Introduction

In her essay, 'Self-Legislation, Autonomy and the Form of Law', Onora O'Neill notes that '[a]fter two centuries, a close relationship between contemporary would-be Kantian writing and the original texts must be cultivated rather than taken for granted'.[1] She worries that Kantian ethical and political philosophy has suffered a drift towards views that Kant himself would have rejected, but recognises that responding merely by a rigorous textual, contextual and 'custodial'[2] analysis of Kant's work risks losing relevance. It would 'fail to keep Kant's thought alive'.[3] Her solution is to pay particular attention to those parts of his philosophy that still have contemporary resonance and yet that are at particular risk of distortion. We read this as a plea to establish a more productive dialectic between the original text and modern philosophical and practical concerns, from which truths may emerge that are both more authentic and more illuminating. This Element is an analysis of Kant's postulate of public right couched in terms of such a dialectic.

The fruits of our first forays into Kant's practical philosophy can be found in two articles: 'Kant's Concept of International Law' and 'Kant's Concept of Law'.[4] In these works, our exposition tended towards what will be described later in this Element as a moral reading of Kant. That is, we offered a reading that sees him defending a moral argument for law having a particular procedural form and substantive content. Towards the end of our work on 'Kant's Concept of Law', we began to glimpse more interpretative, hermeneutic, aspects of Kant's jurisprudential method. The breakthrough came a little later when we noticed that Kant shifts from talking about a 'principle of public right' in his earlier writings and lectures on law, to using the language of a 'postulate of public right' in the *Doctrine of Right* (1797). It dawned on us that this was no accident, but that it reflected the realisation, set out in full in the *Critique of Practical Reason* (1788), that postulates are not only theoretical, but can also be practical. We then came to see that Kant's project in the *Doctrine of Right* is, in effect, to present a philosophy of law that locates his political writings not only within his practical but also his theoretical philosophy. This led to the current Element, which aims to expose the importance of the *Doctrine of Right* to his entire philosophical project.

Public right is, in Kant's view, more than public law. It is right-made-public, that is, the sum of all legal artifices necessary to realise a rightful condition between human persons, spanning the whole field of law. Those artifices include

[1] In O'Neill, *Constructing Authorities*, 121–136, 122. [2] Ibid., 121. [3] Ibid.
[4] Capps and Rivers, 'Kant's Concept of International Law'; Capps and Rivers, 'Kant's Concept of Law', 259–294.

many elements of abiding interest to public lawyers. In Section 2 of this Element, we discuss Kant's substantive views on topics such as constitutions, citizenship, judicial power and international law. For Kant, these institutional arrangements allow us to relate to one another in a way that is consistent with our innate right to juridical dignity, which is to say, our fundamental legal status as free, equal, independent, irreproachable and relational human beings. Innate right – the right we are born with – is not a matter of legal artifice, but it informs the content of the law in subtle ways. For example, it establishes burdens of proof within a judicial setting, and it raises the possibility of declaratory relief being provided by the judiciary against the executive branch of government. Generally speaking, however, innate right does not permit substantive review of legislation. With the exception of rare instances of egregious injustice against persons, Kant's constitution is *largely* procedural.

This conclusion is both at odds with much contemporary Kantian constitutional theory, which tends to defend strong versions of judicial review to protect the rights of the autonomous citizen, and – perhaps surprisingly – is closer also to the real practice of judicial review, at least in the United Kingdom. It exemplifies the productivity of a dialectical reading. A similar story can be told about those who take Kant's writings as the inspiration for forms of federal global governance. Kant's actual position is that public right on a global scale is to be attained by a rather loose confederation of republican states. This reading is preferable to those advancing federal global governance in Kant's name, because it is better able to combine political realism and legal idealism in an authentically Kantian manner. Once again, Kant's actual view turns out to be rather closer to current arrangements than one is typically led to believe.

Kant's account of public right thus contains an illuminating substantive constitutional theory. However, what has been overlooked in contemporary Kantian scholarship is the method by which Kant develops his account of public right. This is why this Element commences – in Section 1 – with a discussion of the emergence of Kant's jurisprudential method. At an important and fairly late point in his career, Kant moved from treating legal and political theory as applied moral theory and became much more *interpretative* (as contemporary theorists would call it).

This move occurs when Kant realises that postulates – which are necessary presuppositions for the possibility of knowledge about the world – can also be practical. In the *Critique of Practical Reason*, he discusses familiar examples such as free will, the immortality of the soul and the existence of God. However, in his mature legal philosophy, public right is also described as a practical postulate. The postulate of public right not only tells us what our most basic political obligations are, but also, more radically, what we must

postulate (6:313) about right (as a noumenal object, or entity) in order to reveal law-relevant sense data to be genuine instances of law. Pure practical reason requires us to presuppose or assume this ideal object as one to which sense data about law approximates. While it is true that the content of this postulate is something that constitutional and other lawyers ought to bring to reality, factual legal phenomena are already to be understood as an expression of moral requirements bearing on members of a political community. A merely empirical, or positivist, way of conceptualising law is quite inadequate. Such a method renders law no more than a manifestation of psychology and behaviour and not a set of institutional relations that express and realise human freedom.

Section 1 thus emphasises the intellectual context within which Kant worked, not merely to demonstrate the development within Kant's texts and their relation to the thought of his contemporaries, but to show how Kant proposed that moral reason can be properly employed in a dialectical relationship with existing legal texts and forms. Rather than distinguishing sharply between the 'fact' of law and the 'norm' of moral rights and duties, Kant's postulate of public right explains how reason is *consubstantial* with (i.e. standing underneath, behind and within) an external world of normative claims backed by institutional power.[5]

This point is of the highest importance for modern constitutional theory specifically and jurisprudential method more generally. It cuts against commonly held contemporary views of the way in which the constitution works. Such views tend to treat the constitution only as a system of rules issued by those in authority or backed by convention, which are a mere vehicle for the pursuit of policies that – we hope – are compatible with the demands of justice. For Kant, the method of public right flows from an insistence that the constitution is only fully intelligible as an attempt to actualise the substance of public right. The constitution has to be read as the expression of an inescapable idea of how public governance ought to operate. 'Getting Kant right' proves to be inextricably intertwined with the pressing need to get contemporary public law method right as well.[6]

[5] Our choice of a theological term to express the relation between the actual and ideal worlds is deliberate: See Kant's reference to *corpus mysticum* (CPR A808/B836).

[6] Some of the arguments in Section 1 were presented at a conference at Radboud University to mark the retirement of Thomas Mertens. We are grateful to the participants for their comments, and to Alan Brudner, Nigel Simmonds, Susan Meld Shell and Howard Williams for their willingness to comment on an earlier draft. The insightful comments of two anonymous reviewers for Cambridge University Press gave us a further welcome opportunity to improve the text of this Element.

1 From Principle to Postulate

1.1 Introduction

Public right is the sum of laws that need to be generally publicised and enforced in order to bring about a rightful condition among human beings (6:311; also TP 8:289 ff.). A condition is rightful, or just, if it is one in which the choice of one person can be united with the choice of every other in accordance with a universal law of freedom. Public right is a condition in which each person is treated as an end in themselves, which is to say as the possessor of an innate right to juridical dignity. Since human beings cannot avoid influencing each other, right must become public in a system of positive law for this condition to be achieved. Each of us is under a categorical moral duty to enter into and submit ourselves to such a system. This duty is a perfect one: we owe it to each other, and we can legitimately coerce each other to comply with it. Right itself demands that it become public in this way, for it is of the essence of practical reason that it be realised by human action in the natural world. The postulate of public right is the claim that real systems of positive law must be understood as expressions of this underlying moral idea (6:307; TPP 8:349). As such, it lies at the nexus not only of moral, political and legal philosophy, but also theoretical philosophy.

Section 2 of this Element is devoted to explaining what Kant thinks the content of public right is. This content, the 'state in idea' or noumenal republic, is what must underlie any coercive system of human relations if it is indeed to count as law. But in this first section, we trace the intellectual context in which the principle of public right emerged in Kant's philosophical reflections, teaching and writing, and how what started out as a *moral* principle became the *epistemological* postulate of his mature legal philosophy.

Although he spent his whole life in Königsberg, a small and relatively insignificant university in what was then East Prussia, Kant was no hermit: he developed his ideas while busily engaged as a university teacher, reading voraciously and enjoying conversation over a good dinner with his friends and acquaintances.[7] He had a sound grasp of contemporary political developments across Europe and its colonies. He admired several aspects of the British constitution, but he also criticised trenchantly British colonial politics. He sympathised with the American revolutionaries and was fascinated by their experiments in statecraft. He wondered whether the relatively open and benign bureaucratic autocracy developed by Frederick II (the 'Great'; ruled 1740–1786) might be

[7] The two main biographies are Vorländer, *Immanuel Kant* and Kuehn, *Kant: Eine Biographie*. The English edition of the latter is *Kant: A Biography.*

a rational alternative to republicanism, even as it closed under his nephew, Frederick William II (ruled 1786–1797).[8] Like many others in Germany, he was enthralled by the revolution in France and horrified by its collapse into terror three years later. The conditions under which Kant worked and the political circumstances of his times are the context into which his philosophy was intended to speak. He did not think of his work as abstract armchair philosophising but as a lively contribution to public debate about pressing matters of practical concern. We should read his works in that spirit.

Kant was the first major European philosopher to earn his living as a university teacher.[9] For fifteen years after he had completed his master's dissertation in philosophy in 1755, he earned his living as a private lecturer by teaching a wide variety of courses, from mathematics to anthropology, and even on one occasion the principles of military fortifications. By all accounts, he was a relatively popular teacher: not always easy to understand, but lively and engaging, prone to making interesting digressions, and perfectly willing to offer a critical response to the textbook he was using. In an often-quoted phrase, he made it his aim not to teach his students philosophy but how to philosophise (APL 2:306). When Kant finally became a professor in 1770, his chair was in logic and metaphysics. However, in practice, his elevation to a chair made only a small difference to his teaching activity. Professors were entitled to continue offering courses on a private basis, so long as they fulfilled their basic obligations.

Although law was taught extensively in its own faculty, some elements were also taught in the philosophy faculty, where it was part of practical philosophy. From the foundation in Heidelberg in 1661 of the first German chair in natural law and the law of nations, the influence of the medieval, Aristotelian, tradition had waned, and the teaching of ethics and jurisprudence had become dominated by the modern natural law theory of Hugo Grotius (1583–1645) and his successors. Grotian natural law theory sought to justify the authority of the state and its laws on the basis of an original contract between human beings as possessors of natural rights; his work also included a groundbreaking account of the law of nations. The professors of practical philosophy at Königsberg in Kant's time taught ethics, natural law and the law of nations, and in his private capacity as lecturer, Kant turned his hand to these subjects as well. So, although his salaried chair was in logic and metaphysics, he ended up teaching ethics twenty-eight times from 1756 to 1794. From 1766, he also offered a course in natural law, but this subject was not as popular with students. Kant's classes

[8] Clark, *The Iron Kingdom*, 252.
[9] A wealth of background material can be found on Steve Naragon's invaluable website, *Kant in the Classroom*, https://users.manchester.edu/Facstaff/SSNaragon/Kant/Home/Index.htm.

were quite small, and courses were cancelled several times for lack of interest. Nevertheless, he still ended up teaching the subject twelve times, roughly every other year from 1767 to the late 1780s.

Kant lectured from textbooks into the margins of which he scribbled a very large number of tiny, almost illegible, notes. University teachers were required by the Prussian government to adopt an approved textbook, but Kant did not follow these texts slavishly. They were a springboard for his own thoughts. Sometimes he had blank sheets interleaved with the textbook pages to give himself more space for his thoughts. In his contributions to the collected works of Kant, the scholar Erich Adickes sought with great ingenuity to date these notes by reference to such features as the colour of the ink, the handwriting and placement on the page, effectively providing an insight into Kant's intellectual development over time. A few more enterprising students would write up their own lecture notes for printing and circulation among fellow students. Several sets of notes from Kant's lectures on ethics have survived, but, sadly, only one set of notes on natural law is extant (L-NR 27:1317–94). We have to use these texts with caution – they are, after all, student lecture notes – but alongside the textbook annotations they also give us clues as to the development of Kant's thinking.

The fullest statement of Kant's philosophy of public right is to be found in his *Doctrine of Right* (1797), which is itself the first part of the *Metaphysics of Morals*, his last major work of practical philosophy. There is no doubt that the manuscript Kant sent to the printer was disordered and it may also have contained earlier draft material. As a result, the work is disjointed and obscure in places. Moreover, the contents are – to many philosophers' eyes – rather strange. Kant's discussion seems to get mired quickly in obscure elements of Roman law and oddments of late eighteenth-century administrative law and criminal process. How are these supposed to flow from the timeless prescriptions of pure practical reason? If one argument stands out, it is the claim that the duty of obedience to the sovereign is absolute, denying any right of resistance or rebellion. Kant was undeniably respectful of Frederick II's rational autocracy, but any absolute duty of obedience seems directly to contradict the categorical imperative that grounds all duty. How is that supposed to fit together? Kant himself admitted that his intellectual powers were starting to wane – after all, he was 73.[10] Many philosophers have taken him at his word and quietly set the work to one side.[11]

[10] See Fenve, *Late Kant*, 1–7.

[11] See Kuehn, *Kant: A Biography* (note 7), 393–8. Arendt considered the *Doctrine of Right* 'pedantic and boring', citing Schopenhauer's view: 'It is as if it were not the work of this great

There can be no doubt about the sorry state of the 1797 manuscript. Kant had wanted to publish a metaphysics of morals for decades,[12] and time was now running out. But close attention to his work as a teacher shows that he had been reflecting on questions of law and government for over forty years. He remarked in 1764 or 1765 that Rousseau had 'set him right' about the value of human freedom (NOFBS 20:43–44). His first intellectual breakthrough in political theory seems to have come in, or shortly after, 1776, several years before his publications in practical philosophy. This was, of course, the year of the American Declaration of Independence and the first colonial experiments in constitutionalism. At this point, he fully articulates the idea that the creation of a certain sort of political order akin to those early American experiments is a matter of moral necessity. Thereafter, he continued to refine his critical philosophy of law up to the point of his death. There is clear evidence of this development in his lectures and teaching materials. The *Doctrine of Right* contains evidence of intellectual refinement relative to the most similar work immediately preceding it, *Toward Perpetual Peace* (1795). Even his posthumous papers contain a paragraph in which he states for the first time the significance of what he had achieved for the practical study of law (OP 21:178). By this stage, the motor for intellectual development had become a second breakthrough: his recognition that the moral principle of public right has a central epistemic role to play in our cognition of legal phenomena. Public right is not merely a moral principle; it is a practical postulate.

When the *Doctrine of Right* is set against the background of this longer-term intellectual development, it looks much less strange.[13] In the rest of this section, we consider in more detail those elements of Kant's thought that are most relevant to the development of the postulate of public right. First, we consider the extent to which his views on public right developed in relation to the theories of earlier political philosophers, focusing on the two he most admired: Thomas Hobbes and Jean-Jacques Rousseau. Then we notice the emergence of a principle of public right in his lectures on ethics and natural law in the 1770s and 1780s. Finally, we set out the steps by which he came to treat public right as a practical postulate, and we explain the significance of this move. It represents his mature and final position.

man, but the product of an ordinary common man.' (Arendt, *Lectures on Kant's Political Philosophy*, 7–8).

[12] He stated his intention to do so in a letter to Johann Heinrich Lambert on 31 December 1765 (Corr 10:55–7).

[13] Ludwig has shown that it is possible to reconstruct the text of the *Doctrine of Right* into something much more orderly, but, although attractive, his efforts remain controversial among Kant scholars. Ludwig, *Kants Rechtslehre*; 'Einleitung' in Ludwig, *Immanuel Kant, Metaphysische Anfangsgründe der Rechtslehre*.