

KANT & THE COMMONS

UNDERSTANDING ANTHROPOCENTRISM IN KANT'S PHILOSOPHY OF RIGHT

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ABSTRACT

The idea of a preliminary commons – a sphere of common property prior to private property – is present in Kant's philosophy of right where, with his theory of natural law, he first makes a move towards a still underdeveloped kind of 'objective idealism'. But he cannot transform the idea of a preliminary commons into a theory of right that legitimates social institutions or a sphere of positive law because he soon turns back to the subjective idealism of his previous work in which he takes the world to be a transcendental construction of human subjects. Kant's anthropocentrism and the highlighting of private property are a direct consequence of this subjective transcendentalism. Kant's return to subjective idealism also makes it impossible for him to conceive a theory of right based on 'serviceable stewardship' and 'responsibility' rather than on private property. My claim is that in order to pass from a discourse of possession to one of responsibility it is necessary to emphasize and enlarge his theory of natural law which, I argue, tends towards 'objective idealism'. Such idealism takes 'objective reason' to be manifesting itself in the world in an almost Hegelian way – and it is not confined to the subjective consciousness of humans. Things in the world can then be endowed with intrinsic rights. It is a further claim of this paper that a consequent theory of the commons needs this transcendental complement endowing things with intrinsic rights. Alternative positions like naturalism or subjective idealism place objects in a domain 'beyond right' condemning nonhuman beings to become merely potential private property. A remodelling of Kantianism would constitute the main layer of a renewed humanism based on an enlarged idea of community and a corresponding idea of responsibility for Being.

KEYWORDS

Kant, Idealism, Commons, Theory of Right, Ethics, Private Property, Anthropocentrism, Theory of Responsibility, Community.

INTRODUCTION

This paper is an attempt to take the idea of the commons beyond empirical naturalism. It is an attempt to understand nature as the expression of

something more transcendental, as a materialization of a normative domain that also includes objective rights. This is a conceptual leap that goes against the mainstream naturalistic, materialistic and ‘realistic’ views of the world many of us have. Such a leap is justified by the need to find a basis for environmental ethics as well as the need to find a new humanistic understanding of the world that could constitute the grounding layer of new ways of life – in fact of a new future civilization. Of course, these are big words and issues which won’t be resolved in this paper but at least I shall try to make understandable what a transcendental approach to the commons could look like. By ‘commons’ I understand a domain of ‘shared resources’ which can be cultural or physical – and underlying both, also transcendental.¹ These resources are accessible to everybody and are thus held in common. Whether they precede or escape being private property is a question of perspective. The claim is made by some that they should remain accessible to all, including future generations. This is a normative claim and not just a descriptive statement. The air we breathe belongs to us all, or more exactly to nobody, which can be stated in a merely descriptive way. Water on the other hand can easily be understood in terms of private property, so that declaring water to be a commons becomes a normative claim. It is in this latter sense that the term commons is usually employed, as a physical domain that acquires a normative content not necessarily by itself, but, as it was the case in Garrett Hardin’s article on the tragedy of the commons (1968), by the moral attitude of humans. According to Hardin the (over)use of physical resources is a matter of concern to humanity. It is the value of humanity that prevails and is in danger.

Hardin was concerned about overpopulation depleting the resources of the earth and thus endangering the whole of humanity. Individual self-interested use of common resources – either through uncontrolled common use or through private property – would end up in total depletion. Individual moral consciousness is not enough to prevent this tragedy of the commons. The preservation of resources needs a higher policing or management, guaranteeing the freedom of humans through the higher level of the state (and beyond). Hardin specifically thinks of population control (1998, 13). The central ethical category to Hardin is the one already introduced by Charles Frankel: ‘responsibility’. Frankel has a quite pragmatic use of ‘responsibility’. To him responsibility simply is “the product of definite social arrangements” (1955, 203). Frankel’s and Hardin’s ‘social arrangements’ do not exclude

¹ On the meaning of ‘commons’ in a cultural sense, see Hess & Ostrom (eds. 2007). See especially the article of David Bollier, who takes ‘commons’ as a general (new) paradigm (2007, 27-41).

community arrangements (and sanctions), which, according to Elinor Ostrom (1990), on a pre-state level have prevented the tragedy of the commons happening. ‘Responsibility’ in this sense legitimates social coercion, which breaches the modern mainstream way of thinking of liberal humanism. Both Frankel and Hardin are in fact pleading for the development of a philosophy of responsibility in the profound meaning of the word – a challenge that Hans Jonas would take up a decade later with his book *The Imperative of Responsibility* (1979).

Hardin’s emphasis on responsibility explains why, at the end of his article, he quotes Georg Wilhelm Friedrich Hegel: “freedom is the recognition of necessity” (15).² Although these words in fact summarize Hegel’s whole philosophy, in the context of the need for ‘social arrangements’ that Hardin is talking about, they primarily allude to the idea of the state as highest representation of a ‘moral substance’ (sittliche Substanz). The state, instead of just being, as in bourgeois society, an administrative entity guaranteeing free movement of private property, should rather act as a moral institution. The state, as envisioned by Hegel, goes beyond the bourgeois state, and is, as he says, a synthesis of both the principle of the household (οἰκονομία) and the idea of bourgeois society (die bürgerliche Gesellschaft).³ Whereas the household hosts the principle of love and represents an original communality, the modern interest-driven economically bourgeois society represents individual subjectivity, and is based on a type of knowledge ultimately guided by particularism (1986, vol.10, §524, §535). The moral state envisioned by Hegel is a synthesis of principles both of worldly (pragmatic) *knowledge* and of communal (empathic) *love*; this new state synthesizes analytical understanding and social feeling – Hegel’s ‘sittlicher Staat’ therefore clearly goes beyond bourgeois society and could be defined as a ‘civil community’ (‘community’ in a sense that will be specified below, §3). It takes up elements of community arrangements (οἰκονομία) into the higher confines of the state. Hegel does not

² The quote actually is from Friedrich Engels’ *Anti-Dühring* (Engels, 1975, 106; Bornefeld, 2010, 271). Engels takes up an idea expressed in Hegel’s *Encyclopaedia*, which summarizes the whole program of his objective idealism and states that “Freiheit (...) und Notwendigkeit, als einander abstrakt gegenüberstehend, gehören nur der Endlichkeit an und gelten nur auf ihrem Boden. Eine Freiheit, die keine Notwendigkeit in sich hätte, und eine bloße Notwendigkeit ohne Freiheit, dies sind abstrakte und somit unwahre Bestimmungen. Die Freiheit ist wesentlich konkret, auf ewige Weise in sich bestimmt und somit wesentlich notwendig“ (1986, vol. 8, §35, 102).

³ Hegel: „Der Staat ist die selbstbewusste sittliche Substanz, – die Vereinigung des Prinzips der Familie und der bürgerlichen Gesellschaft“ (§535, vol.10, 330). ‘Bürgerliche Gesellschaft’ should be translated as ‘bourgeois society’ rather than ‘civil society’ (which nowadays is coming to mean ethically inspired social activism).

explicitly use the notion of ‘responsibility’ but the tasks of his moral state express a form of higher responsibility that combines the principles of society as a loose network of individuals on the one hand and of the loving bonds of familial life on the other. This moral state is therefore a ‘responsible state’. By calling upon Hegel, Hardin, as a biologist, showed an exceptional philosophical intuition.

Hardin’s philosophical intuition however repeats an adage that goes back to Aristotle and Plato. What Hardin calls ‘the tragedy of the commons’ was discussed by Aristotle in his *Politics* – in a passage in which he criticizes the ‘communist project’ of his teacher Plato. If we separate things from private property, Aristotle states, and leave all resources in the hands of some unregulated, spontaneous and collective rationality, what follows will be the depletion of resources. Aristotle says: “Property that is common (...) receives the least attention” (1261b). To Roger Scruton this is an argument against Hardin’s plea for state regulation. The importance of private property, according to Scruton, shows that only markets can regulate the commons (2012, 138). This, of course, has nothing to do with the position of Aristotle who abhors the idea of free floating markets. Kant will line up with Aristotle with similar arguments without explicitly referring to the Greek philosopher. Of course, the case of Aristotle against Plato is not strong because Plato’s communism never abandons resources to random use. To Plato common property is never a question of leaving resources to the mercy of self-regulating spontaneously empathizing individuals. If we take Plato in this way communism would indeed not only be, as Alain Badiou says, “a de-privatization of production”, but also an “annihilation of the state” (“dépérissement de l’État”, 2014, 63). In Badiou’s eyes Plato’s Socrates was an anarchist, although not an anarchist of desires (which leads to chaos), but one based on pythagoreanism and constitutive mathematics, believing in the spontaneous constitution of social symmetry and harmony (2015, 525-528). But Badiou’s position, which rightly connects social empathy and mathematical harmony, comes to negating the worldly – finite and imperfect – existence of humans, and presupposes a total transferal of what in Plato’s eyes only exists as a community of perfect souls in a transcendent sphere to the confines of our worldly and earthly existence. The harmonic community of perfect monads is a gradual objective that can be taken as an idea originally existing in social life but it cannot be taken as at hand and completed.

In his *Metaphysics of Morals* (1797) Kant takes up the position of Aristotle. His ‘*Doctrine of Right*’ (the first part of his *Metaphysics of Morals*) starts from transcendental subjectivism and takes private property necessarily as the core

business of a philosophy of right. Here the idea of a commons – a sphere of common property prior to private property – is not absent but it cannot be developed into a theory of right that starts from the objective rights of things because Kant's transcendentalism departs from a subjective idealistic perspective that is anthropologically bound. Correspondingly, Kant cannot move to a modern theory of responsibility. An analysis of Kant's 'failure' to go beyond private property and to establish a truthful theory of rights of the commons can show us what the transcendental definition of the commons would mean. It is from this transcendental perspective that talking of rights of natural and cultural commons can make sense. Such a transcendental approach takes the commons as having a value in themselves, independently of any effect of depletion on humanity, as was the case for Hardin. A correlation between an idealist theory of right and a commons approach is only possible if the perspective of subjective idealism is abandoned and replaced by 'objective idealism' which delineates a domain of 'objective reason' present in things. In fact, as I will show, Kant's *Doctrine of Right* first takes natural right in this objective sense (§1), but due to his anthropocentric humanism Kant inflects its position back to subjective idealism (§2), which results in a philosophy of right exclusively focused on private property (§3). A politics of the commons is here only thinkable as an explicit rejection by covenant of private property, which according to Kant has little chance of success, since physical things and material resources are naturally bound to private property (§4). Kant's 'objective' approach to natural right and his reflections on the commons, however, make a remodelling of his position possible and that I hope will serve as an argument to redefine the commons in a transcendental way. This remodelling also delineates some first steps towards a deep theory of responsibility (§5).

1. NATURAL LAW AS A TRANSCENDENTAL COMMONS

In the *Doctrine of Right* Kant develops the so-called 'metaphysical grounding' of his philosophy of right. This is just one step in a larger attempt to create a philosophical system based on a transcendental approach. Such a system can be called metaphysical in the sense that it deploys both the principles of theoretical reason – that is, the first principles of physics and natural sciences (MS, A7) – and the principles of practical reason – that is, the first laws of morality and social order (A10). According to Kant empirical descriptions of specific developments of positive law and of social institutions

can enter into this project only as *examples* of conceptually developed deductions of *a priori* principles (A iv).

Although there are many approaches in philosophy, Kant clarifies that the idea of developing a philosophical system is based on the position that there is only *one* human reason (A vi). The transcendental approach tries to reconstruct the most elementary grounds of this universal reason. In his *Groundwork for the Metaphysics of Morals* and in *Critique of Practical Reason* Kant had already introduced the idea of the categorical imperative which he used as a touchstone to come to general interdictions and commandments. In the *Metaphysics of Morals* Kant emphasizes that there is a general domain of law, the moral law (Sittengesetz), which can be discovered using the categorical imperative. This domain of law is, of course, different from that of physical law. It is the object of practical reason, whereas that of physical laws is the object of theoretical reason. The realm of moral law includes general laws and principles. General laws, be they physical or moral, always presuppose the possibility of an application to situational contexts. According to Kant a system of morals must therefore also include principles of application which connect situations to the hierarchal higher laws of morality (A11). Applied to personal actions the moral laws become specifically *ethical*. The ethical frame then defines the *morality* of personal actions (A7). As Kant made clear in his *Groundwork for the Metaphysics of Morals* ethical actions are triggered by an inner identification with the idea of duty. This identification is based on a special ‘feeling’, the respect for the moral law, which originally is not a bodily inclination but a rational insight (A14). What infuses such respect is not only the categorical imperative as such, but the general laws constituting this moral law.

There is a type of externality in this concept of Kant’s moral law. The moral law is part of reason but its validity is not restricted to the scope of finite human reason. According to Kant there are two types of laws which can be called external: the positive laws and the natural laws. The natural laws (natürliche Gesetze) are not the laws of physics but of moral law. The term natural law denotes the fact that the moral law can be taken as an external law which human beings or other finite rational beings can *discover* using the categorical imperative.⁴ This sphere of natural law that Kant takes to be external to our finite mind is merely a realm of *a priori* principles which, when

⁴ “Unter diesen [äußeren Gesetzen] sind diejenigen, zu denen die Verbindlichkeit auch ohne äußere Gesetzgebung *a priori* durch die Vernunft erkannt werden kann, zwar äußere, aber natürliche Gesetze“ (A24).

it concerns rights, he calls natural right (Naturrecht, A44).⁵ Positive laws are cultural, social or legal laws, which are not necessarily always backed up by the inner duty of the categorical imperative.⁶ Today we say that these laws are legal but not necessarily legitimate. So, both natural and positive law are external realities, although they are quite different since natural law is an ‘ideal’ reality existing in the domain of pure reason, whereas positive law is a material reality safeguarded by the institutional domain of society (and therefore having a large set of different cultural expressions). The fact that Kant takes the moral law to be natural means that it is external and not constituted by the minds of finite beings. Natural law is *objective*. It is an external law that can be *acknowledged by reason* as being valid and legitimate (A24).

But this objective domain of natural law is different from what Kant calls the ‘world of things-in-themselves’, which in any case always remains unknown to humanity (KrV, A30). It is however a realm of morals that is external and free from any embeddedness in finite subjectivity. The categorical imperative in us can show the legitimacy of natural law and this is not meant in the sense of it only being subjectively convincing, but in the sense of it having an objective validity. As an externality which requires human beings to respect it, it could truly be called a *common*, but a transcendental one, since it is part of an objective idea of pure reason. It is not a personal possession of any finite subjectivity. And it is a resource of normativity that is a priori, discernible to human reason, since we can use the categorical imperative as a touchstone to discover which laws have objective validity.⁷ That’s why this imperative asks us to imagine ourselves as being universal legislators imparting general laws to humanity. In this sense the categorical imperative is a means by which our mind gains access to a sphere of objective reason that is internal, but also external to our finite minds. The moral law is the main resource of normativity and therefore it functions like a commons without recourse to the realm of private property.

Kant also clearly thinks of this realm of natural law as an ontological domain since he states that we could express it as being the content of a divine will – a content however that should not be taken in a voluntarist way as an

⁵ He seems to invert the distinction made by Thomas Hobbes, who saw natural rights as being primary and belonging to the original state of man, and natural laws as being constructs derived from the first social contract (Hobbes, part.1, chap.14). To Kant the natural rights are just a subclass of the natural law.

⁶ Kant also speaks of “positive rights” (A30), meaning written laws which have been codified and are the object of both jurisdiction and jurisprudence.

⁷ “Der kategorische Imperativ [sagt] überhaupt nur aus, was Verbindlichkeit sei (...)“ (A25).

arbitrary product of His will, since it is itself an objectivity independent from any will creating it.⁸ The reality of natural law is therefore neither empirical nor physical, since it is fully a priori. *It is in fact a transcendental common that depends on nobody's will*, although it can be the object of everybody's will.

The natural law contains all moral rights which also include the *entirety* of conditions (Inbegriff der Bedingungen) under which the will of one person can be unified with that of another by a general law of freedom (A33). The natural law is not an arbitrary product of finite minds and it encompasses the entirety of the material (that is, non-formal) conditions under which moral beings relate to each other. This supports the view of the late Kant according to which moral law is an ontological domain that is normative in itself since it involves a claim of authority. It is a realm that prescribes to humans how to act in a way that respects each other's freedom. It is a reality claiming a validity by 'speaking' to receptive beings through a process in which the inner touchstone of the categorical imperative plays a central role. Natural law however only circulates throughout the realm of pure reason, that is, in a 'space' beyond the world of natural things.

A consequence, of which Kant seems not quite aware, is that if this domain of natural law encompasses all conditions under which the will of persons can be unified and if it necessarily applies to real actions in the physical world, then there must be a non-physical image of our world already existing in this ontological realm of pure reason. If we stretch the argument a bit further we can even say that the natural law cannot be an empty space of formal principles but must contain general ideas or concepts of things that exist in the phenomenal world. Whereas Kant in his early *Groundwork for the Metaphysics of Morals* and in his *Critique of Practical Reason* offers a more formalistic theory of morality since he concentrates on developing the idea of a general and formal categorical imperative, in his later *Metaphysics of Morals* the imperative mainly functions as a means to discover the system of morals that is attached to the idea of natural law. If, for example, there exists in this realm of natural law a principle saying that rational beings should not lie to each other or should not kill each other, then it is obvious that we must find in this realm general *ideas* of 'manifold finite beings', 'different from animals', 'communicating to each other', 'having a language', 'capable of telling lies', 'about things', 'capable of killing each other', etc.. This means that the a priori

⁸ "Das Gesetz, was uns a priori und unbedingt durch unsere eigene Vernunft verbindet, kann auch als aus dem Willen eines höchsten Gesetzgebers, d.i. eines solchen, der lauter Rechte und keine Pflichten hat (mithin dem göttlichen Willen) hervorgehend ausgedrückt werden, welches aber nur die Idee von einem moralischen Wesen bedeutet, dessen Wille für alle Gesetz ist, ohne ihn doch als Urheber desselben zu denken" (A28).

realm of natural law is filled with general ideas of everything whatsoever we find in our phenomenal world. We can see this doubling of the world as a sign of the absurdity of the idea of the externality of natural law; but we can also try to think this position through. Edmund Husserl used the term hyletic forms or ideas in order to identify these non-formal aspects of an a priori realm. Such hyletic forms are to Husserl the essential contents (or εἶδη) of any object that can appear in our experience (1976, vol.3/1, 225; 1974, vol.17, 33). This might be a way to understand the late Kant but it would certainly be a way to understand him beyond himself, since it remains a fact that Kant does not draw these consequences from the idea of an external natural law.

We can see that this idea of the externality of the moral system in Kant's late period was leading him beyond his declared subjective transcendental idealism, according to which there are only phenomena constituted by finite rational beings on the one hand and an unknowable 'world of things-in-themselves' on the other. According to Kant, with practical reason it is possible to discover the a priori laws that are part of a general idea of reason because their validity is objective and external to the manifold minds of individuals. According to this point of view, the moral law (Sittengesetz) is an ideal reality existing in the domain of pure reason, which is accessible to finite rational beings. This view of things clearly tends towards the position of objective idealism since it implies the idea of a domain of pure reason that is general and to a certain extent knowable. This domain is the main resource for moral action and cannot be limited to the private domain or private property of finite subjects. Seen from this 'objectivistic' angle the Kantian idea of personal autonomy depends on an even higher value that is the respect for the moral law. Autonomy stands for the individual attempt to understand what the *objective* rights and duties of man are (A49). What motivates people to follow the moral law is a sense of duty that is based on respect for the 'objectivity' and 'externality' of the moral law. To better understand what this means we must go beyond the terms of duty. There are clarifying passages both in the *Groundwork* and in the *Critique of Practical Reason* (A147-149) in which Kant tends to understand this respect for the law as a deep idea of pure love. As I will show the motivational element would then lead to a concept of responsibility that is broader than that of duty. In his '*Doctrine of Right*', Kant however does not develop these explorative thoughts any further but he does take up some important thoughts on the motivational aspects for moral behaviour in his '*Doctrine of Virtue*' which cannot be expanded here (A39-42). One thing seems clear: Kant never developed a systematic theory of pure love but this certainly would have been necessary in order to understand what

respect for the moral law really means (Rinne, 2017; Schönecker, 2010, 133-175). The general idea is that without such a notion of pure love for the content of the moral law there could be no respect for it.

2. ANTHROPOCENTRIC REDUCTIONISM

Although his *Doctrine of Right* develops the idea of natural law as being part of pure reason and as being external to individual finite minds, Kant falls back into the transcendental subjective position of his earlier critical work in which the phenomenal world is the construct of our minds. Kant starts his analysis of natural law by taking an anthropocentric perspective since he focuses on the human person. It is already a remarkable step that Kant aligns his idea of a philosophical system with the idea that our *human* reason is a unity.⁹ Although we have seen that Kant does not want to delimit the objectivity of pure reason to the finite insights of human reason, he still in fact identifies pure reason with human reason. A similar identification takes place in his philosophy of right where Kant starts from the idea of freedom which he considers to be an exclusive property of persons. This start from humanity is to a certain point surprising because Kant strongly emphasizes that a metaphysics of morals cannot be grounded in anthropology, although, as he says, it must be applied to it since it determines the morality of each personal action and the legitimacy of cultural and social institutions (A11). The principles of morals do not only apply to particular ways of thinking since they are general – inherent to any intelligent being capable of reason (be it human or not). But the anthropology Kant is excluding in these passages is an *empirical* one, a ‘moral anthropology’ as he calls it (A11). This type of anthropology is concerned with specific historical conditions of human nature – conditions which promote or prevent the realization of the moral law, both in the ethical and in the institutional domain.

Kant’s decision to ground his theory of right solely on the idea of the human person (disregarding animals, plants and other beings) shows that from the beginning he is anthropocentric. This can be explained by the fact that his metaphysics is based on a subjective idealistic point of view. This view was dominant in his early critical works but seemed to shift to a form of objective idealism in later works (as we have seen above). But Kant is not logical here. To him the world is still a world of appearances constituted by the minds of finite beings who are incapable of knowing the world as it is in itself. His starting

⁹ “(...) da es doch, objektiv betrachtet, nur Eine menschliche Vernunft geben kann, so (...) ist nur Ein wahres System derselben aus Prinzipien möglich“ (A vi).

point in morality is still the finite mind of humans who are mainly concerned with shifting aside all psychic and bodily inclinations which possibly obstruct the rational enactment of the categorical imperative. From this perspective the only factor to reckon with are persons: there are no objective moral claims coming from the external things themselves.

This choice of an exclusivist anthropocentrism is not only linked to Kant's subjective idealism, it is also linked to an implicit 'transcendental anthropology', according to which the person, the core inner part of humans, is a noumenal being (*homo noumenon*), whereas the physical human being is a 'homo phaenomenon' (A48). All finite rational beings can become moral persons by developing a will that aims to act in conformity with the moral law (A22). This will should be pure and free, that is, it must not be determined by psychic or bodily inclinations, instead it should be guided solely by the inner voice of duty. The fundamental natural right that we all possess is therefore *freedom*, meaning the autonomous capacity to determine our actions independently from heteronomous forces and from the coercion of others. Freedom is an *innate* right (A45), it is the core property of *personhood* (A48). In fact all other rights of man can be derived from this basic right to freedom (A45). Persons are characterized by their autonomy, which makes them both agents of morality and holders of rights (A18). This implicit 'transcendental anthropology' of Kant's practical philosophy is in fact a theory of personhood, in which the subject, thanks to its pure and free inner space, is capable of rationally determining the purpose of its actions.

Kant is in fact very explicit about his anthropocentrism. He explores the scope of a natural law that would include a *nonhuman* domain, but he concludes that, apart from the human intersubjective realm, neither the natural nor the spiritual world can be thought of in terms of rights (A50). Kant starts his exploration with a description of three types of relations that humans can have. He first analyses the relations with entities which have 'neither rights nor duties', by which he means non-rational beings (*vernunftlose Wesen*). These relations cannot be thought of in terms of rights and duties because rights and duties, he says, can only belong to free beings. We have no duties towards beings without rights (A50). This is how Kant in fact excludes the animal, vegetal and mineral world from his '*Doctrine of Rights*'. It is already clear that to Kant the only property of entities grounding rights and duties is freedom. Analysing the properties of nonhuman beings he concludes that freedom plays no role in their essence. This enables him to exclude them from having rights. Of course, this argumentation is problematic because it measures the rights of nonhuman beings from a core human property. But at a

second glance it is also problematic to take freedom in a non-gradual way, as something belonging exclusively to humans. It certainly would have been possible to conceive freedom as a property that is scattered throughout Being in different gradations. Some forms of freedom could then be differentiated from ‘autonomy’ as a specifically human form of moral reflexivity. Freedom could be associated with different levels of nature, and autonomy would just be a specific form of freedom. The recognition of a multi-layered concept of freedom would certainly help to transcend Kant’s anthropocentrism. In an objective idealistic framework it would be possible to understand both the externality of the ideal domain of natural law and a large concept of freedom present at different levels of Being. Natural law would not only have an objectivity independently from the finite minds of humans, it would also entail a more differentiated theory of natural beings.

Kant, secondly, explores our relations with beings which have ‘no rights but only duties’, like slaves and serfs (A50). Kant is correct to exclude this possibility from any philosophy of right, because in order to have duties you need to be a rational being that is naturally endowed with the right to freedom. The existence of beings having duties without any rights is unthinkable. This implies a critique of slavery, but what about animals living in bondage and having to serve man? Can they have duties? If with duty we mean a self-reflective consideration on how to act, there seems to be no duty in the animal world. Animals certainly have no duties towards us, although they might have among themselves – think of duties towards offspring. But in that case ‘duty’ should be redefined. It should then be based on a (biological and not necessarily moral) theory of responsibility connecting duty to love rather than to self-reflection. This love could be instinctive, and for Kant this would be enough to exclude it from morality, since to him only freedom from inclinations can ground rights. The possibility of gradual freedom plays no role in Kant’s inquiry of the domain of natural law.

The third aspect that Kant considers are our relations with beings ‘with no duties, but only rights’ (A50). He does not think here of animals as we would today, since these entities have neither rights nor duties. He rather thinks of God as having the right to be worshipped by man. In the scope of his practical philosophy, the reason he excludes the spiritual domain from a doctrine of right is not convincing since he acknowledges that God has rights. But he also states that God cannot be the object of any possible experience, excluding it from the domain of theoretical philosophy (A50). It is clear that Kant wants to limit his *‘Doctrine of Right’* to the domain of spatiotemporal beings, notwithstanding the fact that his theory of right is part of practical philosophy

in which the idea of God is a necessary postulate. If God exists then it certainly has the right to be worshipped and the reason to exclude it from the doctrine of right can never be a practical one.

The only domain then that to Kant is accurate enough to support a system of rights is the domain of human relationships. Interestingly, in the same passage in which he discusses the extension of a philosophy of right, Kant makes a distinction between ‘engaging’ (Verpflichtenden) and ‘obligatory’ (Verpflichteten) relationships.¹⁰ Rights and dutiful obligations can be found in the sphere of human relations. The distinction between engaging and obligatory relationships seems, however, to admit that a system of right also includes a category of ‘responsibility’ – although Kant does not use the word – as being larger than ‘duty’. Engaging relationships are relationships based on a sense of responsibility, whereas obligatory relationships cover the meaning of duty. Kant associates our relations with non-rational beings, say animals, with ‘an engaging relationship’ (responsibility) since we can engage ourselves for their maintenance without this necessarily implying any ‘dutiful obligation’. Whatever it is that triggers this kind of ‘engagement’ it is something that, according to Kant, calls upon our sense of duty without it being linked to any natural right since nonhumans have no rights. So, there seems to be a kind of subjective call on duty (responsibility) that is not backed up by the rights of nonhumans since these have no natural rights. Our relationship with animals involves no dutiful obligation. It is therefore merely optional whether we feel engaged with them. This seems to involve the kind of feeling that reminds us of Jeremy Bentham’s sensitivity towards any inhuman treatment of animals (2000, 225). Kant makes no efforts to explain where this love or empathy comes from. Instead of enlarging the scope of morally relevant entities, which would have required a more precise analysis of the ‘engagement’ felt in situations of responsibility, Kant clearly assumes this engagement with animals has nothing to do with morality. But by conceiving the possibility of additional ‘engaging relationships’ other than our moral ‘obligatory duties’, Kant paves the way for a theory of responsibility that integrates love and duty in one single concept.

That Kant’s position requires widening in line with a theory of moral responsibility becomes obvious after recalling his remarks on our spiritual duties towards God. Kant assumes that our relationship with God only involves a dutiful obligation to worship him (verpflichtete Beziehung, A50). In his philosophy of responsibility, Hans Jonas (1988, 58) argues on the contrary

¹⁰ “Einteilung nach dem subjektiven Verhältnis der Verpflichtenden und Verpflichteten“ (A50).

that our relationship to God is also one of responsibility (a ‘verpflichtende Beziehung’, as Kant would say). For those who postulate the existence of God it is indeed a matter of moral responsibility to bring about God’s ultimate design. This explains a lot of inexcusable atrocities committed in the name of religion and it also explains why religiousness implies a ‘deep engagement with Being’. Jonas not only acknowledges that we have a responsibility towards nonhuman entities (this is, as I call it, Jonas’ ‘paternalistic stance’), but also towards the highest entity (1989, 391-393), whose right it is to see humanity accomplishing its design (I call this Jonas’ ‘cooperative stance’). To Kant God is an unavoidable postulate of practical reason but in his doctrine of right he fails to understand that this implies a partnership with the divine, an inescapable engagement – involving rights and duties – in the divine project.

For Kant, being a person is both a right and a duty of humans. It is from our subjective awareness of being right-holders that he explains the origin of society and positive law because both social institutions and the legal domain are in fact *solidified claims* of natural rights of persons. All natural rights need an effort on the part of a subjective power (Vermögen) to become real. The power of people to impose respect for their own rights is the start of both the social contract and social institutions (A43). This explains why Kant’s doctrine of right concentrates, as we will see below, on private property. Kant will not just describe free persons as being naturally in possession of rights, he also sees these rights accomplished through private property. Kant’s shift from the externality of natural law to the interiority of the person makes it impossible to do justice to the nonhuman world and thus to acknowledge the larger rights of the commons.

3. THE RIGHT TO PRIVATE PROPERTY

We have seen that Kant’s anthropocentric theory of right starts from the idea that every individual, thanks to its free rational or noumenal nature (personhood) is capable of claiming its own dignity. According to Kant, it is a general duty of intelligent beings to get their humanity *recognized*.¹¹ The imperative: ‘Don’t reduce yourself to a mere end, but always be an end in itself to others’ is, he claims, a direct consequence of the categorical imperative (A43). The power (Vermögen) to claim and to expand one’s own rights must be limited by our capacity to understand that the other is an equal, who is a

¹¹ Kant does not use the word ‘recognition’ as Hegel did, but it is clear that he alludes to a struggle to get our rights accepted by others.

‘master of its own self’ too.¹² According to Kant the main duties towards ourselves have already been summarized by the Roman jurist Domitius Ulpianus, who states: “The following are the precepts of the Law: to live honestly (*honestas*), not to injure another (*alterum non laedere*), and to give to each one that which belongs to him (*sum cuique tribuere*).”¹³ To Kant the ‘*honestas*’ resides in the above mentioned inner call to get oneself recognized by others as an end in itself. In the master/slave-chapter of *The Phenomenology of the Spirit*, Hegel will transform this idea into the explicit formula of a ‘struggle for recognition’ (1986, vol.3, 150-155). The ‘*alterum non laedere*’ is interpreted by Kant as doing no injustice to others, which, of course, presupposes the acknowledgement of others as equals. The most important duty however is to realize a society in which everybody gets what is his or hers, summarized in the formula ‘*sum cuique tribuere*’. All persons have the right to become what they potentially are. We have a duty which is a *common effort* to create a society that counts as the realization of the system of right. This duty is also the moral force of progress that unwittingly steers the organization of institutions and society. It ultimately strives to grant each member its full autonomy, making possible an exterior image of the inner freedom that resides in us. It is this last formula from Ulpianus which connects to Kant’s major ideal of a moral world (a *regnum gratiae*) discussed at the end of the *Critique of Pure Reason* (KrV, A810; A815).

The first steps towards society are therefore related to a personal claim of rights. Although Kant emphasizes the objective and external dimension of natural law, his approach to rights is based on the idea of a *subjective possession*. It is the acknowledgement of our ‘*honestas*’, of a respect or love for our own being and dignity, of our own rights and our own mastery, that makes our *recognition* possible. To stand up for one’s own rights, to resist any submission by others, is also a consequence of our respect for the moral law. We have a duty towards our own rights (Rechtspflicht). Both duty and rights have to be acknowledged as belonging to the inner ‘space’ of subjectivity. And it is this space that subsequently unfolds in the outer world by way of a possession of things. Being related to the inner domain of freedom, the system of rights – before being implemented in a positive way and being enforced by institutional coercion – must have a kind of *potential positivity* in the mind of humans. This potential of rights to become positive law is what makes any explicit ‘communicative’ claim that we possess rights possible. This

¹² “(...) sein eigener Herr” (A45).

¹³ “Iuris praecepta sunt haec: honeste vivere, alterum non laedere, sum cuique tribuere”, *Digesta* (1,1,10). On this passage, see Jacob (2010, 33).

communicative expression is especially triggered when these rights are not respected by others. The situation of recognizing each other's rights, without any need for institutional coercion whatsoever, is what Kant calls *fairness* ('*aequitas*' or '*Billigkeit*'). In such a case the system of right is implicitly acknowledged and remains a (non-actualized) potential positivity (A38/39). The opposite of fairness is the *state of exception* (*Notrecht*), where already established positive rights are put aside in order to facilitate coercion. Rights are then imprisoned in their original potentiality and withdrawn into the inner core of individuals (A41). The *state of exception* is therefore a way of *silencing*, of making impossible, the natural communicative expression of claims of rights, subjacent in the struggle for recognition, even to the point of silencing their expression in already established positive laws. Claims of rights need a social enactment to become material. In itself the natural law safeguards human beings from hindering each other's freedom, but positive law, as a system of coercion, secures this freedom in case there is a failure of morality (A36). A state of exception bundles out morality from reality and it initiates a movement that is contrary to Kant's ideal of an enactment of the moral world (*regnum gratiae*).

Rights are actualized by acts of awareness and mutual recognition. They solidify in social institutions and in positive (written or unwritten) law. What gets lost in this mutual recognition of dignity described by Kant is an opening to our major responsibilities towards the world. The world of things becomes a purely instrumental domain. From a subjective idealistic point of view the phenomenal world belongs to the domain of subjective consciousness. To Kant the world of experience is always related to a subject. Similarly, the world is just a place for human activity. Everything external is in fact a possible object of ownership. Nothing on earth, Kant says, is in itself without a master.¹⁴ Things are *phenomena* and therefore always belong to the domain of subjectivity. They therefore cannot have their own claims. This is a necessary consequence of Kant's subjective approach. But it is also inherent in Kant's decision to approach natural law as a domain of formal principles. There can be no interdictions concerning the use of things, he says, because practical reason is based on formal principles (A57).¹⁵ Practical reason is not concerned with the content or essence of (non-personal) things. It cannot therefore

¹⁴ "Es ist möglich, einen jeden (...) Gegenstand (...) als das Meine zu haben; d.i. eine Maxime, nach welcher, wenn sie Gesetz würde, ein Gegenstand der Willkür an sich herrenlos werden müsste, ist rechtswidrig" (A56).

¹⁵ "Da nun die reine praktische Vernunft keine andere als formale Gesetze des Gebrauchs der Willkür zum Grunde legt (...), so kann sie in Ansehung eines solchen Gegenstandes kein absolutes Verbot seines Gebrauchs enthalten" (A57).

construct possible ‘voices’ or ‘claims’ of non-personal entities. Everything external to my will, which is not a person, can subsequently become the instrument of my physical power. Everything that is not a person becomes a possible mine or yours (A, 58).¹⁶

Although Kant here presents his idea of natural law as something formal, it is clear that it is only partially so because, as we have seen, natural law is not only the domain of general principles of the categorical imperative, it is also composed by general ‘material’ laws condemning specific actions, like suicide, cheating or lying. These specific universal laws cannot be understood, as noted above, without presupposing a hyletic analysis of ideas expressed in entities. Suicide, for example, presupposes an analysis of what humans are, not only as biological beings but also as noumenal entities. A general law condemning lying therefore presupposes a hyletic analysis of the specific *essence* of humanity. The acknowledgement that humans are ends in themselves shows that the categorical imperative presupposes the idea of ‘humanity’ as a space of freedom. So, although Kant’s moral law is not particularly formal as he presents it, it is clear that he uses the argument of formalism to exclude any hyletic analysis of nonhuman entities for normative purposes, although he uses such an analysis in order to exclude them from his doctrine of right as we have seen in the last section. Things are reduced to their instrumental use and cannot appear as objects of moral care.

In its entirety the phenomenal world appears as potential private property; everything in it that is not human is a means to human subjective freedom. As intentional objects of subjectivity, phenomenal things are by definition possessions waiting for a master (A64).¹⁷ For Kant the first step to understand the solidification of right consists in explaining property as an ownership of use (*Besitz*). If what I am using is taken from me, this would be damaging to my freedom of action (A55). The temporary use of land (*Sitz*) constitutes the first form of property (*Be-Sitz*). Land settlement (*Niederlassung*) is a prolongation of the temporary first possession (A65). People originally all have a rightful possession of land because they have been placed by nature at some point in space and time. The right to possession is in this original sense a right to being (A84).¹⁸ In fact, with this interpretation of *Besitz* as being appointed

¹⁶ “Also ist es eine Voraussetzung a priori der praktischen Vernunft, einen jeden Gegenstand meiner Willkür als objektiv-mögliches Mein oder Dein anzusehen“ (A58).

¹⁷ “Der Besitzer fundiert sich auf dem (...) Willen eines erlaubten Privatbesitzes (...) weil ledige Sachen sonst an sich und nach einem Gesetze zu herrenlosen Dingen gemacht werden würden” (A64).

¹⁸ “Alle Menschen sind ursprünglich (...) im rechtmäßigen Besitz des Bodens, d.i. sie haben ein Recht, da zu sein, wohin sie die Natur (...) gesetzt hat. Dieser Besitz (*possessio*), der vom *Sitz*

by nature to a place in space and time, Kant disconnects ‘possession’ from the voluntary act of a person. This makes a broader concept of right appear that is not connected to our free will. It is the right to have a spatiotemporal presence – to be where nature has put us (A84). This however is a right that could also be applicable to nonhuman things but Kant only takes this right to be a substantiation of the person as a transcendental subject; it is only applicable to entities characterized by personhood. So he restricts its validity to the domain of humankind (A92). These passages in Kant’s work show many similarities to Martin Heidegger’s concept of *Geworfenheit* (thrownness) of *Dasein* – of being thrown into the world (1984, 175). For Kant the place appointed to persons is the immediate surroundings of our existence which also may be claimed to be our property.¹⁹ All these passages clearly show that there is a direct connection between Kant’s idea of transcendental subjectivity and his concept of the world as private property.

Property naturally passes from the direct concept of use to that of *possible use*. Things can be mine even when I am not actually using or seeing them: the *possessio phaenomenon* then becomes a *possessio noumenon* (A72). They become mine when I implicitly claim that they are mine (A59). ‘Honestas’ here means to get the things we might use recognized as private property. It presupposes a willingness to *defend* my property (A88). By claiming a property I also declare that I have the power over somebody else’s desire since my claim of property implies a limitation of the actions of others (A60, A70). So there is, according to Kant, a right to appropriation based on the need to install freedom in Being. Labour is one way to do this as it is an action of bringing something external into my possession. Ownership is therefore a type of occupation of the world, which Kant expresses using different words like ‘Besitznehmung’ (A77), ‘Bemächtigung’ (A78) or ‘Zueigung’ (A85). However, the right to appropriation is limited by the ownership of others. The first to appropriate things are therefore their legitimate owners and it would be an act

(sedes), als einem willkürlichen, mithin erworbenen, dauernden Besitz unterschieden ist, ist ein gemeinsamer Besitz” (A84).

¹⁹ “Der Rechtsbegriff vom äußeren Mein und Dein, sofern es Substanz ist, kann, was das Wort außer mir betrifft, nicht einen anderen Ort, als wo ich bin, bedeuten: den er ist ein Vernunftbegriff; sondern, da unter diesem nur ein reiner Verstandesbegriff subsumiert werden kann, bloß etwas von mir Unterschiedenes und den eines nicht empirischen Besitzes (...), sondern nur den des in meiner Gewalthabens (die Verknüpfung desselben mit mir als subjektive Bedingung der Möglichkeit des Gebrauchs) des äußeren Gegenstandes, welcher ein reiner Verstandesbegriff ist, bedeuten“ (A92/93). “Was die Körper auf einem Boden betrifft, der schon der meinige ist, so gehören sie, so gehören sie, wenn sie sonst keines anderen sind, mir zu” (A94).

of injustice, in fact of theft, to appropriate things already belonging to others.²⁰ In summary therefore, we may say, that to Kant the world becomes a place where several subjects, expanding their own freedom, end up colliding in a *struggle* for recognition that primarily involves property. This makes it clear why Kant's *'Doctrine of Right'* starts with private law, which is the major first part of the book, and then moves on to public law, but only as an extension of private law.²¹

With the idea of a possible collision of free persons, who all have a right to appropriation, Kant develops the idea of a social contract. This contract is however not the primary form of sociality. It is an agreement between independent masters (Herren) who already have possessions – their domestic communities – which are the primary institutions of social life (A71).²² Prefiguring Friedrich Nietzsche's autonomy of masters (1988, 264), Kant conceives the idea of a civil constitution (bürgerliche Verfassung) as an agreement among masters based on mutual respect and reciprocity (Reziprozität). Their mutual recognition is therefore a respect for each other's properties and it implies the renouncement (Verzichttuung) of ownership of that which is already the property of others (A98). Seen from this perspective, the origin of the state is therefore a matter of safeguarding the possessions of the masters by means of positive law (A73).

Kant conceives the first institution of social life, the family, strictly in terms of private property. He takes women and children to be personal possessions (Habe) of the housemaster.²³ In fact, in Kant's description the household appears as a place of multi-layered possessions: the man possesses his wife, and both possess their children, which altogether possess the 'Gesinde', the serfs

²⁰ Kant uses this argument in his critique of colonialism that expropriates the 'wild' from their lands (A89/90). This kind of procuration (Erwerbung) is in fact stealing; the rightful owner is the first occupying the land and all types of deprivation are ways of stealing and therefore reprehensible (verwerflich).

²¹ According to Kant a philosophy of right would best be constituted by a first section on natural law and a second on civil law (bürgerliches Recht) which must then be divided into private law and public law (A52). Private law remains pivotal in Kant's philosophy of right. In his *"Tafel der Einteilung der Rechtslehre"* the whole section on natural law is set aside and public law is thought of as a continuation of private law (A xi).

²² Between the natural state and the civilized state (bürgerliche Gesellschaft) there is what Kant calls the social state (gesellschaftlicher Zustand) in which you already find rightful institutions like marriage, paternal relations and domestic relations (A156). The basis of this *oikonomic* state is private property; only in the civilized state is there the development of public right (A156).

²³ "Ebendasselbe gilt auch von dem Begriffe des rechtlichen Besitzes einer Person, als zu der Habe des Subjekts gehörend (sein Weib, Kind, Knecht)" (A71).

(A106).²⁴ But property here, Kant says, respects the personhood of the other: persons are not things (A105). The other is used *as if* it were a thing while acknowledging that it is not – that it is a person. All of domestic life for Kant is basically a place of property reproduction and creation (A105). Kant reserves the term ‘Gesellschaft’ (society) to the ensemble of human relationships *labouring* together to reproduce or increase private property. This he differentiates from ‘Gemeinschaft’ (community), which is a relationship of non-physical, noumenal persons.²⁵ This differentiation influenced the German sociologist Ferdinand Tönnies who, however, deviates from the metaphysical context the term ‘community’ has in Kant (Richter, 1991, 190). Society is conceived around the notion of property creation and it is typical for all societies to balance on the edge of an instrumental reification of the other. To treat the other as if it were a thing can easily slip into a real instrumentalisation of the other. Aspects of ‘Gemeinschaft’ must therefore, according to Kant, always be safeguarded in society in order to prevent people from being reduced to mere means. As an economic unity the family is a kind of small ‘Gesellschaft’ but there is always a higher *oikonomic* dimension playing a central role in families and this is constituted by personal (noumenal) relationships. As long as ‘Gesellschaft’ is taken as a subset of ‘Gemeinschaft’ – and the economy is taken as a subset of the οἰκονομία – there is, according to Kant, no danger of undermining the categorical imperative. It is clear that in slavery the person has been fully reduced to private property, which is condemnable. And the wage contract that binds people tends to degrade persons to mere things. Kant shows a clear awareness that the kind of freedom made possible by wage contracts is relative because some people can be more in need of such a contract than others.

As I said above, Kant describes the public sphere and the state as an extension of private law. The state is a common, ‘das gemeine Wesen’, which means that it may never be seen just as ‘society’ (Gesellschaft) since relationships and sentiments of ‘community’ (Gemeinschaft) must prevail (A161). Relations of dependency, like wage-relations, constitute what Kant calls ‘society’. But the state is a ‘common entity’ which implies that its members are independent; they are not just ‘Staatsgenossen’, members subjected to society, they really are ‘Staatsbürger’, citizens forming a community of free people. In the first case, state membership is just a passive element, whereas in the

²⁴ See also A116: “Das Gesinde gehört zu dem Seinen des Hausherrn.“

²⁵ We can arrive at this interpretation from the following passage: “(...) das Verhältnis in diesem Zustande [das häusliche Verhältnis] ist das der Gemeinschaft freier Wesen, die durch den wechselhaften Einfluss (...) nach dem Prinzip der äußeren Freiheit (...) eine Gesellschaft von Glieder eines Ganzen (...) ausmachen, welches das Hauswesen heißt“ (A105).

second, citizenship enables active participation. Citizenship makes ‘Stimmgebung’ possible; the right to vote (A167). The major attributes of citizenship are therefore ‘freedom’, ‘equality’ and ‘independency’ (A166). Kant’s idea of independency is based on private property, it is a *material autonomy* from the will of others. Kant takes those who cannot subsist by their own means, the uneducated as he calls them (Unmündige) – but in fact also all people bound by wages – as lacking ‘civil personality’ (bürgerliche Persönlichkeit) since they depend on others for their existence (A167).²⁶ Kant’s republicanism here is consistent with censitary suffrage, in which the have-nots are not allowed to participate in democracy. Kant’s thoughts however can also be read as an appeal to strive for a society of true participatory citizenship in which all members are materially independent. Kant’s conception of Enlightenment as a struggle against ‘Unmündigkeit’ very much supports this reading (WA, A481). And so does his argument for a welfare state based on taxation that takes means from the rich to alleviate the poor. He calls this the principle of “Vorsorge des gemeinen Wesens”, the care for our common good (MS, A186/187). However, Kant’s exclusive identification of independency with private property is problematic. It seems much more obvious to reverse the case: persons who by definition are potentially autonomous should all be considered to be citizens of one community independently of their properties. It would then be obvious that the economic relations of dependency would gradually endanger free citizenship. This reading of Kant has a much more revolutionary consequence than the one that limits citizenship to censitary suffrage.

There is a passage clearly tending in this direction. Although Kant does not dismiss wage relationships altogether, by identifying such a relationship with a ‘Verdingungsvertrag’ (a reificatory contract) – a term that in its use anticipates the Marxist concept of ‘Verdinglichung’ (reification) – he clearly criticizes wage relationships.²⁷ True citizenship cannot be based on relationships of reification. Kant even extends this view of true citizenship to the planetary

²⁶ “Der Geselle (...); der Dienstbote (...); der Unmündige (...); alles Frauenzimmer, und überhaupt jedermann, der nicht nach eigenem Betrieb, sondern nach der Verfügung anderer (außer der des Staats), genötigt ist, seine Existenz (Nahrung und Schutz) zu erhalten, entbehrt der bürgerlichen Persönlichkeit (...)” (A167).

²⁷ “Nun scheint es zwar, ein Mensch könne sich zu gewissen (...) Diensten gegen einen andern (für Lohn, Kost, oder Schutz) verpflichten, durch einen Verdingungsvertrag, und er werde dadurch bloß Untertan (subiectus), nicht Leibeigener (servus); allein das ist nur ein falscher Schein. Denn, wenn sein Herr befugt ist, die Kräfte seines Untertans nach Belieben zu benutzen, so kann er sie auch (...) erschöpfen, bis zum Tode oder der Verzweiflung (...)” (A194). Also Kant’s critique of aristocracy should be read in this sense (A192-193).

level. His idea of ‘Weltbürgerschaft’ (world citizenship) implies that the ideal of the independency of people should also be realized on a planetary level. International relations between states (the *ius gentium*) should end up in a ‘Bund’ of nations taking up the form of ‘Genossenschaft’, a federation (A217). This is for Kant the highest end of the system of right, which he calls the *ius cosmopolitanum*; with the formulation of this global law based on the ideal of a planetary world citizenship, Kant closes his doctrine of right.²⁸

Kant’s emphasis on possession and private property brings him to a dangerous edge in which the moral command to always consider others as ends in themselves is easily overthrown. His emphasis on property does not really seem adequate to understand the concept of right because – as he finally must admit – it is impossible to own the other person. It would have been far better to introduce the concept of responsibility rather than steadily focusing on possession. Household relationships between father, mother and children would then be better understood. To connect the idea of right with responsibility would also have made a different perception of nonhuman beings possible and that would have avoided seeing them merely as private property. If things are merely private property this excludes the possibility of being their own owners and having their own rights. Such a disregard for the rights of things also makes it impossible to see appropriation as a form of expropriation. So what we see is that Kant’s idea of private law can explain why people have duties towards each other’s properties, but it cannot generate a situation in which man’s primordial relation towards things is one of stewardship. If things have their own rights then they cannot themselves be reduced to private property.

That Kant is in need of such a concept of responsibility is obvious when he tries to determine the inner relationships of the household. Although acquiring a wife and having children is described in terms of possession (A106), Kant also points out that the procreative qualities of family life result in a dimension of care for the progeny (*Versorgung*). Children have an inborn right to be cared for. In this passage duty is not measured in terms of possession but in terms of responsibility.²⁹ Kant implicitly acknowledges that it is impossible to own another person and that it is in fact inadequate to

²⁸ The system of right closes here, because the earth is in itself a closed entity: “eine sich selbst schliessende Fläche”(A162). The system of right reaches up to the level of all humanity where it finds its highest expression in cosmopolitan law.

²⁹ “(...) so folgt aus der Zeugung in dieser Gemeinschaft, eine Pflicht der Erhaltung und Versorgung in Absicht auf ihr Erzeugnis, d.i. die Kinder, als Personen, haben hiermit zugleich ein ursprünglich-angeborenes (nicht angeerbtes) recht auf ihre Versorgung durch die Eltern (...)“ (A112).

understand these relations in terms of property. Indeed, only if we consider them in terms of responsibility can we uphold the idea of a vivid community (*Gemeinschaft*) that grounds all forms of society (*Gesellschaft*). Kant has great difficulties going from a discourse on possession to one of responsibility: although he declines to speak in strong property terms when it comes to children, in the end he clearly sticks to a discourse based on private property.³⁰

4. THE COMMUNIONS

Kant's subjective idealism considers phenomena to be possessions of subjectivity. But he does not deny that there are original situations in which things cannot be considered in terms of actual ownership. This externality of nature has many similarities with Kant's metaphysical concept of 'things in themselves' which escapes any form of positive knowledge. According to Kant, nature in its original situation is not only beyond property, it is also beyond any concept of right (A82). Like things in themselves, which are non-objects for a theory of knowledge, the original world of things-beyond-property is a non-object for a theory of right. The only thing that can be said about this original realm of nature in terms of rights is that it is 'potential private property'. Although Kant's system of right is, as we have seen above, a transcendental commons, its domain of natural law only includes principles regulating interpersonal relations, it leaves aside the whole domain of natural things. In Kant's theory of right these natural things only exist as long as they are perceived as 'potential properties'. They only enter into the domain of moral law once they have been appropriated by a subject and not before. Kant calls this situation of a pristine state of things-beyond-property the 'communio possessionis originaria', the 'originally common possession' (A84). This however does not mean that things are really common property and that they belong to us all. It means that their ownership has not been specified and is still open to determination. Kant speaks for instance of the land as being 'Gesamtbesitz', a property of all, but this does not denote a state of right: it is rather a situation 'beyond right' that by definition is without rights. It is a situation in which the potentiality of being somebody's property still hasn't been realized. According to Kant, the 'communio possessionis originaria' is a historically real situation, but in terms of rights it only denotes a situation of

³⁰ "(...) die Kinder [können] nie als Eigentum der Eltern angesehen werden, aber doch zum Mein und Dein derselben gehören, weil sie gleich den Sachen im Besitz der Eltern sind" (A114).

potential property waiting to be ‘purchased’ by some kind of appropriation or human labour.

There is one passage in Kant’s *Metaphysics of Morals* that seems to challenge this picture of a passive nature waiting to be mastered. I say ‘seems’, because in the end Kant remains consequent in his picture of the ‘*communio possessionis originaria*’. In this passage Kant, asking what precisely authorises man to occupy a land, makes the land speak for itself, as if it had its own voice. To a possible master the land clearly makes claims of rights: “if you are not able to protect me, then you do not deserve any possession of me.”³¹ Although this fictional conversation is still one in terms of private property, there seems to be a kind of authorisation of private property made possible by the land itself based on the idea of reciprocity because the land can only become private property when it is protected or cared for. A theory of responsibility towards the land clearly resonates in the words ‘if you cannot protect me’. The passage addresses the issue of a care for the land that authorises its possession. But Kant is not really talking about responsibility. Rather, he makes the point that people who are not willing to defend their possessions are unworthy of them. Although the land has been given a voice, there is in the end no real responsibility towards the land as land. Kant also explains that people can only claim mastery over the sea if they are able to actually defend it with their cannons.³² So the discourse on private property has not been abandoned on behalf of one's own responsibility.

We may conclude that the ‘*communio possessionis originaria*’ does not denote any primordial commons in the sense of a realm in nature that has its own rights. But it is, according to Kant, possible to conceive a situation in which people have agreed by social contract to renounce being the sole owners of the land (A98). The land then would become an *artificial commons* made possible by agreement, by a covenant. This would not imply any originally free status of the land.³³ It would by no means imply that things have an original ownership of their own preceding any intervention of man. Kant can conceive the idea of a commons but only in the sense of a common possession made

³¹ Es ist die Frage: wie weit erstreckt sich die Befugnis der Besitznehmung eines Bodens? So weit, als das Vermögen, ihn in seiner Gewalt zu haben (...) ihn verteidigen kann; gleich als ob der Boden spräche: wenn ihr mich nicht beschützen könnt, so könnt ihr mir auch nicht gebieten“ (A88).

³² “Darnach müsste also auch der Streit über das freie (...) Meer entschieden werden; z.B. innerhalb der Weite, wohin die Kanonen reichen, darf niemand an der Küste eines Landes (...) fischen (...)“(A 88)(also, A95).

³³ “Ein Boden aber, der nur durch diesen [Vertrag] frei sein kann, muss wirklich im Besitze aller derer (zusammen verbundenen) sein“ (A65).

possible by a contract in which people explicitly renounce private property or add private properties to a common domain. Such a communality of possession based on the agreement to renounce land ownership, is what Kant calls a ‘*communio fundi originaria*’ (A65). This type of explicit agreement to renounce to land that is already claimed is, as Kant points out, a historical reality. There have been times and there will always be situations in which people have donated and will donate their lands for a common purpose.

Kant speaks here of a communality of land (*fundus*), but he explicitly denies the reality of a *general* communality of properties. Such a ‘*communio primaeva*’ (original communality) would imply an agreement of people to renounce to any kind of private property. According to Kant, this situation is not historical at all. There is no historical evidence for it (A65),³⁴ it is a mere fiction (*Erdichtung*). The idea of a ‘*communio fundi originaria*’ on the contrary is based on historical facts. But although a land commons is possible, Kant declares it to be unworkable. He implicitly refers to the ‘tragedy of the commons’ as discussed by Aristotle, who, contradicting Plato’s communism, said that men pay most attention to what is their own (*Politics*, II, 3 – 1264b-1266a). According to Kant, communal property of land would end up generating inescapable conflicts. Transferring a piece of the communal land to private use seems the only practicable solution to Kant who seems to fully agree with Aristotle although he does not explicitly refer to him.³⁵ He affirms that such forms of communism end up in some kind of redistribution of land. This also proves, he says, that there is ‘*lex iustitia distributiva*’, a general idea of distributive justice, working in us as an a priori law. This general idea manifests itself, notwithstanding people renouncing their private property (A91).

Both the ‘*communio fundi originaria*’ and the ‘*communio primaeva*’ presuppose the idea of a contract or agreement in which people renounce private property. But according to Kant such cultural decisions are in no way a natural inclination of people. The original relation of man to nature is that of appropriation. The existence of a primordial ownership of nature in which things are originally ‘free’ – by owning themselves – has nothing to do with

³⁴ He distances himself from the tradition of Grotius and Pufendorf, who take this to be a real situation (Hruschka, 2015, 66).

³⁵ “Alle Menschen sind ursprünglich in einem Gesamtbesitz des Bodens der ganzen Erde (*communio fundi originaria*), mit dem ihnen von Natur zustehenden Willen eines jeden, denselben zu gebrauchen (*lex iusti*), der, wegen der natürlich unvermeidlichen Entgegensetzung der Willkür des einen gegen die des andern, allen Gebrauch desselben aufheben würde, wenn nicht jener zugleich das Gesetz für diese enthielte, nach welchem einem jeden ein besonderer Besitz auf dem gemeinsamen Boden bestimmt werden kann“ (A91).

these two types of ‘*communio*’. To Kant, the idea of ‘free things’ owning themselves contradicts the possibility that things can be appropriated. If land were originally free this would mean that the land would actively refuse to allow people to take possession of it (A64). The passivity of the land however shows that it cannot be taken to be free. It is clear here that Kant presupposes that only beings able to defend their own dignity can be called free. It seems clear to him that land is a fully passive entity. However, if we apply this argument to the animal world it becomes clear that by running away from being captured animals do in fact protest against their liberty being constrained. And it is clear also that land can revolt against misuse by becoming infertile. But Kant does not catch on to these signs of nature. The idea of the land revolting against misuse could have enabled Kant to consider the relationship between land and man differently, as a kind of mutual assistance. But he takes the use of external things as by definition implying their possession. To talk about an originally free land would come to interdict people using it (A64).³⁶ All this makes it clear that Kant seems unable to conceive a relationship of mutual assistance between man and nature. Using the land immediately entails possessing it.

Kant also introduces the idea of a ‘common earth’, as the place that nature appoints people to be located. People are bound to a common earth (*eines bestimmten Ganzen*), to which everybody has equal rights of possession. In this sense all people originally have a ‘*Gemeinschaft des Bodens*’, a common soil that precedes any juridical idea of property. Kant is thinking of the ‘*communio possessionis originaria*’, of a situation ‘beyond right’ – in fact merely a natural state – in which people are placed similarly to Heidegger’s ‘thrownness into Being’. But the idea of a common soil does not signify that things have any rights of themselves; it only means that they originally are possible possessions of humanity. Kant also combines the idea of a common earth with the ‘*ius cosmopoliticum*’ – the right of all to have their part of the earth. He considers the ‘*ius cosmopoliticum*’ to be a necessary condition for enduring peace (A229/230). It is a kind of cosmopolitanism that sees the earth as the residence of humankind, but in which the citizens stick to their own place, in which in fact all mobility becomes problematic since all parts of the

³⁶ I quote the whole passage: “Wenn auch gleich ein Boden als frei, d.i. zu jedermanns Gebrauch offen angesehen, oder dafür erklärt würde, so kann man doch nicht sagen, dass es von Natur und ursprünglich, vor allem rechtlichem Akt, frei sei, denn auch das wäre ein Verhältnis zu Sachen, nämlich dem Boden, der jedermann seinen Besitz verweigerte, sondern, weil diese Freiheit des Bodens ein Verbot für jedermann sein würde, sich desselben zu bedienen, wozu ein gemeinsamer Besitz desselben erfordert wird, der ohne Vertrag nicht stattfinden kann“ (A64/65).

earth are somebody else's private property. 'Eternal peace' requires an easing of ownership but this cannot be achieved by giving private property such a dominant place. Although Kant recognises that there is a common earth legitimizing cosmopolitanism, it is clear that his attachment to private property is impeding him thinking of a truly free mobility, thinking a cosmopolitanism beyond territorialism. The earth for Kant remains a parcelled property. We may conclude from this that cosmopolitanism remains an underdeveloped issue in Kant's theory of right because he does not abandon his initial subjective transcendentalism in favour of an objective transcendentalism that would make it possible to claim rights for nonhuman things. This would have made it possible to prioritize a discourse of responsibility over that of private property. But Kant's attachment to subjective idealism makes this impossible so he is unable to construct a philosophy of right based on responsibility and stewardship.

5. REMODELLING KANT

In the first section I emphasized the idea that Kant's concept of natural law is, in fact, a 'transcendental commons'. Kant seems to think of this moral domain as an objective externality existing beyond the transcendental subject which means that in his theory of right at some point he is approaching an objective idealist position. The fact, however, that Kant sticks to his subjective transcendentalism leads to an anthropocentric reductionism of natural law. Since he can only conceive of morality on the basis of freedom and rationality, that is, on the basis of autonomy, he can only imagine the moral law as a set of commandments regulating the intersubjective behaviour of human moral actors. Natural right is thus basically limited to the right to autonomy which is essential for people. This approach means that only entities with moral autonomy have rights. We have seen (§2) that Kant sets aside all other entities of the world but he does so starting from an analysis of their essence. He identifies the essence of human beings with their faculties of free thought, of rationality and freedom. The essence of living beings that are not human shows a lack of all that, and animals, as moral objects, are therefore excluded from his doctrine of right. Only if the essence of things reveals an inner freedom, can things become morally relevant objects. But, from the beginning Kant's analysis already presupposes an anthropocentric reductionism. However, a 'hyletic analysis' of nonhuman entities, as I have called it, could focus on incipient forms of freedom existing throughout the biological world, or could focus on other relevant qualities of things by which we could

determine their intrinsic worth and dignity. As I have argued, we could take freedom as a property of things that extends gradually over existence. Such freedom can be studied, for instance, on the basis of communicative and relational attributes of beings. And if freedom is not the only predicate to determine the dignity of things we must at least specify what other quality does.

It is Kant himself who gives a first indication of such a quality when he says that things are appointed a place in Being. If nature appoints each thing its place in space and time, then removing things from their proper place would follow a logic of deprivation. A prohibition against removing things from their proper place can never be a categorical imperative as this would end up with it being impossible for humans to act, and this would contradict the essence of an acting entity like humankind. The term ‘appointing’ only makes sense if it is considered as being part of a larger structure of relatedness of things. I have already made the connection between Kant’s remarks and Heidegger’s concept of ‘thrownness’. Such placement in Being denotes an assignment, a destination and in fact a prescription – simultaneously providing things with both instructions and equipment necessary for this assignment. To Kant this placement is a general quality; it is not confined to human beings alone. In this sense Kant is less anthropocentric than Heidegger. Saying that things are appointed a place in Being does not signify that things are just means. The assignment does not merely denote a core functionality of things that changes their value to something else, it also denotes an inner individual capacity of self-constitution. Being appointed a place reveals itself as an assignment when things take up this purpose individually by self-constitution. In this case, if things are considered to be means, they are so to their own ends. An individual assignment manifests itself as a thing’s natural activity. It denotes an inner energy or a ‘volition’ to engage in its own destiny. Of course, this is what we have been calling the gradual manifestation of freedom. The essence of things is therefore not only a core function or quality, it is not only about ‘what things ultimately are’ (German: *Was-sein, Wesen*), but it is also the manifestation of an inner self-constitution, it is also about ‘how things ultimately are’ (German: *Wie-sein, Wesen*).

The attribute we were looking for then is a thing’s placement in Being as it is ‘claimed’ by its own inner activity. This ‘what’ and ‘how’ make sense in a manifold relatedness of things. Seen from this perspective, the essence of something denotes its particular way of meeting an appointment. Rightness is therefore the art of not disturbing this placement of things, it is the art of enabling things to self-constitute in relatedness to the world. Only a so-called

'hyletic analysis' of things, looking at 'what' and 'how' things are, can help us understand what this means for the human range of action. Such an analysis identifies the nature and dignity of man in its personhood. An additional reconstruction of the hyletic nature of nonhuman beings can bring us to a better understanding of their particular dignity.

Of course, all this requires another type of transcendental approach. Kant's subjective transcendentalism is incapable of developing such hyletic analysis. His philosophy of right ends up reducing the world to human private property, because to him humans are the only morally relevant entities. What is in fact required is an objective idealist approach that takes this externality of natural law seriously. Things would then no longer just be appearances of a transcendental subject, and would not enter the domain of morality as the private property of rational beings. It would be the task of philosophy to discover the inner self-constitutive activity of things, to describe their *essential* 'givenness'. To this end, of course, science is crucial and indispensable, although not science in its modern positivist clothing, but science in an idealist costume. The whole domain of natural science would then change its purpose, becoming part of a normative approach to the world. Our so-called 'neutral science' would end up being ethically transformed, showing again its everlasting commitment to the higher ends of philosophy. The placement and structure of things in Being demarcates 'what' they are, and this also requires understanding 'how' they are; what the activity is of their inner self-constitution in their relatedness to other things. Entities are then conceived as carrying an inner idea guiding their genuine being and constituting their proper dignity. Taken as a whole the world would then manifest itself as a network of self-articulating ideas claiming their own intrinsic rights.

In the objective idealist approach, moral law is an objective externality and not just the mental construction of finite subjects. It is an objective realm that needs to be discovered and that is more than a set of formal rules. The moral law is about imperatives establishing our duties and responsibilities towards other entities. What these duties and responsibilities are depends very much on the content of the essence of these entities. From an objective idealist perspective, natural right would be a 'transcendental commons' establishing the rights of things. It is difficult to determine whether animals have a sense of duty and responsibility or not. If they have, it is certainly not a reflected moral sense. Animals do not have the capacity to reflect on their own morality. Moral duty implies an obedience to the inner law, an obedience that cannot be seen as an imposition from outside since the guiding idea comes from the inside. But this moral law demands us to comply with the being of things, which, if

unblocked and unhindered tend naturally to constitute the idea they naturally carry or are expressions of. This compliance can be described as ‘respect’ or ‘love for’ the law, but if this is not to be taken formally, it means that respect and love are also directed towards the content of the law, that is, to the entities mentioned in that law. A duty feels like an imposition only if there is a lack of love. In this sense real moral duty is a responsibility towards the whole differentiated domain of freedom as it develops throughout the *scala naturae*. A certain sensibility is indeed needed in order to have a mental openness for the diversity in which freedom manifests itself. In objective idealism a philosophy of right therefore implies a recognition of the dignity of things and cannot primarily be articulated around the idea of private property as Kant attempted to do.

Kant only speaks explicitly of responsibility in the context of persons having a responsibility towards humanity.³⁷ This domain of humanity, he says, cannot really be understood in terms of private property. Following this precept, the objective idealist approach would propose an enlarged Kantianism in which responsibilities would be significantly multiplied, extending towards the world of nonhuman things. Stewardship, serving a differentiated concept of dignity, and not private property would constitute the starting point of natural law. An objective idealist approach has to deal with a system of right that has a multitude of levels; it has to deal with a multitude of morally relevant entities, human and nonhuman. Such stewardship implies the recognition of the rights of other entities; it does not impose its voice on things, but it opens itself to the communicative field of Being with each entity radiating its own light. It is stewardship, not piloting, and it serves the multiple dignity of things. And it is here that a new humanism, inspired by objective idealism, detaches itself from the old fashioned humanism based on an exclusivist anthropocentrism. A certain centrality of humanity, however, is unavoidable, since only humankind is able – thanks to its self-reflective freedom – to develop a responsible stewardship of Being. But, since this stewardship is guided by a wide notion of dignity, this centrality of the human is at the same time, so to speak, a decentralized centrality. This may be called a ‘relative anthropocentrism’ or an ‘inclusive anthropocentrism’, it could also be called a ‘decentralized anthropocentrism’. Instead of coining such paradoxical expressions it is easier to talk about a humanism that renounces anthropocentrism. In fact what is

³⁷ “Aber hieraus folgt (...), dass ein solcher Gegenstand nur eine körperliche Sache (...) sein könne, daher ein Mensch sein eigener Herr (*sui iuris*), aber nicht Eigentümer von sich selbst (*sui dominus*) (...) geschweige denn von anderen Menschen sein kann, weil er der Menschheit in seiner eigenen Person verantwortlich ist“ (A96).

central to this position is the normative image of the world, so that it might be more appropriate to speak of deontocentrism (*δέον* in this case meaning an obligation implicit in the essence of things).

CONCLUSION

Kant's attachment to subjective idealism makes it impossible for him to conceive a commons-based theory of right leaning on stewardship and responsibility rather than on private property. When humans are the only relevant moral entities on earth the nonhuman domain becomes the object of an external imposition. This is in fact what private property ultimately is: it is the power of humans to impose their will on the things around them. In its original situation, nature, according to Kant, is beyond any concept of right. So, originally, natural things are non-objects for a theory of right. Kant has shown, that this situation 'beyond any form of right' automatically brings them to a position of becoming 'potential private property'. He shows that if land was free, it could impose restrictions and interdictions on people, which would complicate the range of action for humans. Kant's emphasis on private property in the end also implies severe restrictions to cosmopolitan mobility; it makes it impossible to understand what it means to say that the earth is a common. It is important to see that Kant's highlighting of private property is a direct consequence of his subjective transcendentalism.

In order to pass from a discourse of possession to one of responsibility, it is necessary to abandon this Kantian subjective idealistic position. In order not to reduce physical things to 'potential private property' they must be endowed with intrinsic rights. This makes it impossible to take things from a merely naturalistic perspective. A transcendental approach could bring in an alternative but only if this is conceived as a form of objective idealism. This would take up thoughts on natural right that Kant introduces but does not consequently develop. In this perspective the right of things would be connected to their transcendental essence, to their deeper nature. This being brings in a voice or a claim proper to things. A reconstruction of such natural claims would be part of what I have called a hyletic analysis of nature. Such an analysis would bring science back to the womb of philosophy. It also permits the extension of the idea of a community of moral beings beyond the boundary of relationships between persons. Basic to objective idealism would be a broad idea of freedom that goes beyond personhood and can be connected to forms of self-constitutive activity. It is a claim of this paper that a consequent theory of the commons needs this transcendental complement.

Naturalism and subjective idealism place things in a domain ‘beyond right’ condemning nonhuman beings to become merely ‘potential private property’.

Starting from these reflections a commons-based theory of right cannot primarily be grounded on a theory of private property. It cannot start, like Kant’s *Doctrine of Right*, with a justification of private property. And it cannot base public right on such a justification. A theory of right should therefore start with a theory of natural law, as a theory of abstract right that, however, is not formal but very much dependent on the content of hyletic ideas. Natural law cannot only be conceived of merely as a sum of formal principles as these principles are intrinsically connected to contents, to the ideas of things. These may be general and abstract but they elaborate essential contents. In a commons-based theory of right such a section on natural law should be followed by a section on subjective rights or private law that focuses on the natural conditions of man and things. Abstract right is here individualized and contextualised. A third synthetic section on global right (or cosmopolitical right) would finally develop public right and a general theory of commons management, developing the basic ideas of an institutional framework in which the solidarity of the ‘community’ (of noumenal beings) is the guiding idea of ‘society’ (as the mechanism of administration and labour). This basically develops what Hegel has called ‘Sittlichkeit’, and that now is commonly expressed by the moral transformation of ‘society’.

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