

# IN THE BEGINNING WAS THE DEED

## ON THE ORIGIN OF PROPERTY AND SOCIETY

### IN ROUSSEAU AND KANT

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According to Reinhard Brandt, the genesis of right in Kant represents a sort of inversion of the biblical account of the genesis of the world. As this German interpret said: “In the beginning was the deed, not the word”.<sup>2</sup> At the beginning of the legal relations among individuals there is no contract (the word), stipulated in the context of a symmetric relationship among equal subjects, but an arbitrary act, the *prior apprehensio* of § 14 of the *Doctrine of Right*, through which a double asymmetric relationship among individuals arises: the first, the decisive one, is that between owners and not-owners; the second one, less relevant, arises among the group of owners between those who own different parcels of the land that originally was common land.

Kant follows Rousseau – at least the Rousseau of the second *Discourse* – in describing the origin of inequality among humans as a result of the establishment of private property of land; however, contrarily to the Genevan thinker, the German seems not to complain about the deplorable results of this episode. In this paper I would like to present briefly the context in which Rousseau tells the story of the origin of private property and complains about its consequences (I), and then present summarily the way in which Kant tells the same episode (II). I shall use this Kantian version to make two kinds of remarks. The first one refers to the legal subject emerging from the *Doctrine of Right* (III). The second one refers to a not so uncommon error among interpreters, that is, the idea that Kant justifies the existence of the State with the necessity of guaranteeing private property. I shall try to show that, actually, in Kant the *exeundum e statu naturali* has a different theoretical and motivational basis (IV).

## I

One could say that according to Rousseau there is a sort of dialectic operating in the history of humankind. Its first moment is the original natural state, in which humans are

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<sup>2</sup> Reinhard Brandt made this remark during a debate in the context of the *International Kant Conference* that was organized by the University of Lodz (Poland) in September, 2010.

happy because they live in seclusion and autarchy, and because they only have animal needs connected to survival. Nonetheless, in this first moment they do not have any moral notion of what is just and unjust, good and evil; actually, they do not have any conscience at all. The second moment consists in abandoning the natural state: men form the first societies and start judging each other, comparing reciprocally. As a consequence, they develop artificial needs and in order to satisfy them, they have to renounce to their original autarchy. It is the moment of the Fall, so to say, of the loss of that innocence and amorality that characterized the pristine state. It is in this moment that private property and economical inequality arise, dividing humankind (in Rousseau's quite simplistic view) between "the rich" and "the poor". This primitive society corresponds to Hobbes' state of nature, in which men do interact, but consider each other as rivals or even enemies. In order to escape the dangers connected to this situation of concurrence and war, they enter into a contract – this is the third moment – creating the State and establishing peace. Withal, this contract is unjust. It is the rich who propose it to the poor with the pretext of ending the state of enduring war; but, actually, they do only pursue their interest, since they are the only ones who have something to lose in a situation of incessant conflict, while the poor, who do not own anything, have no reason for fear, since it is quite unlikely for them to become the object of private violence and assault. The social contract ratifies and confirms the unjust situation of economical inequality by declaring it unchangeable. The resulting legal order is, consequently, also unjust and the result of this injustice is human unhappiness, which represents the real problem Rousseau is trying to solve in his oeuvre.

For this reason, the Genevan thinker aspires to give another direction to this historical process. The dialectic of human history followed the wrong path: men left the original state of animal happiness; they went through a form of life in common, in which they developed their moral and intellectual faculties, but also negative passions and unnatural needs; finally, instead of creating a civil state, in which they could attain again happiness, they created an unjust society, in which they are neither free, nor happy: the negative results of the intermediary step, that of the state of nature, were not overcome in the last step, that of civil society. Since this society results from an unjust pact, it is necessary to stipulate a new, more equitable contract that might ground a just legal order. *On the Social Contract* aims precisely at describing the content and conditions of this new pact, but here I am interested, rather, in the reconstruction of the origin of the unjust society which Rousseau offers in the *Discourse on the Origins of Inequality*.

Rousseau starts from several assumptions that are actually simple postulates. The first one is about the natural equality of human beings. Contrarily to Hobbes, Rousseau does not refer to equality in physical strength, intelligence or dangerousness, but to their original moral equality, that Rousseau opposes to the inequality dominating our society. Men are naturally unequal from a physical point of view. This inequality is based on differences concerning bodily structure, muscular strength, tendency to illness, mental and physical health etc. Moral and political inequality, on the contrary (I quote from the second *Discourse*), "consists in the different privileges, which some men enjoy, to the prejudice of others, such as that of being richer, more honored, more powerful, and even that of exacting obedience from them," and it

“depends on a kind of convention”: that means, that it has no natural basis, and it is absolutely unjustified by means of natural inequality, as Pufendorf had already stretched out in his *Ius Naturae et Gentium* (III, 2). It is, of course, this kind of inequality that Rousseau ambitions to criticize and whose origin he tries to reconstruct starting from the moment in which men left their pristine state.

In this hypothetical reconstruction of the history of mankind, Rousseau makes some important assumptions concerning human nature such as: men are free from animal instincts, they are naturally endowed with self-love and compassion, they live originally in autarchy and in a state of amorality and, most of all, they possess the quality of perfectibility. This is the source of every evil, since it is the faculty that brings men to leave their primitive state of happiness. This concept, which Rousseau takes over from Buffon, is worth of some remarks. Perfectibility is a natural faculty, that is, it was Nature herself who gave it to men; therefore, the progress of mankind is unavoidable. The beginning of this process, that is, the moment in which men start going away from Nature, marks at the same time the beginning of moral corruption, which, thence, should too be considered somehow a natural phenomenon (Kant will defend a similar position by speaking of a natural predisposition to evil: in its *Lectures on Anthropology* he says, for instance: “Depravity lies in the nature of all human beings. [...] [T]his is a universal arrangement of nature” [Friedländer, 35: 679]<sup>3</sup>). Furthermore, it is evident that it is Nature which sends men away from her: men cannot be charged with this fact. Still, they might be held responsible for having abandoned Nature following the wrong path, which led them away also from happiness. The present situation of unhappiness, inequality and injustice is caused by men, not by Nature. They could not avoid emancipating themselves from Nature, but could and should have done this in a different way, since it is not Nature that forces them to pursue their egoistic interest at the expense of the well-being of others – on the contrary: natural compassion should prevent them from acting so egoistically. Mankind’s natural history leads necessarily to the creation of civil society, but the behavior of men in it is not natural at all: they alone are to blame for the disorder reigning in it.

This is obviously a completely different account of human history than the one offered by Kant in his writings on philosophy of history. Kant too believes that Nature herself “wanted” men to emancipate and leave their original state, but according to the German philosopher, Nature equipped men with attributes, which are quite different from the ones listed by Rousseau. While both philosophers furnish the human species with perfectibility, Kant does not believe in man’s pristine happiness, autarchy and moral indifference. Rather, he thinks that men have the *natural* quality of unsociable sociability, which leads them to seek and, at the same time, to avoid their fellow humans. This is a decisive element to understand the difference between the two tales on how private ownership of land was created. In Rousseau’s version, this act is unnatural, since it is caused ultimately by a desire to be superior to others, which is not innate or part of our original nature. In Kant’s version, the desires of property, power and glory are *natural* desires – and here the German philosopher follows Hobbes *à la lettre*. Furthermore,

<sup>3</sup> Passages from Kant’s works are quoted as following: volume of the *Akademie-Ausgabe* (first Arabic number): page (second Arabic number).

he considers private property as a necessary step to fulfill that outer freedom that constitutes the only innate right, as we shall see.

Let us go back to Rousseau. Nature does not simply give men the faculty of perfectibility, but confronts them with any possible kind of obstacle and difficulty in order to force them to use and refine reason. The first and more immediate reaction of men to these obstacles is to look for the help of others. These primitive forms of community have a short life, whose duration depends from the difficulty that made them necessary. They are not real communities, imposing obligations on their members; rather, they are casual and punctual forms of cooperation, which in the eyes of the involved individuals do not constitute any kind of bond or commitment toward others. Nonetheless, when they are faced with natural catastrophes and climatic obstacles, men realize that they need more durable forms of common life, and this leads to important novelties, namely to the rising of language, of family, and of the first comforts. But the main consequence is that men cease to live in autarchy, not only in a material sense (since they start depending on each other for their survival), but mainly in a psychological sense. When they make contact with each other, they start comparing themselves mutually. This is the “first step toward inequality as well toward vice”. *Amour de soi*, the kind of self-love that urges them to self-conservation, becomes *amour propre*, which urges them to seek the admiration of others. *This* kind of love is neither natural, nor morally neutral, but it is a cause of evil, since forces men to do everything in order to get admired, revered or feared (once more: the three desires – of power, property, and glory – listed by Hobbes and later by Kant are not natural or innate, according to Rousseau).

At the same time, the desire to be considered superior leads to the rising of newer and newer needs, which individuals are not able to satisfy autonomously, but only with the help from the others. This leads to the division and specialization of labor, which ends definitively the original autarchy and happiness. Particularly important in this sense is agriculture, since it gives rise to land ownership and private property, hence to inequality. At the same time, though, it gives rise as well to justice, since it consists in “giving to anyone what is his own”. We shall meet this connection between land ownership and justice also in Kant, but in a different meaning. It is in this context that we find the well-known description of the origin of property: “The real founder of society was the first one, who, having put a fence around a piece of land, remembered to say *this is mine* and found people simple enough to believe him”. Two points are worth noticing here. First: it is not enough to fence in a piece of land, it is necessary likewise to proclaim that it is mine. We shall see how this speech act plays a central role in Kant. Second: this individual needs other people to accept his claim without questioning it. Besides, this moment of recognition on part of the community stays at the center of Kant’s theory of ownership, as we shall see now.

## II

The asymmetry among individuals created by the *prior apprehensio* goes through the whole *Doctrine of Right* like a thread, determining its structure and content. Differently from Rousseau, who deplored the consequences of the private ownership of land and of the corresponding inequality, Kant presents the asymmetry as something given, with which we have to deal without trying to modify it. This becomes evident, for instance, in the way in which Kant gives an interpretation, rather than a translation, of the pseudo-Ulpianian legal principle “*sum unicuique tribue*”, namely: “enter into a society [...] in which each can keep what is his” (6: 237)<sup>4</sup>. Further on in the text, distributive justice is defined as the kind of justice that gives peremptory character to mere possession (6: 267), not as the one that operates a redistribution of property in order to correct the arbitrariness of the *prior apprehensio*.

In this sense, the attempt to reinterpret the origins of Law by using the regulative ideal of the social contract (an attempt theorized in *On the common saying* and fulfilled in the *Doctrine of Right*) cannot be seen as the attempt to correct this original arbitrariness through the rationality of the social contract, as in Rousseau, but as expressing the necessity of giving to it the qualities of rationality and necessity it does not have originally. There is no attempt to substitute the deed through the word, rather to make the deed speak, so to say: an attempt to interpret the deed in a way that snatches it away from its brute silence. Let us go back again to Rousseau. In order to institute private property, the simple act of apprehension is not enough. What is needed is a speech act, a declaration that transforms that piece of fenced land in *my* piece of land. In both deeds (the act of fencing that defines the limits of the property and, at the same time, excludes others from it, *and* the act of declaring my intention of considering that piece of land as being exclusively mine) there is an anticipation of the Kantian distinction between phenomenal possession and noumenal property, between the simple natural fact of *physical* possession of a thing, and the *social* fact of claiming one's exclusive right to own that thing, even when it is not physically at hand, or when the legitimate owner is presently unable to hold it, whatever the reason for this impossibility may be. The social contract is needed to give peremptory character to this possession, which, before the existence of the State, even in its noumenal form remains subject to the arbitrary will of others, i.e. to that violence, which characterizes the absence of State. Possession (*Besitz*) must become legally recognized ownership (*Eigentum*), which can be defended through the Law against transgressors. The words “This is mine!” pronounced by the possessor must be followed by the formula “This is his property!”, imaginatively pronounced by the State, in order to establish definitively the right of the owner, as Kant explicates in § 16<sup>5</sup> and in § 41 to 44 of the *Doctrine of Right*.

There is, however, another important difference between the Kantian and the Rousseauian explanation of the origin of property. According to the Genevan it suffices that the individual, who fences the piece of land and claims it as its own, finds simpletons who believe him. This would be of course unacceptable for Kant, since it would ground a right on an empirical fact, namely, on concrete acceptance by others; furthermore, this acceptance would be a mindless

<sup>4</sup> English quotations from the *Doctrine of Right* come from Kant 1996.

<sup>5</sup> On § 16 see Kühl 1999. On Kant's theory of property in general see also Saage 1973, Kühl 1984 and Zotta 2000.

act of groundless belief. In order to avoid this, Kant introduces a central concept: that of an original, a priori united will.<sup>6</sup>

This concept appears firstly in § 8, which has a symptomatic title: “It is possible to have something external as one’s own only in a rightful condition, under an authority giving laws publicly, that is, in a civil condition” (6: 255). The actual relations of property are the result of the unilateral will of individuals and “a unilateral will cannot serve as a coercive law for everyone with regard to possession that is external and therefore contingent, since this would infringe upon freedom in accordance with universal laws”. This leads Kant to defend the necessity of the existence of a “will putting everyone under obligation”, hence of “a collective general (common) and powerful will”. This will can be lawgiving only in a civil condition, in which only “can something external be mine and yours” (6:256). Some pages later, the appropriation (i.e. the act of apprehension that grounds the actual possession) is defined as “the act of a general will (in idea)” (6: 259).

The common will must have the following attributes: (1) it puts everyone under obligation, (2) it is common to all individuals (it is collective and general), and (3) it has power. The first point is not problematic: the will is the faculty of giving laws to oneself; thus, if there is a will common to all men, it would be per definition lawgiving for all of them and, consequently, it would put everyone under obligation. More problematic is the second point: how should we understand the idea of a collective, general will? It is not Rousseau’s *volonté générale*, since this is the common will of a single political community, while Kant’s general will (in accordance with Diderot’s original concept of *volonté générale*) is common to all men. It is an instance that must be thought (“in idea”, says Kant), so that the appropriation gets validated, and possession may become property not within the legal order of a particular legal community, but in general. Kant justifies the necessity of thinking such an instance by claiming that, otherwise, any act of acquisition would remain unilateral, therefore not binding for others. In other words: the unilateral, but concrete act of apprehension [*Apprehension*] (and the equally unilateral act of declaring [*Bezeichnung*] something as “mine”), must be followed by the “omnilateral”, but abstract act of appropriation [*Zueignung*] (6: 258 f.). The general will must be presupposed in order that the *lex permissiva*, which allows me to consider myself as the legitimate owner of something external, may become a *lex iustitiae distributivae*. In other words, the general will has to be thought, so that the relations of property, which are established in private right and which are unilateral and arbitrary in themselves, may be recognized as legally valid. Kant asserts that even before the creation of the civil condition there is a duty “to recognize the act of taking possession [*Beitznehmung*] and appropriation [*Zueignung*] as valid, even though it is only unilateral”, so that even “provisional acquisition of land” has “rightful consequences” (6:267). Kant’s main concern here is to secure private right by creating public right. Accordingly, the task of the general will is not to redefine the unilateral, arbitrary relations of property, but to make them definitive. In this sense it is confusing that Kant speaks here of distributive justice. At most, it can be a matter of secondary distribution, i.e. of reestablishing relations of property that were put into question. The common will seems to have merely the function of giving legal

<sup>6</sup> In his very detailed commentary on § 1-9 Hans-Friedrich Fulda does not seem, quite surprisingly, to give much importance to this a priori united will (Fulda 1999, 113).



validity to unilateral, arbitrary property.<sup>7</sup> The third point concerns the claim that the common will must have some kind of power. Since Kant is trying to justify the necessity of public right, he is referring obviously to State power, which actually implements laws, among others the distributive law, i.e. the law that makes it possible that everyone keeps what is his. The general will finds its expression in State power, as it becomes clear in § 41, where Kant presents the “transition from what is mine or yours in a state of nature to what is mine or yours in a rightful condition generally” (6:305).

Kant’s description of how land ownership was originated is, thus, profoundly different from the story told by Rousseau, even if they share the exterior frame in which individuals take hold of parcels of the originally common land, and declare them to be their property. Rousseau thought – following the tradition – that all land belonged originally to all men. There was no private ownership of land, but this was rather common property of all, till an individual put a fence around a piece of it. Kant does not share this presupposition, since property (even the original common property of land) arises from acquisition, and this is possible only if the general will recognizes its validity. He distinguishes between an original community of property, based on principles, and a primitive community, based on history (hence on empiric, contingent circumstances); but even this primitive community of property “would always to be thought to be acquired and derived” (6:258), not as a given fact, as Rousseau presents it. Herein lays the main difference between our two authors with regard to the *justification* of private property. According to Rousseau, the act of taking possession of a piece of land and of declaring it one’s exclusive property is historical and contingent; furthermore, it is not only unilateral and arbitrary: it is somehow unnatural and unjust from the beginning, since it represents the appropriation of a good (land) which does not belong to anyone. According to Kant, on the contrary, land is not *res nullius*, but belongs to the community, which takes possession of it first by occupying it, then by declaring it its own, finally, by giving legal validity to this acts through an act of its general will. Once the land has become property of the community, it is possible that individuals appropriate parts of it with the consent of the general will. This act may have an historical basis, but this historical dimension is not relevant for its legal validity and for its philosophical legitimacy; moreover, it is not *unnatural* at all, it is just unilateral, as long as the general will does not validates it. But is it just? May individuals claim part of what is supposed to be common property? They may, since owning property is a necessary material condition for fulfilling one’s outer freedom – and this fulfillment is the real reason why individuals have a duty to enter into a civil condition, as we shall see. Withal, the act of appropriating parts of the original common land has important consequences for Kant’s political theory, and we should analyze them, before considering the real justification of the *exeundum*.

<sup>7</sup> The idea that the State could redistribute property in order to allow every citizen to exercise their outer freedom (the only innate right) is defended by Kristian Kühl (1984).

### III

The *prior apprehensio* creates economic inequality among individuals and this inequality shall never be abolished again, not even through the instauration of formal, legal and political equality among citizens, since they are never allowed to put into question the economic inequality fixed legally by the social contract, which in this respect resembles the unjust pact that according to Rousseau the rich imposed on the poor. Additionally, economic inequality is decisive for the constitution of political community in a double sense. Firstly, civil society [*Zivilzustand*] arises with the aim of giving peremptory character to the status quo of contingent, unilateral relationships of ownership – therefore of making them normatively necessary (even if this goal does not offer a justification for the existence of civil society, as we shall see). Secondly, economic inequality represents a criterion that enables us to define the class of active citizens – the only ones who really deserve to be called citizens, since those who are mere passive citizens stay under the protection of Law, but may not modify it or create it, so they are not politically autonomous. In other words, economic inequality is essential in defining citizenship.<sup>8</sup>

The exclusion of a large parcel of the population from active citizenship has relevant consequences for the definition of the legal subject in Kant. We may leave aside the exclusion of women, which we could consider – applying generously the so-called “principle of charity” – as being a historically contingent and theoretically irrelevant position on Kant’s side: we could claim that Kant is just reproducing a typical prejudice of his time (even if not a universally accepted one). Yet, the same cannot be said with regard to the exclusion of wagedworkers. It is not by mere prejudice that Kant arrives to defend it, but because of a specific conception of political community, according to which the only individuals who have a right to participate actively in political life and in legislation are those who have a property to be defended. This is not a particularly new argument, since we find the same position in almost all classical republican authors. From this point of view, we can observe during modern times a certain transition from a substantially aristocratic vision toward a more bourgeois one. At first the State is seen as a territory that comprehends the estates owned by landlords. They have, thus, an interest in defending the State because the latter guarantees their property – contrarily to those who do not own land (it is worth noticing that in this view the commons are not taken into account, as if those who did not own land had no interest in defending the forests where they collected wood, the grazing lands where they pastured their herds, or the fields they cultivated together with others). In a later period, the growing claims of urban bourgeoisie, which does not accept any longer to be excluded from legislation, lead to a modification of the criterion of political participation: it no longer depends on income generated by land ownership, but on income generated by autonomous work, by entrepreneurship, or by financial transactions. This process culminates in John Stuart Mill’s electoral theory, according to which the State becomes a sort of stock corporation and the citizens become stock owners, whose vote has a weight that is proportional to their share of stocks – out of metaphor: to the amount of goods and richness they produce and own. In Kant too the decisive criterion is the production and property of goods and richness. Wagedworkers do not produce goods or richness autonomously, but only

<sup>8</sup> On the Kantian concept of citizenship in the *Doctrine of Right* see Pinkard 1999.



as mere instruments in the hands of their employers – particularly when they merely provide services, like the hairdressers mentioned by Kant, or like the *Gesinde*, the domestic servants, who form a sort of sub-human class that the master may treat almost as objects.<sup>9</sup>

Kant situates himself in the horizon of a society in which active citizens are the heads of a domestic economy that reproduces the classical *oikos*, and in which the servants hold the place of the slaves (but there is also the case of criminals whom the State gave to the family chief as bondsmen). In this sense, the Kantian republic reproduces the excluding mechanisms of the Greek *polis*: isonomy, isocracy and isegory are reserved to male adults who are as well land owners and heads of family, while all others (women, minors, foreigners and *metics* [resident aliens], wagedworkers, servants, criminals) remain excluded from the exercise of political rights and, often, also from basic civil rights, like freedom of movement or the liberty of disposing on one's body.

For this reason, the only innate right, which Kant identifies with outer freedom and with the circumstance of being *his* own master (6: 237 f.), is actually the right of some, or even of few individuals – and not simply in a contingent manner. The attribution of full citizenship (and of the corresponding rights) only to land owners or to economically independent individuals is the consequence of a certain view of the State, according to which its main function is to guarantee the property rights of the heads of family. On the other side, Kant does not follow the tradition in justifying the existence of the State because of the necessity of safeguarding private property, as it may seem from what we said till now. Then how does Kant grounds the classical *exeundum e statu naturali*?

## IV

Let us start with a remark: The *Doctrine of Right* is firstly a doctrine of duties and only secondarily a doctrine of rights. This is the reason why it is opened by the reformulation of the three traditional pseudo-Ulpianian rules, which Kant calls “juridical duties”. I shall not analyze these three rules in this context.<sup>10</sup> For my present goals it suffices to remark that the starting point of the *Doctrine of Right* is the duty to enter into a civil state with others, i.e. the duty to create a legal order. The social contract tradition offers an instrumental justification of this *exeundum e statu naturali*: the creation of the State power is the result of a calculation that leads individuals to renounce, at least partially, to their natural rights in favor of the sovereign. To express it in Kantian terms, we could say that the traditional *exeundum* is a hypothetical

<sup>9</sup> He may not consider them as things, but they belong nevertheless to his property and if one of them escapes from him, he may use force to capture him and bring him back without even recurring to justice (6: 283). This “auf *dingliche* Art persönliches Recht”, i.e. this “right to a person *akin to a right to a thing*” was one of the most polemical and most discussed innovation introduced by Kant in his *Doctrine of Right* (it suffices to read its defense in the explanatory remarks to the first edition in 6: 356 ff.), precisely because of the way it seems to transform persons into things – an impression confirmed by the pages on the criminal who becomes “a bondsman [*Leibeigener*] and is the property (*dominium*) of another, who is accordingly not merely his master (*herus*), but also his owner (*dominus*) and can therefore alienate him as a thing, use him as he pleases [...] and dispose of his powers, though not of his life and members” (6: 330).

<sup>10</sup> On this topic see Pinzani 2005 and Brandt 2012.

imperative of the sort: “If you want to safeguard your life and property, you should exit the state of nature etc.” In this vision, there is a quantitative abdication to one’s own liberty: depending from the thinker, one sacrifices a greater or smaller part of it (in Hobbes one renounces to almost all of it, in Locke just to a small part), in order to better guarantee what remains of it after this abdication. This quantitative vision is rejected by Rousseau, who substitutes it for a qualitative one: one renounces to natural freedom in order to gain a qualitatively different, superior freedom, namely civic or political freedom. At the same time, however, in Rousseau individuals are moved to take this step by their particular interest: they enter into the State to safeguard their private property, not to become free in a more sublime way. Although he condemns the unjust pact imposed by the rich on the poor, he considers the defense of property as being the main reason for which individuals enter the State, as it appears in the *Discourse on Political Economy* and in *On the Social Contract*.

The *Doctrine of Right* does not follow these traditional models. The creation of legal relationships among individuals is not presented as a hypothetical imperative. There is no attempt to justify the creation of right on the basis of pathological interests or needs, which are connected to the individuals’ appetitive nature and instrumental rationality. Is it then a categorical imperative which impose individuals to enter into legal relationship with others?<sup>11</sup> If one considers the pseudo-Ulpianan rules, apparently there is such a categorical imperative: “Be an honest man, do not wrong anyone and enter into a society with others in which everyone can keep his property” – all this unconditionally, not in order to satisfy private desires or interests. Nonetheless, at a second reading, doubts arise.

First of all, there is at least a hypothetical or conditional moment in the third rule. Kant himself mentions it: you ought to enter into society, “if you cannot help associating with others” (6:237), i.e. if you cannot avoid them and, therefore, if you cannot avoid the risk of doing harm or wrong them (a risk that, still, is always present when men live together). The State comes into existence under this condition, namely, because there is the risk of wronging others. Kant specifies this point further: because of this risk, it is necessary to give preemptory character to those rights, which have merely provisory character (we must remember that for Kant, men exit the state of nature by establishing *private* legal relations among them without the protection of the public power: his model is not a dual one, as in Hobbes or Rousseau, who distinguish simply between state of nature and civil society; Kant introduces an intermediate level, in which individuals have already entered into legal relations but without the State). Once again Kant does not follow the tradition, since he does not bases the necessity to transform the provisory rights into preemptory ones by stressing that individuals have an interest in this.<sup>12</sup> It is not individuals who prefer the legal security guaranteed by the State, to the instability of legal relations based solely on mutual trust. It is *reason* itself that imposes the passage from provisory private right to preemptory private right through public right. But why does reason demand

<sup>11</sup> Markus Willaschek has objected strongly to the idea of a categorical imperative for right (1997 and 2002). I agree very much with his arguments, but in this paper I shall assume an opposite view for the argument’s sake, as it will become clear in the end. Otfried Höffe (1999) considers, on the contrary, the existence of a categorical imperative of right to be central in Kant’s *Doctrine of Right*.

<sup>12</sup> It seems to me that Kenneth Westphal (2002) does not take this aspect into account in his commentary on Kant’s justification of possession.

this? Which is the basis of the allegedly categorical imperative of *exeundum*? The basis of ethical categorical imperatives is moral law which, on its part, is the expression of moral autonomy. Which would be the basis of a legal categorical imperative like the *exeundum*?

According to Kant, right is “the sum of the conditions under which the choice [*Willkür*] of one can be united with the choice of another in accordance with a universal law of freedom” (6:230). Apparently, such freedom can give rise only to a hypothetical imperative of the sort: “If you want to fulfill your outer freedom, you should enter into preemptory legal relations with others”. Yet, in this case, we would have a quite traditional justification for the existence of right. On the other side, it is obvious that outer freedom cannot be the basis of a categorical imperative as moral autonomy does. The ethical categorical imperative can be reduced to the formula: “act according to your moral autonomy” – and this autonomy is just part of human nature. As for the legal or juridical imperative, it could be reduced to the formula: “fulfill your outer freedom”, but this freedom does *not* belong essentially to human nature as moral autonomy does. Kant says that it is an innate right (the only one), but – as one can easily see by reading the paragraphs on criminal law in the *Doctrine of Right* – it is something we can forfeit. The individual who violates the moral law by following a pathological motive is renouncing to act autonomously, but does not lose his moral autonomy: he simply decides not to make use of it. The individual who violates the juridical law – like the criminal we mentioned before – forfeits his outer freedom, and sometimes he forfeits it forever, as in the case of death penalty or perpetual prison. Now: if he can lose his freedom (and even his personality, according to Kant), then this freedom is not an essential part of his nature, but just a contingent element of it. The fulfillment of outer freedom through right must be justified somehow. Asking “why should I be morally autonomous?” (which is not tantamount to asking “why should I act according to my moral autonomy?”) makes no sense, since it would be tantamount to asking “why should I be the rational being I am?”. The question “why should I fulfill my outer freedom?”, on the contrary, does not only make sense, but may be answered in different ways, starting with the traditional answer: “because outer freedom allows me to fulfill my desires” (this is Rousseau’s answer). Kant does not opt for this answer, since it would ground the existence of Law on man’s appetitive nature, and on his pathological desires. But why else should we fulfill our outer freedom?

There are two possible ways of answering this question and both are problematical from a Kantian point of view. The first one consists in making outer freedom the condition to fulfill ethical duty. We cannot act morally if our capacity of acting is limited by insuperable external obstacles, and if external conditions make the task impossible. In the state of nature, in which violence and insecurity reign, it is impossible to act always according to moral law. This answer seems to have a textual basis in the writings on philosophy of history (from the *Idea to Perpetual Peace*), in which Kant claims that right shall be really preemptory only when all states will be peaceful republics, in which everyone shall be sure that his outer freedom will not be threatened by his government, or by foreign powers. As intriguing as it is, this reading ends up subduing too much right to ethics. It is true that according to Kant juridical norms may not contradict ethical norms, but he is always adamant that right and ethics represent two distinct realms of moral, even if they may overlap in certain occasions. In any case, right

may not be an instrument to implement the moral law, as Kant repeatedly claims (even in the *Religionsschrift*, 6:96).

The second answer would push Kant close to Aristotle. Outer freedom, even if it does not belong essentially to human nature as moral autonomy does, belongs potentially to it, and must be fulfilled through right. This teleological foundation of the *exeundum* has, however, problematical consequences, since it is scarcely compatible with Kant's stance on such themes. According to him, there is either a categorical normativity based on the demands of practical reason, or a hypothetical one based on man's appetitive nature or on a merely *eudemonistic* teleological view: in Kant's moral writings men tend naturally to be *happy*, not to be *free*.

The basis of the *exeundum* remains therefore opaque. Nonetheless, we can exclude that men have a duty to enter into civil society in order to safeguard property. Rather, property must be safeguarded in order that men can fulfill their outer freedom, as reason demands – whichever the basis for this demand may be. This duty to fulfill outer freedom implies the duty to exit from the state of nature, and this gives rise to legal relations, which are unilateral and arbitrary, but must, nevertheless, be legally ratified by the common will – and this implies on its part the creation of State power. Ultimately, the State exists so that individuals may fulfill their outer freedom, and property is just an instrument for reaching this goal.

On the other side, the unilateral character of the origin of property gives rise to an inequality that is not only economical, but likewise legal and political, since it divides the members of the community in active and passive citizens. This division is therefore also unilateral, but it is necessary, in Kant's vision of the State as a community of land owners – a vision that we could and should reject as obsolete and altogether inadequate. Even in this case, however, we were faced with the question of why the unilateral, arbitrary *prior apprehensio* should be safeguarded instead of proceeding to a more just, more rational redistribution of property. If property is a material condition for the fulfillment of outer freedom, and if this fulfillment is a demand of reason, then reason demands as well that everyone has property enough to live in freedom, and that no one may be considered as belonging to the property of someone else, as in the case of the bondsmen, of the servants or even of wife and children with respect to the head of family. It is precisely the non instrumental, categorical character of the Kantian *exeundum* that should lead to admit the possibility of redistributing property in order to allow everyone to be her or his own master and to be free. In this sense, there is a tension between this train of thought and the actual way in which Kant constructs his theory of property. He wants to justify the *exeundum* in a categorical way, but he comes to conclusions that make sense only if the *exeundum* would be justified instrumentally, for only an instrumental justification could explain why unilateral relations of property may not be modified (individuals would never enter into the State, if the State could intervene on their property, however unjust its origin may be). Maybe the problem arises because Kant (similarly to Rousseau) does not distinguish between the justification and the motivation level. The fact that individuals would not enter into the State, if they were not sure that their property is safeguarded in any case, has to do with their personal motivation. The fact that they should enter into the State in order to be free, even if this may imply that they would have to renounce

to part of their property, so that it might be redistributed among those who were not able to get their piece of land during the original partition of the common property, does not depend on their subjective motivation, but on an objective demand of reason that justifies the creation of State. But is it possible that a thinker like Kant did not notice this difference?

**ABSTRACT:** This paper aims at confronting the two different accounts given by Rousseau and Kant on the origin of private property. Firstly, I shall present briefly the context in which Rousseau tells his story of this event and regrets its consequences (I). Secondly, I shall present summarily the way in which Kant tells the same episode (II), in order to make two kinds of remarks: the first one refers to the legal subject emerging from the *Doctrine of Right* (III), while the second one refers to the wrong interpretation according to which Kant would justify the existence of the State with the necessity of guaranteeing private property. Against this interpretation, I shall try to show that, actually, in Kant the *exeundum e statu naturali* has a different theoretical and motivational basis (IV).

**KEYWORDS:** Kant, Rousseau, (private) property, origins of the State

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