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Provisional Publicity

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The Centre for Political Theory and Global Justice was established in 2011 in order to focus and deepen the role of political theory in responding to global issues of human coexistence. Central to the mission of CPGJ has been the promotion of research that deploys and examines dominant philosophical paradigms in the areas of political thought and international political theory. The Centre is particularly interested in issues relating to debates about global justice and how political theory can help inform actual political practice and policy. The Centre welcomes and encourages research from all theoretical traditions and provides a distinctive opportunity for researchers to develop their interests in a supportive and intellectually diverse environment.

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Provisional Publicity

It can be said that establishing universal and lasting peace constitutes not merely a part of the doctrine of right but rather the entire final end of the doctrine of right within the limits of reason alone; for the condition of peace is the only condition in which what is mine and what is yours are secured under laws for a multitude of human beings living in proximity to another and therefore under a constitution. – Immanuel Kant, Doctrine of Right 6:355

With renewed interest in Kant’s political writings, we face a variety of interpretations of what exactly the Professor from Königsberg required with his moral and political theory. Indeed, we have at last begun to move pass the debates about Kant’s absolutism and to consider his work as much more flexible and dynamic than previously thought. It is thus with this new approach that we should start to examine one of his fundamental principles for politics: the principle of publicity.

The principle (or at least the negative formulation of it) states that: “All actions that affect the rights of other men are wrong if their maxim is not consistent with publicity.” That is, any maxim of action that one contemplates undertaking must be subjected to a publicity test: if the publicity of the maxim would result in the act’s failure, either due to inconsistency or inefficacy, then the maxim (and thus the act) is wrong. With regard to politics, the test can be applied at three different levels of analysis: within a domestic state (ius civitas) when rulers contemplate the rightfulness of a proposed law; within the international system (ius genitum) when states contemplate actions towards other states; and within the cosmopolitan condition (ius cosmopoliticum) when all nations attempt to regulate their behavior towards each other for the purpose of establishing a community of all. It operates, therefore, at each level of Kant’s tripartite system of right.

He terms this principle the “Transcendental Concept of Public Right,” and such labeling leads one to believe that, as formulated, it is an unconditional principle. However, as we will see, it is not. Rather, the publicity principle is provisional, and only when a system of public right exists can we transcend its provisional status and make it

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4 The principle could also be arguably applied to individual’s relations with one another, as Kant does spend considerable amount of time discussing the “public” and individuals in the Conflict of the Faculties and What is Enlightenment, but this is not the focus of this essay.
conclusive (and thus unconditional for all). Furthermore, by viewing the principle as provisional, we can also resolve the apparent contradiction between Kant’s use of it in *Towards Perpetual Peace (TPP)* and its notable absence in the *Doctrine of Right (DR)*. I suggest that Kant’s treatment in one text assumes a civil condition, whereas in the other it does not. The essay concludes by suggesting that unless we understand that the principle of publicity is provisional, we cannot hope to formulate the required tripartite system of public right (*ius civitas, ius genitum* and *ius cosmopoliticum*), and thus cannot reach complete cosmopolitan justice.

**A Provisional Duty of Publicity**

Understanding the role of the publicity principle requires that we answer three fundamental questions: Who is the intended audience, or “public,” in question? Who is the agent, or duty bearer, that must make his maxims public? And what exactly does the obligation entail? In other words, we must identify what the principle of publicity imposes on us as moral agents, and if that duty or obligation only applies to certain agents or to all.5

**Audience**

Because Kant’s musings on the publicity principle span several works, and ultimately address several topics, we are left with a bit of a hodge-podge account of it. The popular essays, such as *Theory and Practice, Universal History with a Cosmopolitan Purpose* and *Towards Perpetual Peace,* were not written in the ‘high’ academic fashion, and only in one of Kant’s academic works does he explicitly address the notion of publicity in politics (*The Conflict of the Faculties*). His main academic work concerned with his theory of justice (the *DR*), does not engage with it. For present purposes, I am here concerned with the intersection of the principle with politics, and not the more distant goal of eventual human enlightenment. Thus I will restrict the discussion mainly to *TPP* and the *DR.*

Discussing the publicity principle requires that we make explicit two assumptions: what “publicity” means, and who the “public” is. In the first instance, the

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5 Some authors, such as Kevin R. Davis and Elisabeth Ellis, address the question of the differing ‘publics’ in Kant’s works, and provide insight into our first question, while others, like Habermas, Rawls, or O’Neill, attempt to formulate what the obligation of publicity requires. See: Davis, Kevin R. “Kant’s Different ‘Publics’ and the Justice of Publicity” *Kant-Studien,* Vol. 83, no. 2 (1992): 170-184; Ellis, Elisabeth. *Kant’s Politics: Provisional Theory for an Uncertain World* (Yale University Press, 2005); Habermas, Jürgen. *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society* (MIT Press, 1991); O’Neill, Onora. *Constructions of Reason* (Cambridge University Press, 1989); Rawls, John. *Political Liberalism* (Columbia University Press, 2005). These latter constructivist accounts, however, move away from exegesis and so are not as central to our purposes of providing a comprehensive account of Kant’s publicity principle.
notion carries with it the idea of it being “openly divulged” or opposed to secrecy. In the second, the audience, or “public” appears to be a group of hypothetical rational agents because the principle, as formulated, is a thought experiment. Any agent that would oppose the maxim would do so on grounds that it is not universalizable. While this audience of hypothetical rational agents is merely one “public” in Kant’s works, it is the only public that suffices for the principle’s political dimension. As Davis argues, there are six different “publics” at work in Kant’s writings: the reading public, university scholars, philosophers, the people as a whole, virtuous individuals, and ideal rational agents. Yet each of these audiences does not necessarily act as the standard bearer for rightful action.

In other words, while each of these audiences serves to further Kant’s general project, they are not all directly related to the question of justice. While Davis’ categorization is certainly helpful, these six publics are, perhaps, better dealt with in three: the civil community, the learned community and the ideal community. As Kant explains in the Conflict of the Faculties, the civil community is that group of people united under civil laws; they are the “people.” This “people” desire “to be led, that is (as demagogues say, they want to be duped” because they “naturally adhere most to doctrines which demand the least self-exertion and the least use of their own reason, and which can best accommodate their duties to their inclinations.” This people, while available as a public tribunal, does not possess the authority to render rightful judgments. They lack the necessary competence to do so. In fact, as Kant claims, this lot must obey the commands of the state, not undertake to judge it or revolt against it.

The learned community, which Davis divides between the scholars and the philosophers, directs its attentions to “a different kind of public”, one “devoted to the sciences” that the civil community is “resigned to understanding nothing about”. The learned community debates publicly, in so far as it publishes opinions and holds scholarly debate openly. Such debates, however, have the potential of moving from the scholarly realm to the civil one, where the two “publics” might clash. Kant believes that moving debates from the learned community to the civil is impermissible, as the civil community lacks the capacity to judge scholarly matters. Scholars who take their disputes to the civil community “publicly – from the pulpits, for example”, ultimately

6 TPP, 8:381.  
7 Davis, op.cit. fn, 4  
8 Davis, op.cit. fn, 4.  
10 Conflict, p. 49.  
11 Conflict, p. 51.  
12 Theory and Practice, Doctrine of Right, Conflict of the Faculties, etc. We should note too that when discussing whether a maxim is wrong, we are not discussing this from the perspective of the “jurist”. We are concerned with the transcendental meaning of justice, not necessarily what the state’s laws say are ‘just’.  
13 Conflict, P. 57.  
14 Conflict, p. 47.
force the state to become involved and pass censures because such scholars “attempt to steer the judgment of the people in whatever direction they please, by working on their [the people’s] habits, feelings, and inclinations, and so win them away from the influence of a legitimate government.”

The only public capable of meeting Kant’s requirements for political justice is Davis’ the ideal community of “ideal rational agents who demand nothing more than action which respects the right of humanity,” and “demand that others act in accord with the principle of right.” This community, he argues, is the only one capable of rendering a political act rightful because it is the only public that would “uniformly oppose unjust action.” The community is ideal in the sense that no empirical community “can have the power to prevent actions which it deems to be unjust” and is a community of “rational human beings” and not perfectly moral beings (like angels) because human beings understand and foresee the need for justice. The ideal public of rational agents, thus, unanimously agrees that protecting external freedom is of fundamental importance, and that the only way in which to do this is in accordance “the legal order of the state.” The ideal community of rational agents, therefore, can exist for each level of Kant’s tripartite juridical system, and need not be an actual community in any time or place.

Agent

Our second set of questions involves identifying who has a duty to act in accordance with the publicity principle. In other words, we must identify who the duty bearers are, and what kind of duty it is. Recall that in TPP, Kant calls the principle the transcendental formula of public right, yet the DR does not explicitly address the notion of publicity nor makes use of this transcendental principle. To identify the duty bearers, then, and understand how such a principle fits into the DR as well as TPP, we must look to Kant’s notion of provisionality. This is because the structure of his theory of justice begins with it. Moreover, Kant’s discussion of the provisionality of justice in the first section of the DR provides us with a keen insight into the requirements for public justice, and what we can expect absent such a condition.

The DR is divided into two parts: private right and public right. A condition of private right lacks the requisite juridical institutions of civil society, i.e., the executive, the legislative and the judicial. Such a condition is one where one’s rights to external objects of choice (that is, things, promises and the status of persons) are not "secured."
It is only by one’s strength that one can physically possess any of these objects. Furthermore, any judgment that takes place about a supposed violation of one’s right is done by the private person, and not by a public institution, like a judiciary. Kant thus claims that all “rights” in this condition are provisional. They have a rightful presumption in their favor, but they do not become “conclusive” until one establishes a state of public right. The condition of private right is thus one of provisional right.

Public right, on the contrary, is the civil condition. The civil condition is marked by the presence of a constitution that formally establishes the three requirements for public justice: protective justice, commutative justice, and distributive justice. To these three forms of justice correspond the necessary institutions of justice: the legislative, the executive, and the judicial, respectively. Protective justice concerns the public promulgation of laws, and for Kant public law contains “the a priori principles of reason about what law should be, but it also gives them effect in the world of experience because it is enacted and enforced.” Whereas the commutative form of justice governs the transactions between individuals in the marketplace. While this might not seem to be the province of the executive function, it is. The executive must establish the requisite institutions for law, and here the law is primarily concerned with regulating actions between individuals. Thus the executive must create the marketplace, as it is the public sphere. Finally, distributive justice corresponds to the legislative authority because the legislative function is to settle rights disputes. A neutral judge determines to “award to each what is his in accordance with the law.” The judiciary renders final and public justice in accordance with the laws laid down by the legislature.

Duties of justice in states of nature or conditions of provisional right (or in instances of uncertainty, like those Kant discusses in his section on “ambiguous right”); however, face a myriad of problems. Foremost amongst them is that the scope of a duty is not immediately clear, and the capacity for a duty bearer to be coerced to fulfill her duty is at best disputable and at worst impossible. In Kant’s system, we classify a duty as either perfect or imperfect, and duties of justice, Kant thinks, are all strictly perfect.

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21 The provisional nature of acquisition is untenable for the universal realization of justice in the real world because it relies on the morally arbitrary fact of physical strength. If I am strong enough to “possess” my object of choice, then I can thwart anyone’s attempts at taking it from me. However, if I am not strong enough, then my objects of choice are not secured. The establishment of public juridical institutions that protect everyone equally, and also secure everyone’s external objects equally, allows agents to perform their duties of justice towards one another without making them into victims.

22 DR, 6:297.
23 DR, 6:264-266.
24 DR, 6:306.
25 DR, 6:306.
27 For an excellent discussion of the executive function corresponding to commutative justice, see: Byrd and Hruschka (2010), Chapter 7 section 3.
28 DR, 6:313.
29 We might say that it is impossible because for duties of justice to be legitimately coerced, the state must act as the coercer. Absent this ability, then one of the hallmark features of duties of justice is impossible.
However, as I have argued elsewhere, this not in fact the case. When the juridical features of public right are lacking, then the most we can say about our duties of justice is that they are “provisional.” Provisional duties of justice only apply to agents that have the capacity to fulfill them; all other agents are temporarily exempted from them.

An obligation to act in accordance with the publicity principle falls to those who have the capacity to act in accordance with it. Determining whether an agent is capable, though, requires that we meet several conditions. First we ought to look to whether the agents are within a civil society (or public right). If they are, then they ought to be under the protection of public laws, arbitrated by a neutral judge and backed by a coercive force. That is, as long as they are not violating any of the external laws of the state, then they are protected. Second, we ought to look to whether the agent possesses the necessary material capacities to act in accordance with the principle of public right. Returning to the types of “public,” for instance, the learned community has a particular capacity for judgment and reflection that the civil community lacks. Thus in this particular case, it is the capacity of scholars, not laymen, that grounds their duty to seek truth.

For the first level of Kant’s system, that of the domestic state, we see that most all people satisfy these conditions, and so acting in accordance with a principle of publicity is required. However, when we move to the second level of the international system, the agents are no longer individuals but states (or rulers of governments of states). As Kant reminds us, whether a state decides to excuse itself of a declared promise, or to attack a growing power, the only agents with the capacity to act are states. Do states (or rulers of states) have an obligation to uphold the publicity principle? Looking to the above two conditions, it becomes clear that all states do not.

First, the international system is a condition of private right. There is no public executive or legislative authority, and the weak judicial institutions of the International Court of Justice and the International Criminal Court do not satisfy Kant’s requirements for distributive justice. For aside from the questionable jurisdictional practices and rules pertaining to each court, the notion of coercing either states or individuals to uphold the judgments of the court is tenuous at best. The international system ought to be considered a system of private right, and as a condition of private right, rights to external objects and duties to recognize others rights are merely provisional.

Second, all agents (i.e. states) do not possess the same capacities for action. This, of course, does not entail that those with the capacity always act rightly. As Kant himself notes, “it cannot be conversely concluded that whatever maxims are compatible with publicity are for that reason right, for he who has decisively supreme power has no

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31 Roff, op.cit. fn 1.
32 I argue at length why the international system, and in particular, the ICJ and ICC, does not satisfy the requirements of public justice in: Global Politics, Kant and the Responsibility to Protect: A Provisional Duty (Routledge Press, forthcoming 2013).
need to keep his maxims secret.” 33 Might, in this sense, cannot make right. But we ought to look to whether a state is capable of even acting in accordance with the dictates of right. What I mean here is that we must determine if states are exempted from certain juridical precepts or duties because of their position in the international system. Such exemptions are not foreign to Kant’s arguments, as he provides explicit permissions for states to delay the exit from the international state of nature because to do so prematurely would risk war and thus civil breakdown. 34 Such an exemption is to prevent a “greater violation” of losing the little civil order present in the international system. Thus in an analogous move, we might also claim that in a similar situation some states might also be exempted from a duty to publicize their maxims of international action, especially if doing so would result in a still greater violation, such as the demise of a state or its people.

If duties of justice in this a condition of private right are provisional, and the international system is such a condition, then I suggest that the duty bearers are those moral agents capable of acting within this sphere (i.e. states). If the publicity principle is a transcendental formula for public right, then it can only apply conclusively – that is apply to all agents at all times – when public right is instantiated. Absent this, it is merely a provisional principle with an attending provisional duty and applies to only some agents.

**Obligation**

Yet what does an obligation to act in accordance with the transcendental principle of public right entail? Ellis’ interpretation of the obligation is to “act in such a way that the highest good remains possible.” 35 This “highest good” is to achieve a state of universal and lasting peace, where human rights are respected via republican rule both within and between states and peoples. For Ellis, this obligation is a corollary to Kant’s arguments concerning provisional right. 36 The principle of publicity, for her, “bridges the gap between freedom and nature, but does so via the slow education of humankind to enlightened governance, conducted in the public sphere.” 37

Yet this reading seems inadequate on two fronts. First, the principle is so vague that it cannot yield any firm guidance to the content of an obligation of publicity. 38 For

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33 *TPP*, 8:385.
34 *TPP*, 8:373, and footnote section 373.
35 Ellis, op.cit. fn 1, p. 143. Her maxim of provisional right is to: “always leave open the possibility of entering into a rightful condition.” This is different than the obligation to act so that the highest good remains possible. Entering a rightful condition is a minimum condition, and does not necessarily imply the achievement of the “highest good.”
36 She claims: “On the face of it, the theory of provisional right makes no sense without a concomitant theory of publicity” (146). Furthermore “Kant’s theory of provisional right and his account of publicity mutually imply each other; neither is complete without the other” (150).
37 Ibid, 151.
38 Indeed, Banham criticizes her for “a lack of specificity.” Banham, op.cit. fn.1, 74.
it does not provide us with details on who the “public” really is, nor does it circumvent the classic problem of maxim formulation. Second, it appears to place more weight on *What is Enlightenment* and the *Conflict of the Faculties* than Kant’s more political works of *Perpetual Peace* and the *Doctrine of Right*. This might not seem important, but if the principle of publicity is the transcendental formula of public right, then it seems we ought to look to firmer ground than the eventual progress of humankind, especially given that all of the agents that possess the capacity for political change and progress are rulers or states. Kant’s system is, after all, one of top-down reform.

Gary Banham, on the other hand, makes a more nuanced argument. He claims that we should instead follow the “supreme principle of right” to guide us in our understanding of what an obligation of publicity requires. Kant’s “supreme” or “universal” principle of right (SPR) states that “Any action is right if it can coexist with everyone’s freedom in accordance with a universal law, or if in on its maxim the freedom of choice of each can coexist with everyone’s freedom in accordance with a universal law.” As Banham explains, it is the fact that when one acts with and amongst others that one’s action is “external” and hence “public,” and so the character of any rightful relation is necessarily a public one. Kant’s concern with agents’ external actions is ultimately a concern with individual freedom, which is why Kant formulates the concept of right as one that is “connected to an authorization to use coercion.” We must be able to guarantee our freedom, and so legitimately hinder those who would infringe upon it. Banham’s claim is that we must use the SPR, and not Ellis’ formulation, because Ellis’ account fails to provide any specificity and is merely negative.

Furthermore, Banham argues that “publicity conditions apply even in the case of provisional right and without reference to such conditions it is doubtful that we could describe provisional right as being in any sense ‘right’ at all.” If we follow Banham’s logic, then, it is a duty to act in accordance with the SPR regardless of the condition in which one finds oneself because provisional right is still a condition of right. However, this seems odd. While it is certainly true that the SPR is “a public principle in the sense that it makes manifest the nature of effective choice in conditions of social coordination,” it does not follow that if I lack the capacity to act in accordance with it (either due to the lack of protective capacities of the state or material capacities generally), I still ought to act. What the SPR seems to require of us is that we institute the necessary mechanisms for the SPR to be truly universal, but not dictate an “ought” when one cannot.
A second and related problem with Banham’s account of using the SPR as the ground for the principle of publicity (and thus as the way in which we can determine the content of our obligation), is that the SPR does not square with the negative principle of publicity, though Banham believes it does. Much like the SPR, the negative principle of publicity is to have “abstracted in this way from everything empirical contained in the concept of national and international right (such as the wickedness in human nature that makes coercion necessary).”\(^45\) That is, the negative publicity principle cannot rely on Kant’s presumption of evil to have effect. But Kant’s entire argument about the need for the establishment of the civil condition, and his subsequent assertions that one can coerce others into it, are grounded on exactly this presumption.\(^46\) As Banham notes, “the need for a civil condition turns on the lack of security for any holdings in the state of nature, and this authorizes the postulate of practical reason in the broadest sense as, \textit{given the propensity of others to act in ways that are hostile to one}, one can legitimately coerce them to join one in a civil constitution [...].”\(^47\) But the SPR cannot justify the move to civil society on this ground. To do so would be to hold that the SPR authorizes the unilateral coercion of others into a civil condition, and the SPR cannot do this. Rather, the SPR requires an exemption – the postulate of practical reason – to allow for the unilateral violation of another’s freedom for the sake of justice, and this exemption is not a transcendental object.\(^48\) The SPR, as used by Banham though, would authorize this, and give justification for the publicity principle based on an empirical and not transcendental consideration.

Furthermore, the effect of this argument is that if the SPR is the ground of (at least) the negative publicity principle, then we cannot employ defensive measures in conditions of private (or provisional) right. The SPR forbids such actions, though the negative publicity principle allows such coercion if one was strong enough to publicize the maxim without hindrance. Using the SPR as the publicity principle’s foundation presents us with coherence problems when we find ourselves outside of civil society.

The obligation to act in accordance with the transcendental principle of public right, is one that is dependent upon whether one finds oneself inside a civil condition and what material capacities one possesses. As we will see in the following section, the notion that the transcendental principle(s) of publicity should be considered a provisional duty explains Kant’s disparate remarks about the requirements for publicity and his allowance for states to prosecute their rights in a nonpublic manner in the

\(^{45}\) TPP, 8:381.
\(^{47}\) Banham, op.cit fn 1, p. 84 (italics added).
\(^{48}\) DR, 6:247. Kant calls the postulate of practical reason a “permissive law (\textit{lex permissiva}) of practical reason which gives us an authorization that could not be got from mere concepts of right as such.”
international system. Ellis and Banham are correct, then, to stress the connection between Kant’s concept of provisionality and the publicity principle, but they do not go far enough in understanding its place in Kant’s juridical system. Moreover, as long as the duty is provisional, the scope of the obligation is determined by the duty-bearer, as there are no clear juridical institutions to dictate otherwise.

The Tensions

While the explanation that the publicity principle is best explained by Kant’s concept of provisionality, we still must try to resolve the tensions between Kant’s use of it in *TPP* and its glaring absence in the *DR*. The first tension is between his negative and positive formulations in *TPP*. The second is between his arguments about the absolute and unconditional nature of the principle in *TPP* and his claims about the rights of states to wage war in the *DR*. By focusing on the second problem, we can resolve the first more easily.

In *TPP*, Kant states:

If a neighboring power grows so formidably great (*potentia tremenda*) as to cause anxiety, can one assume that it will want to oppress others because it can; and does this [assumption] give the lesser powers a right to (unified) attack on it, even without previous injury? A nation that let it be known that it affirmed this maxim would suffer evil even more certainly and quickly. For the greater power would beat the lesser ones to the punch, and, as far as concerns the union of the latter, that would only be a feeble reed against one who knew how to employ the maxim *divide et impera*.49

In the *DR*, Kant writes:

In the state of nature among states, the right to go to war (to engage in hostilities) is the way in which a state is permitted to prosecute its right against another state […]. In addition to active violations (first aggression, which is not the same as first hostility) it may be threatened. This includes another state’s being the first to undertake preparations, upon which is based the right of prevention (*ius praeventionis*), or even just the menacing increase in another state’s power (by its acquisition of territory) (*potentia tremenda*). This is a wrong to the lesser power merely by the condition of the superior power, before any deed on its part, and in the state of nature an attack by the lesser power is indeed legitimate.50

This certainly seems to provide us with two contradictory claims. In *TPP*, it appears that small weak states cannot assume a right to attack a powerful state, whereas in the *DR* such an attack is rightful (*rechtmäßig*). The publicity principle is nowhere to be found. However, appearances notwithstanding, there is no contradiction. The principle of publicity in the *DR* does not apply to weak states that find themselves in a position

49 *TPP*, 8:384.
50 *DR*, 6: 346.
where their rights are under threat. Weak states – in a state of nature – have no guarantee that a strong state will not in fact attack them, and so they must prosecute their rights as best way as they see fit. And Kant knows this; just because one’s maxim can be public does not make it right.51

We can see how this apparent contradiction arises only when one fails to read carefully Kant’s caveat in TPP, where he states that any discussion of “international right” is possible only in a lawful condition (status iuridicus).52 That is, one that meets the requirements of public right. In a state of nature, states prosecute their rights by their own lights and their own force. Any claims to justice are considered “private” because states use their “private” judgment – and not a public authoritative judge – to arbitrate disputes.53

In the DR, Kant’s claims are no different. Here, he notes explicitly that states find themselves in a state of nature and are always threatened with the outbreak of war.54 States (and their peoples) cannot “enjoy” their rights because of a lack of juridical institutions, and so find themselves in a state of “lawless freedom,” i.e. a condition of private right. That a weak state should make its maxims known to all of the powerful states is to demand that it commit suicide, as the strong states will, as Kant claims, “beat the lesser powers to the punch” and visit destruction and war upon them. Here we have a different “wrong” in the making. It is not that the weak states’ maxim of secretly attacking a powerful state is wrong, but the requirement that a weak state either sit idly by while a strong powerful state encroaches on its autonomy or publicize its maxim and ensure its destruction. The weak state has no duty to publicize its maxim; it is temporarily exempted from it. Thus Gregor’s footnote in the DR that “Kant reaches the opposite conclusion [of the argument in the TPP] by using his ‘principle of publicity’” is in fact incorrect. The conclusions are the same, only the juridical conditions are different.

Such a reading helps us to resolve the first tension with Kant’s publicity principle: that between the negative and the positive formulations. The affirmative formulation of the principle states that “All maxims that require publicity (in order not to fail of their end) agree with both politics and morality.”55 This formulation is

51 TPP, 8: 385.
52 TPP, 8:383. Kant also explicitly claims in TPP that: “It is commonly assumed that one ought not take hostile action against another unless one has already been actively injured by that person and that is entirely correct if both parties live in a state [governed by] civil law. For by entering into civil society, each person gives every other (by virtue of the sovereignty that has power over them both) the requisite security. However a man (or a people) who is merely in a state of nature denies me this security and injures me merely by being in this state. For although he does not actively (facto) injure me, he does so by virtue of the lawlessness of his state (status iuriusto) [...]” (8:350 footnote). This is of course almost identical in content to the passage quoted from the DR at 6:346.
53 “The condition underlying the possibility of international right in general is that that there first exist a state of right [rechtlicher Zustand]. For without this there is no public right, and all right other than this (in a state of nature) that one can think of is merely private right.” TPP, 8:385.
55 TPP, 8:386.
concerned with the means by which we can achieve the “universal public end” – that is “happiness,” and it is “the singular task of politics to establish this (to make the public satisfied with its condition [Zustand].”\textsuperscript{56} The negative formulation merely states what is wrong, the positive what is commensurable.

In other words, Kant is explicit that if we are to establish just relations between agents, and thus remove the provisional status of our rights and duties, we must first create a civil condition. As Banham correctly notes, the publicity principle shows how the very concept of justice is one that is inherently linked to publicity. Our actions in relation with others are “public”, and the requirement that the rules promulgated to regulate those actions also be public shows this. However, this is not the whole of Kant’s system. For some civil societies are not all “ideal” states, where the rights of peoples are upheld. Some civil societies are despotic. These states are ones where “the ruler is not a fellow citizen, but the nation’s owner,” and war is a matter of sport for him.\textsuperscript{57}

To strive for the ideal is Kant’s ultimate concern, and this ideal is achieving the universal public end or the well-being of the state:

By the well-being of a state must not be understood the welfare of its citizens and their happiness, for happiness can perhaps come to them more easily and as they would like it in a state of nature (as Rousseau asserts) or even under a despotic government. By the well-being of a state is understood, instead, that the condition in which its constitution conforms most fully to principles of right; it is the condition which reason, by a categorical imperative, makes it obligatory for us to strive after.

A state’s well-being, therefore, is how closely it approximates a republican constitution and all the maxims that relate to its ultimate establishment. (Further, of course, is the subsequent establishment of a federation of republics.) Those maxims, then, that require publicity for this end not to fail, are those that relate to the establishment of republican constitutions and principles at the domestic, international and cosmopolitan levels because only this type of constitution and juridical arrangement agree with both freedom and dependence. This is, of course, Kant’s reformulation of Rousseau’s solution of making men free who are everywhere in chains. For Kant claims that “external (rightful) freedom is to be clarified as follows: it is the privilege not to obey any external laws except those to which I have been able to give my consent.”\textsuperscript{58} Only when I give my consent to laws that govern and limit my freedom am I truly free. Only a society geared towards maintaining my freedom (and its own) is in accordance with the principles of morality. Thus any maxim that requires publicity (one directed towards the establishment of republican constitutions) agrees with both politics and morality. The key to understanding both the positive and negative formulations of the publicity

\textsuperscript{56} TPP, 8:386.
\textsuperscript{57} TPP, 8:351.
\textsuperscript{58} TPP, 8:350 footnote.
principle is the establishment and presence of public right. Without the formal institutions of civil society, at all levels of Kant’s tripartite system, the publicity principle and the duty to act in accordance with it, is merely provisional.

**Provisionality, Conclusivity and Cosmopolitanism**

Kant’s notion of provisionality is of fundamental importance to our understanding of the publicity principle. Indeed, this is why contributions like Ellis’ and Banham’s are so important. While Ellis might not provide us with concrete guidance on what such a principle requires, or that she fails to see that it does not apply universally to all moral agents at all times, or that existing polities can in fact comply with the requirements of republican rule, her contribution to the elucidation of provisionality began a sea change for Kant scholarship. Furthermore, while Banham’s account might face some problems at its foundations, he is correct to focus on how provisional right plays a crucial role for the universal instantiation of justice. Publicity and right are intertwined, and he is right to draw attention to the fact that “the emergence of effective institutions in the republican civil condition is the organization of a second layer of publicity as such institutions have to explicitly commit themselves to rules that regulate the conduct of those governed by them in ways that reflect the basic public principle of right itself.”

However, as I argue, we must be careful to answer fundamental questions about who the audience or public is for this principle, who the duty-bearers for an obligation of publicity are, and what that obligation entails. When we answer these questions, which themselves are only answered once we take into account Kant’s complete theory of justice, can we begin to see how international and cosmopolitan justice might be possible.

Kant’s arguments for justice are predicated on the fact that individuals form themselves into civil societies, and that these societies reform themselves into republics, whereby they then unite into a permanent congress of states where grievances can be arbitrated by law and not violence. It is only after such a congress is formed can we begin to envision the landscape of cosmopolitan justice. For only when such a congress is established, might we say that a duty to publicize one’s maxims is conclusive, and so states are no longer at liberty to prosecute their rights in secret. At this point, we are at liberty to move beyond questions of the rights of nations to that of the rights of world citizenship. For it is at this point that the rights of “men and nations stand in mutually influential relations as citizens of a universal nation of men.” Until this point, however, the publicity principle and its attending obligation to publicize one’s maxims is merely provisional, and if at any point any one of these divisions (ius

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59 Banham, op.cit. fn 1, p. 85.
60 DR, 6:350-351.
61 TPP, 8:350 footnote (italics added).
civitas, ius publicum civitatum, ius cosmopolitanum), has “only physical influence on another, they would be in a state of nature” and so such a condition “denies me this security and injures me merely by being in this state”, and our obligation to openly divulge our maxims is not absolute.62

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62 TPP, 8:350 footnote.