

Kant's apple: the moral grounding of right and the interdependence of ethics and law

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Introduction

Much has been discussed about the relationship of dependence or independence of the Kantian philosophy of right from his moral theory. Positions vary widely from one extreme to the other.

The strong independence thesis, or the absolute independence of right from morals, has been sustained amongst others by Allen Wood and Georg Geismann. The medium-independence thesis has been defended by Thomas Pogge in an attempt to differentiate Kantian philosophy of right from Rawlsian comprehensive liberalism. There is also the “non-conclusive” position of Arthur Ripstein regarding this dependence (he claims that the Principle of Right does not derive from the Categorical Imperative but is, notwithstanding, a legitimate extension of it). Finally there is the position of Otfried Höffe and Paul Guyer, which defends a strong dependence between right and morals, and states a deduction of the Principle of Right (PR) from the Categorical Imperative (CI) through the notion of freedom. I will base my defense on the discussion between Markus Willaschek and Gerhard Seel regarding this matter because their positions summarize many of the fundamental arguments used by both lines of thought¹, and I will refer to the other scholars' arguments when proposing my own defense of the dependence thesis.

One latter remark: it is interesting to outline that if the strong dependence thesis is proved to be correct it would be reasonable to expect a clarification of the kind of relation right and ethics hold with regard to each other. I will argue that defending the dependence thesis,

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¹ There exists a recent discussion on the matter of the derivability of Kantian right from the Categorical imperative between Michael Nance (2011) and Willaschek (2012). Although we will refer to Willaschek's response to Nance, we have decided to use as reference the texts on the Willaschek-Seel discussion because they are richer on content regarding this problematic, and also because Willaschek response to Nance reiterates the position stated in the former discussion paper.

the necessity of the CI to the legitimacy of right, leads to the defense of an interdependence relation of right and ethics, or of the two parts of the *Metaphysics of Morals*; a position that some of the defendants of the dependence thesis would not be in accordance with.

1. Willaschek versus Seel: the problem of Kant's apple

The question of the dependence or independence of Kantian philosophy of right from the moral imperative or from his moral theory (the derivability or non-derivability of the Kantian concept of right, or of the principle of right, from the categorical imperative and the normative independence or dependence of right from morality) is the core of the confrontation of Marcus Willaschek and Gerhard Seel on number 17 of the *International Journal of Philosophical Studies*. While Willaschek defends the independence thesis on the line of Pogge, Ripstein and Wood, Seel, together with Tretter and Oberer (amongst others), defends the strong dependence thesis.

In this paper I will defend the strong dependence thesis, but I will also argue that the arguments Seel presents are not enough, or conclusive, to defend this position.

The main argument in defense of the independence thesis seems to be the analytic nature of the principle of right and the definition of the law of right as a postulate. That is, the identity between right and coercion and the nature of the law of right are used as the basis to defend the various degrees of independence of right from the categorical imperative. On this line, several arguments are outlined by Willaschek that try to complement these theses, amongst others, the impossibility of there being a conflict between duties in the realm of right that is, however, possible in morals, or what I will call the problem of Kant's apple. On the other hand, Seel defends the dependence thesis through an argument *ad absurdum*, that is, by proving the falsity or wrongness of the previous thesis and arguing in favor of the dependability thesis as the only response available after his critique of Willaschek; but he does not offer a definitive or strong argument to defend the derivability of the principle of right from the categorical imperative. Seel also makes a series of affirmations that are at least controversial, such as the statement that the theory of wide duties is completely inconsistent with the Kantian conception of moral obligation.

Let me face, on the one hand, the arguments supplied by the independence thesis.

According to Willaschek, to prove the derivability of the PR from the CI we must be able to include the legitimacy of coercion in this derivation. Since coercion and the law of right are analytically linked, if the former cannot be proved to be derivable from the CI, neither could the latter. On a second attempt, he will try the opposite route, that is, to prove the legitimacy of coercion through the derivability of the PR from the CI. Finally, as I said before, he will defend the independence thesis through the exposition of the problem of Kant's apple.

Willaschek tries to prove the non-legitimacy of coercion by denying its derivability from the Kantian moral theory. He argues that neither the notion of moral autonomy, nor the end in itself formula or the universal formula of the CI are adequate basis from where to derive the legitimacy of coercion. The first, because the subject does not need coercion to maintain his moral autonomy²; the second, because, according to the author, to defend that Kantian right implies the possibility of legitimate coercion in order to further defend right as an end of rational beings requires to presuppose the legitimacy or validity of coercion linked analytically with the concept of right, and this seems to make the deduction logically invalid; the third, because considered as a universal formula, coercion would make the moral duties indistinguishable from juridical ones and hence from coercible duties, annihilating the very essence of morality.

After these arguments, Willaschek attempts to legitimate coercion retroactively, that is, by showing that the PR derives from CI and so that the PR would be the CI limited to the external use of freedom; he denies this possibility because it would make all external duties juridical ones.

Finally, he defends the independence thesis also through an argument that enlightens the difference between rights and morals on the basis of the possibility, or not, of allowing conflicting duties or, to say it in another way, to effectively limit rights. This last example, which we have called the problem of Kant's apple, is argued according to the following example: since it can be said of two individuals that they can have a moral right to eat an apple and attempt to do so, but only one of those have a juridical right to eat it, it follows that morality allows conflicting rights while this is not the case for right, which delimits

² This is highly debatable from two aspects: one is the very notion of human autonomy and the power exercised by the CI, understood as a coercive power; the other is the acknowledgment of the contradiction that supposes to act in a moral way in an environment adverse to morality, which it is followed by the very definition of what does it entails to fulfill a duty towards another. We will discuss both these points on the paper. It can also be argued, as we will see later, that this is one of the reasons at the basis of the duty to enter a civil state and the possibility to act morally in an environment that allows it.

exactly the right of one person by coercing the rest to respect it. I will discuss later this problem on the basis that the very notion of having a moral right to eat an apple, or to have a moral right to a specific empirical object, is a non-sense proposition.

When Seel argues with Willaschek he defends the dependence thesis, in the end, on the basis of the rejection of Willaschek's entire thesis. The problem is that in his attempt to deny some of the former thesis he makes some statements difficult to defend and of poor value in order to advocate for the dependence thesis. For example, he states that the law of right cannot be derived from the CI because no content can be derived from a non-content law, and so that, if there is a derivation, it has to be done through the test of the universal validity of the PR. This is why, when he argues against Willaschek's argument that there are some obligations that are specifically legal and other moral in nature, Seel tries to defend the thesis that the action prohibited by the CI and the PR are the same, and thus he states that there are no moral duties to act externally that are not at the same time juridical or legal duties. In doing so, Seel relegates the nature or role of the duties of virtue to an inconsistency within the Kantian system derived from his Christian legacy, instead of defending the most logical argument, which would be to argue that all juridical duties can be considered also ethical or of moral nature, and so defend the integration of the first into the second, showing that moral duties are of a wider nature and include amongst them the juridical ones. That is, he does not argue the notion of duty Willaschek is using, but his argument leads to a misunderstanding, declaring that duties of virtue are not duties properly speaking (we will see later that this is not the case).

When arguing about the impossibility of conflicting rights with Willaschek, he also offers an argument that is not correct, and so does not contribute to the defence of the dependence thesis.

Finally, when arguing about the problem of Kant's apple, or the question concerning the possibility of two persons having the moral right to eat an apple but not the legal right to do it, Seel tries to refute Willaschek's argument denying that the proposition that allows two persons to have the moral right to an apple could pass the universality test. This is another example that does not touch the core of the problem, unlike arguing that to have a moral right to eat an apple makes no sense according to Kantian moral theory.

In the end, and after refuting the validity of the independence thesis through this analytic strategy, Seel defends the dependency thesis on the basis that no other possible foundation is available in the Kantian

theory, and discusses the notion of practical reason as a grounding concept for the PR on the basis that it is not clear what this reason is, if not the moral capacity under the law of morality, nor the moral nature of men. He also discusses the solution given by Ebbinghaus and Geisman, who base the independence thesis on the conviction that the doctrine of right can be sufficient on the basis of hypothetical imperatives, arguing that the authors confound motivation with justification. While it is true, in this latter case, that both arguments are correct, they do not help much in order to provide a positive argument for the dependence thesis. They are arguments of the type “until someone can prove these theses to be incorrect, the PR can be said to be founded on the CI”, but they do not provide a convincing explanation for the dependence thesis.

I will try to defend that the PR is grounded and depends on the CI. I will do this through a linear and simple argument: the derivation of the notion of coercion from the CI, by using the notion of self-coercion, external freedom and universal will as key concepts of that deduction. This way, I will try to oppose the two stronger arguments the defendants of the independence thesis use to prove the non-derivability of the PR from the CI: the analytic nature of the PR regarding coercion and the nature of postulate of the law of right.

2. Defending the dependence thesis: on the legitimacy to use coercion

To defend the dependence thesis I will focus on a single argument. Following the direction of Paul Guyer’s analysis, I will defend that the analytic nature of the PR is one that does not preclude a deduction, and that the nature of postulate of the law of right does presuppose in fact the existence of some concept to which it serves as a guarantee proposition, on account of a practical necessity and so unfit in order to deny derivability of the PR from the CI.

Guyer defends the dependence of right from morality by showing how the PR derives its validity from the concept of freedom. He says that even if it is true that the PR cannot be derived from the CI because the second forces to act according to maxims, and the former according to actions, the PR can still be proven to be derived from the concept of freedom, and he shows this by proving that both the analytic nature of the PR and the nature of postulate of the law of right presuppose in fact the notion of freedom, and also by defending that the system of rights and coercion promote the freedom of every subject. I will extend

Guyer's argument in some ways. I will attempt a justification of the dependence thesis through an explanation of the fundamental link that exists between freedom and coercion, through the explanation of the notion of external freedom and the postulate that grounds it, and through the exhibition of what does it mean for an external action to be in accordance with the CI, and how this explains the nature of the postulate of the law of right. In doing so, I can defend that the PR is deduced from the CI as far as the first one is just the reformulation of the notion of external freedom under the form of an imperative that supposes the maxim of the subject as the maxim of a universal will or third individual: the sovereign.

3. External freedom or the universal validity of coercion

It is interesting, at this point, to recall the structure of the action in the Kantian philosophy and the fact that every maxim has an object³; that in every action there is an end that has also to conform to the CI in order to be considered good or according to morality. This is not something new in Kant's practical philosophy, but corresponds to his notion of an object of practical reason as defined in the second Critique (KpV, AA 05: 57), and is one of the keys of the notion of external freedom, and of the grounding of right and the state in Kantian philosophy.

We will use the following Kantian definition of external freedom: "the faculty to act or omit, to make use of an object of my choice" (Refl, AA 19: 232)⁴. External freedom so considered, the right to make use of an object of my choice is the expression of the human need to use means in order to obtain ends; human happiness and perfection are reached, amongst other things, also through the possession, interchange and manipulation of objects of the external world. It is the other face of freedom, or the consideration of freedom as an act in the empirical or sensorial world.

When acting according to the CI we are not only acting in accordance with a universal maxim, we are also pursuing an end or object that has passed the test of universality. The object of the action

³ A propos the object of the action and its importance in the *MS* see Marie Gregor (Gregor, 1988).

⁴ We use this notion of freedom in the external use of will from Kant's definition of right (*facultas moralis generatim*) as appears in the Observations on Moral Philosophy, concretely the 7039 (Refl, AA 19, p. 232, Pr 32, above and in § 67). This observation is dated around 1776-1778, written even before the publication of the first Critique. A definition that, despite its distance on time, agrees with the non-systematic one given by Kant at the § 2 of the Doctrine of Right. We use it here because of its simplicity and systematic character, together with its correspondence, both in terms and intentions, with the notion of an external freedom in the latter Kantian philosophy.

here can be a right, mine or another's, or an actual object or thing. Every action has an object, and every action can be judged according to the maxim of the action and also according to the object the action pursues. Both elements are part of human morality, intention and the objects or means we use to pursue our ends as free and moral subjects.

In the Introduction of the Doctrine of Right Kant divides rights into two types. Point 2 in paragraph B specifies rights as capacities while 1 divides right into natural or positive according to doctrine. According to the capacities, we divide rights into what is mine or yours, internally and externally; that is, what is originally mine or an innate right and what is mine through acquisition or acquired right. These two kinds of rights are defined as moral capacities for putting others under obligation, and while the first belong to everyone by nature, the second rights, the acquired, require of an act that establishes properly the right.

If external freedom is defined as above, then I have a right to do or omit that would correspond with innate right, and a right to use an object of my choice that would correspond with the second type of rights. When speaking about external freedom, then, we are speaking about the action that follows from the ability of freedom, and this is, a priori, non-pathologically determined.

The Doctrine of Right, however, has as its proper object the second kind of rights or acquired rights (MS, AA 06, p. 238) — even if in the end it will also secure the rights that are considered innate. These acquired rights refer to what is externally mine or yours, the objects of my action and the capacity to make use of an object of my choice, and the Doctrine of Right establishes the motive for the compliance with the duty that follows from these rights, as an external motive or coercion, including the pathological motive. Does this mean that coercion in general, and the pathological one in particular, is something that comes out of the blue and independent of any moral consideration?

There exist two kinds of pathological coercion that we can find inside the realm of the legal or juridical: the external moral coercion and the properly pathological⁵ or strictly legal coercion. Both type of rights mentioned above, whichever the source of juridical duties and contrary to the duties of virtue, allow (at least) an external moral coercion. (MS, AA 06, p. 383)⁶.

⁵ What differentiates the external moral coercion from the strictly juridical one is that the last one is accompanied by legal punishment, while the first one attends to the logical reasoning or even to the feeling of the subject.

⁶ “What essentially distinguishes a duty of virtue from a duty of right is that external constraint to the latter kind of duty is morally possible, whereas the former is based only on free self-

The important issue is the element of coercion understood as the imposition of another's will. This is the key of the juridical duties, but we can ask ourselves if coercion as a broad notion is exclusive of duties of right.

According to Kant, obligations (external and internal) are divided into moral or legal, according to the cause or motive of its fulfillment. If it is duty, then the obligation is moral, if it is the will of another, then it is legal; "obligations whose motive (motivation) are subjective or internal are ethical. Those whose motive are objective or external are strictly juridical" (V-Mo/Collins, AA 27, p. 271). So external moral coercion and legal coercion are both modes to enforce a juridical or legal obligation.

This does not mean there is no such thing as coercion for ethical duties; the very notion of duty, in fact, implies coercion over the subject. If the problem with the derivability of the PR from the CI is that the latter would not accept coercion while the former would be analytically linked with it, then it can be argued that already at the level of the moral imperative the human being faces constraint or coercion. Because we are free, we obey the CI, that is, we are compelled or coerced to obey it, but this coercion is self-coercion or self-constraint (MS, AA 06, pp. 381-394). But this does not mean that the very notion of freedom does not imply an always forced obedience from the subject (MS, AA 06, p. 223). Moral self-coercion — self-constraint, internal but intellectual constraint (KpV, AA 05, p. 33) — is a kind of coercion that is rational, in the sense that it ultimately results in respect from the subject and compliance with the law from it. In any case, and as Kant states: "All duties involve a concept of constraint through a law" (MS, AA 06, p. 395). In the exercise of self-constraint the subject can be viewed as two persons, and it can be argued that — similar to the process in which a subject gives a duty to himself (MS, AA 06, p. 417), which let us remember, is the basis of the notion of every duty, even of the external ones (MS, AA 06, pp. 417-8) — the CI contemplates the right of one subject to limit the freedom of the other subject. This does not mean that self-constraint is the exact equivalent of a *facultas iuridica*, as understood in the Doctrine of Virtue (MS, AA 06, p. 383), but that my personality allows a

constraint". The possibility to use a moral coercion in the realm of the juridical obligations was preannounced by Kant at his Lectures on Ethics (V-Mo/Collins, AA 27, p. 267). Moral coercion is the first or warning action between two subjects inside the realm of law. External moral coercion is considered to turn the action it enforces into legal or juridical, provided I comply with an obligation because of the other's will or desire, because I am convinced by the other's argument through logic or feeling, and not because I give an absolute value to the action or regard it as an ethical duty.

determination of the free choice, a *necessitation*, which entails a kind of coercion. So it would not be incorrect to state that in every case the obligation is accompanied by coercion, mine or others', moral or legal, from rational motives or pathological ones.

The Doctrine of Right in its general formula implies in theory both pathological and external moral coercion. This is why Kant refers also to the maxim of action (besides the action) when defining what a right action is. In the paragraph that follows, when speaking about right and its analytical connection with coercion, he does not speak neither of a pathological coercion, but of coercion in a broad sense. So, the problem is not the analytic link between right and coercion or freedom and coercion. When differentiating between the principle of right and that of virtue, the key to distinguish their analytic or synthetic nature is not the element of coercion, but the notion of end, which is the element that is added to the concept of a moral imperative from which only a duty of right arises (MS, AA 06, p. 396). Coercion or self-constraint is then always analytically linked with the notion of freedom as that which opposes what opposes it. As we will see, the problem of right and its relation with morality remains in the adjective pathological.

4. The moral legitimacy of pathological coercion inside the realm of law

When Willaschek defended the independence thesis he argued that since the CI does not allow coercion, then the PR is not derived from it. We have seen that the CI does allow a kind of coercion, the self-constraint. We will further argue that the kind of coercion that is analytically linked with the notion of external freedom is one that is in accordance with the CI and that can be somehow derived from it.

Strict Right, or the positive one, refers to external freedom and will ultimately cover both innate and acquired rights, but the motive of its compliance is only pathological.

The question here is to defend that the kind of coercion exercised by strict right, pathological coercion, is not only in accordance with morality but that it can be deduced from the anatomy of human action and made to coincide with a will that follows the CI, since the proper coercion of the CI is the self-constraint, or moral one.

In order to show how this is possible let me expose the kind of external freedom the doctrine of right is committed to protect and how it propels the need to create the civil state or the juridical system.

Let us remember the juridical postulate of practical reason. This postulate is related to the objects that are properly speaking the content of the doctrine of right, that is, to the external mine or yours:

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 come a law, an object of choice would *in itself* (objectively) have to *belong to no one* (*res nullius*) is contrary to rights.

For an object of my choice is something that I have the *physical* power to use. If it were nevertheless absolutely not within my *rightful* power to make use of it, that is, if the use of it could not coexist with the freedom of everyone in accordance with a universal law (would be wrong), then freedom would be depriving itself of the use of its choice with regard to an object of choice, by putting *usable* objects beyond any possibility of being used [...] But since pure practical reason lays down only formal laws as the basis for using choice and thus abstracts from its matter, that is, from other properties of the object *provided that it is an object of choice*, it can contain no absolute prohibition against using such an object, since this would be a contradiction of **outer freedom** with itself.[...] It is therefore an a priori presupposition of practical reason to regard and treat any object of my choice as something which could be objectively mine or yours.

This postulate can be called a permissive law (*lex permissiva*) of practical reason, which gives us and authorization that could not be got from mere concepts of rights 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 our 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. (MS, AA 06, pp. 246-247)⁷

There are three types of objects that can be externally mine or yours, that can be objects of my choice: a thing, another's choice and another 'status' in relation to me. These things become owned or acquired through and only through contract. In the case of owning things, it is possible to have an original right to a thing, but to really have it or own it implies a contract inside the constraint of a system of law or civil state.

The ownership of a thing, as far as it can be done originally, is the most basic form of property and one which explains and justifies, besides compelling, the creation of a system of right.

Since things are for Kant universally owned (*communio fundi originaria*) each act of appropriation needs of the universal consent to make it a legal or rightful appropriation, and so requires of the institution that can represent this universal will to convert the object of empirical

⁷ Bold is by the author.

possession into an object of real or *noumenal* possession. Only under a universal and impartial justice (distributive justice) can that which is mine and yours be decided; only under a system that respects the original right everybody has to own things as means to ends, and that can work as the representation of the universal will allowed to confer to each individual property, is it possible to have something mine in a juridical sense, in a just way. This is why this proposition or principle of practical reason is a postulate: a proposition that permits to make the sensible or external action of the subject something that can be defined as free.

A proposition that cannot be proved theoretically but that functions in relation to an interest of reason (it is necessary to make sense of an object or end of practical reason) is a postulate (KpV, AA 05, p. 122). This is the case of the notion of external freedom, which is not apt to be proven theoretically. I have to suppose the possibility to have as mine objects of choice that are external because this way I define the external realm or ambit of freedom. Property allows the subject to fulfill freedom in the external world in the sense that objects are means to ends that a free subject pursues. This delimitation of what it means to have external freedom allows an exercise compatible with universal laws and the notion of humanity that is at the base of the concept of freedom.

Ownership, or the capacity to make use of an object of my choice is an action that requires the universal consent of the others; it requires the system of right that is in accordance with the moral nature of the subject. If, for example, Kant were in agreement with Locke, with Achenwall, Wolff or with the Roman tradition of civil law, and everything were, as it is according to those, originally *res nullius*, then the right that would follow from it would be one based on pathological or contingent reasons, such as a system in which ownership is based in a physical capacity to work or to dominate. This way, property is a notion based on humanity, and so the system of right that follows is one based on the equal capacity to own or to be free, on the concept of external freedom.

Juridical laws or positive laws prevent violations or actions that violate the right to property regarding any of the three types of objects that can be acquired. Every action that goes against these rights or that, on the other hand, tries to convert something that is not one of these objects into a possession, would also be punished. This is how law or right defends liberty in a broad sense, by defending properly and strictly the right to own and the rights acquired through contract, through a strict

delimitation of the objects of choice necessary for the human being to pursue ends.⁸

Internal freedom and its security, the inner and original right of every human being, is secured also through the establishment of a legislation that, by securing the rights that derive from contracts (or the rights of ownership) secures also what is not an object of choice and cannot be acted against. The meaning of “the faculty to act or omit” expresses the right of my inner freedom to be respected, but this is done through the delimitation of what an object of my choice or my use is. So, internal freedom becomes the object of positive right only when external freedom becomes the ground of right and the reason for the establishment of the civil state. The original or innate right becomes an “as if an acquired right” inside the civil state that secures the subject’s correct way of acting through the delimitation of things that is possible to own and things that are not possible to own, securing for the subject a space of autonomy that is an expression of his morality and of his need to pursue his own ends freely. A freedom secured, now, by pathological coercion.⁹

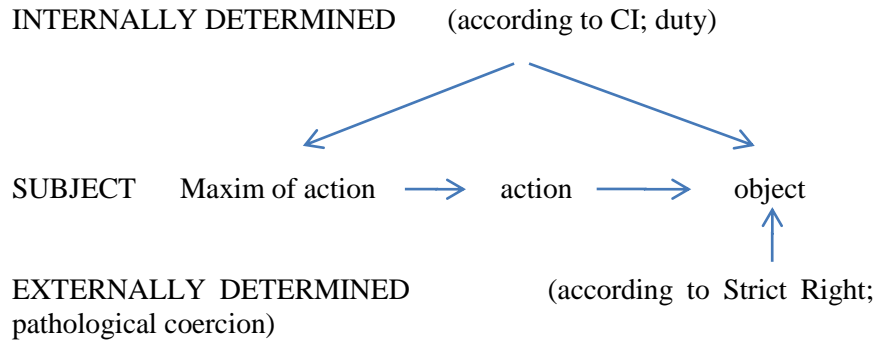
Being things so, we could say that there is a correct way of using external objects that is in accordance with the universality that corresponds with humanity, and this correct use is granted and secured by right.

As said before, if every action has an end as an object, we could say that the maxim of the action includes the object as the material of the action, and that basically both are judged when the maxim of the action that is a means to an end is judged by the CI formula. If we want the maxim and we want the end then we also want the action that follows the maxim and produces the end. In the agency process, and since the end of the action cannot be determined or chosen but by the very agent, it (and the maxim that has it as aim) can be determined only internally; however, the action performing the end can be determined also

⁸ See Helga Varden (Varden, 2011) and Louis Philippe Hodgson (Hodgson, 2010) on the explanation of the duty to enter a civil state as the only institution able to satisfy the right to property, and so of securing external freedom and compliance with contracts. I am not in agreement, however, with the complete separation Varden establishes between right and morality when considering the type of motivation needed in order to make a civil state a functional one.

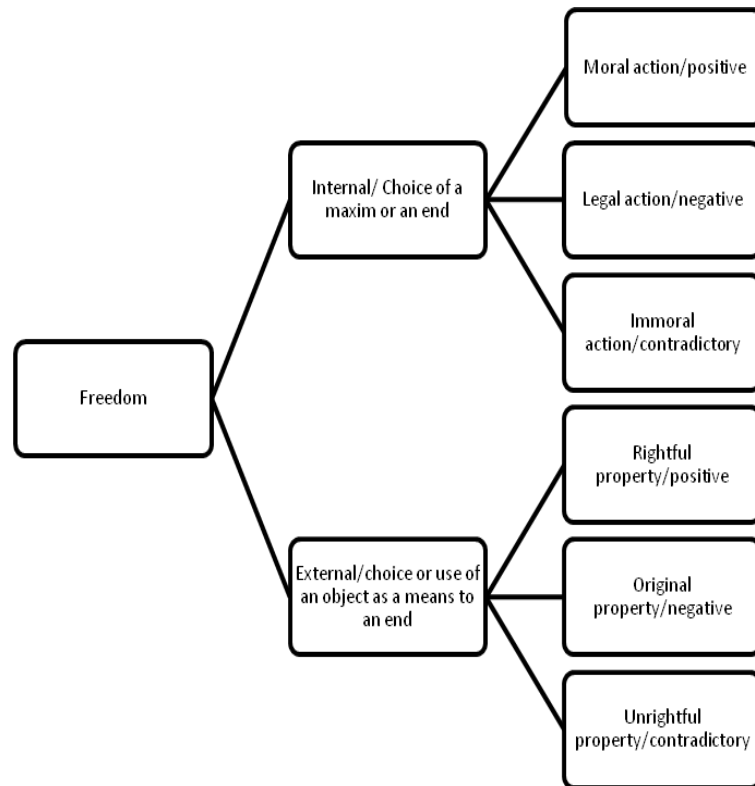
⁹ So, it is not adequate to derive the rights inside the civil state from the general formula of freedom, as Byrd and Hruschka (Byrd & Hruschka, 2010) do, but from the notion of an external freedom and the possibility of its universal use. The right to bodily integrity, the right to equal treatment under the law, of legal independence, of presumed innocence and of freedom of expression, are moral rights in themselves, deriving from the general notion of freedom and originally related to the CI; but only when external freedom compels to the creation of a system of right do they become legal rights, positive rights secured through pathological coercion.

externally. Internal determination or auto-coercion is determination by the CI and so a determination by duty; external determination is a determination by another element different from duty, that is, in the positive legal case, a determination by a pathological element. We can see it in an illustration here:



Now, if we want pathology to be at the service of morality, or if we want pathology to be in accordance or grounded on the basis of the CI, then we have to define not just the freedom that pathology can serve to preserve, which is obviously external freedom, but its coincidence with a free will, its derivability from a will which acts out of duty.

Since freedom can only be determined internally, the only way to secure an external system of action universally acceptable would be to instantiate a universal will that represents the will of every subject and to secure and define through this will what passes as a correct action inside the realm of the positive law. We present here a figure that illustrates the way an action is done out of freedom and that represents its positive, negative, or contrary character, according to its conformation with the universal principle that corresponds with each realm of action (CI, PR respectively).



As well as in the case of internal freedom, we have here a negative and a positive notion of external freedom. The general understanding of negative freedom has here been divided into two further notions: what we call negative freedom, or to act independently from pathological motives but not in contradiction with the law, and what we have called contradictory freedom, or to act independently from pathological motives but in opposition or against the law. So, in the case of internal freedom, negative freedom consist broadly in the capacity to act independently from pathological motives, and the positive one is the capacity to act in accordance with the categorical imperative. In the case of external freedom, accordance of the external action to the categorical imperative would be something like “take as yours only that which can be so universally accepted”, which could be considered another formulation of the PR. Anything that is universally accepted or judged as yours can be only done under the conditions of distributive justice or the civil state. Inside the civil state, the appropriation or possession of means

to ends are determined universally, by a universal judge or reason, the reason of the sovereign, an external author or authority different by the subject that possesses and has ends.

So, external freedom, or the capacity to use things as means for ends is only fully accomplished inside the civil state and determined by a subject that is not the individual one. When the subject acts out of duty he acts out of self-constraint, which is analytically linked to the moral law and the notion of inner freedom. When the subject acts in contradiction to the law of right, apart from the moral punishment, he acts contrary to the notion of external freedom, and the kind of coercion linked analytically with this freedom is external coercion, the pathological one, the legal punishment or penalty, because no one can determine the will of another, but only his action. This is how right becomes one with pathological coercion through the notion of external freedom and a universal law that is the expression of the compatibility of external action with the external freedom of every subject.

If the conscience or the internal judge of the subject is the one that determines and imparts justice, and does so through the intellectual determination of the action, the sovereign is the subject that imparts justice through pathological coercion. Both subjects are authorized to use coercion as a hindrance of hindrance of their respective freedoms, according both to the CI and the PR; and both subjects, the individual acting out of duty and the sovereign that establishes the fair or just law in accordance with external freedom, act inside the realm of ethics.

The pathological coercion of right is then coercion that corresponds to a notion of external freedom, and the coercion here follows or is deduced from what is considered to be an external freedom that is in accordance with a universal law of freedom, in a positive way.

Kant states:

Thus the universal law of right, so act externally that the free use of your choice can coexist with the freedom of everyone in accordance with a universal law, is indeed a law that lays an 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 in conformity with the idea of it and that may also be actively limited by others; and it says this as a postulate that is incapable of further proof. (MS, AA 06, p. 231)

What he is saying here is not more and not less than there is a universal will, or the will of a governor, in accordance to whom every law is dictated and that is necessary to ground the object here at issue: the very system of right (and the peace that would follow from it). As in

the case of the postulate of practical reason, this law serves to make sense of an object of freedom, the sensible realm of external freedom that is in accordance with universality: right. If external freedom has to be presupposed theoretically and is presented through the postulate of practical reason, its universal configuration, or its social configuration under conditions of universality, is presented by this postulate, the law of right. The will of the governor is here the law of right, the will that acts out of the law, whose maxim and ends are determined by this universal law of external freedom, and the one who has the capacity to determine the action of the single subject that lives under the law of right acting out of his private motivations. Laws are the expression of this will, as is the coercion linked with them, and both have as its basis the ethical notion of freedom that is in accordance with a universal law and that the sovereign imposes himself as the end of his legislating.

It is important to notice that the fact that the PR does not require the subject to accomplish the action by the sake of the law is just a consequence of the sphere of freedom which this principle is due to protect. Even so, this principle is “constructed” so as to respect the origin and end of an action that it converts into an object (end) that is in accordance to morality¹⁰, while at the same time it secures or respects the internal freedom of the subject. So, through pathological coercion, the PR makes the action of the single subject be in accordance with the universal will or the will of the sovereign, whose maxims and ends are determined by the universal law of right or the categorical imperative of external freedom. He, the sovereign, or the laws understood as an expression of his will, makes sure that the realm of external and thus also of internal freedom are safe and respected, as would be if every subject would act out of duty (moral or legal).

One last remark can be made in this discussion: not only is this pathological coercion compatible or deductible from the CI (when considered with regard to external freedom), but it is also a moral duty for the subject to establish a system of right secured by this pathological coercion. According to *The Metaphysics of Morals* (AA 06, pp. 417-8) and *Kant's Lectures on Ethics*, duties towards oneself “are the condition under which the second duties (duties towards the other) have to be obeyed” (V-Mo/Collins, AA 27, pp. 341-342), and he describes external

¹⁰ It does not matter which one is the maxim or end of the single individual, but that the legal determination of the action makes of them a maxim and object that are in accordance with morality; at least in the sense that prevents them from being in contradiction with the principle of right and so with the categorical imperative.

obligations (including juridical obligations) and their relation with regard to internal obligations as follows:

External *obligationes* are larger than internal, since external *obligationes* are, at the same time, internal, but not on the contrary. The *obligatio externa* already presupposes that the actions are placed under morality, and therefore, is internal; the *obligation externa* is consequently an obligation, since the action is already *interne* an obligation. For, because of the fact that the action is a duty, this constitutes an internal obligation, but since I can always constraint the other to fulfill this duty, then it is also an *obligation externa*. (V-Mo/Collins, pp. 270-1)

This means that juridical duties already entail an ethical duty, and specifically a duty toward oneself that is joined to the juridical duty towards another, in the sense that the latter implies already the obligation to defend my own rights against everyone. Performing a duty towards another, in a broad sense (moral or legal) implies the ability to refrain the other from harming my very same right. So coercion and freedom, moral or legal, self-restraint, external moral coercion and pathological coercion, imply one another. I have a duty towards myself to defend the right I have the obligation to fulfill towards another. The ethical duty compels the subject to create a state of law, a system of rights, able to defend and secure my rights, external and also internal ones, with the aid of coercion; a coercion that is pathological in the realm of positive law. This is the sense of the Ulpian duties, which can be defined as ethical duties founder of the public law or civil state.

So we can object Willaschek's statement that the subject can maintain his moral autonomy independently from coercion. From the very definition of a duty towards another we could infer that coercion is not only compatible and derivable from the CI, but that it is also a moral duty to construct a system of right that, through coercion, can secure a rational exercise of morality, or an exercise of morality that is not fundamentally detrimental to the subject.¹¹

5. The problem of Kant's apple

Let me consider some of the arguments stated in order to defend both the independence and dependence thesis. Willaschek stated that coercion is not necessary for morality. We have seen that coercion is a

¹¹ As a consequence of this and also on the conviction of the strong interdependence between rights and ethics we are on a general agreement with Christine Kosgaard (Kosgaard, 2008) and her statement than when a government does not respect human rights then there exist a moral right or a duty of virtue that allows, contrary to the duties of law, revolution.

part of morality and that external duties include internal duties or duties to oneself; so, to perform a duty towards another implies to defend a right toward oneself, and it can be argued then that this is the case also with legal obligations. Consequently, coercion or the guarantee of compliance of legal duties is something that is required by morality as part of the fulfilling of our internal obligations, and this is why to state a realm of law is a moral duty. The two further objections stated by Willaschek both refer to the nature of coercion and its legitimacy and can be refused also on the basis that coercion is a part of every obligation, be it moral or legal, since to be free for a human being is to be forced to comply with an obligation.

Seel's defense of the dependence thesis is based on some erroneous notions, such as the affirmation that legal and moral duties are identical and that duties of virtue are not strictly speaking duties (we will discuss this affirmation on the next point), or that there is no alternative to the CI in order to ground the PR, for which he does not give a proper content or explanation, as we have tried to offer here. In the end, however, we agree on the fact that to ground right in something called practical reason, as the independence supporters do, is vague and does not explain how this reason is different in the end from the CI.

The only problem that could remain in this moral grounding of right is the possibility of arguing against the dependence thesis on the basis that the specificity of right allows no conflict of duties while this is not correct in the case of the morality. That is, even if we can derive the PR from the CI and ground this derivation on the notion of external freedom, there exists still the possibility of defending a relative independence on account of the limitation on the sphere of action that the pathological coercion establishes. Once it has been shown how the PR follows from the CI, and how pathological coercion is legitimized on a moral basis, this problem might seem irrelevant. However, it can be used to defend a fundamental aspect of right that seems to be independent of its moral foundation.

This is the key to the problem of Kant's apple. The fundamental affirmation of Kant that there exists no such thing as the conflict of duties in the moral realm (and so no conflict of rights), but only a subjective conflict of maxims (MS, AA 06, p. 224) should give us the key and solution to this discussion. I will follow it in order to specify the incorrectness of this conflict of moral rights. When confronted with this problem both authors made the following statement: "every person has a moral right to an apple", which for them meant the moral right to eat it, or, in the end, a moral right to possess it.

A person has a right to own things that follow from its freedom, specifically from its external freedom as the capacity that permits the subject to pursue ends through means. This capacity to propose and pursue ends defines the very notion of humanity (KpV, AA 05, pp. 430-2). But, and here is the key idea, there is not such a thing as a moral right to an apple.

The general right to own a thing becomes a juridical right the moment a concrete object is pursued or taken, the moment a concrete object becomes a problem for the universal community of men. It is then that the universal consent is required and, with it, the establishment of a system of rights able to define precisely which object corresponds to what subject with mathematical precision. There cannot be a conflict of moral rights regarding a concrete object; this can be only a juridical problem, never a moral one. Do I have a moral right to possess? Of course, it is stated by the postulate of practical reason in order to give sense to the notion of a right that is in accordance with the concept of humanity, or freedom and the CI. Do I have a moral right to a concrete object? No. When freedom is related to a specific object of possession we are speaking about a legal or juridical right. The exercise of external freedom, the right to possess, is the grounding moral proposition of the civil state and the system of right, and when referring to a concrete action it speaks about a legal right. So while the capacity to possess is a moral one, the possession of a thing is always a juridical one. When the moral action becomes a concrete action in the sensorial world it can be considered to be related or not with an object of choice. Both these realms are limited by right, which specifies legal rights and the space of moral action or the concrete action that is not related with possession. But when the action has to do with a concrete thing or object of my choice it becomes automatically a legal right.

So there is not such thing as a conflict of rights or a lack of non-definition or conflicting rights in the case of the moral rights, and less so when speaking about the example of an apple which is not an object of morality. And neither is it the case to try to defend the non-conflictive nature of a moral right to a concrete thing when there is not such a right in Kantian philosophy.

If we want to speak about injustices inside the realm of law, for example, when an individual has 100 apples and another has got none, we do it in this juridical sense. Since according to the grounding principle of the state, everybody is a proprietor and what is mine and yours should be something that could be validated by a universal will, then the mentioned situation would be an unjust one. Possession is the

matter of right, not of morals, so while there is a moral right to possess, there is no moral right to possess a concrete thing; and if an injustice is done it has to be the scope of the law which corrects it; and it is a duty of the state to secure the life and well-being of every subject in a state of factual injustice, like through taxes or specific social measures, because it is grounded on the basis of a universal community of proprietors and has to respect the basis of the pact and the moral nature of its subjects.¹²

Could we add something else in order to make stronger the dependence thesis? I think it is possible to argue for further dependence or interdependence between right and morals if the *Metaphysics of Morals* was considered a complete work, consisting of two parts that complement one another. Not only are right and its principle derived from morals, but right is not possible without ethics or virtue. It can be argued that a minimum grade or exercise of virtue is required for right to exist and subsist, and some kind of virtue can also be considered necessary for right to improve or supersede its positive forms.

6. The role of virtue inside the realm of right

As Willaschek himself noted on one of his contributions to the independence thesis:

In real life, juridical laws and duties are typically not considered in isolation from ethical considerations in the Kantian sense. After all we *do* demand, and often expect, ourselves and others to obey the law 'even when no coercion must be feared', which, according to Kant, is an ethical duty, not a juridical one (6, p. 220). Could this be the key to a dissolution of our paradox? (Willaschek, 2002, p. 86)

He made this affirmation a propos his defense that the prescriptive character of the juridical laws can be accepted, but only if considered from the ethical perspective.

The reality is that not only the prescriptive character, but also the very existence of right is dependent on ethics in a way that makes both parts of the MS a whole doctrine.

For example, the perfect duties of the Doctrine of Virtue (MS, AA 06, pp. 422-44, 462-9) can be understood, on the one hand, as the actions that pursue those ends that are proposed as duties necessary for humanity, provided it pretends to reach the objective of a good will; but,

¹² See Kristian Kühl (2009) and his defense of a notion of equality in the Kantian theory of right that is not just formal but also material. I think his conclusion about the duties of the state can be extended to include an actual right of possession for every citizen of the world that would secure his active status within society; but this discussion goes beyond the scope of this paper.

on the other hand, and regarding the very existence of law, they can be also understood as duties necessary to pursue if this former task is pretended to be conducted in the world—in empirical conditions that allow this exercise. The ends that these duties command are necessary if a society of right is to be possible.

Perfect duties of virtue assure that the conditions of existence of a juridical society are given. All the vices they forbid are those who prevent the establishment of contracts, which break the ones existent or which degrade the contracting parts by turning them into subjects of no-pacts. These duties also forbid, in the case of the vice of lying, the gesture that prevents the very arrangement of a contract or pact; the gesture that would go against the human communication that lies at the basis of every society. If it is true that in order to fulfill a law or juridical duty virtue is not necessary, this is not true for law to exist and persist. There are some actions that cannot be legally punished but that are against the very existence of a law society; actions that prevent or erode the state of law and the forbiddance of which is the condition of possibility for the exercise of a law that requires of no virtue for its everyday validity.

These duties, so considered, suppose the logic contrary to the cases that express the necessity right (*Ius necessitatis*) (MS, AA 06, pp. 235-6): actions that cannot be punished because the result of accomplishing an action of this kind is exactly the same penalty that follows its non- accomplishment, and so the subject has a right to avoid the duty which the law would state in these cases. In the case of perfect duties of virtue, we find duties that cannot be punished according to a similar contradiction; death cannot be the penalty for men who wish death when life is the basis of the contract that founds the state and makes it forbid killing. The state cannot punish a man with its disqualification to state pacts when the state grounds law with a pact with all men. They are then duties that, in the case of being forced by law, this would suppose a contradiction with the very conditions of possibility of the state. But, contrary to the former duties, they give rise to a requirement instead of a right. Instead of establishing a right of necessity they establish a duty of necessity, of juridical relevance.

In the case of the improvement of the forms of law, or what could be called the internal *Aufhebung* of law, I will defend that this is neither possible but as a moral action, by the exercise of imperfect duties (MS, AA 06, pp. 444-57) that are destined to the improvement of a reality in its non-adequacy to its constituent principle. Imperfect duties, besides their contribution to the tasks of obtaining a good will, have as their aim

(when considered in their relationship with law) the attainment of an authentic common property or a society of equals, of active citizens; societies in which each and every one of its members is a proprietor or master of himself, and so, capable of participating in the making of decisions and in the selection of ends that compete to a community of free and equal subjects.

Imperfect duties transform actual conditions into better ones. If this is clear in its exclusively moral significance, it has also consequences due to their contribution to the existent conditions of law. Imperfect duties are obligations that contribute to the acknowledgement, not of what we own to each other as citizens, but before being citizens, and can comprise in this debt what is owned to every subject understood as original proprietor of a common land. The Doctrine of Virtue takes charge of the situation of those subjects that, because of factual conditions, do not enjoy the same statute of freedom inside the legal state than outside it. These duties perform their task by commanding determinate obligations the aim of which aim is to acknowledge an external freedom considered from general ethics, not subjected to positive legal constrictions that are indifferent to inequalities between men. These duties work as an example of the actions that should be desirably regulated by law, even if they are not legal actions by nature.

So, considered under this aspect, imperfect duties to oneself — ordering the development of human dispositions — contribute, not just to the maintenance of the subject as an active member of society, but to the achievement of the active statute and the behavior according to it; they command the subject to contribute to the proposal of ends that define the whole society factually and its development in time. This is possible through the inclusion of the subject as an active member of society, capable of deciding actively on the ends to which society commits itself, and to transform these into a matter of legislation (AA 06, pp. 445-6).

Imperfect duties to the others (also under this consideration) pursue the aim of equality inside the civil state. The duties of beneficence, gratitude and sympathy imply the consideration of all subjects as equals. They impel, indirectly, to make of this morally based universal relationship of equality one that has its reflection on the factual terrain. They contribute, not only to the maintenance of a civil society in what can be considered its structural terms, but to its very change in what concerns legal and institutional terms. In the case, for example, of the beneficence duty, subjects take charge of all the other subjects from a perspective that implies an understanding of the acts of the state destined

to the maintenance of its members (as is between others taxation) as fair actions, but also as actions of a corrective character that have to be superseded. Virtuous imperfect duties are actions that acknowledge a law according to morality and also the dignity of all human beings. Its exercise implies a re-acknowledgement of the worst-off subjects inside the civil state that makes them appear as subjects-cause of a necessary change.

The obligations ordered by the imperfect duties imply the admittance of injustice. As Kant says:

Having the means to practice such beneficence as depends on the good of fortune is, for the most part, a result of certain men being favored through the injustice of the government, which introduces an inequality of wealth that makes others need their beneficence. Under such circumstances, does a rich man's help to the needy, on which he so readily prides himself as something meritorious, really deserve to be called beneficence at all? (MS, AA 06, p. 454)

It is not the case that imperfect duties entail a legal transformation just through their exercise, but that they are its condition of possibility. Its exercise has as end an equality of fact that is in accordance with the foundational principles of law.

Imperfect duties do not only allow an empowerment of all subjects, but allow justice to be more than a formal concept, and have important significance in the establishment and content of a worldwide juridical system. Substantive justice should be translated into a society of owners or lords that, given the reality of a cosmopolitan citizenship, would consist of all the subjects in the world. Only such a state of justice, reachable in empirical conditions, allows the prosecution of a good will and the constitution of an ethical community (MS, AA 06, pp. 94-5).

These duties are, contrary to what Seel affirms, real duties; that is, even if there is no external coercion to them, and there is not punishment for its lack of fulfillment, this does not mean they are not obligations that have an important goal, our denial to pursue them having terrible consequences for humanity. The denial to fulfill ethical duties will result, not only in the destruction of the system of law and the civil state, but also in the impossibility to correct justice inside and outside the borders of the single states. They are of capital importance to the existence and to the improvement of law and they have to be a constant exercise (as they in fact are) in the normal life of a citizen that lives inside a system of right.

So, what is presented in the *Metaphysics of Morals* is a symbiotic system; the exposition of two doctrines grounded in the moral nature of man that complement one another to make possible, in the sensible and/or empirical world, the existence and exercise of freedom and its perpetual flourishing.

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Abstract: Much has been discussed about the relationship of dependence or independence of the Kantian philosophy of right from his moral theory. The strong independence thesis has been sustained amongst others by Allen Wood and Georg Geismann. The medium-independence thesis has been defended by Thomas Pogge in an attempt to differentiate Kantian philosophy of right from Rawlsian comprehensive liberalisms. There is also the "non-conclusive" position of Otfried Höffe and Paul Guyer, which defends a strong dependence between right and morals, and states a deduction of the Principle of Right (PR) from the Categorical Imperative (CI) through the notion of freedom. I will base my defense on the discussion between Markus Willaschek and Gerhard Seel regarding this matter because their positions summarize many of the fundamental arguments used by both lines of thought and, at last, propose my own defense of the dependence thesis.

Keywords: Kant, philosophy of right, moral theory, dependence / independence

Resumo: Houve muita discussão a respeito da relação de dependência ou independência entre a filosofia kantiana do direito e sua teoria moral. A tese de independência forte foi sustentada, entre outros, por Allen Wood e Georg Geismann. A tese de independência meio-forte foi defendida por Thomas Pogge numa

tentativa de diferenciar a filosofia kantiana do direito do liberalismo amplo de Rawls. Há também a posição “não-conclusiva” de Artur Ripstein, e, finalmente, a posição de Otfried Höffe e Paul Guyer que defende uma dependência forte entre direito expõe a dedução do princípio do direito do imperativo categórico através da noção de liberdade. Pretendo basear minha posição na discussão entre Markus Willaschek e Gerhard Seel, uma vez que suas posições referentes a este assunto reúnem muitos dos argumentos principais usados em ambas as linhas de pensamento, e propor, enfim, minha própria defesa da tese de dependência.

Palavras-chave: filosofia kantiana do direito, teoria moral, dependência / independência

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