Challenged Universality – Kant and a *Citoyenne* between Stage and Scaffold

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Abstract:
The universality of human rights faces the fundamental problem of the nationalized basis of their constitutionalization. Much can be said about the historical struggles to integrate females in the "all men"-formulas, but what are the crucial lines of conflict? Historical answers may be found in the Kantian rightful republicanism (*rechtlicher Republikanismus*), denoting the legitimacy of state political structures by consistency with everyone's freedom in accordance with universal law. "Rightful" is more precise than "legal". Kant's fundamental concept of right – derived from the categorical imperative among equal and free human beings – was "the possibility of [directly] connecting universal reciprocal coercion with the freedom of everyone" (Metaphysik der Sitten, Introduction, § E, 339). Of course, this paper is not so naive to transform Kant into a feminist voice; it draws the attention to the fundamental aspect of constitutional history, how to explain the relationship between the freedom of the individual and the formation of states.

Keywords: universalism; human rights; constituent nation; world citizenry; Immanuel Kant, representative republicanism

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Introduction: Marie-Olympe de Gouges, a *citoyenne* between stage and scaffold

Eighteenth-century France is traditionally explained by the dichotomy of the male public sphere and the female private sphere. Civic virtues for women related to the ideal of civic motherhood, breastfeeding, childcaring, and only a very few crossed the lines to the stage of the public sphere. When the Convention[1] decreed in October 1793 (10 brumaire an II)

[1] By the summer 1792, a Parisian insurrection overthrew the monarchy and led to the summoning of the Convention as the new constituent assembly (naming in reference to the constitutional process in the United

the title Madame and Mademoiselle to be changed into *citoyenne*,[2] they met the style, how Olymp de Gouges (1748–1793) used to sign her letters.[3] As member of the *Cercle Social* (1790–1793),[4] dedicated to study the Rousseauean *Contrat social*, she has welcomed the outbreak of the French Revolution, but complained about the discrimination of women in the 1789 Declaration of the Rights of Man and of the Citizen (and about France continuing to profit from slavery). Her counterpart, the Declaration of the Rights of Woman and of the Female Citizen (*Déclaration des droits de la Femme et de la Citoyenne,* 1791) comprised the famous statement: "A woman has the right to mount the scaffold. She must possess equally the right to mount the speaker's platform."[5] – providing some inspiration for this paper.

Her sympathy for the constitutional monarchy is well known, and when Louis XVI was about to be sentenced to death, she dared to write a letter to the National Assembly (December 1792), criticizing the execution of Louis XVI of France (which took place

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States). On 21 September 1792, it unanimously declared the monarchy to be abolished (HÉLIE, F.-A. *Les Constitutions de la France, ouvrage contenant outre les constitutions, les principales lois relatives au culte, à la magistrature, aux élections, à la liberté de la presse, de réunion et d'association, à l'organisation des départements et des communes, avec un commentaire*. Paris: Ainé, 1875, p. 342), and drew up a new republican constitution (the French Constitution of 1793, *Acte constitutionnel du 24 juin 1793*, authored principally by Robespierre and Saint-Just never came into force). Contrary to the moderate constitutionalists (Mirabeau) of the former National Assembly (1789–91) and the republican Girondins of the Legislative Assembly (1791–2) Robespierre's extremist Jacobins (=Montagnard faction) dominated the Convention as a tool for the radicalization of the revolution; from 2 June 1793 onwards, prominent Girondins were sent to the guillotine. The revolutionary army's victory at Valmy on 20 September 1792 and the Convention's vote for the execution of the king in January 1793 both were turning points, initiating a republican antagonism against monarchy which, ever since, has been a characteristic customarily attributed to French republicanism. During the Montagnards-predominance (2 June 1793 till 27 July 1794) the Convention had executive and legislative powers, extended throughout the whole country by the salut public-comities. (For more details cf. MÜSSIG, U. *Juridification by Constitution. National Sovereignty in Eighteenth and Nineteenth Century*. In: MÜSSIG, U. *Reconsidering Constitutional Formation I: National Sovereignty. A Comparative Analysis of the Juridification by Constitution*, Springer Open Access, 2016, p. 13; IDEM, Republicanism and its 'gentle wings' (Ode to Joy). The Republican Dignity to be Governed, not Mastered as Founding Rational Legitimacy. *Giornale di Storia Costituzionale / Journal of Constitutional History*, 2021, vol. 41, No. I, 117 ff., 143 ff.; IDEM. The Kantian Legal Turn of Republicanism: 'Rightfulness' by a Categorical Right to Justification. *Giornale di Storia Costituzionale / Journal of Constitutional History*, 2021, Vol. 41, No. II, 183 ff., 195 ff. Both Giornale essays are blueprints for the reasoning here, esp. on pages 68, 69, 74-78. In doing so, I revised my conclusions on the Kantian visitation right.

2 Feminised French version of citizen.

3 Olympe de Gouges was born Marie de Gouze on 7 May 1748, growing up in the Occitan Dialect region of the Languedoc. Her *Réflexions sur les hommes nègres* (1788) was performed on stage by the Comédie-Française, forced to do so by legal action, until the slave trade lobby has stopped it.

4 Also called the Society of the Friends of the Truth (*Société des Amis et Amies de la Vérité*), gathered under the patronage of Sophie Marie Louise de Grouchy, marquise de Condorcet (1764–1822). Together with her husband Nicolas, the mathematician, philosopher and woman's rights advocate, Sophie worked on the campaign for full women's suffrage in a July 1790: CONDORCET, M. Sur L'Admission des femmes au droit de cité. In: CONDORCET, M. *Oeuvres de Condorcet*. Paris, 1847, p. 121 ff. Available at: https://gallica.bnf.fr/ark:/12148/bpt6k41754w/f6.item [accessed on 22.07.2022]. Next to her translations of Adam Smith and Thomas Paine she fostered republican ideas via the short living journal *Le Républicain*.

5 DE GOUGES, O. *Les droits de la femme a la reine*. [Paris]: 1791, p. 6 ff. according to the BNF-digital copy. [online]. Available at: https://gallica.bnf.fr/ark:/12148/bpt6k426138?rk=879832;4. [accessed on 01.12.2021].

on 21 January 1793).[6] According to her reasoning the king was guilty as king, but not as a human being, and should be rather exiled.[7] Her last poster "The Three Urns, or the Salvation of the Fatherland, by an Aerial Traveller" (« *Les Trois Urnes, ou le Salut de la Patrie, par un Voyageur Aérien* » of 1793), demanded a plebiscite about the future potential form of government, be it a unitary republic, a federalist government, or a constitutional monarchy. As the revolutionary legislation has banned any support for the monarchy de Gouges became arrested for her commitment to reestablish the monarchy.[8]

So, what was Olympe's problem? That she was French, or that she explicitly wanted to have the monarchy constituted? Let us turn to the German mastermind Immanuel Kant, the Königsberg philosopher, disgusted by the revolutionary terror. He is the most influential theorist of a strong legislative counter-balance to a monarchical executive – exactly the model, the French September constitution of 1791 has tried. And his philosophy has an influential republican say – hitherto unknown – which are appealing to compare with French republican ideas. This is the essence of my paper.

I. Kant's Favourite in the French Revolution

The National Assembly's main goal upon undertaking the Tennis Court Oath on 20th June 1789 was to write the constitution of France: the formerly absolutist monarchic power claims were transformed into a constituted kingship "of the French",[9] and the creation of a strong unicameral representation of the people, while not removing the monarchy totally, reduced royal legislative involvement to a mere suspensive royal veto. This corresponded to the contemporaries' experiences of the king meddling in affairs.[10]

In Title III, Art. 1, the September Constitution of 1791 stated that "[t]he sovereignty [is to be] […] unique, indivisible and non-susceptible to time-barring. It only belongs to the nation." The third sentence connected national sovereignty to legal equality: "No part of the people and no singular person can appropriate its exercise."[11] The executive

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6 Between 20th and 21st June 1791, the royal family had attempted to flee in the direction of Austria, making it only as far as Varenne before being captured, returned to Paris, and placed under house arrest. Therefore, there seems to be climax from the arrest, the storming of the Tuileries on 10th August 1792, the suspension as the leading citizen of France, and finally the king's execution.

7 MOUSSET, S. *Women's Rights and the French Revolution: A Biography of Olympe de Gouges*, translated from the French by Joy Poirel. New Brunswick (USA) – London (UK): Transaction Publishers, 2007, preface, p. viii.

8 Available at: https://upload.wikimedia.org/wikipedia/commons/0/03/Olympe_de_Gouges._Les_Trois_Urnes%2C_ou_Le_salut_de_la_patrie_%28Paris%2C_1793%29._British_Library_443.a.3%287%29.jpg. [accessed 28.07.2022]; permanent via BL 443 a.3(7).jpg; cf. also https://www.olympedegouges.eu/ [accessed 26.07.2022].

9 Chap. II, Sec. 1, Art. 2, WILLOWEIT, D. – SEIF, U. (eds.). *Europäische Verfassungsgeschichte.* München: C. H. Beck, 2003, p. 310.

10 Returned to Paris in disgrace, the king signed the September Constitution as prepared by the National Assembly. At the altar of the fatherland, built in the middle of the Champ de Mars, Louis XVI was to take the oath to the nation and the law at Lafayette's side, framed by representatives of the National Assembly, not of his court. The oath to be taken by the King on law and nation was intended to put the past and thus also the breach of the past in 1789 in relation to the present. On 14 July 1790 he had refused to swear an oath alongside Lafayette at the Feast of Federation. Louis is said not to have left his place to take the oath before the altar.

11 Cited by WILLOWEIT – SEIF, *op. cit.*, p. 299.

power remained vested in the king and his ministers (Tit. III, Art. 4).[12] The nation of the September Constitution of 1791 (Tit. III, Ch. II Sec. I, Art. 2)[13] consisted of people and monarch, with the latter acting as constituted power (*pouvoir constitué*) to protect the civil order. Sièyes, together with the Girondist barrister and president of the Constituent National Assembly Jacques Guillaume Thouret,[14] as well as the Jacobin Antoine Barnave,[15] had opposed monarchical participation in the legislation in vain, denying even a suspensive veto of the king.[16] The "September design" of a strong representation of the people and a surmountable royal legislative involvement was quite singular within European constitutions around 1800, and the parliamentary position as the representative of the nation was exactly the goal Immanuel Kant's philosophy was heading for.

II. What "killed" de Gouges?

The French Twin Story of Nation and Republic together with the Absoluteness of the General Will made any individual dissenting opinion an assault against all, which only scaffolds could stop to erode the public good, divinized as *suprême être*. Let me explain these two aspects.

1. The French Twin Story of Nation and Republic

The legal construction of the constituent nation[17] transformed the Estates General into a genuine constituent assembly under the leadership of the Third Estate. Breaking with the privileges of the first two estates and the medieval assumption of representing the traditional divisions of society, the Third Estate declared itself the National Assembly, and claimed the exclusive representation of the nation construed as the sovereign. The reference to the nation was the tool to legitimize the civil war against the *Ancien Régime* « La nation existe avant tout, elle est l'origine de tout. Sa volonté est toujours légale, elle est la loi ellemême » ("The nation exists before all, it is the origin of everything. Its will is always legal and it is the law itself").[18] The pairing of republic and nation was not a novelty, it had already

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12 Cited by Ibidem, p. 300.

13 Cited by Ibidem, p. 310. In contrast to the American text of 1787, the French September Constitution of 1791 constituted the *monarchy*, leaving the *republican* experiment for the Convention Constitution to come in 1793. Deviant from FURET, F. – HALÉVI, R. *La monarchie républicaine. La constitution de 1791*. Paris: Fayard, 1996, the royal inviolability and sanctity, the lack of an electoral principle, and the orientation of the executive towards the monarch made the king more than just a decorative accessory.

14 1746–1794.

15 Together with Adrien Duport and Alexandre Lameth, Antoine Barnave made the 'Troika' in the National Assembly (1789–1791), and he was one of its rhetoric protagonists. His dispute with Mirabeau and de Vazalès about the royal prerogative to decide on war or peace (16th–23rd May 1791) is deemed to be one of the highlights in the debates' history of the National Assembly.

16 Sièyes' manuscript *Représentation et Élections* (1791) made it very clear that this "would be divided into two branches, in a national will and a hereditary monarchical will". (284 AP 4 doss. 12, cit. also in PASQUINO, P. *Sieyès et l'invention de la constitution en France*. Paris: Éditions Odile Jacob, 1998, p. 173).

17 Cf. Lafayette is to talk of the principle of the nation later on in his pre-draft on the declaration of human and citizen rights of 11th July 1789, cf. here No. 3 and AP, Vol. VIII, BN, Microfilm M11174(4): AP, Vol. VIII, P. 222 [11 juillet 1789]. Malouet critisises in his Opinion sur l'acte constitutionnel: « Tel est donc le premier vice de votre Constitution, d'avoir placé la souveraineté en abstraction, » (cit. in FURET, F. – HALÉVI, R. (édité par). *Orateurs de la Révolution française.* Édition Pléiade. Paris: Éditions Gallimard, 1989, vol. I, p. 503.

18 SIEYÈS, E. J. *Qu' est-ce que le tiers état?* Édité par Zappieri, R. Genève: Librairie Droz, 1970, p. 180.

started within the French monarchical discourse of the sixteenth century.[19] The true innovation in 1789 lay in connecting republicanism with represented national sovereignty, not in the republicanism itself. For Sièyes, despotism is to be avoided by a moment legally construed when the ordinary legislative body (deciding on statutory law by the representing majority) was established as *pouvoir constitué* and therefore differentiated from the constituent power.[20] But Sièyes did not prevail over Rousseau by claiming a representative system against the absolutisation of the general will. For Sieyes "representation can never be a direct act, and under the constitution it is always divided, never accumulated and always dependent on the constitutional laws",[21] but the undivided sovereignty advocated by Jean-Jacques Rousseau, embodied in the law and not in the person of the ruler, results in the subjection to democratic monism.

2. The Absoluteness of the General Will

Rousseau's fundamental rejection of pluralism, be it in a classical mixed constitution or the liberal constitutional distribution of powers, is the main goal of the general will (*volonté générale*), influencing the debates in the French Revolution.[22] Crucial to his republicanism was the establishment of a republican community through the egalitarian model of a contract, based on the natural law implications of equality,[23] also derived from "a normative ideal blending nostalgia for his native Geneva … with Sparta and Rome".[24] Due to civilisatory critique in the "Discourse concerning Inequality" (1755) that human self-alienation resulted from the preoccupation with property the civic state for Rousseau, in contrast to Hobbes and Locke, is not an optimized natural state. Therefore, a *contrat social* was needed to create a new legal equality on a completely new basis.[25] Returning to nature was

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19 This is analyzed thoroughly in my article Republicanism and its 'gentle wings' (Ode to Joy), pp. 117 ff., 143 ff.

20 « Le despotisme doit être rendu impossible avant qu'on se permette de faire une loi à la majorité. » 284 AP 5 doss. 1 (4), cit. also by PASQUINO, *op. cit*., p. 179. MÜSSIG, U. Republicanism and its 'gentle wings' (Ode to Joy).

21 « Donc, la représentation et non l'action directe; dons la représentation divisée, sous la constitution, et non accumulée et rendue indépendante de ses lois constitutives. » 284 AP 5 doss. 1 (4), cit. also by PASQUINO, *op. cit*., p. 179 f. MÜSSIG, Republicanism and its 'gentle wings' (Ode to Joy); English translation of French or German quotes are the author's ones, if not indicated otherwise.

22 MANIN, B. *Principes du gouvernement représentatif*. Cambridge: Cambridge University Press, 1997, p. 17 ff.

23 "[I]n harmony," writes Johnson Kent Wright, "with the entire republican tradition", Rousseau started from "an umbilical connection between individual and collective freedom". (WRIGHT, J. K. The Idea of a Republican Constitution in Old Régime France. In: GELDEREN, M. VAN – SKINNER, Q. (eds.). *Republicanism. A shared European Heritage*. Vol. 1. Cambridge: Cambridge University Press, 2002, pp. 289 ff., 297). Wright refers to the grounding works of Maurizio Viroli (*Jean-Jacques Rousseau and the 'Well-Ordered Society'*. Cambridge: Cambridge University Press, 1988), Helena Rosenblatt (*Rousseau and Geneva: Form the First Discourse to the Social Contract 1749–1762*. Cambridge: Cambridge University Press, 1997) and Robert Wokler (*Rousseau*. Oxford: Oxford University Press, 1995).

24 WRIGHT, *op. cit.*, pp. 289 ff., 296; MÜSSIG, Republicanism and its 'gentle wings' (Ode to Joy), pp. 117, 148.

25 Contract 1762, book II, chap. 6; ROUSSEAU, J. J. *Oeuvres completes. Vol. III: Du Contrat social – Écrits politiques.* Paris: Gallimard, 1964 (Pléiade-edition), p. 378: « Par le pacte social nous avons donné l'existence et la vie au corps politique. » … Whereas the natural state is lawless, the civil state comprises the rights fixed by the law: « Il n'en est pas ainsi dans l'état civil où tous les droits sont fixés par la loi. » Wright identifies a closeness to contract theorists (WRIGHT, *op. cit.*, p. 296).

no option, and individual efforts to overcome the degeneration by a "natural" education of great artificiality – propagated in the *Emile* (1762) – should be strengthened by transforming oneself into a *citoyen*, capable of civil liberty and possession. In doing so, the individual would become "a part of a greater whole" (Contract 1762, book II, chap. 7)[26] and, through moral conversion of his nature, by the "total transfer of each partner with all his rights to the whole community" (Contract 1762, book I, chap. 6),[27] would gain a new wholeness of life. Rousseau believed that it was only through the boundless state power of this new Leviathan that the original freedom of man would be reborn (Contract 1762, book I, chap. 8): "Obedience to the law one has prescribed for oneself is freedom."[28] The individual could, of course, only exercise freedom as a partner in the whole, as a member of the sovereign.[29]

Rousseau did not conceive of any individual natural rights of freedom that would prevent the indivisible and unrepresentable sovereignty of the people[30] to turn into majority despotism. His "republican" solution for this risk was an abstract statutory state rule (Contract 1762, book II, chap. 6), limiting the direct expressions of popular sovereignty by the common will to the implementation of general-abstract norms. Rousseau's equivalent of the common good thus took the form of a bourgeois civil religion. Justification (of the law) draws the hierarchical model of the rule of law from the assumed normative quality of the law: it binds the other state powers as an expression of the common will. The generic nature of the general will was constructed by Rousseau on the basis of the generality and abstractness of the norms that would be set in place, in the sense of a supreme public reason. As he noted: "The people themselves always want the good, but of itself they do not always see it. The general will is always right, but the judgment that guides it is not always enlightened."[31] This, to Rousseau, "is where the need for a Legislator arises";[32] the result was a legitimate republicanism as a legal state order.

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26 Contract 1762, ROUSSEAU, *op. cit.*, p. 381: « de transformer chaque individu, qui par lui-même est un tout parfait et solitaire, en partie d'un plus grand tout don't cet individu reçoive en quelque sorte sa vie et son être. »

27 Contract 1762, ROUSSEAU, *op. cit.*, p. 360: « l'aliénation totale de chaque associé avec tous ses droits à toute la communaute. »

28 Contract 1762, book I, chap. 8; ROUSSEAU, *op. cit.*, p. 365: « l'obéissance à la loi qu'on s'est prescritte est liberté. »

29 MÜSSIG, Republicanism and its 'gentle wings' (Ode to Joy), pp. 117, 149 f.

30 Contract 1762, book III, chap. 15; ROUSSEAU, *op. cit.*, p. 429: « La Souveraineté ne peut être réprésentée, par la mêeme raison qu'elle ne peut être aliénée; elle consiste essenciellement dans la volonté générale, et la volonté ne se réprésente point: elle est la même, ou elle est autre; il n'y a point de milieu. »

31 « De lui-même le peuple veut toujours le bien, mais de lui-même il ne le voit pas toujours. La volonté générale est toujours droite, mais le jugement qui la guide n'est pas toujours éclairé. » (ROUSSEAU, *op. cit.*, p. 380). Cf. also Contract 1762, book II, chap. 3, chap. 4; ROUSSEAU, *op. cit.*, pp. 371, 373.

32 The whole quotation reads: « Il faut lui faire voir les objets tels qu'ils sont, quelquefois tels qu'ils doivent lui paroitre, lui montrer le bon chemin qu'elle cherche, la garantir de la séduction des volontés particuliers, rapprocher à ses yeux les lieux et les tems, balancer l'attrait des avantages présens et sensibles, par le danger des maux éloignés et cachés. Les particuliers voyent le bien qu'ils rejettent: le public veut le bien qu'il ne voit pas. Tous ont également besoin de guides: Il faut obliger les uns à conformer leurs volontés à leur raison; il faut apprendre à l'autre à connoitre ce qu'il veut. Alors des lumieres publiques résulte l'union de l'entendement et de la volonté dans le corps social, de-là exact concours des parties, et enfin la plus grande force du tout. Voilà d'où naît la nécessité d'un Législateur. » (Contract 1762, book II, chap. 6; ROUSSEAU, *op. cit.*, p. 380).

Therefore, "[t]he law is nothing else than the expression of the general will" (Contract 1762, book III, chap. 15).[33] Consequently, in 1789, Article 6 sentence 1 of the Declaration of the Rights of Man and Citizen followed Rousseau's cues. The rule of the people is the impersonal rule of the law, insofar as its execution is separate from the law-making (Contract 1762, book III, chap. 1, 4, 15, 16)[34] and the law unites "the totality of the will with that of the object" (Contract 1762, book II, chap. 6, 4).[35] The generality of the object of legislation meant that the law considered its subjects "as a whole and the actions as abstract, but never a person as an individual or a single action" (Contract 1762, book II, chap. 6).[36] The generality and abstractness of the regulations appeared to be a necessary condition for all to be able to be asked as "true" citizens for their vote as integrated parts of a whole. Rousseau seems to have constructed the correspondence of the "totality of the will with that of the object".

In addition, Rousseau intended the majority to be an identity of individual will and *volonté générale*, rather than a collection of individual votes (*volonté de tous*).[37] This required civic virtue[38] and the exclusion of all factional formations (Contract 1762, book II, chap. 3,[39] Contract 1762, book IV, chap. 1[40]), though in this Rousseau sounded utopian; particular factions (*associations partielles*) rendered impossible the purification processes within individual considerations, which were supposed to hold mere individual interests at bay. Instead, factionalism would turn any vote into a competition of particular wills, obscuring the focus on the common good and preventing overruled minorities and others who did not prevail in the voting from recognizing their integration in the majority's will, insofar as they were merely mistaken about the true common interest (Contract 1762, book IV, chap. 1).[41] "If there are partial societies, it is necessary to multiply their number and prevent their inequality," claims Rousseau with reference to Solon, "in

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33 Contract 1762, book III, chap. 15; ROUSSEAU, *op. cit.*, p. 430: « La loi n'étant que la déclaration de la volonté générale, il est clair que dans la puissance Législative le Peuple ne peut être réprésenté. »

34 Contract 1762, book III, chap. 1; ROUSSEAU, *op. cit.*, pp. 395, 396, 399; Contract 1762, book III, chap. 4, ROUSSEAU, *op. cit.*, p. 404; Contract 1762, book III, chap. 15; ROUSSEAU, *op. cit.*, p. 430: « mais il peut et doit être dans la puissance exécutive, qui n'est que la force appliqué à la Loi. » Contract 1762, book III, chap. 16, ROUSSEAU, *op. cit.*, p. 432 f.; MÜSSIG, Republicanism and its 'gentle wings' (Ode to Joy), pp. 117, 150.

35 Cf. note 31 with the full quote of Contract 1762, book II, chap. 6; ROUSSEAU, *op. cit.*, p. 380; Contract 1762, book II chap. 4; ROUSSEAU, *op. cit.*, p. 374. Cf. MÜSSIG, Republicanism and its 'gentle wings' (Ode to Joy), pp. 117, 150.

36 Contract 1762, book II, chap. 6; ROUSSEAU, *op. cit.*, p. 379: « Quand je dis que l'objet des loix est toujours général, j'entends que la loi considere les sujets en corps et les actions comme abstraites, jamais un homme comme individu ni une action particuliére. »

37 Contract 1762, book II, chap. 3; ROUSSEAU, *op. cit.*, p. 371: « Il y a souvent bien de la différence entre la volonté de tous et la volonté générale; celle-ci ne regarde qu'à n'est qu'une somme de volontés particulieres: mais ôtez de ces mêmes volontés les plus et les moins qui s'entredétruisent, reste pour somme des différences la volonté générale. »

38 It reads as the willingness to relate oneself to the common conservation and to the public good. (Contract 1762, book IV, chap. 1; ROUSSEAU, *op. cit.*, p. 437. « Le bien commun se montre par tout avec évidence, et ne demande que du bon sens pour être apperçu. »

39 Contract 1762, book II, chap. 3; ROUSSEAU, *op. cit.*, p. 371.

40 Contract 1762, book IV, chap. 1; ROUSSEAU, *op. cit.*, p. 438.

41 Contract 1762, book IV, chap. 1; ROUSSEAU, *op. cit.*, p. 438 f.

order to prevent the people from erring about the general will" (Contract 1762, book II, chap. 3).[42]

In this way, Rousseau constructed a cognitive identity of individual wills with the general will, thus avoiding the spectre of total subjugation under a Hobbesian sovereign and reframing the traditional republican "umbilical connection between individual and collective freedom"[43] in a democratic language addressing social equality and civic solidarity. His idea of the rule of general laws as an exercise of collective autonomy equated political legitimacy with egalitarian participation in public decision-making. Rousseau's democratic republic, inspired by the classical examples of Sparta and Rome, was centred around the general abstractness on two levels. The laws consented to by the people were to be general in regard to addressees and application, which guaranteed equality before the law (*égalité devant la loi*). They were also to be general in relation to the legitimatory source – the popular, participatory sovereignty. Such different layers of general abstractness set the scene for the Revolutionary terror that killed de Gouges, owing to the framing of the Jacobin public good as the *suprême être* paradigm.[44]

What could have saved de Gouges then? The principle of representation! It was Kant to protect the republican idea of self-legislation from Rousseau's democratic monism, and yes – to answer the title's question in the middle of this paper – thereby a republican re-reading of Kant could have saved de Gouges from the guillotine. De Gouges made this explicit by the initiating words of the preamble of her declaration: "The mothers, daughters, sisters, who represent the nation, demand to be constituted within the national assembly."[45] She elaborates in Art. III of her declaration, that "the sovereignty resides essentially within the nation, which is the reunion of female and male".[46]

III. The Legal Turn of the Kantian Cosmopolitan Republicanism

The decisive factor of Kantian republicanism is moral autonomy built on the *a priori* reasonableness of human beings and their consequential individual freedom (*Willkürfreiheit*). It is translated into legal terms – though his legal theory (*Rechtslehre*) is part of the introduction of the metaphysics of morals – as the free consensus of intellectual beings, thereby achieving "the state [as] the greatest congruence of the constitution with … legal principles".[47] Therefore, he advocated a moral cosmopolitanism with a cosmopolitan idea of justice, as a global value transcedentally beyond territorial borders and addressed to the individual as moral and legal entity within a supranational civil society. Though, as women were not taken into account, this kind of enlightened universality is to be challenged, which inspired the title of this essay.

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42 Contract 1762, book II, chap. 3; ROUSSEAU, *op. cit.*, p. 372. Cf. MÜSSIG, Republicanism and its 'gentle wings' (Ode to Joy), pp. 117, 151.

43 WRIGHT, *op. cit.*, p. 297.

44 MÜSSIG, Republicanism and its 'gentle wings' (Ode to Joy), pp. 117, 151 f.

45 DE GOUGES, *op. cit.*, p. 6.

46 Ibidem, p. 8: « Le principe de toute souveraineté réside essentiellement dans la Nation, qui n'est que la réunion de la femme et de l'homme. » Cf. also Art. VI, p. 8.

47 MÜSSIG, U. *Reason and Fairness. Constituting Justice in Europe, from Medieval Canon Law to ECHR*. Leiden: Brill, 2019, p. 225 (n. 260).

1. The Kantian Constituted World Citizenry

The Kantian world citizenry (Weltbürgerliche Verfassung) starts from the conditionality within territorial politically constituted community and explains national citizens due to their reasonableness also to be citizens of a supranational civil constitution. The self-sufficiency of the reasonable human being allows a connection to any supranational entities only on the basis of the categorical imperative of justification. Politics was an "exercised legal doctrine" (*ausübende Rechtslehre*);[48] consequently, Kant started in his *Critique of Pure Reason* (1781) to develop the political philosophy of a constituted world citizenry (*weltbürgerliche Verfassung*). Reasoning was universal and independent of any religious considerations, and the final purpose (*letzter Grund*) of his philosophy was to be found in the idea of practical reason (*praktische Vernunft*). This was nothing other than a categorical imperative of justification: there is always a right to justification, and justification is independent of specific circumstances, but determined on formal, technical grounds. It is in this sense that the Kantian philosophy is transcendental,[49] and at the same time blocks revolutionary upheavals with its cosmopolitan reasonableness.

The advent of the French Revolution was welcomed by Immanuel Kant as a practical triumph of the philosophy of the Enlightenment; this was explicit in his *Dispute of the Faculties* (1798), in which the philosophical faculty and the faculty of law argued over the question whether the human race is engaged in a continuous progress towards betterment; in Kant's argumentation, "betterment" in this case means the "evolution of a constitution in accordance with the [Kantian] law of nature".[50]

Totally different from Rousseau, the Kantian understanding of the law of nature circumscribes a republican idealisation of the monarchy, constituted by the internal and external rule of law. Kant's addendum to the academy edition of the *Dispute* notes that "the republican constitution, at least in spirit" does not mean "that a people under a monarchical constitution thereby assumes the right to have it changed, not even only secretly in itself".[51]

Kant argued that human beings are naturally independent, owing to their intellect; as a result, the state, as the embodiment of the "civil constitution" (*bürgerliche Verfassung*),

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48 VOLKER, G. Ausübende Rechtslehre. Kants Begriff der Politik. In: SCHÖNRICH, G. – KETO, Y. (eds.). *Kant in der Diskussion der Moderne*. Frankfurt a. M.: Suhrkamp, 2002, pp. 464–88.

49 In lieu of many: SCHWARTLÄNDER, J. *Der Mensch ist Person: Kants Lehre vom Menschen*. Stuttgart: Kohlhammer, 1968, p. 163 ff.; GIESE, B. *Das Würdekonzept. Eine normfunktionale Explikation des Begriffes Würde in Art.1 Abs.1 GG*. Berlin: Duncker & Humblot, 1975, p. 35 ff.; WOLBERT, W. *Der Mensch als Mittel und Zweck*. Münster: Aschendorff, 1987, pp. 14 ff., 27 ff.; HRUSCHKA, J. Die Person als Zweck an sich selbst. Zur Grundlegung von Recht und Ethik bei August Friedrich Müller (1733) und Immanuel Kant (1785). *Juristenzeitung*, 1990, pp. 1–15; BIELEFELDT, H. *Zum Ethos der menschenrechtlichen Demokratie*. Würzburg: Königshausen & Neumann, 1991, p. 23 ff.; BAYERTZ, K. Die Idee der Menschenwürde: Probleme und Paradoxien. *Archiv für Rechts- und Sozialphilosophie*, 1995, 81, pp. 468–9; LORZ, R. A. *Modernes Grund- und Menschenrechtsverständnis und die Philosophie der Freiheit Kants*. Stuttgart: Boorberg, 1993, esp. pp. 119 ff., 125 ff., 271 ff.; KÖNIG, S. *Zur Begründung der Menschenrechte: Hobbes – Locke – Kant*. Freiburg: K. Alber, 1994, p. 247 ff.; ENDERS, Ch. *Die Menschenwürde in der Verfassungsordnung*. Tübingen: Mohr Siebeck, 1997, p. 189 ff.; FOLKERS, H. Menschenwürde – Hintergrund und Grenzen eines Begriffs. *ARSP*, 2001, No. 87, p. 329 ff.

50 KANT, I. Streit der Fakultäten, section II, No. 7 (Wahrsagende Geschichte der Menschheit). In: WEISCHEDEL, W. (ed.). *Immanuel Kant. Werkausgabe.* Vol. VI. Frankfurt a. M.: Suhrkamp, 1977, p. 360.

51 KANT, Streit der Fakultäten, section II, No. 6, p. 358.

is "a relationship between free people that leaving aside their liberty as a whole in their relationship with others finds itself subjected by compulsory laws",[52] and "the citizens' state" is a "purely legal state".[53] In his idea of a citizen – in the sense of the *citoyen* (*Staatsbürger*), not the bourgeois (*Stadtbürger*) – according to the 1793 treatise *On the Common Saying*,[54] (negative) liberal and positive political-republican civil liberties meet. Only the republican self-legislation by free citizens who are equal before the law guaranteed freedom. These were also the elements with which Kant defined his concept of a republic in "The First Definitive Article" in his work *On Perpetual Peace* (1795):

"The constitution established firstly according to the principles of freedom [...] as human beings, secondly according to the principles of the dependence of all on a single legislation (as subjects), and thirdly according to the law of equality [...] as citizens, – the only one that arises from the idea of the original treaty, on which all legal legislation of a people must be based, is the republican one."[55]

No words of the *citoyennes*! Of course, one is declined to add, and nevertheless Kant's representative republicanism could have saved de Gouges life. Her reasoning with „innate rights of freedom, property, surety and esp. the resistance against oppression" (Art. II) is remarkable for the all-including approach instead of pleading for extending men's rights to women. In this aspects de Gouges appears in the Habermasian sense to make the enlightenment more perfect.[56]

2. Representative Republicanism against Democratic Despotism

"The civil constitution of every state is to be republican,"[57] postulated Immanuel Kant in response to the *terreur*. Any democracy for which he blamed the French Revolution, was incompatible with the "republican constitution".

For Kant, "democracy […] is necessarily despotism; because it establishes an executive power in which 'all' settle things for each individual, and may settle some things against an individual who does not agree with the policy in question. Decisions are made

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52 KANT, I. Über den Gemeinspruch, part II (Vom Verhältnis der Theorie zur Praxis im Staatsrecht, Gegen Hobbes). In: CASSIRER, E. (ed.). *Immanuel Kants Werke. Vol. VI. Schriften von 1790–1796.* Berlin: Cassirer, 1923, p. 373; MÜSSIG, U. *Recht und Justizhoheit: Der gesetzliche Richter im historischen Vergleich von der Kanonistik bis zur Europäischen Menschenrechtskonvention, unter besonderer Berücksichtigung der Rechtsentwicklung in Deutschland, England und Frankreich*. Berlin: Duncker & Humblot, 2009, p. 280.

53 KANT, *Über den Gemeinspruch,* part II, p. 373. Kant defines the attributes of state citizens ("1. The liberty of each part of society as a human. 2. The equality of the same with the others as subject. 3. The independence of each part of a common entity, as citizens.") with the *a priori* predominant reason and thereby as human rights. Cf. also KANT, I. Die Metaphysik der Sitten in zwei Teilen (Metaphysische Anfangsgründe der Rechtslehre; Metaphysische Anfangsgründe der Tugendlehre), here: Metaphysische Anfangsgründe der Rechtslehre, part. 2: Das öffentliche Recht, section 1: Das Staatsrecht, § 46. *Gesamtwerkausgabe Cassirer*. Bd. VII. Berlin, 1922, p. 120.

54 "That may be correct in theory, but it is of no use in practice." KANT, *Über den Gemeinspruch*, part II, p. 151.

55 KANT, I. Zum Ewigen Frieden. Ein philosophischer Entwurf. In: WEISCHEDEL, W. (ed.). *Immanuel Kant. Werkausgabe.* Vol. VI. Frankfurt a. M.: Suhrkamp, 1977, p. 204.

56 De GOUGES, *op. cit.*, p. 7.

57 KANT, Zum Ewigen Frieden, p. 434.

by an 'all' that does not include everyone. In this, the general will contradicts itself and [the concept of] freedom".[58]

In order to establish this, however, Kant had to conceptualise that which was rightfully republican, but not democratic. What, then, did Kant *mean* by his rightful republicanism?

In his "First Definitive Article" *On Perpetual Peace* (1796), Kant continues to "bill the French Revolution" by explaining that "the democratic mode of government makes [a representative system] impossible, because everyone wants to be in charge".[59] Representation is at the heart of the Kantian reading of republicanism at the end of the eighteenth century: a republic is a state led by the interests of its people, as opposed to one led by the interest of its dynasty. The representative use of sovereign power relies on "the protection and securing of the law"[60] as the central state purpose or, indeed, its "holiest purpose".[61] Against any paternalistic determination of the public good, Kant defines the purpose of the state to be limited to the securing of personal liberties: "The government is not authorised to act or to decree what is not necessary for the preservation of the rights of the individual."[62] Any top-down prescription of the public good was the "most dangerous weapon for despotism",[63] specifically owing to its sole dependency on the Enlightened-absolutist sovereign's discretionary interpretation.[64] For Kant, the consensus of intellectual beings by their free will is what makes the state.[65] As already said, according to his philosophical legal doctrine, human beings are naturally independent, owing to their intellect; as a result, the state, as the embodiment of the "citizens' constitution" (*bürgerliche Verfassung*), is "a relationship between free people that leaving aside their liberty as a whole in their relationship with others finds itself subjected by compulsory laws"[66] and defines "the citizens' state" as a "purely legal state".[67] The *a priori* reasonableness (*Vernunftgegebenheit*) of human rights in the citizen state of the law[68] as "the state of the greatest congruence of the constitution with the legal principles … as according to which we are to strive according

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58 Ibidem. Beatrice Heuser identifies Jonathan Bennet's translation, Towards Perpetual Peace, as the superior English treatment of Kant's text. See HEUSER, B. *Brexit in History: Sovereignty or a European Union?* London: Hurst & Company, 2019, p. 260 (n. 40); KANT, I. *Toward Perpetual Peace: A Philosophical Sketch.* BENNET, J. (ed.). 2017. [online]. Available at: http:/www.earlymoderntexts.com/assets/pdfs/kant1795_1.pdf. [accessed 01.12.2021].

59 KANT, Zum Ewigen Frieden, p. 434.

60 KRUG, W. T. *Über Staatsverfassung und Staatsverwaltung: Ein politischer Versuch*. Königsberg: Göbbels und Unzer, 1806, p. 7.

61 KOLB, G. F. Justiz (Deren Unabhängigkeit und Hauptgrundlage ihrer richtigen Organisation). In: ROTTECK, C. VON – WELCKER, C. T. (eds.). *Das Staatslexikon*. Vol. VIII. Altona: Hammerich, 1846, p. 27.

62 BROXTERMANN, T. W. *Demophilos an Eukrates: Ueber die Gränzen der Staatsgewalt und ein gewisses, in der Constitution vom Jahre 3 nicht enthaltenes Mittel, die Freyheit der Beherrschten gegen Anmaßungen der Beherrscher zu sichern.* Germanien, 1799, p. 44. MÜSSIG, U. *Reason and Fairness. Constituting Justice in Europe, from Medieval Canon Law to ECHR.* Leiden: Brill, 2019, p. 220.

63 KANT, *Über den Gemeinspruch,* pp. 145–6; Gros, K. H. *Lehrbuch der philosophischen Rechtswissenschaft oder des Naturrechts*. Tübingen: Cotta, 1802, p. 167.

64 BROXTERMANN, *op. cit.*, p. 32.

65 KANT, Einleitung in die Metaphysik der Sitten, IV (Vorbegriffe zur Metaphysik der Sitten). *Gesamtwerkausgabe Cassirer.* Bd. VII. Berlin, 1922, p. 21 ff.

66 KANT, Über den Gemeinspruch, part II, p. 373. For further details cf. MÜSSIG, *Recht und Justizhoheit*, p. 280.

67 KANT, Über den Gemeinspruch, part II, p. 373. Cf. also KANT, Metaphysische Anfangsgründe, p. 120.

68 KANT, Zum ewigen Frieden, p. 434.

to the reasonableness of the categorical imperative"[69] allowed the restricted and rightful[70] "Republicanism" as contrasted with the unrestricted "Despotism" that resulted from absolutism.[71] Human liberty was thus the telos of the state and a "principle for the constitution of a community".[72] Kant defined "exterior legal liberty" as "the authority not to obey any exterior laws but the one to which I was able to contribute".[73] This legal idea of equality as subject, in which one was not only subject to but also a stakeholder in the law, rendered traditional estate differences null and void.

The Kantian idea of representation relies on the self-determination of the "united will" of the citizens.[74] As Kant famously argued in *Metaphysik der Sitten*, "All true republic is and can be nothing else than a representative system of the people, united by all citizens, in order to obtain their rights in the name of the people, through their deputies."[75] Kantian representation not only meant (externally and institutionally) the establishment of a parliament, but it also addressed how the sovereign power is used, by whomever wields it, to administer the affairs of the state. Kant thus aimed to separate legislation from the will of empowered individuals, transforming it into the self-determination of the "united will" of all citizens, achieved through the legislative participation of the people who were subjects to power (*Gewaltunterworfene*).[76]

This line of arguments has two consequences: the (novelty of the) normative function of the social contract and the link between the legitimization of any government, regardless of the concrete organisational form, and the structures of effective justification.

3. The Normative Function of the Social Contract

The first precondition of the use of this republican sovereignty was the derivation of all sovereignty from the "united people". This required that the sovereignty would be understood as emanating from the people as the true sovereign to whom sovereignty falls when it is removed from the hands of the "monarchical representative",[77] as had happened in France in 1789.[78] In the Kantian understanding government actions were not to be content-related, but guided exclusively by formal considerations. This corresponded with the Kantian definition of law as the epitome of the conditions by which individual freedom can be brought into balance with the freedom of the others.

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69 KANT, Metaphysische Anfangsgründe, part II, section I § 49, p. 124; KANT, Streit der Fakultäten, p. 404.

70 Within the scholarship on Kant, "rightful" (rechtlich) appears to be used interchangeably with "juridical" (juridisch). Cf. KANT, I. *The Metaphysics of Morals.* GREGOR, M. (translated and edited). Cambridge: Cambridge University Press, 1996 (Cambridge Texts in the History of Philosophy), p. 21 (n. b).

71 KANT, I. Anthropologie in pragmatischer Hinsicht abgefaßt. In: CASSIRER, E. (ed.). *Immanuel Kants Werke. Vol. VIII. Schriften von 1790–1796.* Berlin: Cassirer, 1923, p. 225.

72 KANT, Über den Gemeinspruch, part II, p. 374.

73 KANT, Zum Ewigen Frieden, Annotation 1, pp. 434–5.

74 HOFMANN, H. *Repräsentation: Studien zur Wort- und Begriffsgeschichte von der Antike bis ins 19. Jahrhundert*. Berlin: Duncker & Humblot, 2003, p. 411 ff.

75 KANT, I. Metaphysik der Sitten, Rechtslehre, Zweiter Teil (Das öffentliche Recht), 1. Abschnitt: Das Staatsrecht, § 52. *Gesamtwerkausgabe Cassirer*. Bd. VII. Berlin, 1922, p. 149; p. 112 f.; KANT, *Metaphysics of Morals*, pp. 112–13.

76 KANT, Metaphysik der Sitten, I § 46, p. 1.

77 KANT, Metaphysische Anfangsgründe, I § 51, p. 167.

78 Ibidem, § 52, p. 170.

Furthermore, Kantian republicanism based on the rational obligation of man to enter the state results from his *a priori* innate right of freedom. This is only realisable if the limitation inherent in it to be compatible with the freedom of all other human beings is observed and, if necessary, compulsorily enforced. The only basis for coercive measures to ensure freedom is a law that is compatible with the freedom of all human beings and that thereby requires universal consent – the generally united will that exists only in the state. Thus, the obligation to enter the state complements the innate right of human freedom. In addition to the innate right of liberty, Kant relies for the legal imperative of the state on the fundamental right of every human being to property, which serves the comprehensive realization of freedom of action and thus results from the innate right of liberty. In other words, these are two complementary justifications which, taken together, legitimise the state as a comprehensive security instrument of human freedom, within the framework of a metaphysical legal doctrine, emerging from reason. Thereby, the social contract is relieved of legitimation tasks and has a normative function as an idea of the free association of citizens.[79]

The legal turn of such an argumentation is also present when compared to the works of the American federalists on this point. For the federalists, the social contract served both the legitimation and the limitation of state rule, whose claim to authority is dependent on the consent of the people in terms of reason and extent. If the state seriously violates the rights conferred on it by the people for fiduciary exercise, then – in the view of Alexander Hamilton, John Jay, and James Madison, writing under the collective pseudonym 'Publius' – the people have a right to active resistance or revolution. Kant, on the other hand, categorically rejects an active right of resistance because of the human obligation to live in the state, but grants people a right – and an obligation – to passive resistance for reasons of conscience. Kant's concept overcomes the contradiction inherent in the traditional doctrine of social contract and to which Publius is also subject: the problem that the contract cannot provide the required substantiation because its domination-limiting, resistance-legitimating function counteracts and nullifies the legitimation of the state based upon it. As far as the authors of the *Federalist Papers* (No. 15, Hamilton; No. 51, Madison; No. 55, Madison; No. 76, Hamilton) were concerned, leaving the state of nature is useful, but not necessary.

This contrast has further consequences when comparing American constitutionalism with Kantian legal republicanism. In Kant's monistic conception, the social and power contract coincide; his reasoning of an a priori existing rational legal obligation to enter a civil polity contradicts the Anglo-American reading of power, which is based principally in trust.[80] While in the horizontal perspective the legislature has a prominent position vis-à-vis the other powers, from the citizen's point of view in the vertical perspective one state power is expressed in all three powers.[81]

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79 MÜSSIG, The Kantian Legal Turn of 'Republicanism': 'Rightfulness' by a Categorical Right to Justification, pp. 183, 192.

80 WAWRZINEK, C. *Die ‚wahre Republik' und das ‚Bündel von Kompromissen': Die Staatsphilosophie Immanuel Kants im Vergleich mit der Theorie des amerikanischen Federalist*. Berlin: Duncker & Humblot, 2009, p. 311.

81 WAWRZINEK, *op. cit.*, p. 342 f.; MÜSSIG, The Kantian Legal Turn of 'Republicanism': 'Rightfulness' by a Categorical Right to Justification, pp, 183, 192 f.

4. The Republican Use of Sovereignty

Kant relied on the "evolution of a constitution based on natural law" (*Evolution einer naturrechtlichen Verfassung*). By this he meant that public authority gains an ethical quality through Enlightenment, when monarchs recognise their duty "even if they rule autocratically, to rule yet in a republican way (not democratically), that is to treat the people according to principles which are in accordance with the 'spirit of the laws of freedom' (as a people of mature reason would prescribe them to itself), though, under the characters to be respected, their consent were not be asked".[82] Thus, even authoritarian rulers could be considered republican if their rule followed "the spirit of republicanism" – expressed through a legal order made up of general principles of law (*allgemeine Rechtsprincipien*) crafted through the participation of the people themselves.[83]

For Kant, the republic was the only possible form of government, characterised by a rule of law under which the subjects were also citizens. The granting of freedom, equality and autonomy did not separate the citizen subjects from the state; rather, it would cause them to turn towards the state (as the necessary state of being able to enjoy freedom and equality in the first place). In the Kantian republic, which could also be a constitutional monarchy, the people are both the sovereign and the legislator, and this could only be guaranteed by a representative system and a legislative power separated from the executive. Such a republican reading of the second part of the doctrine of right corresponds with a legal reading of Kantian dignity; the essential (legal) meaning of freedom as (moral) autonomy means having a categorical right not to be subjected to norms that cannot reciprocally be justified, which this justification embodied in laws people have consented to via their representatives. The persuasiveness of rulings and judgments is key to the legal understanding of Kantian dignity as moral autonomy; there cannot be any legitimate form of government if not based on structures of effective justification. This is paradigmatic for Kant's practical philosophy in its entirety, which is concerned with finding a lasting solution to "order" the human condition itself. Instead of dealing with forms of government, Kant was more interested in the way sovereignty is used to the best of all. Like in the Platonian cave manner, the philosopher explained the fundamental pattern of how societies are organized to their and each individual's best. This is near to the wording of de Gouges' declaration (Art. XV), that every woman, like man, has the right to hold any official responsible on the use of authority to the best of all.[84]

IV. A Cosmopolitan Republicanism founding the Universality of Rights

1. The Kantian Cosmopolitan Republicanism

On the international level Kant appears to be in favour of a federation of free and sovereign states, i.e., a federation without coercive power. He does not conceive of the world of international law as a polis in which individuals have civil rights. Strictly speaking for Kant, international law is only state law. It concerns only states as legal subjects.

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82 KANT, Streit der Fakultäten, part II, no. 8, p. 364.

83 Ibidem, no. 7, p. 358 f.

84 DE GOUGES, *op. cit.*, p. 11. MÜSSIG, The Kantian Legal Turn of 'Republicanism': 'Rightfulness' by a Categorical Right to Justification, pp. 183, 193.

A republican understanding of international relations did not originate with Kant. Since the Utrecht agreement of 1713 it was an established topos for the equilibrium of powers. The negotiations ending the War of the Spanish Succession dispelled the traditional rights (of monarchies) as negotiable aims, replacing them with the tranquillity of Europe in an equilibrium of powers as the preferred aim of diplomacy. Among the eleven bilateral treaties signed in Utrecht in 1713, that between France and Portugal was expressive on its aimed "contribut[ion] to the repose of Europe", as joined by the treaty between the French crown and the Estates-General which proclaimed its intention of the "re-establishment of the tranquillity of Europe".[85] The promotion of Europe's common interest over that of individual dynasties became the overall legitimate aim;[86] no less important a figure as Louis XIV could be seen at Utrecht to "consent willingly and in good faith that all just and reasonable measures be taken to prevent … an excessive power [as] … contrary to the good and repose of Europe".[87]

The interest in Europe as a whole had a seismic impact on the very same power that was not only geographically removed from the continental mainland but fond of its geopolitical distinctiveness. Utrecht was a milestone in European history, not only for the first determination of a European *res publica* – as an equilibrium to the best of all instead of power struggles in dynastic interests – but also for the rise of British voices that Great Britain was an island after all.[88] Britain was the main beneficiary of the Utrecht "formal proclamation of the principle of the balance-of-power as a fundamental condition for peace",[89] allowing its dominance in the Western Mediterranean with the cession of Gibraltar and Menorca and its rise to the pre-eminent European commercial power by the granted monopoly over the slave trade between Africa and Southern America and the establishing of an efficient stock market in London to refinance the war debts in the form of easily traded securities. Others did not profit from the bargaining of power balance in the same way; the Dutch Republic found itself effectively bankrupt, Austria struggled with the Pragmatic Sanction of the same year, designed to ensure the succession of Maria Theresa, and France only had two more years of the reign of the Sun King, with Louis dying in 1715.[90] A long-term peace, let alone an eternal one, was simply not possible; irrespective of concrete political actors, the fact that peace was only to be defined in the abstract, coupled with the looming Anglo-French conflicts in North America as well as the unresolved conflict between Russia and Sweden, meant that it could only remain an ephemeral illusion.

Kant's innovation on the international scale was again a legal one. His cosmopolitan republicanism transformed the peacekeeping by legal protection of that which is mine and that which is yours into the "constitutionalisation of international law". The inter-state

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85 DUCHHARDT, H. *Frieden im Europa der Vormoderne: Ausgewählte Aufsätze 1979–2011*. Paderborn: Ferdinand Schönigh, 2012, p. 71.

86 HEUSER, *op. cit.*, p. 129.

87 OSIANDER, A. *States of Europe, 1640–1990: Peacemaking and the Conditions of International Stability*. Oxford: Clarendon Press, 1994, p. 137.

88 See, *e.g.*, HEUSER, *op. cit.*, p. 131.

89 OSIANDER, *op. cit.*, p. 133.

90 Spain retained the majority of its Empire and recovered remarkably quickly. On this and the Spanish War of Succession see DUCHHARDT, H. From the Peace of Westphalia to the Congress of Vienna. In: FASSBENDER, B. – PETERS, A. (eds.). *The History of International Law*. Oxford: Oxford University Press, 2012, p. 643 ff.

legal coordination of "spheres" of freedom constituted the core of the peace-building function of law, which Kant elaborated in his work *On Perpetual Peace: A Philosophical Outline* (1795),[91] to be explained in the following text.

2. The Kantian World Citizenship

According to the three definitive articles of Kant's sketch of perpetual peace, a world citizen right (*Weltbürgerrecht*) and perpetual peace were attainable under three conditions: First, "the civil constitution of every state is to be republican", second, "the law of nations is to be founded on a federation of free states"; and third – aiming at a global republic of republics – "the law of world citizenship is to be united to conditions of universal hospitality".[92]

The republicanisation of the individual states, in Kant's reasoning, is an act of peacekeeping, because all citizens have a say in war and peace. The first definitive article is a continuation of the previously discussed republican reading of the second part of the doctrine of right, amounting to the categorical right not to be subjected to norms that cannot reciprocally be justified. The transnational persuasiveness of rulings and judgments requires the same level of justification by consent through the individual society's own representatives. The participation of all citizens in the decision concerning war or peace ensures that sovereignty is used to the best of all, both domestically and in transnational affairs.

The "Second Definitive Article" explains the republicanisation of interstate relations by the fact that "for relations among states the only reasonable way out of the lawless condition that promises only war is for them to behave like individual men, that is give up their savage (lawless) freedom, get used to the constraints of [public coercive laws],[93] and in this way establish a continuously growing state of nations (*Völkerstaat, civitas gentium*),[94] to which, eventually, all the nations of the world will belong."[95]

By equating states with people in the natural state, Kant postulated that the same principle of law forces men into a civil constitution and states to found a "world republic (*Weltrepublik, civitas gentium*)"[96] or a republic of republics. Contrasting "Grotius, Pufendorf and Vattel etc. (all vexed comforters, *lauter leidige Tröster*)" whose legal theories do not have the "least legal force",[97] lacking the power of coercion, the law of reason requires a world republic and thus a world domestic law with the power of coercion (*zwangsbefugtes Weltinnenrecht*). Only the republicanisation of the international system of states matches the principles of practical reason, as it "finally brings the human race ever closer to a world citizen's constitution".[98] However, the world state must be a republic, otherwise it is a despotic graveyard of freedom. Only this republic could guarantee that the freedom

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91 All subsequent English translations rely on Jonathan Bennet's translation, cited previously in MÜSSIG, The Kantian Legal Turn of 'Republicanism': 'Rightfulness' by a Categorical Right to Justification, pp. 183, 194 f.

92 Kant, Zum Ewigen Frieden, pp. 204, 208, 213.

93 Here, Bennet translates the term as "public law". This, however, ignores the coercive aspect of it, as expressed by the *Zwang*- prefix of Kant's *öffentlichen Zwangsgesetzen*.

94 Here, Bennet's use of "superstate" appears anachronistic.

95 Kant, Zum Ewigen Frieden, p. 212.

96 Ibidem, p. 213. Bennet does not translate this on p. 9 of his edition.

97 Ibidem, p. 210.

98 Ibidem, p. 214.

(sovereignty) of one individual republic could coexist with the freedom (sovereignty) of any other republic under a general, coercive law.

The "Third Definitive Article" *On Perpetual Peace* among states established "the idea of a world citizenship (*Weltbürgerrechts, ius cosmopoliticum*)" as the third necessary prerequisite of an enduring republican peace by defining it "[as] necessary to complete the unwritten code of both civil and international law on public human rights in general, and thus on perpetual peace".[99] Kant explains the world citizenship as a "right to visit (*Besuchsrecht*), that all men have to offer themselves as potential members of any society. All men have this right by virtue of their common possession of the surface of the earth, where (limited by its surface area) they can't spread out for ever, and so must eventually tolerate each other's presence. Originally no one had more rights than anyone else to any particular part of the earth."[100]

In his plea for the juridification (*Verrechtlichung*) of international relations, Kant did not mention any coercive public authority (*zwangsbefugte öffentliche Gewalt*) that would guarantee the right to world citizenship as a human right to asylum.[101] However, from the "necessary complementary character" of both the constitutional law of the individual republics (of the first definite article) and the international law of the republic of the republic (of the second definite article), the conclusion cannot be drawn that public human rights may also restrict the internal sovereignty of the individual republics. Kant's explanation that "the community … among the peoples of the earth … has gone so far that a violation of rights in one place on earth is felt by all"[102] indicates the lack of legal enforceability. Nevertheless, his category of world citizenship tries to depart from the dichotomy of national and international rights and seems to plead for a third category of cosmopolitan rights, which means rights as citizens of the earth rather than of particular states. Reading de Gouges and realizing the same plural in the preamble as in the 1789-declaration addressing the whole mankind by declaraing: „Considering that ignorance, forgetfulness or disregard of the rights of women are the sole causes of public misery and the corruption of governments, we have resolved to set forth in a solemn declaration the natural, inalienable and sacred rights of women, so that this declaration may be constantly before the eyes of all members of society, reminding them unceasingly of their rights and duties; …"[103] it becomes clear, that her emancipatory cry included some ingridients of supranational validity. Her historic example may stipulate future discussions to develop supranational rights like a climate passport to ‚dignitarian', migration, which can then be transformed into legally enforceable national rights, if national legislative assemblies consent to do so (even under a world wide moral pressure to do so).

Conclusion

The courage to use one's own intellect (*sapere aude*) is also for de Gouges the beginning of the end of immaturity. However, this self-empowerment resulted in a loss of authority by the ruling powers, conspicuous due to the terror of the French Revolution, which cost

99 Ibidem, p. 216.
100 Ibidem, p. 214.
101 Ibidem, p. 213.
102 Ibidem, p. 216.
103 DE GOUGES, *op. cit*., p. 6.

de Gouges her head and which Kant despised. Therefore, thinking alone could not make the world better, not more moral, not freer.

De Gouges' reasoning relied on the public appearance of women within the French Revolution, not only demanding for bread, but claiming for their rights, like the the march of the market women to Versailles. The revolutionary struggle for liberty, equality and fraternity united the third estate as national assembly. The importance of the "Declaration of the rights of women and citizens" (de la Femme et de la Citoyenne) lies precisely to be a catalogue of rights for all people, including men. While the common will manifests itself in general laws, de Gouges is concerned with the practical question of who the people are and what "general" means.

The Kantian chain of reasoning is different. If reason alone does not guarantee the emancipation of man, then reason must become a moral force. One way of achieving this was the idea of a republican "world citizenship" to prevent future wars. As a category between national and international law it is a cosmopolitan status of human beings, more precise in the later Arendtian phrasing as "basic right to have rights".[104] Though not immediately enforceable against national sovereign states, it has its legal roots in the Kantian legal understanding of republicanism, which two pillars: 1st, the Kantian (republican) civil state is characterized by the categorical right to be subjected only to norms people have consented to via their representatives. 2nd, the Kantian frame of reference for republic is moved away from the mere bargaining for power by different state powers, and rather establishes the idea(l) of a perpetual peace in the world's republics' republic. Interestingly enough, in the Kantian Doctrine of Law, only published shortly after the Perpetual Peace, anybody who does not strive for eternal peace is an "unjust enemy". Even if there is no active female contribution foreseen in the intellectual experiment of transforming the unsociable sociability of humanity into a cosmopolitan community, de Gouges' stand might be understood as pars pro toto of what enlightenment meant: to accept constant improvability; enlightenment can only be further illuminated and penetrated, critically relativised and further developed through enlightenment, an idea that Kant would have emphatically underlined.

This paper's emphasis on the categorical right of justification may enrich nowaday's discussions of memory culture (being an essential part of legitimizing rule by communicating it),[105] – facing this year's elevation of Joséphine Baker to the hall of fame in the Parisian Panthéon,[106] but also the Rouen discourse to remove Napoleon in favour of a female monument.[107]

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104 ARENDT, H. Es gibt nur ein einziges Menschenrecht. *Die Wandlung*, 1949, 4, p. 760.

105 Cf. ReConFort, Reconsidering Constitutional Formation (ERC-AG-SH6 - ERC Advanced Grant – The study of the human past). See: https://www.reconfort.uni-passau.de/. [accessed on 22.07.2022].

106 See: https://www.elysee.fr/emmanuel-macron/2021/11/30/josephine-baker-entre-au-pantheon.

107 Cherchez la femme – Napoleon soll weichen; Die Zeit, Ausgabe 48/2021 von Matthias Krupa. The problems of ahistorical intolerance was the subject of Horst Bredekamps lecture in Passau on 25 July 2022 "Die Kultur als Verräterin. Über die Folgen einer Idee Jakob Burckhardts".