

Private property and *a priori* general united will in Kant's *Rechtslehre*. Some troubles with Kant's alleged foundation of liberalism¹

Nuria Sánchez Madrid*

Universidad Complutense de Madrid (Madrid, Espanha)

Vor dem Gesetz waren alle Bürger gleich, aber nicht alle waren eben Bürger. (R. Musil, *Der Mann ohne Eigenschaften*. Berlin: Rowohlt. p. 34).

The aim of my paper will be to shed light on Kant's theory of citizenship and especially on the function that property fulfils regarding the civil status. One important point related to this topic that I would like to discuss here is the scope that Kant assigns to the highest ruler of the state – in the general remark on the effects with regard to rights which follow from the nature of civil union – in order to modify or interfere in extreme circumstances the social map of propriety, which has naturally an historical and contingent genealogy, where reason is not involved. Despite these texts Kant's approach to the topic of *prior apprehensio* in the *Rechtslehre* (DoR, § 14) would be enough to recognize that the process of constitution of different properties brings about situations of clear inequality for human agents. Scholars as R. Brandt or A. Pinzani have opportunely hinted to some important inconsistencies that they find in Kant's foundation of property², especially if we understand legal

¹ This article stems from the Research Project *Naturaleza humana y comunidad* (II): H. Arendt, K. Polanyi y M. Foucault. *Tres recepciones de la Antropología política de Kant en el siglo XX* (FFI2009-12402), financed by the MICINN of Spain. I thank the useful remarks that prof. Andrzej M. Kaniowski (Univ. Lodz), prof. Christoph Horn (Univ. Bonn) and prof. Frederick Rauscher (Univ. Pennsylvania) conveyed to me during the 5th Congress of the Brazilian Kant Society, held on 6th-10th May 2013 at the UFSC (Florianópolis). These remarks gave me the opportunity to improve the argumentation of my paper.

* Email: nuriasma@ucm.es

² See Pinzani (2011, p. 37): "L'uguaglianza originaria degli individui viene dunque meno con la *prior apprehensio* e non verrà mai più restaurata, neanche con l'instaurazione di un'uguaglianza formale, legale e politica tra i cittadini dello Stato, giacché questi ultimi non potranno mai mettere in discussione la disuguaglianza economica sancita dal contratto originario, come abbiamo visto.

possession as the public declaration of a private injustice as a peremptory deed. The main point here could be formulated so: to what extent Kant's doctrine of Right countenances and legitimates economic and social inequality and which are the boundaries of distributive justice? Excerpts as following are often quoted as the evidence of Kant's last word on the topic of hypothetical interactions between state and society:

This uniform equality of human beings as subjects of a state is, however, perfectly consistent with the utmost inequality of the mass in the degree of its possessions, whether these take the form of physical or mental superiority over others, or of fortuitous external property and of particular rights (of which there may be many) with respect to others. Thus the welfare of the one depends very much on the will of the other (the poor depending on the rich), the one must obey the other (as the child its parents or the wife her husband), the one serves (the labourer) while the other pays, etc. Nevertheless, they are all equal as subjects before the law, which, as the pronouncement of the general will, can only be single in form, and which concerns the form of right and not the material or object in relation to which I possess rights.³

Kant claims obviously here that state should not have any reluctance that civil society develops its *unsociable sociability* in freedom, but I deem appropriate to bear in mind that our author also prevents from the risks that enduring an extremely poverty of some parts of the population could mean for the survival of the civil whole. I do not neglect Kant's critics against a paternalistic state, which would contradict the goals of his notion of republicanism, but he does not either hesitate to point out that the state has to take steps in order to force the wealthy people to guarantee the sustenance of people unable to do it by themselves for the sake of the *civitas*. Other authorized scholars as W. Kersting or B. Ludwig⁴ have decidedly restrict the scope of this claim to

Tale disuguaglianza è, anzi, decisiva per la costituzione della comunità politica, e lo è in un duplice senso. In primo luogo, lo stato civile, il *Zivilzustand*, nasce con l'obiettivo di rendere perentorio – quindi di dotare di necessità normativa – lo *status quo* di relazioni di proprietà contingenti e che probabilmente hanno un'origine ingiusta [...]. In secondo luogo, la disuguaglianza economica fornisce il criterio per definire la classe dei cittadini attivi, gli unici che meritano questo nome, giacchè chi possiede la mera cittadinanza passiva è un semplice suddito soggetto ad una legge che, sì, lo protegge, ma che non può modificare o contribuire a creare". Cfr. Brandt (1982, pp. 223-285).

³ TP, AA 8: 291.

⁴ Kersting (2003, p. 127) [my translation]: "The interests of the individual self-preservation only call the attention of the philosophy of law when their negligence could destabilize the community and jeopardize the conservation of right. Therefore, the assistance of the welfare state is not grounded on a right to the livelihood of individuals, but on the right of subsistence of the right itself, which, in turn, is exclusively the institutional expression of law principles of freedom. The indirect duty of the state to preserve the existence of dispossessed citizens is the price to be paid by the right itself, in case he wishes to be applied in a concrete space and time, and in case it wishes to gain power of organization and to exist under different empirically verifiable conditions. But that means that the

a pragmatic extent, whose subordinated normativity I will not discuss, preferring to focus now on the fact that this assertion appeals to what general will *wills* that the legislator performs:

The general will of the people has united itself into a society that is to maintain itself perpetually; and for this end it has submitted itself to the internal authority of the state in order to maintain those members of the society who are unable to maintain themselves. For reasons of state the government is therefore authorized to constrain the wealthy to provide the means of sustenance to those who are unable to provide for even their most necessary natural needs.⁵

The text highlights that the sustenance of the poorest and indigent people inside a civil unity is a claim that reason itself commands to fulfil, what hinders to compare the instauration of Right by means of its universal principle and the postulate of practical reason applied to Right with the upshot of a conversation held by the members of a civil community in order to increase their happiness. This is nonetheless the approach argued by Guyer⁶ in several papers and accurately refined recently by Ripstein⁷, which notices some differences between Rawlsian constructivism and Kant's concept of Right, arguing that Kant understands equal freedom as acting independently from the choice of others and from the ends that they could choose for us, in the wake of the neo-roman conception of freedom. In contrast with the foregoing interpretations, I rather find more convincing Flikschuh's⁸ approach to

welfare state is not a legal concept, but only a prudent instrument, that is, attentive to the reality of the exercise of right", cfr. Idem (1992, pp. 143 and 164, n. 7); cfr. Ludwig (1993, pp. 234-235 and 253): "[U]nder the Kantian approach to promoting material equality and individual welfare is neither an aim nor a mediate consequence of the civil constitution. [...] [T]he minimal conditions of a state of civil constitution are limited in the best steady legal relations and serve to maintain the state as a place of the fulfilment of right and in no event to promote the welfare of individual citizens. [...] I hope to have shown that those who seek a theory of social justice, which provide the criteria for the redistribution of the results of social cooperation, have to leave for the time being without the company of Kant".

⁵ *DoR*, General Remark (following § 49), § C, AA 6: 326.

⁶ Guyer (1997, p. 137): "Since property consists in the deference of the choices of others, nobody possesses wealth as a natural good like strength or talent, but rather all wealth is a social creation, which if it is to be acquired or maintained freely rather than forcibly can only be enjoyed under conditions in which it is rational for others to agree with it. And it will be rational for others to agree with a system which assigns wealth to anyone only if it provides all with a suitable level of property to access to it. In other words, the right of the state to control the distribution of property or wealth is a consequence of the fact that the possibility of the rational consent of all to the distribution of property is a necessary condition of the existence of property at all".

⁷ See Ripstein (2009, pp. 34-41).

⁸ See Flikschuh (2000, p. 3): "Rawls' specifications of his first principle of justice, which is concerned with the equal standing of individuals as citizens, broadly coincide with what he characterizes as his Kantian conception of the moral person. However, the second principle, which is concerned with distributive justice, is premised on an account of free agency and of the

the Doctrine of Right, which involves a deep criticism of the strategies of appropriation of Kant's juridical thought that modern liberalism figured out, emphasizing Kantian moral philosophy and disregarding Kantian metaphysics. Liberal accounts of these Kantian texts tend to prove, as Guyer has claimed, that postulates of the Doctrine of Right are the most reasonable result of human deliberation before entering into a civil community. Yet this assertion parts from the conditions of the reasonable consent of a dialogic community which has no correspondence with Kant's conception of reason. Nonetheless, the indemonstrability of this kind of propositions obeys in some extent to the fact that according to Kant nobody is author of its own freedom. As one can read in Refl. Nr. 7171, "Die Freiheit selbst [is] nicht in meiner Gewalt"⁹, what modifies essentially the modern idea of autonomy. The duty to set up a civil state beyond a society has also nothing to do with the pursuit of happiness carried out by all human beings, since it refers to a requirement of practical reason. And this duty grounds the property rights.¹⁰ This stated, I will tackle *first* the meaning of the *lex permissiva* in Kant's Doctrine of Right. *Secondly*, I will argue Flikschuh's interpretation of the indemonstrability of the postulate of Right. *Third*, I will consider the function that general will fulfils in the system of Right, which only cosmopolitan Right could successfully top.

1. The entangled root of right: the *lex permissiva* and property rights

As it is well known, B. Ludwig called the postulate of practical reason with regard to Right "the theoretical *novum* of the *Rechtslehre*"¹¹, which he proposed to relocate from its original position in § 2 to § 6, attempting to ease the understanding of this abstruse passage. I suggest reading it in order to grasp its implications:

It is possible for me to have any external object of my choice as mine, that is, a maxim by which, if it were to become a law, an object of choice would be *in itself* (objectively) have to belong to no one (*res nullius*) is contrary to Right. [...] This postulate can be called a permissive law (*lex*

rationality of individual choice that is deeply un-Kantian". I also appreciated the approach of Varden (2006), see especially her claims in pp. 270-274.

⁹ AA 19: 263.

¹⁰ See Flikschuh (2014, p. 7): "While for libertarians (and for most liberal egalitarians, too), rights entail corresponding duties, Kantians generally think of rights as *grounded* in duties. The current emphasis on the 'second-personal' or 'relational' structure of Kantian moral reasoning is a gloss on the justificatory priority of the concept of duty over the concept of a right".

¹¹ See Ludwig (1982, pp. 218-232).

permissiva) of practical reason, which gives us an authorization that could not be got from mere concepts of right as such, namely to put all others under an obligation, which they would not otherwise have, to refrain from using certain objects of our choice because we have been the first to take them into possession. Reason wills that this hold as a principle and it does this as *practical* reason, which extends itself *a priori* by this postulate of reason.¹²

A widespread interpretation of this *permissive law* deems that to be the first at taking something into possession allows the holder to refrain others from using it, so that the law itself would legitimate a provisional violation of the universal principle of Right. R. Brandt has upheld that the establishment of relations of justice between rational subjects requires a violent beginning¹³, something like an original unavoidable despoilment, but I shall try to show that this could not be the deep meaning of Kant's use of this enigmatic permission. Several scholars have interpreted permissive laws as a provisionally authorization to commit actions which would be prohibited in normal circumstances¹⁴. Actually, permission in natural law [*Naturrecht*] hinges on "practical contingencies", as it is stated in *Perpetual Peace*.¹⁵ The emergence of permissive laws obeys to the specificity of political judgment, which endorses to put off the ruling according to natural law when external circumstances urge to proceed in this way:

Permissive laws of reason allow a state of public right to continue, even if it is affected by injustice, until all is ripe for a revolution or has been prepared for it by peaceful means. For any legal constitution, even if it is only in small measure lawful, is better than none at all, and the fate for a premature reform would be anarchy. The political wisdom, with things as they are at present, will make it a duty to carry out reforms appropriate to the ideal of public Right.¹⁶

The measures which the juridical category of permission makes foresightful and prudent have been compared with the outcome of a "dark preliminary judgment"¹⁷, that guides the steps of the politician as he cannot orientate himself neither by prescriptive laws nor by prohibitive laws. So Kant would accept as practical necessary a provisional violation of the universal principle of Right, remaining unexplained how to move from this unlawful situation to an honestly juridical one. Kant's thought does not fit well with embracing

¹² DoR, § 6, AA 6: 246-257.

¹³ Brandt (1982, pp. 245-247).

¹⁴ Ibid.

¹⁵ PP, AA 8: 348.

¹⁶ PP, AA 8: 374.

¹⁷ Brandt (1982, p. 247).

exceptions, even if circumstances recommend it. Byrd and Hruschka focus in their commentary of the Doctrine of Right on the fact that the permissive law is a “power-conferring norm”¹⁸, which provides agents with the moral faculty to be the owners of physical things, to sign contracts and to establish kinship relations. I share the argument which Flikschuh¹⁹ uses in order to shed light on the content of the *lex permissiva*. Scholars, perhaps under the sway of modern liberalism, have often read these passages from the point of view of the interests of an individual possessor, which should reach agreements the most satisfying for her. Yet it could be useful to attempt another approach to this term, namely considering the postulate as a statement of practical reason. I suggest paying attention to the following text of Flikschuh:

While the *lex permissiva* does authorize individuals' acts of unilateral empirical acquisition, it does not in so doing concede authority to individuals' unilateral wills. Individual wills' “power of dominion” does not rest on a “natural entitlement of freedom”, as Kersting suggests. Instead, the authority behind the postulate's special authorization is grounded in reason itself: *reason* wills that the postulate hold as a principle of pure practical reason. But if it is *reason* which authorizes this special permission, then those whom the *lex permissiva* authorizes to take into possession external objects of their choice must be acting within the constraints of reason. This means that their actions are subject to the demands of their possible justification to others.²⁰

The identification of the postulate with the will of reason prevents from any consideration of it as a condition for any future contract signed among persons. It leaves no doubt that the agent is not the author of his duty to enter into the civil state. On the contrary, the postulate points out that nobody can refrain others to use his alleged external possessions without recognizing first to be himself under an obligation of justice towards others, with them he shares the limited space of the spherical earth. Especially relevant here is that this mutual recognition among agents does not hinge on a contract or agreement, but it is rather a corollary of human exercise of external freedom. Kant's formulation of the universal law of Right entails the same conclusion of the postulate that I have argued till now:

The universal law of Right [*Rechtsgesetz*], so act externally that the free use of your choice can coexist with the freedom of everyone else in accordance with a universal law, is indeed a law [*Gesetz*], which lays an

¹⁸ Byrd and Hruschka (2010, p. 106).

¹⁹ Flikschuh (2000, pp. 113-143), chapter 4: “The *Lex Permissiva*: property rights and political obligation in the *Rechtslehre*”.

²⁰ Flikschuh (2000, p. 141).

obligation on me, but it does not at all expect, far less demand, that *I myself* should limit my freedom to those conditions just for the sake of this obligation; instead, reason says only that freedom *is* limited to those conditions [...] and it says this as a postulate which is incapable of further proof.²¹

According to the foregoing argument the *lex permissiva* fosters that agents acknowledge by themselves that their exercise of external freedom constrains them to recognize duties of justice toward other agents, so that the postulate marks off the transition from provisional Right to peremptory Right, where only the last one expresses a lawful freedom. Yet, far from considering this as a juridical authorization of a violent and unfair deed, one should consider the function that the united general will fulfils in this point towards the recognition of a rightful possession. Kant's argument depends largely on highlighting the term *Präsumtion*, t.i., the physical possession acquired in the state of nature *is presumed* to become a rightful possession if it fits "with the will of all in a public lawgiving"²² and this *presumption* which hints to a future state suffices to regard it as a *comparatively* rightful possession. If this prevision is accomplished there is no reason to suspect that Kant's *lex permissiva* enhances the right of the strongest, jeopardizing consequently civil justice and social fairness.²³

2. Why Kant's postulates of Right cannot be demonstrable?

Kant emphasizes more than once the fact that the postulate of practical reason with regard to Right cannot undergo a further proof, topic that has become a rather common disputed question with regard to the *Doctrine of Right*, especially through the controversy arisen by Paul Guyer and Markus Willaschek.²⁴ As I claimed in the first section, the postulate of Right displays the practical and rational necessity that human beings build up a civil community, instead of belonging only to a society, which shares with the state of nature the arbitrariness and the temporariness of the property claims that pop up in it. This would suffice

²¹ IfR, § C, AA 6: 231.

²² DoR, § 9, AA 6: 257. Here the complete excerpt: "In summary, the way to have something external as one's own *in a state of nature* is physical possession which has in its favor the rightful *presumption* that it will be made into rightful possession through being united with the will of all in a public lawgiving, and in anticipation of this holds *comparatively* as rightful possession".

²³ Flikschuh (2007, p. 23): "If, therefore, rightful possession presupposes the conception of intelligible possession, and if intelligible possession is possible only in the civil condition, then my act of unilateral acquisition authorized by the postulate can count as rightful only in so far as it can be taken as the expression of my intention to enter with all others into the civil condition".

²⁴ See their contributions to the volume edited by Timmons (2002).

in order to discard the hypothesis, suggested by Willaschek, that the postulate of Right would have not any morally status at all. Yet the non-provability of this principle confirms that the duties of justice, which compel every agent to act showing respect towards the freedom of choice of others, are unconditional for human beings. Kant puts forward the postulate of practical reason with regard to Right in connection with the deduction of rightful possession, which requires arguing for both concepts of intelligible possession and juridical condition. The postulate of Right reads as follows:

It is possible for me to have any external object of my choice as mine, that is, a maxim by which, if it were to become a law, an object of my choice would in itself (objectively) have to belong to no one (*res nullius*) is contrary to Right.²⁵

This principle authorizes agents to take into possession external objects of their choice, which presupposes – if one considers the wholeness of Kant's argument – that this kind of actions ought to be submitted to the tenets of equality and reciprocal coercion of public Right. Put differently, the postulate of Right *supplements* the universal principle of Right, which is concerned with relations of innate right, so that the postulate might not be *derived* from the last one, as Guyer has supported in some papers.²⁶ As Flikschuh has criticized, according to Guyer's approach there would be no gap between innate Right and acquired Right, thus the rational duty to enter into a civil state becomes murky.²⁷ Höffe has argued in a recent paper that the postulate of Right entails two quasi-human rights, which declare respectively that "every human has a right to live in a legal order that permits every object of human choice to become mine or yours"²⁸ and that every human being has a right to live in a public order – according to the postulate of public Right – as the only possible mechanism that enables natural law to rule a society. But these quasi-human rights fail to ground acquired rights as property. Kant points out that, when agents attempt a unilateral acquisition of thing, a deed which confirms an effective use of external freedom, the obligation to enter into a civil state arouses necessarily as the unique means to remove subjective controversies.²⁹ What results

²⁵ DoR, § 6, AA 6: 246. For the classical treatment of this concept, see *Digest*, 41.1.3, where one can read that "what belongs to no one is conceded to an occupier by natural reason".

²⁶ See Guyer (2002, p. 60) and the response to Guyer by Flikschuh (2007, pp. 15 ff.).

²⁷ Flikschuh (2007, pp. 18 ff.).

²⁸ Höffe (2010, p. 91).

²⁹ See Varden (2006, p. 265): "[I]t is impossible for individuals in the state of nature to apply the Universal Principle of Right and thereby rightfully determine the quantity and quality of any single appropriation of goods, because such an application of the principle will be unilateral and arbitrary

obvious here is that the language of public Right is not subjective shaped and could be translated into a subjective scheme only with a metaphorical scope, because practical reason remains to be the voice which guides and leads human rational beings from private Right to the public Right. Let us read a sharp text from Flikschuh:

I am not the source of my freedom: its source lies beyond the limits of my possible comprehension. Consider, in this respect, the postulate's extension of my juridical perspective: I raise a claim to external possession and find myself obligated to join into civil society with all others. This is more than I bargained for when initially raising my claim. Yet, in obliging me to enter into the civil condition with all others, the postulate effects a qualitative change in relations among subjects, who now bear civic responsibilities towards one another. It is reason, not the subjects themselves, which wills their entrance into civil society. Reason wills this as practical reason, that is, in accordance with the idea of freedom.³⁰

The risk here, largely run by most Kant's liberal interpretations, is to abridge a command of practical reason featuring it as a reasonable overlapping consensus attained by the members of civil state, since Kant does not uphold a *consensus conception* of political obligations, but rather one based on the legitimacy of reason, expressed as public authority. Indeed, taking into account the rational basis of Right it would be more advisable that some propositions, as the postulate of Right, conceal always an opaque remainder compared with the discursive transparency usually demanded from this kind of propositions.³¹ As this scholar has reminded, "*Wille* and *Willkür* are not 'located' in the same agent"³² in Kant's Doctrine of Right, since the *Wille* refers to the ruler who acts according to the state in the idea and to the idea of general united will, whilst *Willkür* is the power of choice of each agent, who has to be submitted under the commander of the state.³³ I glimpse in Kant's

and therefore irreconcilable with itself (8: 289 f.). For these reasons, private property in the full sense of the word is impossible in the state of nature".

³⁰ Flikschuh (2007, p. 25).

³¹ See Flikschuh (2007, p. 30): "As beings who cannot but think of themselves as free, at least from a practical perspective, we must acknowledge our membership in an intelligible order of things. The establishment of thoroughgoing relations of Right as an end in itself then articulates, in practical terms, our capacity, in virtue of our freedom, 'to give the world of the senses, as sensuous nature (which concerns rational beings), the form of an intelligible world' (KpV, AA 05: 44)". This position agrees with the famous passage of the Dialectic of practical reason (§ IX, "On the wise adaptation of the human beings cognitive faculties to his practical vocation"), see KpV, AA 05: 148: "[T]he inscrutable wisdom by which we exist is not less worthy of veneration in what it has denied us than in what it has granted us".

³² See K. Flikschuh (2010, p. 64).

³³ DoR, § 41, AA 6: "The civil union (*unio civilis*) cannot itself be called a *society*, for between the *commander* (*imperans*) and the *subject* (*subditus*) there is no partnership. They are not fellow-

texts some traces which allow tracking Right not as a means to protect human properties or whatever an agent could consider source of happiness, but rather as a reliable mechanism of interaction that enables the coexistence of free choices on the earth according to practical reason. I suggest paying attention to the following rightly exam to the consistency of most liberal approaches to Kant's Right:

The crucial if routinely overlooked difference between Kant's account of citizenship participation and liberal approaches lies in the fact that, for Kant, the citizen asks herself whether, in her judgment, the *sovereign* could have passed a given law as public law *for everyone*. On the liberal account, by contrast, each citizen asks himself whether *he* could have passed the law as public law *for himself*.³⁴

Naturally, according to Kant the citizen may resort to intellectual means – press, public discussion – in order to convey the sovereign the reasons which recommend a legal reform, but the point is that neither with regard to property right realm nor to citizenship's theory does Kant adopt the point of view of the individual agent, but of the whole of the community. There is no place for a *voluntarist* grounding of political obligations according to Kant.³⁵ According to this neither the head of the state nor the individual subjects by themselves can be the foundation of the supreme legislation, but the entire commonwealth³⁶, which is a rational concept. So the monarch, the nobility of the whole of the population shall be considered the supreme authority inasmuch as they keep up a “*system representing the people*”³⁷, but they lose this legitimacy as they do not fulfil longer their function in the mechanism of

members: one is *subordinated to*, not *coordinated with* the other; and those who are coordinate with one another must for this very reason consider themselves equals since they are subject to common laws”.

³⁴ Flikschuh (2010, p. 69).

³⁵ For a rejection of this *voluntarist* reading and the defense of a *republican* institutional framework as basis of Kant's theory of the state and a discussion about the institutional requirements of his political authority see Varden (2010, pp. 349-351).

³⁶ Especially relevant regarding this contrast is the ending passage and remark of DoR, § 52, which contains an ironic hint to the mistake of Louis XVI, as he convoked the Estates General, that then became the National Assembly. See AA 6: 341: “Any true republic is and can only be a *system representing* the people, in order to protect its rights in his name, by all the citizens united and acting through their delegates (deputies). But as soon as a person who is head of the state (whether it be a king, nobility, or the whole of the population, the democratic union) also lets itself be represented, then the united people does not merely represent the sovereign: it is the sovereign itself. For in it (the people) is originally found the supreme authority from which all rights of individuals as mere subjects (and in any event as officials of the state) must be derived; and a republic, once established, no longer has to left the reins of government out of its hands and give them over again to those who previously held them and could again nullify all new institutions by their absolute choice”.

³⁷ DoR, § 52, AA 6: 341.

government. The *civil union* is not a *society*, but rather it makes this one possible, as § 41 of *DoR* affirms. Kant's consideration of citizens as *co-legislators* of their state is compatible with their *submission under a commander*, a formula where there is no space for an *overlapping consensus*, what according to what has been said so far would be incompatible with Kant's metaphysics.

3. The united general will and Kant's system of right

As it is well known, Kant rejects firmly Locke's labor theory of property, which understands Right as based on a direct relation between subjects and objects, "as if someone could, by the work he expends on them, put things under an obligation to serve him and no one else"³⁸, so that from that point the right accompanies the thing as a "guardian spirit".³⁹ Yet things have not a right to freedom and are not able to interact with others, so that property rights require a two-step argument, which tackles first the relation of the choice of one agent with the choice of others, and, once the foregoing is guaranteed, their concrete relation to objects of the choice. Kant considers that the Lockean approach commits a clear mistake, t.i., the assumption that a unilateral act of empirical acquisition could be entitled to claim a right against all others to possess an object, since only the notion of general and omnilateral united will, t.i., a public ruling will, could avouch property rights. It is obvious that Locke fails in distinguishing between "innate rights" and "acquired rights". Kant asserts that freedom, understood as "independence from being constrained by another's choice"⁴⁰, does not entail any relation with exteriority; so that the person's inalienable *suum* does not entail the right to acquired properties and external possessions. It is important to move this assertion away from the evidence that subjects would claim to property rights as a consequence of their innate right to freedom. I agree completely with Flikschuh as she points out that Kant's theoretical effort regarding right to external possession has to distinguish between empirical possession and intelligible possession, but in order to do it he has first to draw a principle – in this case, the postulate of practical reason with regard to Right – which makes individual property claims compatible with the universal principle of Right. Let us read the

³⁸ DoR, § 17, AA 6: 269.

³⁹ DoR, § 11, AA 6: 260.

⁴⁰ DoR, "Division of the Doctrine of Right", § B, AA 6: 237-238.

beginning of § 6, where Kant focuses on the rational conditions of legitimate possession:

The question, How is it possible for something external to be mine or yours? resolves itself into the question, How is merely rightful (intelligible) possession possible?, and this in turn, into the third question, How is a synthetic *a priori* proposition of Right possible.⁴¹

Despite of the natural association of rightful possession with the fact that one maintains an object under physical control or detention, Kant's argument abides intelligible possession as the unique principle which can put an end to the controversial between the claims alleged by different agents. Regarding this issue the Antinomy of Right displayed in § 7 of Doctrine of Right could serve as the perfect instance of the function that the postulate of practical reason with regard to Right fulfils. If one explore accurately the rational conflict, she would find that the thesis states that "[i]t is possible to have something external as mine even though I am not in possession of it", whilst the antithesis says that "[i]t is not possible to have something external as mine unless I am in possession of it".⁴² After showing both opposed points of view regarding the foundation to rightful possession, Kant affirms that the conflict hinges on a linguistic controversy, since the first sentence could be considered true if possession is understood as a *possessio phaenomenon*, whereas that the second one could be true if one understand the term possession a *possession noumenon*. They tackle respectively the material scale and the intelligible condition of property right. Kersting has nonetheless considered that the thesis performs better than the antithesis the claims of the postulate of practical reason, which according to him vindicates "the right of dominion"⁴³ of the first proprietor over external objects. Put differently, he does not pay enough attention to the fact that the postulate assigns to both propositions a part of reason, which are not completely mistaken, so that the antithesis has the virtue to restrict the legitimate claim of the thesis to the requirements of the equal right to freedom of all choices, t.i., to the conditions raised by the universal principle of Right. So the postulate would remind to the advocate of the

⁴¹ DoR, § 6, AA 6: 249.

⁴² DoR, § 7, AA 6: 255.

⁴³ See Kersting, "Intelligibler Besitz", p. 38: "[The postulate affirms] the right to dominion [*Herrschaftsgewalt*] over external objects [as] a natural entitlement of freedom of choice [which] cannot be lawfully restricted. Any legal regulation must be rejected, whose norms restrict or even deny freedom's right of dominion over the realm of objects. The postulate constitutes a transcendental relation of Right [*transzendentes Rechtsverhältnis*] between freedom of choice as such and external objects; it confers upon freedom of choice an absolute legal power [*Rechtsmacht*] over external objects". I thank the translation to Flickschuh (2000, p. 128).

thesis the importance of securing not only the right to freedom of individual agents, but the right to freedom of all possible members of a civil community, which a “thoroughgoing reciprocal coercion”⁴⁴ warrants. The essential affirmation of the postulate is that practical reason wants external possession to be possible, therefore its material conditions ought to be provided, so that the postulate could not endorse at all – as Kersting holds – the rightfulness of the thesis, since this assertion supports the point of view of a unilateral will. The thesis should rather go over several corrections in order to achieve an admissible position regarding the universal coexistence of the freedom of choices, so that it will be recognized that every exercise of external freedom involves obligation toward others.

I argued in section 1 that the provisional authorization of unilateral acquisition, which the *lex permissiva* entails, relies on the intelligible possession, which in turn draws on the idea of an *omnilateral will*, the only one which can declare a property right peremptory, t.i., avowed by the civil condition. As one can read on § 8:

[A] unilateral will cannot serve as coercive law for everyone with regard to possession that is external and therefore contingent, since that would infringe upon freedom in accordance with universal laws. So it is only a will putting everyone under obligation, hence only a collective general (*common*) and powerful will, that can provide everyone this assurance. – But the condition of being under a general external (i.e., public) lawgiving accompanied with power is the civil condition. So only in a civil condition can something external be mine or yours.⁴⁵

As Mulholland (1990, pp. 279-280) has stated accurately, human beings enter the world *with independence of their will*, but they cannot help to enter each one *with its own will* and respective claims regarding the land they physically possess, so that this individual ought to be decidedly restricted by the omnilateral will. Though the emergency of unilateral will is prior from an historical point of view, effective legal coercion could derive only from a general united will, which is an *a priori* idea of practical reason, which brings about the distributive justice for the first time.⁴⁶ Kant agrees with Achenwall, whose course *Juris naturalis* he commented in a Lecture on Natural Right from 1784, that the *communio primaeva* (Grotius, Pufendorf) is a mere fictional speculation, whilst the idea of a *communio fundi originaria* adds to the unilateral choice of an agent a united will, which takes the place of an

⁴⁴ DoR, “Introduction to the Doctrine of Right”, § E, AA 6: 233.

⁴⁵ DoR, § 8, AA 6: 256.

⁴⁶ For an insightful discussion of this point see H. Varden (2008).

alleged contract or consensus of human species. The spherical shape of earth involves the necessity that every agent has at disposal a piece of land, which is scarce, since the earth is not an unlimited plane, in order to put in exercise its innate right to freedom:

All human beings are originally (i.e. prior to any act of choice that establishes a right) in a possession of land that is in conformity with right, that is, they have a right to be wherever nature or chance (apart from their will) has placed them. [...] [T]he spherical surface of the earth unites all the places on its surface; for if its surface were an unbounded plane, people could be so dispersed on it that they would not come into any community with one another, and community would not then be a necessary result of their existence on the earth.⁴⁷

This passage focuses on a relation between each agent and the common possession of earth which is prior to the acquisition of any external possession. The right to live in one region of the earth is an indispensable material condition of human survival on earth, which does not concern directly the controversies about property right. Guyer gives an insightful account of this Kantian topic, even though I cannot agree with him about the role played by the rational acceptance of Kant's system of property rights, since I consider that reason – not the pursue of happiness of the community's members – is the unique element which could express its accordance with such a civil order:

The right has to be understood as one to an opportunity, of course, because the innate right to unhindered occupation of a place on the surface of the earth which is the basis for the acquired right of property does not itself guarantee continued existence, but only the opportunity for continued existence; after Eden, the land has to be worked in order to provide sustenance, and nature as well as other humans have to cooperate for that end to be achieved. And the right has to be understood as one to an equal chance to maintain one's own existence, not necessarily as a right to an equal share of any particular material goods. Nevertheless, the right to an opportunity to property sufficient to maintain existence or an equivalent which can produce the same result provides a minimum standard for the rational acceptability of any system of property rights, where the rational acceptability of such a system is in turn a necessary condition of its morality.⁴⁸

⁴⁷ DoR, § 13, AA 6: 262. Cfr. Byrd and Hruschka (2010, p. 128): "My right, which I have against everyone else, is a right to an (unspecified) piece of earth that I have even if all the land on this earth has been claimed by others. In other words, I have a right to exist on the face of this earth as I am. No one may throw me against my will into the ocean or rocket me into the universe".

⁴⁸ Guyer (1997, pp. 134-135).

According to Flikschuh, “the property argument introduces the curvature of empirical space”⁴⁹ into the unbounded space as intuition *a priori*, inasmuch as juridical relations take place always in a limited space. Naturally, in a bounded space conflicts over claims on external possessions are unavoidable and only the state, an artificial and ideal entity which dictates distributive justice, can put a stop to the controversy and submit equally all agents to a universal coercive law. The public Right, claimed by the rightful state, resolves the conflicts raised in the pre-civil condition between the agents which demand to refrain others from the external objects that they unilaterally consider as their own. The § 42 of the Doctrine of Right displays this transition which reason itself commands to perform to the human species:

From private right in the state of nature there proceeds the postulate of public right: when you cannot avoid living side by side with all others, you ought to leave the state of nature and proceed with them into a rightful condition, that is, a condition of distributive justice. – The ground of this postulate can be explicated analytically from the concept of *right* in external relations, in contrast with *violence* (*violentia*).⁵⁰

Human beings are forced to undergo an unchosen coexistence on the earth surface, which highlights what Flikschuh calls “interdependence claim”, the clue of Kant’s system of Right. Actually, interdependent juridical relations that states as moral agents and individual agents set up contribute to the architectonic feature of Right, as a system which touches individuals, states and the whole of human species. A famous text from *Perpetual Peace* emphasizes this incessant interdependence human beings go through living on earth:

Since the (narrower or wider) community of the nations of the earth has now gone so far that a violation of right on *one* place of the earth is felt in *all*, the idea of a cosmopolitan right is no fantastic and exaggerated way of representing right; it is, instead, a supplement to the unwritten code of the right of a state and the right of nations necessary for the sake of any public rights of human beings and so for perpetual peace; only under this condition can we flatter ourselves that we are constantly approaching perpetual peace.⁵¹

The foregoing arguments suggest that is reason which commands human beings to adopt Right as the grammar which rules and warranties the external coexistence of free choices. Such a claim does not imply that individual agents have no voice in Kant’s Doctrine of Right, but rather

⁴⁹ See Flikschuh (2011, p. 11). Cfr. Flikschuh (2000, pp. 144-178), chapter 5: “The general will and cosmopolitan Right”.

⁵⁰ DoR, § 42, AA 6: 307.

⁵¹ PP, AA 8:368.

that they are not supposed to uphold by themselves directly their interests. There is an irreducible gap between moral laws⁵² and the point of view of individual choice in Kant's political thought, as Flikschuh has essentially contributed to highlight. I would not support that Kant's Right is not concerned with topics as justice and fairness, social autonomy and citizenship. Yet I rather argue that only reason and its institutional embodiments – not properly a community of communication composed by individuals – are called to perform the fulfillment of Right on the earth. Is this Kantian approach compatible with the features of our complex social frameworks? This would be an interesting question to elucidate in a further paper.

References

- BRANDT, R. "Das Erlaubnisgesetz, oder: Vernunft und Geschichte in Kants Rechtslehre". In: _____ (ed.), *Rechtsphilosophie der Aufklärung*. Berlin: Walter de Gruyter, 1982.
- BYRD, B. S. and HRUSCHKA, J. *Kant's doctrine of right: a commentary*. Cambridge: Cambridge University Press, 2010.
- DENIS, L. (ed.) *Kant's metaphysics of morals: a critical guide*. Cambridge: Cambridge University Press, 2010.
- FLIKSCHUH, K. *Kant and modern political philosophy*. Cambridge: Cambridge University Press, 2000.
- FLIKSCHUH, K. "Kant's indemonstrable postulate of right: a response to Paul Guyer", *Kantian Review* 12.1 (2007): 1-39.
- _____. "Political obligation: property, peace and trade". In: W. Dudley and K. Engelhard (eds.), *Immanuel Kant: key concepts*. Durham: Acumen, 2011.
- _____. "Human rights in Kantian mode". In: R. Cruft, M. Liao and M. Renzo (eds.), *The philosophical foundations of human rights*. Oxford: Oxford University Press, 2014.

⁵² DoR, AA 6: 214: "In contrast to laws of nature, the laws of freedom are called *moral* laws. As directed merely to external actions and their conformity to law they are called *juridical* laws; but if they also require that they (the laws) themselves be the determining grounds of actions, they are ethical laws, and then one says that conformity with juridical laws is the *legality* of an action and conformity which ethical laws its *morality*". Cfr. Byrd and Hruschka (2010, p. 4): "'Morals' means mores or customs which are transcended by metaphysics. [...] Everything moral is thus part of metaphysics. A right is a moral category. Accordingly, rights are first cognizable when we place ourselves on the terrain of a metaphysics of morals. [...] The *homo phaenomenon* who is neither caged not tied is also externally free. External freedom can be perceived empirically, but internal freedom and the *right* to external freedom can be comprehended only within a metaphysics".

- GUYER, P. "Kantian foundations for liberalism", *Jahrbuch für Recht und Ethik* 5 (1997): 121-140.
- . "Kant's deduction in the principles of right". In: M. Timmons (ed.), *Kant's Metaphysics of Morals: interpretative essays*. Oxford: Oxford University Press, 2002.
- HÖFFE, O. "Kant's innate right as a rational criterion for human rights". In: L. Denis (ed.), *Kant's Metaphysics of Morals: a critical guide*. Cambridge: Cambridge University Press, 2010.
- KANT, I. *Gesammelte Werke*. Berlin: Preussische/Deutsche Akademie der Wissenschaften, 1902 ss.
- KERSTING, W. "Kant's concept of the state". In: H. L. Williams (ed.), *Essays on Kant's political philosophy*. Chicago: University of Chicago Press, 1992.
- KERSTING, W. "Kant e o problema da justiça social", *Veritas* 48.1 (2003): 121-136.
- LUDWIG, B. "Der Platz des rechtlichen Postulats der praktischen Vernunft innerhalb der Paragraphen 1-6 der Kantischen Rechtslehre". In: R. Brandt (ed.), *Rechtsphilosophie der Aufklärung*. Berlin: Walter de Gruyter, 1982.
- LUDWIG, B. "Kants Verabschiedung der Vertragstheorie — Konsequenzen für eine Theorie sozialer Gerechtigkeit", *Jahrbuch für Recht und Ethik / Annual Review of Law and Ethics* 1 (1993): 221-254.
- PINZANI, A. "Chi è il soggetto della *Dottrina del Diritto*?". In: V. Rocco and M. Sgarbi (eds.), *Diritto e storia in Kant e Hegel*. Trento: Verifiche, 2011.
- RIPSTEIN, A. *Force and freedom: Kant's legal and political philosophy*. Cambridge, Mass. Harvard University Press, 2009.
- TIMMONS, M. (ed.), *Kant's Metaphysics of Morals: interpretative essays*. Oxford: Oxford University Press, 2002.
- VARDEN, H. "Kant on dependency relations: Kant on the state's right to redistribute resources to protect the rights of dependents" *Dialogue* 45.2 (2006): 257-284.
- . "Kant's non-voluntarist conception of political obligations: why justice is impossible in the state of nature", *Kantian Review* 13.2 (2008): 1-45.
- . "Kant's non-absolutist conception of political legitimacy — how public right 'concludes' private right in the 'Doctrine of Right'", *Kant-Studien* 101 (2010): 331-351.

Abstract: The paper argues against the general liberal account of the main theses of Kant's *Rechtslehre*. I move from the tenet that according to Kant the duty to set up a civil state beyond a society has nothing to do with the pursuit of happiness carried out by all human beings, since the first one refers to a commandment of practical reason, which gives form to a duty that grounds the property rights. I will tackle *first* the meaning of the *lex permissiva* in Kant's *Rechtslehre*. *Secondly*, I will argue Flikschuh's interpretation of the indemonstrability of the postulate of public Right. *Third*, I will consider the function that general will fulfils in the system of Right, which only cosmopolitan Right could successfully top. I claim that cosmopolitan right belongs to the juridical duties which practical reason commands to the human species, what dissuades from considering it an emotional expression of human pursuit of justice.

Keywords: Kant, political philosophy, *lex permissiva*, public right, cosmopolitan right

Resumo: O artigo argumenta contra a leitura liberal geral das principais teses da *Rechtslehre* de Kant. O ponto de partida da argumentação é que segundo Kant o dever de estabelecer um Estado civil além de uma sociedade é completamente alheio à procura de felicidade levada a termo por todos os seres humanos, dado que se trata de um mandato da razão prática, que dá forma a um dever, que por sua vez fundamenta os direitos de propriedade. Ocupar-me-ei, *em primeiro lugar*, de analisar o significado da *lex permissiva* na *Rechtslehre*. *Em segundo lugar*, descreverei a interpretação de K. Flikschuh da indemostrabilidade do postulado do direito público. *Em terceiro e último lugar*, considerarei a função que a vontade geral desempenha no sistema do direito, que somente um direito cosmopolita poderia culminar. Sostenho que o direito cosmopolita pertence aos direitos jurídicos que a razão prática ordena à espécie humana, o que desaconselha considerar tal mandato como uma expressão emocional da procura humana de justiça.

Palavras-chave: Kant, filosofia política, *lex permissiva*, direito público, direito cosmopolita

Recebido em 01/08/2013; aprovado em 23/08/2013.