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Common Possession of the Earth and Cosmopolitan Right

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Abstract: *Common possession of the earth* was a prominent idea in seventeenth-century modern philosophy. In this paper I will argue that Kant not only provides a secularized version of common possession of the earth but also radically departs from the conception of his natural law theory predecessors. I argue that Kant's account of cosmopolitan right seeks to address the same problem as Grotius' right of necessity, namely the implausibility of assuming inflexible acquired rights when this would go against the rationale for introducing these rights. However, while Grotius intended to excuse violations of private property in cases of necessity, Kant restricts his discussion to the right of host peoples to reject entrants in their territory. I show that in Kant's account, to deny life-saving occupation of space to another being who is in principle just as entitled as anyone else to any place of the earth is to *contradict* the very justification for the territorial rights of states. This is because the permission to control territory and the right of the involuntary visitor to be admitted are based on the same legal foundation or *Rechtsgrund*, namely, the original community of the earth.

Keywords: Kant, Common Possession of the Earth, Cosmopolitan Right, Right of Necessity, Territorial Rights.

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I Common Possession of the Earth in Modern Political Philosophy

To all the way was open;
The use of all things was a *common* right...¹

Common possession of the earth was a prominent idea in seventeenth-century modern philosophy. It has its origins in the Christian idea of God's common gift of the earth to Humanity and accounted for the idea that although private property was a development devised by human reason, it was not contrary to natural law.² The notion appears in the works of philosophers such as Hugo Grotius, Pufendorf, Locke, Achenwall and Immanuel Kant. In this paper I will argue that Kant not only provides a secularized version of common possession of the earth but also radically departs from the conception of his natural law theory predecessors. While Kant preserves some important affinities with the use of the notion by natural law theorists, such as its central role in imposing limitations on acquired rights, he had to redefine the concept in order to make it compatible with his legal theory, as it is based on external freedom and not on a conception of human nature.

There has been a surge of interest in the notion of common possession of the earth in the recent debate on global distributive justice and territorial rights. For instance, left libertarians such as Hillel Steiner and Mathias Risse have found a renewed interest in the idea as a means to argue for equally shared natural resources.³ Common possession of the earth, or the idea that all human beings have at least some minimal equal claim to the earth and its natural resources, seems promising since it can provide a non-relational argument for global redistribution or for questioning states' control of borders. However, it is important to note that although the current debate often refers to common *ownership* of the earth,

¹ Seneca, quoted by Grotius, Hugo: *De Jure Belli ac Pacis / On the Law of War and Peace* (1625). Kitchner 2001, 288.

I use the following abbreviations:

DJPC Grotius, Hugo: *De Jure Belli ac Pacis / On the Law of War and Peace* (1625). Kitchner 2001.
DJNG Pufendorf, Samuel: *De Jure Naturae et Gentium libri octo / Of the Law of Nature and Nations* (1672). London 1729.

² See Aquinas, Thomas: *Summa Theologica*. 2.2 quaest. 66 art. 2 ad 1.

³ See Vallentyne, Peter & Steiner, Hillel: *Left-Libertarianism and Its Critics: The Contemporary Debate*. New York 2000.

the notion did imply joint ownership.⁴ “Possession” is thus a more appropriate term than “ownership”.⁵ Common possession of the earth was used to explain the normative development from individual first appropriation into a system of private property. It meant neither fully fledged property rights nor claim rights to objects. A claim right is a right to exclude others from the use of an object. In contrast, common possession of the earth gave rise merely to *use rights* in the sense of a *liberty* or *privilege*.⁶ This idea has traditionally been illustrated by the theatre seat example.⁷ Assuming that there are no seat reservations and that the row of seats is reserved to the class of knights, no knight has any claim to any specific seat in the theater. The seats must be occupied on a first-come basis. Once you are occupying a seat you shall not be removed from it by another knight who would prefer to sit exactly where you are. Removing you would not only violate your physical integrity (the original *sum*), but would also presuppose that some other knight has more than a mere use right and can therefore *claim* the seat you are occupying. A mere use right does not allow this. Common possession of the earth therefore explained why individuals are permitted to use objects or occupy a certain place on the earth without wronging others but have no claim to objects or places as a *right to exclude*. According to the Grotius-Pufendorf tradition, the institution of private property eventually developed from the original community of goods and its corresponding original use right because it was a more *convenient* arrangement. This is probably why Kant, following Achenwall, criticizes Grotius and Pufendorf for understanding original community as a fictitious “historical” fact (*uranfänglicher Gesamtbesitz, communio primaeva*).⁸ Kant, as we will see, understands the notion as an idea of reason, having objective, that is, legally practical, reality (*rechtlich praktische Realität*).⁹ Understanding the role of common possession of the earth in modern political philosophy is thus important

⁴ See for instance, Risse, Mathias: “Common Ownership of the Earth as a Non-Parochial Standpoint: A Contingent Derivation of Human Rights”. In: *The European Journal of Philosophy* 17, 2009, 277–304. And Risse, Mathias: *On Global Justice*. Princeton 2012.

⁵ See Westphal, Ken: “Do Kant’s Principles Justify Property or Usufruct?”. In: *Jahrbuch für Recht und Ethik / Annual Review of Law and Ethics* 5, 1997, 141–194.

⁶ Salter, John: “Grotius and Pufendorf on the Right of Necessity”. In: *History of Political Thought* 26 (2), 2005, 28.

⁷ This is Seneca’s version of the example, used in ch. 5 of *Mare Liberum*. Seneca, *De Beneficiis / On Benefits*, M. Griffin and B. Inwood (trans.), University of Chicago Press, 2011, VII. 12.3, p. 176. Grotius also uses Cicero’s version in DJPC, II.II.2, 71. Cicero, *De Finibus / On Moral Ends*, Julia Annas (ed.), R. Woolf (trans.), Cambridge 2001, III. 67, 86.

⁸ MS, RL, AA 06: 262.31.

⁹ MS, RL, AA 06: 251.02.

not only for grasping how this idea can be rehabilitated in contemporary debates, but also for understanding (1) how Kant departs from the Grotius-Pufendorf tradition, (2) his specific contribution as an alternative to this tradition and (3) its potential for current debates such as climate change and ecological migration.

A common assumption of Christian natural law theory is that *God* gave the world to everyone in common. The world can be seen as the common bounty of humanity, whose resources can be used by each to satisfy their needs. This leads us to another fundamental assumption of natural law theory: that the basic needs of living beings (their “fundamental desires”) provide the *content* of natural law. Natural law includes whatever is necessary for self-preservation.¹⁰ However, as I will show, this is Kant’s major rupture with his natural law predecessors, although he still preserves several elements of the natural law tradition (which he redefines). Kant not only *secularizes* the idea of common possession of the earth; he also does away with the notion of *needs* as the source of natural law (which is the law of *reason*), since in his account empirical facts about human nature are insufficient to *generate obligations* and unable to *justify coercion* in a way compatible with the freedom of all.

Hugo Grotius used the idea of common possession of the earth to explain why every individual had an *original* use right to the resources of the earth. The use right is “original” because no deeds were required in order to give rise to the right: we are born with it as God’s creatures. Because the goods of the earth were given to us in common, individuals have a right to use whatever they need for their self preservation, that is, to maintain what is originally theirs: the *suum* (life, limbs and liberty). Since use rights often coincide with *using up* a resource (i.e., eating an apple means “using up” the apple), use rights naturally excluded others from using a resource. One can thus see how the satisfaction of needs in a sense “calls” for the institution of private property.¹¹ However, it still seems problematic to take away and use up a resource without the *consent* of others. How do I know that others agree to my eating this specific apple? What if they also want that same apple for themselves? Grotius assumed a general *tacit consent* on the matter. Individual appropriation is thus not properly unilateral in Grotius’ account. Acts of acquisition are permitted by the community of original possessors, which is constituted by the notion of common possession of the earth.¹² This presupposes a

¹⁰ See for instance Aquinas, Thomas: *Summa Theologica*. I-II, Q. 94, A.2.

¹¹ Buckle, Stephen: *Natural Law and the Theory of Property. Grotius to Hume*. Oxford 1991, 30.

¹² As Gierke observes, community is not the source of natural law, but the other way around: natural law is what gives rise to community. Gierke, Otto: *Natural Law and the Theory of Society Vol. I.*, Cambridge 1934, 100.

power to use things to the exclusion of others, without which one would be doing injustice to those who are necessarily excluded from that resource.¹³

The original power to use things requires that rights relations between persons already be in place before any agreements or deeds. This is precisely what the notion of original community means to accomplish. However, it is important to understand the *nature* of that original community. Pufendorf considered Grotius' understanding of the original community of the earth and the assumption of tacit consent to be problematic. As Pufendorf makes clear, we do not need to conceive the earth and its resources as belonging to humanity *ab initio*, that is, as a *positive* community. His strategy is to start with the assumption of a *rights vacuum* in regard to the earth's resources, what he called a *negative* community of the earth.¹⁴ In a negative community, all things are open to everyone, not because they were given to us in common, but because they belong to no one. Appropriation thus requires neither the assumption of use rights nor the consent of the community of users.¹⁵ Nevertheless, Pufendorf argues, nature "does not want us" to stay in that situation forever: unless things are appropriated, they can be of no use to us. Therefore, appropriate we must (and God is fine with that). Individuals then began acquiring things for themselves. However, since everyone was equally entitled to whatever single individuals separated for themselves, conflict became inevitable. The establishment of separate dominions over things was needed to avoid conflict and this in turn required *pacts*. Pacts, however, are not valid for all times and all generations: at different stages of development, new agreements must be put in place. Therefore, the introduction of use rights and ultimately of private property is a means of avoiding conflict and creating security in Pufendorf's account.

The original community, as conceived by Grotius and Pufendorf, also imposed *restrictions* on property rights in cases of extreme necessity. Although the privatization of the common stock of humanity was a departure from common possession, appropriation and ultimately private property still has to be compatible with the *rationale* of common possession. Since private property was intro-

13 Buckle, Stephen: *Natural Law and the Theory of Property. Grotius to Hume*. Oxford 1991, 30.

14 Pufendorf, DJNG IV.4.

15 According to Buckle, Pufendorf's claim that the original community should be understood as a negative instead of a positive community does not mean that he disagreed with Grotius. Pufendorf thought that Grotius' view *implied* a negative community although Grotius himself was not clear about it and tended to confuse positive and negative community. Positive community is always adventitious, that is, it must be a later development and thus a departure from the original negative community. Buckle, Stephen: *Natural Law and the Theory of Property. Grotius to Hume*. Oxford 1991, 104.

duced as a way to optimize human self-preservation, it would be absurd to make it so inflexible as to hinder persons to secure their self-preservation in cases of extreme need. Both Grotius and Pufendorf recognized that a person in extreme necessity should not be considered guilty of theft.¹⁶ Grotius argues for a *right of necessity*, which meant a “revival” of the original use right in case of extreme necessity, although some restrictions applied.¹⁷ In contrast, Pufendorf thought that reviving the original use right as in the state of nature would be inconsistent with property rights. He therefore sought to give an alternative account of the intuition that necessity can excuse violations of property rights. Similarly to Aristotle, Pufendorf considered an important aim of the institution of private property the creation of an opportunity to property owners to exercise generosity towards the needy, thereby winning their gratitude.¹⁸ His strategy thus was to appeal to the distinction between *imperfect rights and duties* instead of assuming a perfect right to violate the law of property.¹⁹ The needy do not have a *right* to the surplus of the wealthier. They can be *worthy* of their help. In contrast, the wealthy have an imperfect duty to attend to the needs of others and to share their property. This obligation can be made perfect as a matter of state provision (for instance, by taxing the wealthy to support the needy).

Kant’s conception of an original community of land (*communio fundi originaria*) follows the Grotius-Pufendorf tradition.²⁰ However, Kant gives the notion a radically different interpretation, compatible with his legal theory as based on external freedom. Although this notion lies at the heart of Kant’s account of cosmopolitan right and is central to his theory of acquisition in the Private Right section of the *Doctrine of Right*, it has not been given enough attention in Kant scholarship. I will argue that Kant’s account of cosmopolitan right seeks to address the same problem as Grotius’ right of necessity and Pufendorf’s imperfect rights and duties, namely the implausibility of assuming inflexible acquired rights when this would go against the rationale for introducing these rights. However, Kant’s account of original community constitutes a radical departure from Grotius and Pufendorf. While Grotius and Pufendorf had in mind violations of

¹⁶ Grotius, DJBP II.II.VI.4, 78. Pufendorf, DJNG, II.VI (“Of The Right and Privilege of Necessity”).

¹⁷ A needy person should not take from an equally needy person, but from the surpluses of a wealthier person. There must be restitution after the emergency is over. Need must also be genuine and not attributable to the agent’s own fault. DJBP II.II. 7–9, 78 f.

¹⁸ Pufendorf, DJNG, II. VI. V.

¹⁹ For a discussion of Pufendorf’s criticism of Grotius’ right of necessity, see Salter, John: Grotius and Pufendorf on the Right of Necessity. In: *History of Political Thought* 26 (2), 2005.

²⁰ Byrd, B. Sharon & Hruschka, Joachim: *Kant’s Doctrine of Right. A Commentary*. Cambridge 2010, 123.

private property, Kant restricts his discussion to the right of states to decline involuntary entrants.

II Common possession of the Earth and Acquisition of Land

Similarly to Grotius and Pufendorf, Kant tells us how external objects of choice can become the property of persons, that is, how the original *suum* can be extended to include external objects. For Kant, this is far from being obvious. He assumes that we are born with a *right* to be free from unjustified interference in the exercise of our agency. This innate *right* also entails our physical integrity but does not originally extend to objects outside us. The fundamental assumption which Kant shares with Grotius and Pufendorf is that rights can only be derived from something the person *already has*, that is, from *the suum*. Kant's argument for the inclusion of external objects under the notion of right is that we must assume a legal capacity to become owners of objects, in order to avoid a contradiction. External freedom (and with it pure practical reason) would be depriving itself of the possibility of using objects of choice and thus contradicting itself (*ein Widerspruch der äußeren Freiheit mit sich selbst*). We must thus introduce a *postulate of practical reason*, assuming the possibility of becoming legal owners of objects.²¹

Once it has been established that external objects can become the matter of rights (i.e., that the *suum* can be extended to external objects), the next question Kant's theory must address is the problem of *acquisition* of external objects. Acquisition is the empirical deed through which an external object is incorporated into a person's *suum*. *First* or *original acquisition* is when an object becomes someone's possession for the first time. Explaining the possibility of original acquisition is extremely important since all further acts of acquisition are derived from it.²² Interestingly, Kant argues that acquisition of land must be conceived as *prior* to the acquisition of objects. Possession of anything on a territory presupposes

²¹ MS, RL, AA 06: 246.04–247.08.

²² Byrd, B. Sharon & Hruschka, Joachim: *Kant's Doctrine of Right. A Commentary*, op.cit, 135. One must thus distinguish two distinct steps in Kant's argumentation for the right to possess objects: firstly, he argues for the formal *possibility* of becoming owners of objects. Secondly, he accounts for the possibility of *acquiring* objects of choice. Why is the first step not enough to justify acquisition of objects? Acquisition as an *empirical deed* has more implications than the mere possibility of extending the *suum* to external things. It requires "separating" a resource from the global community of goods and thus doing something that seems incompatible with that

the possession of the territory itself, since objects are regarded as mere accidents of the substance on which they “inhere”, i.e. the land on which are located.²³ Kant’s claim relies on the ontological dependence of accidents on the substance: just as the accidents cannot exist independently of the substance, movable objects cannot be acquired without the prior acquisition of land on which they are located.²⁴ However, one may wonder if this ontological dependence can be extended to the relation between land and movable objects. Is it not possible to possess movable objects without possessing the land on which they are located? Katrin Flikschuh argued that unless one has some control over the land on which one’s possessions are situated, one’s right to those possessions would be easily compromised. One would be at the mercy of others while pursuing one’s ends. While possession of external objects does not require that *I myself* possess the land on which these objects are placed, I must at least be able to enter some form of agreement with someone who owns or has control over the land, lest I be in the situation of a *squatter*: someone who can be permanently pushed away, along with one’s possessions, from one place to the other. If so, some kind of ownership of land or at least a right to control the land is necessary to secure one’s right to things. Because I can in principle occupy the space on which your object is situated by displacing your object from its location, displacing your object without your consent would be in principle no infringement upon your possession. We could think of a scenario where you would have to look for your car every time you leave work because it keeps being moved around from where you parked it in the morning. The car would still be yours, but you have no control over its location. However, secure possession of objects must entail the possibility of determining the location of one’s possessions.²⁵

Although this is certainly correct, it seems to miss Kant’s fundamental point, which is not merely about the *empirical* conditions necessary for securing possession of objects, but about the normative *priority* of acquisition of land over acquisition of objects. Acquisition of land must be understood as normatively prior to acquisition of objects due to the *spatial* character of Kant’s theory of property and of his legal theory in general. Right has to do with *external* freedom, an aspect of freedom which would be irrelevant if we were not embodied rational beings, not

very community. The possibility of singling out a resource from the shared bounty of humanity without injustice to others who are equally entitled to it thus requires additional justification.

23 MS, RL, AA 06: 261.29–35.

24 See Kersting, Wolfgang: *Wohlgeordnete Freiheit. Immanuel Kants Rechts- und Staatsphilosophie*. Paderborn 2007, 205.

25 Flikschuh, Katrin: *Kant and Modern Political Philosophy*. Cambridge 2000, 156.

only *in space*, but also confined with each other to the *limited surface of the earth*. The limited dimension of the planet (which also defines the limits of human expansion) renders the interaction and the possibility of impact on the mutual exercise of external freedom *inevitable*. Our agency can have, and will most likely have, an impact on the agency and rights of others. Nowadays we do not even need to travel to distant lands to do this: climate change proves that my external deeds can have a considerable impact on your agency and way of living wherever you are. In other words, we are *globally interconnected*, whether we want it or not. Therefore, there would be no *problem of Right* without the possibility of interaction which arises from our embodiment and the limited space to which we are confined. The problem of Right in Kant's theory is thus essentially a *spatial* problem: we must bring the external exercise of freedom of a plurality of persons under a *system* of external freedom, that is, in accordance with universal laws which can regulate these interactions. Without universal laws, that is, *a priori* principles, there can be no necessity and consequently no rights and obligations that deserve the name. Therefore, although the problem of Right has an empirical component, namely the facts about the human condition mentioned above, the solution to the problem of right must nevertheless be provided by rational principles. The project of Kant's legal philosophy in the *Doctrine of Right* is to provide the *a priori* principles capable of addressing the problem of right, taking into account the different levels of possible interaction and institutionalization of right: within individuals in a common polity (state right), between polities (international right) and as citizens of the world (cosmopolitan right).

Although we can conceive possession of objects as separate from possession of land, this independence is only normatively possible through the idea that the first proprietor of land can *dispose* of the objects acquired via his acquisition of land. The idea is that persons were able to enter contractual relations with whoever first possessed the land and thus acquire movable objects independently of possessing the land themselves. Kant's point is to explain where acquired rights to movable objects come from, normatively speaking. Once acquisition of objects becomes independent from possession of land, we need contracts regulating the location of objects, that is, agreements between possessors of land or those with jurisdictional rights over land and proprietors of movable objects.²⁶ I can park my car in the street, even though the street does not belong to me, provided I satisfy certain requirements (I might need to pay a parking ticket or refrain from parking at certain areas at certain times and so on).

²⁶ According to Kant the sovereign is the "supreme proprietor" of land, which means that it has jurisdictional rights over the national territory (MS, RL, AA 06: 323.27–28).

Acquiring land for the first time must be regarded as a realization or “particularization” of innate right.²⁷ But this is the beginning of another problem. First acquisition of a piece of land involves both singling out a specific part of land as my “dominion” and excluding others from access to it. However, Kant’s legal theory does not assign a right-conferring function to empirical acts. If acquisition is to have a legal quality, its lawfulness cannot be grounded on an empirical act.²⁸ Further, if empirical acquisition justified possession, we would have to regard possession as a legal relationship between a thing and a person. This is not an option in Kant’s theory, according to which legal relations pertain only between *persons* as beings capable of obligation and consequently as subjects of rights. Therefore, the legal foundation or title (*Rechtsgrund, titulus possessionis*)²⁹ enabling the acquisition of land must be understood as follows: it must *precede* the empirical act of acquisition and is not created by it; is a relation between persons in regard to external objects, and finally it is able to impose an *obligation* on all others to respect one’s acquisition. The idea of the original community of the earth is what constitutes this *Rechtsgrund*:

All human beings are originally in *common possession* of the land of the entire earth (*communio fundi originaria*) **and each has by nature the will to use it** (*lex iusti*) which, because the choice of one is unavoidably opposed by nature to that of another, would do away with any use of it **if this will did not also contain the principle for choice by which a particular possession for each on the common land could be determined** (*lex iuridica*) But the law which is to determine for each what land is mine or yours will be in accordance with the axiom of outer freedom **only if it proceeds from a will that is united originally and a priori** (that presupposes no rightful act for its union). **Hence it proceeds only from a will in the civil condition** (*lex iustitiae distributivae*), which alone determines what is *right* (*recht*), what is *rightful* (*rechtlich*), and what is *laid down as right* (*Rechtens*). But in the former condition, that is before the establishment of the civil condition, but with a view to it, that is *provisionally*, it is a *duty* to proceed in accordance with the principle of external acquisition. Accordingly, there is also a rightful *capacity* of the will to bind everyone to recognize the act of taking possession and of appropriation as valid, even though it is only unilateral.³⁰

27 Byrd, B. Sharon & Hruschka, Joachim: *Kant’s Doctrine of Right. A Commentary*, op.cit., 134 f.

28 As Kersting notes, the realization that empirical acts have no right conferring function is the very heart of Kant’s legal theory. Kersting, Wolfgang: *Wohlgeordnete Freiheit. Immanuel Kants Rechts- und Staatsphilosophie*, op.cit., 214.

29 MS, RL, AA 06: 251.31. *Rechtsgrund* is the legal justification of a juridical claim or deed. *Deutsches Rechtswörterbuch* (DRW) <http://drw-www.adw.uni-heidelberg.de/drw/>, accessed 06/12/2014.

30 MS, RL, AA 06: 267.04–23. “Alle Menschen sind ursprünglich in einem *Gesamt-Besitz* 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

A unilateral will cannot impose an obligation on others. It is a contingent exercise of freedom and has no *authority* to impose an obligation. For this, we would need the *consent* of all others whose exercise of freedom is restricted by that unilateral act. *Omnis obligatio est contracta*: all obligation must be *self-imposed*.³¹ The idea of a united will of all therefore *extends the scope* of Kant's reason based legal philosophy, introducing what seems to be a voluntaristic element in his theory. A unilateral will can only impose an obligation on others if it is the *will of everyone* that it be so. However, for Kant it is not enough that this be the will of all (as a contingent matter of fact); it must be the will of all *a priori*. In Kant's reason-based legal theory, only reason can impart necessity. The necessity of respecting unilateral acts of acquisition is thus derived not from the unilateral acts themselves (which are *empirical and therefore contingent*), but from the united will of all, which is *a priori* and therefore *necessary*.

But how can he assume that we all want *a priori* that objects be appropriated to the exclusion of others? How could I possibly *want* to be excluded from using an object I might be interested in? The notion of a united will *a priori* follows from the fact that intelligible possession is *a priori* necessary, and for this, acquisition of objects to the exclusion of others must be permitted from the perspective of pure practical reason. Since on pain of contradiction practical reason must allow appropriation of objects, it must be the case that it is *our will* to be able to use objects of choice.³² This is why the general will is said to be united *a priori*, independently of actual consent.

Entgegensetzung der Willkür des Einen gegen die des Anderen 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 (*lex iuridica*). Aber das austheilende Gesetz des Mein und Dein eines jeden am Boden kann nach dem Axiom der äußeren Freiheit nicht anders als aus einem ursprünglich und a priori vereinigten Willen (der zu dieser Vereinigung keinen rechtlichen Act voraussetzt), mithin nur im bürgerlichen Zustand hervorgehen (*lex iustitiae distributivae*), der allein was recht, was rechtlich und was Rechtens ist, bestimmt. - In diesem Zustand aber, d.i. vor Gründung und doch in Absicht auf denselben, d.i. provisorisch, nach dem Gesetz der äußeren Erwerbung zu verfahren, ist Pflicht, folglich auch rechtliches Vermögen des Willens jedermann zu verbinden, den Act der Besitznehmung und Zueignung, ob er gleich nur einseitig ist, als gültig anzuerkennen; mithin ist eine provisorische Erwerbung des Bodens mit allen ihren rechtlichen Folgen möglich."

³¹ Kersting, Wolfgang: *Wohlgeordnete Freiheit. Immanuel Kants Rechts- und Staatsphilosophie*, op.cit., 146.

³² Kant is referring to our will as *pure practical reason*, not as the contingent will of particular individuals with preferences which can diverge from one another. Kant is presupposing a substantive conception of rational willing from which it is possible to establish "what we can and cannot want" as rational beings with a will. This idea is present for instance in Kant's argument

It is important to note that the same rational principle that allows the use of external objects as an extension of innate freedom is the one that makes it necessary to assume an *a priori* united will. This idea ensures the compatibility of Kant's theory of acquisition with the principle of right. Because acquisition of objects to the exclusion of others would mean an unjustified impediment on their freedom, only the assumption of an *a priori* united will can make acquisition rightful. However, Kant also stresses that a united will is only realized in a condition of public justice, that is, in the civil condition. Possession of objects thus commits us to the implementation of a system of distributive justice under which the *a priori* united will can be realized.

The transition from common ownership of the earth to a concrete individual possession of land requires a principle of distribution, according to which the earth can be *divided*. Distribution in this case can only be done by an empirical act: occupation (*Bemächtigung, occupatio*)³³ through a unilateral act of choice (*Act der Willkür*).³⁴ In taking physical possession of a piece of land, an individual is *particularizing* her original right to be somewhere.³⁵ However, the only principle available for determining who has originally acquired something is *prior in time, strong in right (qui prior tempore portior iure)*.³⁶ Unless the right is given to the person who arrived first, no person would ever be able to exercise the right to acquire land, for anyone else would have a claim to the land that person acquired. Being the first to take control over a piece of land must entitle the agent to keep it despite the possible interest of others, as a condition for the possibility of making use of land at all. It therefore follows from *prima occupatio* that native peoples must be seen as the rightful possessors of their land. All later acquisition of land can only be *derived* from first possession, that is, it must be transferred to another by means of a *contract* with the native peoples, which presupposes their free and true *consent* in order to be valid. Further, this principle of distribution must be understood as contained in the united will of all (who have the will, individually, to use the land).

for a contradiction in the will in the *Groundwork*. According to this conception of the will of rational beings, one cannot want one's talents to be neglected or to give up one's claim to the help of others when committed to a maxim of indifference (GMS, AA 04: 422.37–423.01–35).

33 MS, RL, AA 06: 259.13, 263.02–03, 15.

34 MS, RL, AA 06: 263.09.

35 See Byrd, Sharon B. and Hruschka, Joachim: *Kant's Dictrine of Right. A Commentary*. Op. cit., 134.

36 MS, RL, AA 06: 259.16–17.

III Community of the Earth as the basis of Cosmopolitan Right

The idea of *communio fundi originaria* has implications that extend beyond what is required for the justification of a right to external things. This is because the realization of one's right to occupy space starts not with the occupation of land for the first time, but already with *birth*. When we are born, our mere "entrance in the world" is already a legally relevant fact.³⁷ Not only have we *come* to occupy space in the world, we also have an original *right* to do so: this is "the right to be wherever nature or chance (apart from their will) has placed [one]".³⁸ The existence of a *person*³⁹ in the world entails both her equal legal status among a plurality of subjects of right and her original right to occupy space. Persons are also automatically members of the global community of the earth, which is constituted by the unity of all possible places individuals can occupy within the limited surface of the earth.

Common possession of the earth plays a central role in Kant's argument for cosmopolitan right. Although the role of cosmopolitan right, I will argue, has an analogous function to Grotius' right of necessity and Pufendorf's imperfect rights and duties, Kant's "revival" of the original community in cosmopolitan right is nevertheless a radical redefinition of the Grotius-Pufendorf tradition.

[It] is not the right to be a guest (*Gastrecht*) [...] but the right to visit (*Besuchsrecht*); this right to present oneself for society, belongs to all human beings by virtue of the right to possession in common of the earth's surface on which, as a sphere, they cannot disperse infinitely but must finally put up with being near one another; **but originally no one had more right than another to be on a place on the earth.**⁴⁰

37 Kersting, Wolfgang: *Wohlgeordnete Freiheit. Immanuel Kants Rechts- und Staatsphilosophie*, op.cit., 211.

38 MS, RL, AA 06: 262.19–20.

39 Kant defines a person as a subject whose actions can be imputed to her because she is able to be under obligation (MS, RL AA 06: 223.24–25). Kant's definition presupposes his conception of transcendental freedom: moral personality is freedom under moral laws. Right is thus a relation between persons, that is, finite rational beings who are not only capable of conceiving and understanding obligations but also of experiencing themselves as under obligation.

40 ZeF, AA 08: 358.05–13, (my emphasis) „Es ist kein Gastrecht [...], sondern ein Besuchsrecht, welches allen Menschen zusteht, sich zur Gesellschaft anzubieten vermöge des Rechts des gemeinschaftlichen Besitzes der Oberfläche der Erde, auf der als Kugelfläche sie sich nicht ins unendliche zerstreuen können, sondern endlich sich doch neben einander dulden müssen, ursprünglich aber niemand an einem Orte der Erde zu sein mehr Recht hat, als der Andere.“

This rational idea of a *peaceful*, even if not friendly, thoroughgoing community of all **nations** on the earth that can come into relations affecting one another is not a philanthropic (ethical) principle but a principle having to do with rights. (...) And since possession of the land, on which an inhabitant of the earth can live, can be thought only as possession of a part of a determinate whole, and so as possession of that to which each of them originally has a right, it follows **that all nations (Völker) stand originally in a community of land**, though not of rightful community of possession (*communio*) and so of use of it [...].⁴¹

In the *Doctrine of Right*, Kant derives *nations'* original community of the land from the fact that the possession of individuals (to which they have an original right) *can be thought* as a part of a *determinate whole*. National borders in connection with an internal civil condition make the *extent* of individual possessions relatively *determinate*. Borders delineate the scope of individual acquisition in a way which, although not peremptory until the institution of a cosmopolitan condition of distributive justice, is *closer* to the idea of right than leaving individuals to determine the limits of their acquisition in a wholly unilateral way (as in the state of nature).⁴² Unlike Locke, Kant has no theoretical resources for establishing the content (*Inhalt*) of occupation; the *prior occupans* must decide according to her own judgment if her possession is being infringed upon and consequently have a conception of the extent of her possession. Only the civil condition is able to provide relatively legitimate conditions for determining the scope of acquisition.⁴³ This necessity makes Kant's theory far more dependent on the institution-

41 MS, RL, AA 06: 352.06–17, (my emphasis) „Dieser Vernunftidee einer friedlichen, wenn gleich noch nicht freundschaftlichen, durchgängigen Gemeinschaft aller Völker auf Erden, die untereinander in wirksame Verhältnisse kommen können, ist nicht etwa philanthropisch (ethisch), sondern ein rechtliches Princip. [...] und da der Besitz des Bodens worauf der Erdbewohner leben kann, immer nur als Besitz von einem Theil eines bestimmten Ganzen, folglich als ein solcher, auf den jeder derselben ursprünglich ein Recht hat, gedacht werden kann: so stehen alle Völker ursprünglich in einer Gemeinschaft des Bodens, nicht aber der rechtlichen Gemeinschaft des Besizes (*communio*) und hiemit des Gebrauchs oder Eigenthums an demselben [...]“.

42 Oliviero Angeli sees the role of territorial borders as providing a more reliable spatial reference for identifying degrees of different *legal* relations between individuals (Angeli, Oliviero: *From Proximity to Territoriality: A Kantian Genealogy of the State*, unpublished manuscript, forthcoming in: *Reading Kant's Doctrine of Right*. Ed. by Jean-Christophe Merle. Wales 2016). Although I believe this certainly follows from implementing territorial borders, the primary point of extending original possession of the earth to nations is that they provide a better (*relatively* omnilateral) standard for quantifying acquisition, which is one of the main functions of a condition of distributive justice.

43 I say “relatively legitimate conditions” because a fully fledged condition of distributive justice can only be completely achieved in a *cosmopolitan* civil condition. There are three different levels of civil condition (domestic, international and cosmopolitan). Inner state justice is just a step towards a greater scale institutionalization of right, as commanded by reason.

alization of right than Locke's theory.⁴⁴ The territorial rights of states can thus be understood as a necessary step towards a cosmopolitan condition of distributive justice.

As Kant formulates in *Perpetual Peace*, "cosmopolitan rights shall be limited to the conditions of universal hospitality".⁴⁵ This is a right to offer oneself for commerce (*Verkehr*) with one another, be the subjects of these rights individuals or nations.⁴⁶ As cosmopolitan right makes clear, the idea of common ownership of the earth presents itself under two different *modes*: (1) as basis of the *acquired* right of host peoples to their territory, enabling them to decline voluntary interaction, and (2) as the basis for the *original* right of individual citizens of the world or nations to offer themselves for interaction with foreign nations. In *Perpetual Peace* Kant called this right "right to visit",⁴⁷ which is neither a right to settle (*ius incolatus*⁴⁸) nor a right to be a *guest* in the foreign land (*kein Gastrecht*⁴⁹). As Kant stresses, host nations retain a right to reject the visitor on the condition that this can be done "without causing his destruction".⁵⁰ Although visitors have no *claim* to enter the foreign territory, they should not be treated with hostility by the inhabitants, so long as they behave peacefully.

However, the original community of the earth also imposes constraints on the acquired right of host nations to control their borders. Kant makes clear that host nations have the right to *reject* visitors whenever their reason for interaction is *voluntary*.⁵¹ Similarly to the original right to a place on the surface of the earth,

⁴⁴ Kersting, Wolfgang: *Wohlgeordnete Freiheit. Immanuel Kants Rechts- und Staatsphilosophie*, op.cit., 216.

⁴⁵ ZeF, AA 08: 357.20–21.

⁴⁶ Byrd and Hruschka argue that in Kant's later account in the *Doctrine of Right* the right to visit of *Perpetual Peace* no longer falls under cosmopolitan law, that is, between individuals and foreign states, but under international law (*Völkerrecht*), that is, between nations (Byrd, B. Sharon & Hruschka, Joachim: *Kant's Doctrine of Right. A Commentary*, op.cit., 208). Despite the difference from the account of 1795, individuals are not excluded from the *Doctrine of Right* as addressees of cosmopolitan right. As Kant mentions further in the *Rechtslehre* text, abuses of cosmopolitan right "cannot annul the right of *citizens of the world* (*Erdbürger*) to try to establish community with all and, to this end, to visit all regions of the earth" (MS, RL, AA 06: 353.04–06, my emphasis). Here we have individuals instead of nations, although these individuals could be seen as directly or indirectly promoting the community of all nations.

⁴⁷ *Besuchsrecht*, 08: 358.07.

⁴⁸ MS, RL, AA 06: 353.08.

⁴⁹ ZeF, AA 08: 358.05.

⁵⁰ ZeF, AA 08: 358.03.

⁵¹ See VAZeF, AA 23: 173.11–17. As Kant's endorsement of the selective practices of China and Japan in the 18th century illustrate, restricting or completely suspending contact with outsiders is justified, given the previous inhospitable behaviour of Europeans (ZeF, AA 08: 359.05–08).

the right to admission in a foreign territory obtains only under the condition of *involuntary* occupation of space. Just as the occupation of space by virtue of one's entry in the world is independent of one's will, rejecting an involuntary visitor when this would harm or destroy her is *incompatible with the original community of the earth*. As Kant stresses, in principle no one has more claim to a specific area of the earth than another person. The global distribution of land is thus wholly *contingent*. Today's nations can be seen as "permitted" to control a certain territory to the exclusion of others because borders are helpful for determining the extent of individual acquisition, at least within that territory. However, to deny life-saving occupation of space to another being, who is in principle just as entitled as anyone else to any place of the earth, would be to *contradict* the very justification for the territorial rights of states. This is because the permission to control territory and the right of the involuntary visitor to be admitted are based on the same legal foundation or *Rechtsgrund*, namely, the original community of the earth. Kant could easily have insisted that the acquired right of nations to their territory not only has priority but *trumps* the original right of persons to occupy space. It is worthy of attention that he did not accept this in the case of involuntary occupation of space.

My view is that cosmopolitan right signalizes a contradiction of the right to occupy space with itself under different *modalities*: on the one hand as the *original* right of individuals or nations to "be somewhere" (as belonging to the *lex iusti*) and on the other, the *acquired* right of peoples to their land (belonging to the *lex iuridica*). Kant distinguishes between three *leges* or conditions of justice: *lex iusti*, *lex iuridica* and *lex iustitiae*⁵². The distinction is essential for understanding the relationship between Right as a system of external laws *a priori* and the subsequent developments of right. As Byrd and Hruschka stressed, the three *leges* correspond to three categories of modality in the *Critique of Pure Reason*: possibility (*Möglichkeit*), reality (*Dasein*) and necessity (*Notwendigkeit*⁵³). They can be seen as different "modes" of the same idea of right: original right as the pure rational concept of right (*possibility*), acquired right as arising from concrete deeds or relations between agents (*reality*) and preemptory right as legitimized

However, Kant does not specify which would be reasonable criteria for rejecting a voluntary visitor with peaceful purposes. Therefore it remains an open question whether accepting or rejecting voluntary visitors is wholly at the discretion of the host nation, in which case one must ask if there is indeed any *right* to visit. Cosmopolitan right thus secures the right to a *safe haven* and the right to *offer* oneself for interaction (without guarantee of acceptance), which is certainly less than the expression *Besuchsrecht* may suggest.

52 MS, RL, AA 06: 236.24–237.08, 306.08–16.

53 KrV, AA 03: 93.16–20. KrV, A / B

and enforced by a public court of justice (*necessity*).⁵⁴ Although there is a positive development in the transition from the *lex iusti*, through the *lex iuridica*, to the *lex iustitiae distributivae* in the civil condition, the *lex iusti* is not made superfluous in the civil condition, but is still the source of the normativity, and consequently, of the *legitimacy*, of all further developments of right. The need for maintaining the compatibility of the development of right with its a priori normative source is what gives rise to cosmopolitan right. In this sense, cosmopolitan right in Kant's theory has a similar function to the right of necessity in Grotius and imperfect rights and duties in Pufendorf's theory. They are needed to avoid scenarios which would contradict the rationale for introducing certain rights.

While Grotius, following the natural law tradition, appeals to the *need* of individuals as a basis for the original use right to land and natural resources, Kant does not make the need of individuals the basis of cosmopolitan right. Kant replaces the natural law idea that fundamental needs of human beings provide the content of natural law with the idea of the external exercise of freedom and the impact that unregulated interaction can have for the external freedom of individuals, assuming they have equal juridical status and thus an equal right to non-interference. While Grotius' right of necessity excuses what would otherwise constitute violations of private property, Kant leaves private property untouched. He restricts himself to limitations to the rights of states to refuse entrants in their territory in case of involuntary occupation of space. Kant does not recognise a right of necessity. As he puts it in the *Common Saying*, to preserve one's life is a conditional duty, that is, to be observed if this can be done without injustice (*Verbrechen*).⁵⁵ Although it may seem too inflexible to insist upon the inviolability of private property, property rights are too central in Kant's legal theory to be compromised.⁵⁶ Therefore, the closest Kant comes to imposing limitations on acquired rights is cosmopolitan right.

It is important to note how Kant replaces the natural law idea of human fundamental needs with occupation of space. The notion of original community is used to justify a right to occupy a particular place in the earth. The mere existence of our bodies entails the occupation of a separate area in the world (*Separatbesitz*),

⁵⁴ I adopt here Byrd and Hruschka's interpretation of the three *leges*. See Byrd, B. Sharon & Hruschka, Joachim: *Kant's Doctrine of Right. A Commentary*, op. cit.

⁵⁵ TP, AA 08: 300n. However, Grotius did not recognize an unqualified right of necessity either; there were several restrictions to be observed for violation of private property to be justified.

⁵⁶ Kant insisted on the lexical priority of perfect over imperfect and consequently juridical over ethical duties. He did not recognize a duty of rescue either. For a Kantian account of a duty of rescue when this would require the violation of private property, see Pinheiro Walla, Alice: "Kant's Moral Theory and Demandingness". In: *Ethical Theory and Moral Practice* 18, 2015, 731–743.

which Kant considers an original right.⁵⁷ Original acquisition of space (land) entails acquisition of natural resources, without the appeal to human needs. Further, the kind of community generated by the original right to occupy space is a radically different one from Grotius and Pufendorf. It is constituted by the *unity of all potential places individuals can come to occupy on the earth*.⁵⁸ These potential places are considered *disjunctively*.⁵⁹ Concretely, this means that no one is entitled to any specific area but only to a *place* on the surface of the earth. Everyone can, in principle, possess *this or that* place on the earth.⁶⁰ The right to occupy a place on the earth is thus a *disjunctively universal right (disjunctiv-allgemein)*. It is therefore only a contingent fact that persons (and consequently nations) have come to occupy a particular place on the earth, for instance, the present territory of France. This contingency plays an important role for Kant's argument that there is a right to be admitted in case of involuntary interaction. Further, the community of the earth must also be understood as *collectively universal (collectiv-allgemein)* insofar as it is constituted by the idea of the *union* of all possible places on the earth.⁶¹ It is therefore not a community in the sense of a *joint use* of the earth, but a community constituted *malgré soi*, in virtue of the interconnectedness of all points within the closed spherical surface of the planet. The spatial relations between individuals are what constitute the global community, not God's gift of the earth to humanity. However, one should not think, as Flikschuh argued, that Kant moved from "the fact of individual acquisition to the idea of original common possession" and thereby "inverted" the natural law sequence from common possession to individual acquisition.⁶² This would mean taking the original community to be constituted by empirically given facts. Kant is clear enough that the original community is an *idea of reason* and not a community that was "instituted" (*gestiftete Gemeinschaft*⁶³). This failure to realize the rational (i.e., *original*) character of the idea of community of the earth is precisely what Kant takes to be the failure of Grotius' and Pufendorf's "primitive community" (*uranfängliche Gemeinschaft, communitio primaeva*⁶⁴). Kant's departure from natural law theory

57 VARL, AA 23: 311.33 „Alle Menschen stehen von Natur aus ein Recht zum Separatbesitz zu“.

58 MS, RL, AA 06: 262.21–23.

59 VARL AA 23: 320.22.

60 See VARL AA 23: 320.22–23 and 323.29 and Byrd, B. Sharon & Hruschka, Joachim: *Kant's Doctrine of Right. A Commentary*, op.cit, 128.

61 VARL AA 23: 323.30.

62 Flikschuh, Katrin: *Kant and Modern Political Philosophy*, op. cit., 152.

63 MS, RL, AA 06: 251.05–06.

64 MS, RL, AA 06: 251.04, 258.17.

lies not in an “inversion” of the sequence of ideas but in his *redefinition* of central concepts of the natural law in terms of external freedom.

Kant not only *secularizes* the natural law conception of a community of the earth but also replaces fundamental human needs (the traditional content of the laws of nature) by the spatial relations between subjects of right. Although Kant renders the natural law idea of an original community of the earth compatible with the fundamental tenet of Kant’s Doctrine of Right, he by no means does away with the notion: common possession of the earth plays a central role in his legal theory.

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