereign, the people. In this sense, the moral person that is exercising the legislative power should act in conformity with

the will of the people just as the other authorities do. This implies that the legislative power is not directly exercised by the sovereign, i.e., by the people, but only by some instance representing it. But, contrary to what happens in Hobbes' theory of authorization, the representative is bound to the will of the represented. In Hobbes, the represented notably agree to accept every decision of the sovereign—of the Leviathan—as their own and agree to be considered as its *authors*, while the legal person who actually decides (be it a monarch or an assembly)² is just an *actor*, i.e., someone acting on behalf of the author. Kant seems to imply that the person deciding on behalf of the people (Hobbes's actor) is bound to consider the will of the people itself.

On the other side, Kant insists on the fact that the head of state, who exercises sovereignty in the name of the real sovereign (the people), does not need to ask the people directly for their opinion. He decides according to what he thinks the united will of the people would be. On this point Kant seems to follow Rousseau, who distinguishes notably between general will, or *volonté générale*, and the will of all, or *volonté de tous*. The fact that these two kinds of will can differ shows that the will of the people does not necessarily coincide with the will of the individuals who happen to form it at the moment. This is the reason why in Rousseau the popular assembly decides but does not discuss. It is a silent assembly called to ratify or reject the proposals of the magistrates, who try to identify the general will. In this sense, even if Rousseau claims fiercely that sovereignty cannot be represented and that the people should exercise it directly, he never thinks of letting the people discuss a law or its formulation, since this would lead to conflicts among individuals or to the triumph of particular interests. All the people do is say “Yea” or “Nay” to laws written by the magistrates.³ Kant, who shares Rousseau's mistrust of the individuals who form the people and his fear of particular interests, prefers to give the power of decision to a representative of the people in order to banish the risk that conflicting passions and egoistical points of view may overcome the general interest.

We should therefore understand Kant's claim that “[t]he legislative authority can belong only to the united will of the people” in the sense that it belongs not to the will of all the citizens but to the general will. While the will of all the citizens gives way to a *synchronic* definition of “the united will of the people” (since it would be the result of the sum of the individual wills at a certain moment), the general will refers to a *diachronic* concept both of the “united will” and of “the people.” The latter would no longer be seen as the amount of individuals living in the country at the time, but as an abstract entity composed by all the past, present and future generations of inhabitants of that country. Its united will could therefore be impossibly determined just by directly asking the present inhabitants of the country. The effort of the representative head of state is a double one: he must firstly abstract from his personal will and opinion and secondly from the actual will of his present subjects. When he makes his decisions, he must think of himself as representing a people which is much greater than the number of the individuals who are actually

² Cf. *Leviathan*, Ch. 17.

³ On Rousseau's silent assembly see Urbinati 2006, 60 ff.

subject to his government—a People with P written large, so to say. This is a risky task, as the head of state could easily incur a paternalistic attitude in deciding what he thinks best for the People (in the 19th or 20th century, one would say for the nation) independent of what his subjects (the people with small p) actually desire.⁴ One cannot help noticing the centrality of representation in Kant’s political theory, and this also explains why Kant insists that every republic is necessarily a representative political system⁵.

This is also the reason why Kant, after insisting so much on the necessity of logically separating the state powers, admits that they can be practically concentrated in the hand of the head of state who directly exercises the legislative power and indirectly the executive and judiciary powers: the former through the ruler whom he may nominate and recall at any moment, the latter through the judges whom he may also nominate and recall. What is important for Kant is the logical distinction of the different functions of the state powers, not the practical distinction of the instances exercising them. As Kersting has remarked, Kant’s theory is quite different from those formulated before him: the ancient theory of the *regimen mixtum*, for instance, or Montesquieu’s system of checks and balances.⁶ Kant’s theory of the separation of powers and his theory of representation are the logical consequence of his conception of sovereignty, not the result of empirical observation. He is not interested in balancing the different interests and reaching a political compromise among different groups or power holders, as Montesquieu was, but in constructing a legal and political system based on rational, metaphysical principles. Even if some of the arguments used by Kant seem similar to those used by his predecessors, the perspective assumed by the German philosopher is completely different than that of Hobbes, Montesquieu or Rousseau, as we shall see.

Corresponding to the idea that legislative power is the expression of the will of the sovereign and that the three authorities form a practical syllogism, and in conformity to his derivation of the necessity of public right from the lack of a power able to sanction private right, Kant claims (1) that the will of the legislator is irreproachable “with regard to what is externally mine or yours”, (2) that the executive power of the supreme ruler is irresistible and (3) that the verdict of the highest judge is irreversible (6: 316). In this passage Kant apparently justifies the criticism of those commentators who insist on the fact that he would ground the necessity of the

⁴ From this point of view, Kant seems to think that a single representative – as in monarchy – would be more capable of interpreting the general will and, therefore, of better contributing to the increasing republicanization of the constitution – and he would achieve this by gradual reforms, not through revolution. Kant thinks probably that in aristocracy or in democracy, that is, when *a number* of representatives (not just one) are at work, it would be more difficult to achieve a clear vision of what the general will wants. Monarchy is the best form of government because it facilitates the republicanization of the constitution, and it does this precisely because it is the most representative form of government.

⁵ On representation in Kant’s political thought see Pinzani 2008.

⁶ “Kant’s theory of the separation of powers is the rationalistic counterpart to the recommendations of political prudence based on experience. Its core is logic, not astuteness. Through the distribution of legislative and executive functions among different political groups Montesquieu wanted to let them all participate in the exercise of political power; he wanted thus to bind power to the necessity of balancing the different interests and of reaching a political compromise. [...] Such a system, whose aim is control, [...] used social antagonism to moderate power. Montesquieu was a political and empirical thinker, not a philosopher of law as Kant” (KERSTING, 2004, 135 f.).

state on the necessity of securing private property (cf. Saage 1973 and Zotta 2000). This explains why he specifically connects the legislator's irreproachability with what is externally mine or yours, and it also establishes a connection to the idea that private property depends on a "will that is united originally and a priori" (6: 267). The law which proceeds from this will and determines "for each what land is mine or yours" gives rise to a *lex permissiva* (6: 247 and 267), which is supposed to be transformed into an actual law safeguarding property once individuals enter a rightful connection. Why it is so, i.e., why the state should respect the permissive law, is not immediately clear. Kant insists very much on this point, and this leads him to translate the third Ulpian rule *suum cuique tribue* not as "give to each one what is his" but as "enter a condition in which what belongs to each one can be secured to him against everyone else" (6: 237). The reason for this interpretation of the principle—since it is more than a mere translation—could be the one offered by Rousseau both in his *Discourse on Political Economy* and in the *Social contract*: People enter civil society, i.e., what Kant calls "rightful connection" or "civil condition" (*bürgerlicher Zustand*), only to protect their property rights. It seems therefore to be a motivational question: individuals will accept to subject themselves to the burden of civil laws only if these protect their life *and* their goods. To this end, it is necessary that the protection that the state accords to property rights be firm and unquestionable. The idea that sovereignty is connected to the securing of rights is central also in Hobbes' foundation of state power: individuals establish a commonwealth (a "Sovereign Power") in order to live in peace and security; in reverse, the sovereign will hold his power as long as he is able to guarantee these two features.

On the other side, Kant does *not* defend a similar position, contrary to the abovementioned criticism according to which he justifies the existence of the state recurring to the argument that the sovereign will secure individual rights, in general, and property rights, in particular. Kant's argument for justifying the state cannot be merely instrumental, as in Hobbes, if his doctrine of law is to be a metaphysical one. In fact, the argument is logical and is based on the concept of freedom: individuals enter the state in order to be free, i.e., in order to autonomously decide about their lives. But how can individuals be free if they are submitted to laws? Kant's answer to this question takes over the one Rousseau had already given: individuals will be free if they are at the same time the addressees and the authors of the law. I am free insofar as I obey to a law that I gave to myself, i.e., insofar as I can consider myself to be the author of the law I have to obey. The central question therefore becomes the one concerning the authorship of law, i.e., the legislative power or sovereignty, just as in Hobbes and Rousseau. Contrary to these thinkers, Kant does not give an empirical answer. Rousseau thinks that people can consider themselves as being the authors of laws only if they *actually* create them. Hobbes relies rather on a mechanism of representation, but he grounds it on the empirical acceptance of the subjects. Kant introduces representation in order to guarantee that the citizens consider themselves to be the authors of the laws, but he grounds representation not on the actual consent of the people, but rather on the rationality of the decisions made by the representative head of state. If a law is such that the people *might* give it their consent,

then it can be considered an expression of the people's will, as Kant writes repeatedly.⁷ On this point Kant distinguishes himself once more from Hobbes and Rousseau not just with regard to concrete political positions (against direct democracy, in favor of representation), but also with regard to the metaphysical perspective from which he considers these questions. This is the reason why the reader is struck by the strong distinction that Kant makes between the empirical level of everyday politics and the logical, rational level of the political ideal.

This dichotomy of rational ideal on the one hand and concrete political reality on the other hand reproduces the one between intelligible and phenomenal world. This becomes quite clear when we consider the distinction between *respublica noumenon* and *respublica phaenomenon* that Kant makes in *Conflict of Faculties*. While the former is a rational ideal that ought to find practical realization but cannot be completely fulfilled, the latter is, at its best, the most accomplished realization of it. Due to the finished, corruptible nature of men, every *respublica phaenomenon* will be a very imperfect, *yet perfectible* attempt at realizing the ideal. The republicanization process consists precisely in approximating the practical realization of the rational ideal, and the actor of this process is the head of state, who has to change the constitution of the state in order to make it more and more republican. This seems to be his main task, and in order to fulfill it, he doesn't need to ask for the people's assistance. What he needs is the ability of thinking in a republican way, as Kant puts it—that is, the capability of judging what kind of laws or institutions would be more likely to result in a republicanization of the state constitution—and this can be tantamount to giving way to a constitution in which the sovereign power is exercised by an assembly of elected representatives and not by a monarch. The head of state as representative of the people ought to bring out a state of things in which he will possibly be needed no more. This is not so much in line with Rousseau's lawgiver (who from the beginning is supposed to 'disappear' after having accomplished his task), but rather like Machiavelli's prince, who, after having created a principedom, should give it a republican constitution so it can survive its own founder. The monarch is, therefore, supposed to create the conditions under which he will no longer be exercising sovereignty in the name of the people. This poses a severe motivational problem: how is he then to be moved to republicanize the state constitution? Kant has no answer to this question. He has to rely on the good will of the sovereign (as in the case of Frederick II, whom Kant tends to almost transfigure and consider as the perfect specimen of the good monarch)⁸ or on a mistake on his part, as in the case of Louis XVI when he summoned up the General States—an example that Kant

⁷ The best known passage is from *Perpetual Peace*, when Kant defines "external (rightful) freedom" as "the warrant to obey no other external laws than those to which *I could have given* my consent" (PP, 232; 8: 350, note, my italics). The verbal form is decisive, since it is merely conditional: what is decisive is the fact that the external laws *could* find the people's consent, not that they *actually* find that consent. In *The Contest of Faculties* Kant claims that monarchs have the duty "to govern in a republican (not a democratic) manner, even if they may rule autocratically. In other words, they should treat the people in accordance with principles akin in spirit to the laws of freedom which a people of mature rational powers would prescribe for itself, *even if the people is not literally asked for its consent*" (PW 187; 7: 91; my italics).

⁸ That this trust in the good will of the monarch could be easily betrayed was shown by Frederick's reactionary successor Frederick William II, whose restrictive laws on religion and censorship caused many problems to Kant himself.

mentions often when he discusses representation, since it allows him to show what happens when the representative, i.e., the empirical sovereign, gives back his power to the people, i.e., the real sovereign⁹. Once the represented is present, the representative ceases to be such; the people take back the sovereign power and may decide to keep it for themselves, transforming the constitution from a monarchic to a republican one (of course, I am using the term “republican” in the usual sense of indicating a regime opposed to monarchy, not in the Kantian sense of indicating a regime opposed to despotism).

This legal and political progress is at the same time a moral one, as we know from Kant’s philosophy of history. Political institutions are partly rooted in the intelligible world, insofar as they can give concrete realization to the practical ideal of the *respublica noumenon*. This intelligible element is not accessible to intellect, but only to reason.¹⁰ While intellect is only able to consider empirical facts and circumstances so that history appears to it only “like a chaotic multitude of historical events”, reason sees in it “a gradual accomplishment and a progressive unfolding of human capacities,” which is expressed at best through the moral and legal progress of republican institutions (BARTELSON, 1995, 233). In this sense, the head of state, when conceived as a representative of the people, has to rely on reason more than intellect. He needs to assume a viewpoint that embraces a wider dimension than the one accessible to intellect. He can therefore decide and act in the name of the People written large, the diachronic people, and not only in the name of the synchronic people, the individuals who happen to be his subjects at the moment. If politics is to be understood as the “doctrine of right put into practice” (*ausübende Rechtslehre*) (PP 338; 8: 370), according to Kant’s famous definition, we should not forget that the doctrine of right he is thinking of is a metaphysical one, which is rooted in reason, not in experience.¹¹

REFERENCES

ARENDDT, H. *Lectures on Kant’s Political Philosophy*. Ed. by R. Beiner. Chicago: Chicago University Press, 1982.

BARTELSON, J. *A Genealogy of Sovereignty*. Cambridge: Cambridge University Press, 1995.

⁹ “In Frankreich könnte die Nationalversammlung die constitution ändern, ob sie zwar nur, um das Creditwesen der Nation in Ordnung zu bringen, zusammen berufen war. Denn sie waren Repräsentanten des Ganzen Volks, nachdem der König erlaubt hatte, nach unbestimmten Vollmachten zu decretiren. Der König repräsentirte sonst das Volk; her war er | also Vernichtet, weil das Volk selbst gegenwärtig war. In Grossbritannien kan man nicht sagen, der König repräsentire das Volk, sondern er mit den Ständen zusammen genommen macht allererst das Volk aus und ist in Ansehung jener primus inter pares. Also kommt das Unglück des Königes, nachdem er einmal alle Volksdeputirte sich hatte versammeln lassen, gerade von seiner Souveränität her, er war alsdenn nichts; denn seine Gesetzgebende Gewalt gründet sich nur darauf, dass er das ganze Volk repräsentirt; daraus erhellet auch die Ungerechtigkeit einer einzelnen Person als Souverains. Er kan nicht zugeben, dass der, welchen er selbst representirt, sich selbst darstelle. Weil er das Ganze vorstellt, so wird er nichts, wenn dieses Ganze, von dem er kein Theil, sondern nur dessen Stellvertreter ist, sich selbst stellen läßt. Wäre er ein Theil, so könnte ohne seine Beystimmung das Ganze niemals statt finden und ein gemeinschaftlicher Wille entspringen, welche zu oberst gesetzgebend ist” (R 8055; 19: 595 f.).

¹⁰ I rely here and in the following on an intuition I found first in Bartelson 1995, 233.

¹¹ This somehow platonic stance is probably the real reason why Arendt (who rejects fiercely political Platonism) refuses to consider the *Doctrine of Right* as the legitimate formulation of the political philosophy of Kant and prefers to search for Kant’s ‘true’ political theory in the third *Critique* (ARENDDT, 1982).

- KANT, I. *Political Writings*. (PW) Ed. by H. Reiss. Cambridge: Cambridge University Press, 1991.
- _____. *Practical Philosophy*. (PP) Ed. and transl. by M. Gregor. Cambridge: Cambridge University Press, 1996.
- KERSTING, W. *Kant über Recht*. Paderborn: Mentis, 2004.
- PINZANI, A. Der systematische Stellenwert der pseudo-ulpianischen Regel in Kants *Rechtslehre*. In: *Zeitschrift für philosophische Forschung*, 59/I, pp. 71-94, 2005.
- _____. Representation in Kant's Political Theory. Forthcoming in: J. Joerden, S. Byrd e J. Hruschka (Hrgs.). *Jahrbuch für Recht und Ethik*, 15, 2008.
- SAAGE, R. *Eigentum, Staat und Gesellschaft bei Immanuel Kant*. Stuttgart: Kohlhammer, 1973.
- URBINATI, N. *Representative Democracy. Principles and Genealogy*. Chicago: Chicago University Press, 2006.
- ZOTTA, F. *Immanuel Kant. Legitimität und Recht. Eine Kritik seiner Eigentumslehre, Staatslehre und seiner Geschichtsphilosophie*. Freiburg / München: Alber, 2000.