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THE APPLICATION OF METAPHYSICAL PRINCIPLES TO THE EMPIRICAL WORLD. A BRIEF RECONSTRUCTION OF THE CORE OF KANT'S DOCTRINE OF RIGHT*

Abstract
The rediscovery of Kant's Doctrine of Right resulted in many attempts to apply Kant's position to current affairs. This research often faces the problem of defining clear borders of what in Kant's texts needs to be considered as rational core of his theory and what is merely a theoretically less significant consequence of particular political situation of 18th century. My claim is that in order to be able to adequately apply Kant's ideas and concepts to the 21st century problems, the process of application of his rational principles to the world of experience must be reconstructed. This will not only bring about the core structure of right but may also determine which elements of Kant's legal theory are contingent to changing empirical data. I recognise two levels of Kant's application of the rational principles to human condition, which consecutively determine the rational core of right and secondary structural divisions that emerge from contingent data about political history of mankind. The aim of the article is to investigate the fundamental steps of Kant's application on the first level, in order to reconstruct the rational core of his legal theory. In the first step I analyse the universal principle of right in order to clarify Kant's concept of a right. Further, I investigate the axiom of external freedom, which, in conjunction with human condition generates the necessity of using external objects of choice and therefore grounds the emergence of acquired rights. Nevertheless, these rights, as particular legal titles that limit the freedom of others, cannot be reconciled with

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universal freedom in the state of nature. Therefore, from the establishment of innate and acquired right, there arises the necessity of public right and entering the civil condition.

Keywords:
Kant's political philosophy, Kant's legal philosophy, innate right, private right, public right

INTRODUCTION

In the past decades the political philosophy[1] of Immanuel Kant has received unprecedented attention from philosophers, jurists and political scientists. The rediscovery of his Doctrine of Right resulted in numerable attempts to apply Kant's position to current affairs, especially in the domain of global politics, such as cosmopolitan law, climate change or peace studies. My belief is that such endeavours may be not only philosophically fruitful, but also practically useful for understanding and tackling global political issues. Nevertheless, the other side of the coin of this blossoming Kantian research in the realm of his political philosophy is the repeatedly resurfacing problem of defining clear boarders of what in Kant's texts must be considered as the rational core of his theory and what is merely a (theoretically less significant) consequence of the political situation at the end of 18th century. My claim is that in order to be able to adequately apply Kant's ideas and concepts to current political issues, we need to understand Kant's method of application of his rational concepts to the world of experience.

Kant's project of establishing a new, critical approach to ethical and legal theory was based on the premise that the principles of such theory must be derived a priori from pure rational concepts, without any empirical additions. Nevertheless, Kant's practical philosophy was designated for human beings and their empirical character, including the limitations defining them as a species. Especially in the sphere of his legal theory, Kant had to consider the phenomenal world, as the practical prescrip-

[1] It is important to stress that the term "political philosophy" is used here in accordance with its contemporary usage in English language literature. For Kant the sphere of political philosophy was of a much narrower scope. The normative topics, commonly classified as political philosophy, were addressed by Kant as legal and moral issues, not as political theory. Politics was considered the sphere of implementation of normative prescriptions (of right), but the methods of application and the rules thereof had an instrumental and goal-oriented character. In other words, for Kant, politics belonged rather to the domain of prudence, not practical normativity.

tions refer to the use of external freedom. Therefore, he claimed that the method in his Doctrine of Right rests on the application of rational principles to anthropological, historical and even geographical knowledge about the world:[2]

> Just as there must be principles in a metaphysics of nature for applying those highest universal principles of a nature in general to objects of experience, a metaphysics of morals cannot dispense with principles of application, and we shall often have to take as our object the particular *nature* of human beings, which is cognized only by experience, in order to *show* in it what can be inferred from universal moral principles. But this will in no way detract from the purity of these principles or cast doubt on their a priori source. – This is to say, in effect, that a metaphysics of morals cannot be based upon anthropology but can still be applied to it (RL, VI: 217).[3]

While introducing the idea of the metaphysics of morals, Kant drew a distinction between highest universal principles (*Grundsätze*) and the principles of application (*Prinzipien*) of the former to the empirical conditions and the nature of the human beings. Kant's method in practical philosophy in general and theory of law in particular, must thus consist of the following steps for his philosophy to remain pure and yet be applicable to the empirical world. First, one must define and ground the rational principles of practical philosophy. Second, there is the need to discern only those empirical data, which is indispensable for the adequate application of the principles to the human condition. The third step is the proper application of the former to the latter, while considering that the principles of application (*Prinzipien*), which bring about normative laws, belong to a different level of philosophical reflection than the highest principles (*Grundsätze*) as such. The above presented procedure determines the entire structure of Kant's doctrine of right, although we may recognize at least two levels of such application, which consecutively determine the core structure of the legal theory, which rests on the most indispensable empirical data and the secondary structural determinations, which result from contingent knowledge about the political history of humankind.[4]

[2] In the following quote Kant mentions only anthropology. Still, it will become clear from my considerations that for some further determinations in the structure of Kant's legal theory, some essential knowledge of geography and history becomes necessary.

[3] Kant's works are referenced to the volume and page number in the '*Akademie Ausgabe*' of the Prussian Academy of Sciences (1902 ff.), the translation cited throughout the paper stems from the *The Cambridge Edition of the Works of Immanuel Kant*, volume *Practical Philosophy*, translated by Mary J. Gregor and edited by Allen Wood, New York: Cambridge University Press, 1996 ff.

[4] One may argue if such rational "core" structure of right can at all be inferred from Kant's writings and in this respect my endeavor should not be seen as a mere recapitulation

In this paper, I aim at demarcating a clear border between the core structure of Kant's legal theory and the rest of the elements belonging to the Doctrine of Right. For this purpose, I will reconstruct the fundamental steps of the application of the rational principles to the human condition with regard to the juridical sphere, which results in discerning the basic structure of this theory. I argue that there are three fundamental steps in Kant's deduction of right. Firstly, (1) he grounds the external freedom as the only innate right of every individual. What follows from the innate right in conjunction with the human condition is the need to make use of external objects, which justifies the emergence of acquired rights (2). Nevertheless, as these individual rights asymmetrically limit the freedom of others, they cannot be reconciled with universal freedom in the state of nature. Therefore, from the establishment of innate and acquired right, there arises the necessity of public right, in which the idea of omnilateral united will serves as the instrument of legitimation of individual rights. The postulate of entering the rightful condition in an institutionalized form of a state is, therefore, a necessary conclusion of applying the right to external freedom to the most basic empirical elements of the human condition. Moreover, I argue that since individual and conclusive rights of persons are only possible within a state, coercion becomes an inevitable instrument of securing them on an institutional level (3).

WHAT RIGHT IS AND WHOM IT MAY CONCERN

The reconstruction of Kant's core right must begin with restating several premises of his practical metaphysics. Kant claims that practical laws, including those belonging to juridical sphere, must not be derived from experience but have purely rational, metaphysical origin, even though their application to the relations between legal subjects is clearly empirical. These laws, as much as they are metaphysical, need to possess two major features: they must be universal (as opposed to particular) and necessary (as opposed to contingent). Kant was obviously aware, that in the world of experience, the juridical sphere encompasses some contingent laws that are based on empirical knowledge. Nevertheless, the origin of law, as well as the most fundamental principles, had to be established on

of Kant's account. For an opposite view that one presented in this paper see, for example, Beck (2006: 371–401).

purely rational basis. For this reason, the subject matter of laws must be freedom (as opposed to happiness), because only freedom could be conceived of *a priori*. Happiness in Kant's understanding, as a perfect fulfillment of one's all needs and desires, rests on individual, empirical and contingent preferences. Freedom, on the other hand, together with rationality, is a universal capacity of all persons.

Let us follow with a brief presentation of the necessary traits of the subjects, to which one may apply the juridical sphere. The metaphysical constitution of a legal subject is founded on a lawgiving practical reason, and on free choice between acting according to law and being driven by one's desires. These two capacities contribute to the imputability of such subject, which makes him[5] the author of his actions, i.e., a person (RL, VI: 223). This concept of a person, which Kant presented in his moral theory, is a necessary yet not sufficient prerequisite for generating the juridical dimension of practical laws. In other words, the justification of the need for harmonization of external use of freedom of persons requires the introduction of some essential empirical data.

The first precondition for the emergence of the juridical sphere is the existence of plurality of persons. Moral life could probably be conducted in complete solitude,[6] but for the postulate of right to emerge, there is a need for at least two persons, who could raise legal claims against one another. Moreover, these persons need to exist as embodied beings, who have some basic existential needs, make use of their freedom externally (i.e. in time and space) and pursue various goals. For eons, who do not occupy and act in the empirical spatiotemporal realm we can conceive of practical (moral) laws, but not juridical laws. Finally, we must consider the finitude of Earth surface and thus of the resources, which can be distributed to all men. If this were not the case (or if people could inhabit some indefinite number of other planets) the subjects of external laws could disperse indefinitely. Instead, they must live in proximity to one another, which makes their interactions inevitable. Under these conditions there arises the possibility of a conflict, which is aggravated by the acquisition of objects of choice (possession).

[5] There is a heated discussion concerning the universal applicability of Kant's moral theory. Due to my specific focus in this paper, I cannot include my views on this topic. Throughout the paper I attempt to use gender-neutral vocabulary, in order to signal that Kant's ideals can be applicable regardless of gender. Wherever it is not possible and for the sake of accommodating many reasonable arguments in favor of the exclusionary character of Kant's account, I forfeit using female pronouns (she, her, hers) in the text.

[6] At least with regard to the ethical duties towards oneself.

Only while considering these basic facts of the human condition, the universal principle of right becomes the metaphysical basis for the entire Doctrine of Right:

> Any action is right if it can coexist with everyone's freedom in accordance with a universal law, or if on its maxim the freedom of choice of each can coexist with everyone's freedom in accordance with a universal law (RL, VI: 230).

Right is therefore the harmonization of the use of freedom of everyone under universal law. This use of freedom is manifold, but due to the imperative of respecting its other users, persons must limit their conduct by following laws, which constitute their juridical duties. Such duties towards others, as opposed to moral duties, ground the rights of others. If a person has a right, it means that all other persons have a duty to respect such right.

Moreover, since for embodied beings, who have the capability of free choice, the act of following the law (fulfilling one's duties) is subjectively contingent, the juridical sphere brings about the necessity of external incentive for any rightful action. Thus, in the sphere of external freedom, the rights are connected to permission for enforcing them with coercive measures:

> A strict right can also be represented as the possibility of a fully reciprocal use of coercion that is consistent with everyone's freedom in accordance with universal laws (RL, VI: 232).

For Kant, coercion in juridical sphere is the opposite of violence, because it is fully reciprocal and consistent with freedom under universal laws.These conditions for rightful coercion cannot be met if a dispute concerning a right is solved by force between two competing parties. Conversely, it requires a solution in which the universality of laws and the full reciprocity of coercion protects the freedom of every person. The force must then be legitimized by both parties, applied for the protection of their freedom and equally effective for them both, i.e. it must be exercised within a **rightful condition**, a legal order.

THE INNATE RIGHT TO FREEDOM – THE FOUNDATION OF THE LEGAL SYSTEM

The structure of a right, together with the exposition of the legal subject cannot account for the starting point of Kant's system of rights – the innate right to freedom. This first step must be considered the postulate incapable

of further proof, or 'the axiom of external freedom' (RL, VI: 267), since it does not simply explicate the nature of right as such, but raises a normative claim, that external freedom really is a *right* of every human being:[7]

> Freedom (independence from being constrained by another's choice), insofar as it can coexist with the freedom of every other in accordance with a universal law, is the only original right belonging to every man by virtue of his humanity (RL, VI: 237).

Kant defines external freedom in a republican way as non-domination and in the reflections following the definition equips this right with further elements – human beings are thus originally granted the right to equality (in being bound by others in a reciprocal relation), being one's own master, being beyond reproach (often explained as legal innocence) and being authorized to do anything one pleases as long as they do not infringe on the right of others (RL, VI: 237–238).

We cannot, therefore, be obstructed in our free choice by the domination of others and this rule applies equally to establishing legal relations (such as a contract), being held responsible for only one's own deeds and doing anything we are pleased to (also while violating moral duties), as long as we respect equal freedom of others. It is important to stress, that Kant's right to external freedom is not one that permits an unlimited use of it (like it is the case with Hobbesian freedom of individuals in the state of nature), but it is limited by the same extent of freedom of everyone else.

The question concerning the justification (if not proof) of the innate right as an *a priori* metaphysical cognition of practical reason in the juridical sphere may be settled only by considering the opposite proposition. If persons did not have a right to make use of their freedom in the empirical world, the juridical sphere would not exist. Moreover, the exercise of free choice would be deemed impossible, and thus people would be reduced to things, animals or slaves, since personality requires free action and imputability. Such scenario is possible, yet not within Kant's practical philosophy. Another question, which may arise is why the freedom as right needs to be distributed equally to everyone, even though experience teaches us that people are so different in many ways and so it might have been beneficial to every person and to the society as a whole to give different scopes of freedom to different individuals. In order to answer this, we only need to remind ourselves that this right is given *a priori*, without considering the empirical differences between people and the consequences of legal equality. Simply put, if external freedom is given to anyone as a right, then it must be given to every person in an equal share.

[7] Cf. also Byrd, Hruschka (2010: 78 ff.).

THE SPACE TO DWELL AND THRIVE – THE ESTABLISHMENT OF ACQUIRED RIGHTS

As Kant progresses in the application of the rational principles to human condition, he arrives at the conclusion that as embodied beings we cannot sufficiently secure our wellbeing only using free choice, of which everyone has an equal share. The most basic knowledge of human condition states it as necessary (although the necessity is contingent to their empirical nature) that people, in order to survive and thrive, need (and want) to use external objects — they need to find shelter, food, clothes etc., and in the course of the development of culture, satisfy further needs.

Originally,[8] all human beings share common possession of the surface of the Earth and are equally (understood collectively) entitled to use it. Moreover, they also have a right to a place they occupy by their body (understood disjunctively), for they are embodied spatiotemporal beings. Since Earth is a globe and therefore the amount of space to occupy and the objects to use is limited, there arises the need to introduce acquired rights.[9]

These rights state that persons can exclusively possess certain objects of choice and therefore exclude others (unilaterally posing limitations to their freedom) from using them. For Kant claims, that using objects of choice implies possession of them (RL, VI: 245). What is more, rational investigation into the conditions of using external objects concludes for him with asserting the necessity of not merely physical, but intelligible possession of things.[10]

In the world, where everyone has an equal right to freedom, acquiring such a particular right seems practically impossible,[11] because in order to do it, one must unilaterally exclude everyone else from use and possession of an object and this violates their external freedom (as one imposes obligation, which is not reciprocal). On the other hand, if intelligible possession of things were impossible, then it would contradict with the external

[8] It is important to note that Kant does not mean some primordial order of things millennia ago but uses the term "common possession of earth" as a rational concept necessary to ground the acquisition of objects as well as the cosmopolitan right. Cf. Pinheiro Walla (2016: 160–178).

[9] Cf. also Byrd, Hruschka (2010: 128–129), Pinheiro Walla (2016: 177).

[10] As opposed to physical possession which is merely an empirical fact of holding an object in our power (or just in our hand), an intelligible possession of an object means that I am being wronged when someone uses an object of my possession without my consent (cf. RL, VI: 245–250).

[11] In Kantian terms: what is practically possible is allowed, what is practically impossible is forbidden, what is practically necessary is commanded.

freedom of everyone, since no subject would be allowed to use any objects except the ones currently held in his hand or the space occupied by his body (RL, VI: 250):

> 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;* in other words, it would annihilate them in a practical respect and make them into *res nullius,* even though in the use of things choice was formally consistent with everyone's outer freedom in accordance with universal law (RL, VI: 250).

Therefore, one of the most crucial steps in Kant's process of application of the principles of right to human condition is introducing a principle that cannot be directly derived from the concept of freedom itself, and nevertheless is practically necessary for human existence – existence of embodied creatures dwelling on the limited surface of Earth. This principle – the postulate of practical reason with regard to rights is the one which gives permission to unilaterally exclude others from using an object of one's choice:

> This postulate can be called a permissive law *(lex permissiva)* of practical reason, which gives us an authorization that could not be got from mere concepts of right as such, namely to put all others under an obligation, which they would not otherwise have, to refrain from using certain objects of our choice because we have been the first to take them into 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 (RL, VI: 247).

Even though such a permissive law, which enables to unilaterally impose an obligation on others may be considered highly problematic, it is deemed necessary to enable human existence.[12] It by no means introduces any legal relation between a subject (an individual) and an object (a thing) but is always considered a legal relation between persons. As such, the permission to impose limitation on the freedom of others is given, but only conditionally. An unconditional use of such permission would be the exact opposition of the equal external right to freedom of everyone, since some people would have their freedom limited more than the others.

[12] The interpretation of permissive law has been discussed by many Kantians, which follow roughly three interpretative trends. They either reject *lex permissiva* as a rationally grounded element of Kant's theory, they consider it as an exception to a general rule (which forbids certain acts) or they understand it as a permission to impose asymmetrical obligation. My interpretation is a combination of the latter two interpretation trends. For reference, see Tierney (2001: 45–72); Brandt (1982: 233–285).

Therefore, the permissive right is valid only together with a presumption of establishing a civil condition (*Rechtszustand*) in a form of a state, where all the acquired rights would become consistent with universality of the law, by means of the idea of the general united will:

> Now, a unilateral will cannot serve as a coercive law for everyone with regard to possession that is external and therefore contingent, since that would infringe upon freedom in accordance with universal laws. So it is only a will putting everyone under obligation, hence only a collective general (common) and powerful will, that can provide everyone this assurance. - But the condition of being under a general external (i.e., public) lawgiving accompanied with power is the civil condition. So only in a civil condition can something external be mine or yours (RL, VI: 256).

What follows from the ability of acquiring further rights is the necessity of establishing civil condition, i.e. the postulate of public right. Only under a presumption of omnilateral acceptance can a unilateral act, which limits the freedom of other people, be considered permitted. For only under public laws the equality in being bound by other's choice may be reinstated.

Before we proceed to the discussion of the core elements of Kant's structure of public right, there is a need to clarify what follows from permissive right. Firstly, there arises a question what the notion of intelligible possession, and consequently, the permissive law applies to. The concept of possession of an external object is not limited to physical objects. According to Kant, this concept can be applied to any object of free choice that one can acquire as such possession, which means any right or legal title that transgresses the right to external freedom (RL, VI: 247):

> There can be only *three* external objects of my choice: 1) a (corporeal) *thing* external to me; 2) another's *choice* to perform a specific deed *(praestatio);* 3) another's *status in* relation to me. These are objects of my choice in terms of the categories of *substance, causality,* and *community* between myself and external objects in accordance with laws of freedom.

Kant speaks in this passage about 1) property rights, 2) contract rights and 3) family rights. All these objects of choice can become our intelligible possession, which translates into having a right, regardless of the physical proximity. If one can claim these objects (corporeal things, will of another person or her status), there arises a need to secure such claim by excluding others from making them their objects of choice. With every limitation of freedom of others, there arises the need of legitimation of this limitation as well as of securing one's rights to the object, i.e., the need of a civil condition.

Another issue, which needs to be considered, is the way one may acquire such rights. Purely intuitively, the least problematic may be the

rights acquired by contract. The latter involves only equal individuals, is based on their bilateral agreement, and the structure of imposing obligations is symmetrical. Furthermore, contracts are the very basis of most human conduct and one can acquire anything in this way, starting from an apple and ending with an employee (the choice of other person, limited by the conditions of contract). What raises a doubt is how anyone can acquire a property in the first place, before he can rid of it by means of a contract. In other words, what is Kant's understanding of the original acquisition of every object of choice on Earth before the contract law comes to being.

Kant aims at solving this issue by introducing the 'practical postulate of reason with regard to rights.' According to him, from all physical objects that can become an object of choice, the most basic possession is the possession of a piece of land. As Kant states, land is the substance, to which all the objects, which are situated on it (and over, and under it), can be considered accidents:

> Land (understood as all habitable ground) is to be regarded as the *sub- stance* with respect to whatever is movable upon it, while the existence of the latter is to be regarded only as *inherence.* Just as in a theoretical sense accidents cannot exist apart from a substance, so in a practical sense no one can have what is movable on a piece of land as his own unless he is assumed to be already in rightful possession of the land (RL, VI: 261).

Original acquisition, which must happen before any contract is possible, is the acquisition of land. As Kant, in opposition to Locke,[13] does not pose any limitation on how much land can be acquired in this original unilateral act, the basic principle, according to which property of land must be attributed, is the first occupation of such piece of land (RL, VI: 263). This so called *beati possidentes* principle may be highly problematic, as there is no practically possible way of redistribution of individual[14] property rights, even if one individual had acquired significantly more than another. Nevertheless, it must be considered more plausible[15] than previous explanations of original acquisition, because such solution preserves

[13] Locke believed that property of land in the state of nature comes to being on the ground of mixing it with the possessor's labor. Hence no man could acquire more land than he could reasonably make use of. Cf. Locke's *Second Treatise* (1824, section 26).

[14] It is different when it comes to property rights of legal entities other than private persons. For example, Kant claims that religious institutes or orders should not be granted unlimited property rights. Interestingly, perpetual property rights are also not granted to nobility. See RL, VI: 370. One can also argue that in a republican Kantian state the inequalities might be possible to even up by means of taxation. The possibility of reinterpreting Kant into a welfare state theorist will not be discussed here. Cf. e.g. Ludwig (1993: 221–254) and recently Holtman (2018).

[15] As a matter of fact, Kant considers it the only plausible ground for first acquisition of land. See RL, VI: 251.

strictly interpersonal character of legal relations (there can be no relation of persons to inanimate objects, but only relations between persons) and seems to reduce empirical conditions of such acquisition to a necessary minimum. Permissive law in private right enables provisional intelligible possession of such acquired piece of land and of other rights acquired via contract, while conclusive rights are possible only in civil condition.[16]

I have presented a basic structure of innate and acquired right in Kant's legal theory with a view to his application of rational concepts to human condition. The further steps in the course of the application lead to widening the scope of possible rights within human society, but also cannot avoid the limitation of freedom of some individuals to the benefit of others. While the limitation of freedom in innate right rests solely on rational concept of the universality of laws, in the private right the freedom is limited due to empirical fact that the surface of the Earth and therefore the space provided for people to live is finite. Because the interaction with other people is unavoidable and the resources are limited, in order to use objects of choice individuals must acquire possession, while excluding others from using the possessed objects. The original act of acquisition is unilateral and although permitted in the sphere of right, it only guarantees a provisional possession. Thus, the empirical conditions of humans compromise their free choice and they cannot escape arbitrariness and violence of what in the tradition of political philosophy has been long before Kant named the state of nature. From the state of nature, there arises the postulate of public right, which secures conclusive possession and replaces unruly violence with institutional coercion. The final grounding step of the core structure of right in Kant's theory is the introduction of the concept of public right, civil condition and the requirements, which it must fulfil in order to bring about justice.

THE NECESSITY OF THE IDEA OF GENERAL UNITED WILL – PUBLIC RIGHT

In the following paragraphs I aim at outlining the most basic elements of Kant's public right theory as stemming from rational concepts applied to human condition. I focus on the postulate of public right and Kant's

[16] I abstain from discussing the family law here, as I consider it a matter of secondary application, since it presupposes certain kinds of social bonds and corresponding duties, which can easily be historically and anthropologically challenged.

idea of justice as a legal concept. Moreover, I investigate the sources of state legitimacy (and its monopoly on the use of coercion) in the idea of general united will (which is omnilateral as opposed to unilateral) and the concept of citizenship.

In the paragraph 41 of the Doctrine of Right, which sets the ground for the transition from the state of nature into a rightful condition Kant reiterates the three core elements of the structure of right in the form of a division of public justice. Public justice is the prerequisite to a rightful condition, where everyone can enjoy their rights. According to Kant:

> Public justice can be divided into *protective justice (iustitia tutatrix), justice in acquiring from one another (iustitia commutativa),* and *distributive justice (iustitia distributiva).* In these the law says, *first,* merely what conduct is intrinsically *right* in terms of its form *(lex iusta); second,* what [objects] are capable of being covered externally by law, in terms of their matter, that is, what way of being in possession is *rightful (lex iuridica); third,* what is the decision of a court in a particular case in accordance with the given law under which it falls, that is, what is *laid down as right (lex iustitiae)* (RL, VI: 306).

Whereas the first two types of justice may be present in the state of nature, the latter is possible only within a civil union and therefore Kant calls the civil condition "a condition of distributive justice" (RL, VI: 307). Of course, as the final step in establishing what is right, the rightful condition encloses all the three components of justice, which can also be translated into three sovereign powers of a state (legislative, executive and judiciary). Public justice requires moreover that the civil condition is ruled under public laws, which create the framework of interpersonal interaction. This framework, the system of public laws, is where the Universal Principle of Right can finally be applied to the world of experience, as only within the state the individual rights are not only granted to everyone equally, but also secured by means of institutional coercion (RL, VI: 307). The authorization to use coercion, which was introduced in the section discussing the legal subject and the concept of right, is implied by the universality of right (RL, VI: 231–232), as a necessary tool to provide the implementation of legal norms. Nevertheless, the proper justification of coercion, can only come to being if there is an institution capable of securing the reciprocity of such constraint to freedom.[17] In other words, in the state of nature, coercion must be considered just pure violence, but under the system of public laws, where rights obtain universal validity, coercion is a necessary element of juridical lawgiving (as an incentive, which is external) and a warrant for the execution of rights.

[17] An exhaustive justification of this claim has been presented by Pinheiro Walla (2014: 126–139).

The introduction of a condition of public justice, with three powers of state and the legal framework of public laws is the final stage of demarcating the core structure of Kant's legal doctrine. Three powers exercising public justice within a civil condition are all subdued to the idea of general united will, which protects the universality of the innate right to freedom by means of providing justification to individual acquired rights:

> Every state contains three *authorities* within *it,* that is, the general united will consists of three persons *(trias politica):* the *sovereign authority* (sovereignty) in the person of the legislator; the *executive authority* in the person of the ruler (in conformity to law); and the *judicial authority* (to award to each what is his in accordance with the law) in the person of the judge *(potestas legislatoria, rectoria et iudiciaria)* (RL, VI: 313).

General united will of everyone turns the provisional rights of the state of nature into conclusive rights, because it requires an omnilateral consent to any limitations of individual's rights for the benefit of another individual. According to Kant, what must be inferred from this idea is the republican and representative form of government and the concept of active citizenship. The republican form of government is the empirical representation of the rational concept of "state in idea", which Kant introduces in the paragraph 45 of the Doctrine of Right:

> A *state (civitas)* is a union of a multitude of human beings under laws of right. Insofar as these are a priori necessary as laws, that is, insofar as they follow of themselves from concepts of external right as such (are not statutory), its form is the form of a state as such, that is, of *the state in idea,* as it ought to be in accordance with pure principles of right. This idea serves as a norm *(norma)* for every actual union into a commonwealth (hence serves as a norm for its internal constitution) (RL, VI: 313).

In the republican government the sovereignty, which is expressed by lawgiving, belongs to the united will of the citizens, who can implement this will through representative[18] system – the empirical representation of the idea of general united will. Kantian contractualism rests, as we may infer from previous reflections, on a rational concept of unanimous will, which declares laws in accordance with their universality and compliance to the right of external freedom. What needs to be stressed regarding the idea of representation is that while there may be many different empirical procedures, which are fulfilling this function, the idea of general united will is not an empirical concept expressing the aggregate of all individual and particular desires of citizens. Conversely, the will dictating laws is

[18] "Any true republic is and can only be a *system representing* the people, in order to protect its rights in its name, by all the citizens united and acting through their delegates (deputies)" (RL, VI: 341).

another moral concept, representing the rational source of such lawgiving, which stems from practical reason. The general will of all people is not their collective power of choice, rather, it is their practical rationality that must only dictate laws, which benefit the state as a whole and equally protect individual rights of all citizens.[19]

The last rational concept, which must be discussed here is the one of a citizen in a state. Recall being pointed out that that the idea of general united will is the only concept, which can provide final justification for any limitation of individual freedom. In a republic, the freedom of a subject is not only protected by securing his individual rights, but also is extended whilst providing its positive aspect. The idea of a citizen in Kant's terms is constructed by means of three attributes, two of which belong to the rational core of his legal theory:[20]

> The members of a state, are called *citizens of a state (cives).* In terms of rights, the attributes of a citizen, inseparable from his essence (as a citizen), are: lawful *freedom,* the attribute of obeying no other law than that to which he has given his consent; civil *equality,* that of not recognising among the *people* any superior with the moral capacity to bind him as a matter of right in a way that he could not in turn bind the other (RL, VI: 314).

The positive freedom of a citizen is the freedom of a lawgiver and the attribute of equality means that no citizen of a state can impose more obligations on other citizens than he himself is obliged to follow. In our times, this rational account of a free citizen does not strike us as any breakthrough, but according to Kant these principles were supposed to ensure that

> Since all right is to proceed from it, it *cannot* do anyone wrong by its law. Now when someone makes arrangements about *another*, it is always possible for him to do the other wrong; but he can never do wrong in what he decides upon with regard to himself (for *volenti non fit iniuria).*; Therefore only the concurring and united will of all, insofar as each decides the same thing for all and all for each, and so only the general united will of the people, can be legislative (RL, VI: 313–314).

For citizens to truly exercise their freedom, they must be the ones, who impose limitations to it. Only then the universal right to external freedom, together with individual acquired rights, can be protected by means

[19] Flikschuh (2002, 64 ff.) stresses in this context the distinction between German terms "Wille" and "Willkür".

[20] For space reasons, I am not capable of providing exhaustive critique of Kant's account of an "independent" citizen, which is the only one to be granted the positive freedom rights (i.e. autonomy within a state), see RL, VI: 314–315. It is enough to say that connecting the capability of "being one's own master" with certain type of occupation in contrast to another (a wig maker vs. a barber) is deeply rooted in economic relations of Kant's times (ZeF, VIII: 296).

of institutional coercion, because these are the citizens themselves, who legitimate the use thereof. Public justice – securing what is right, as well as individual rights – rests on the institution generated by the general united will of the people, with three demarcating state powers that leave the sovereign right of imposing laws to the ones, who are affected by them whilst granting their civic freedom. There certainly arises the question of appropriate means of creating just institutions, which ensure the rational character of dictated norms, sufficient protection of individual rights as well as of civic freedom and equality. Yet, the manifold answers provided by Kant himself, as well as Kantian scholars throughout the centuries, belong to further levels of application of metaphysical concepts to increasingly specific knowledge of human nature and historical circumstances.

The last step in determination of the rational core of right brings us to conclude that human beings have external freedom as their constitutive right as well as ability to acquire further rights through acquisition (original acquisition of land) and contracts of various types. For these rights to be granted conclusively there arises the necessity of the idea of general united will, expressed in the institution of a state. Only under the condition of an institutionalized power of a state, which grants justice in its three domains (*iustitia tutatrix*, *commutativa*, *distributiva*) can the omnilateral united will be satisfied and the requirements of "right" fulfilled. In a just state, citizens are granted the participation in juridical lawgiving and this should assure that the laws passed will not incur them injustice.

(CONCLUSION) HUMANITY IN HISTORY – CONTINGENCY UNDER MORAL LAWS

Kant's *Metaphysical Foundations of the Doctrine of Right* (as well as his other texts on political philosophy) substantially transgresses the brief description of the core structure presented in this paper. I claim that normative conclusions met by Kant in further paragraphs of the Doctrine of Right are inferred in the process of secondary application, which takes into account the political history of human race. In other words, the further conclusions made by Kant in his major works on political philosophy presuppose deep knowledge of the historical, anthropological and geographical conditions of his times as well as acquaintance with the discussions concerning natural law theories, in which he participated. To name just a few crucial moments of Kant's political philosophy, which transgress the "core" rational concept of right, we can mention: Kant's

exhaustive account of his theory of contract, his family right section, the permissive right in public right (mentioned only in his late essay *Perpetual Peace*), the particular relation between the state and its citizens and many more. In order to do justice to Kant's political philosophy we should not render those other mentioned elements of his theory as unimportant and simply dated. I am confident, that some of the empirical data, which determined Kant's mode of application, must be considered necessary despite their historical and contingent character. Nevertheless, the core structure of right, which emerges from the reconstruction above should be considered the first point of reference, if we want to argue for political solutions from a Kantian perspective.

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