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The Moral Source of Kant's Concept of Right

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Abstract: In this paper, I argue in favour of dependency of Kant's concept of right and his entire legal theory on the general concepts of Kant's practical philosophy, i.e. his account of practical freedom and moral law, categorical imperative, autonomy and his theory of agency. My arguments are directed against claims that Kant's legal theory can preserve its normative potential without being grounded in his ethics. While presenting my interpretation I address the most common objection to the dependency thesis, i.e. I aim at showing that Kant did provide some evidence to justify the use of coercion in the theory of right without the latter being independent of his demanding ethics of moral motivation. I investigate the distinctions in Kant's Introduction to the Metaphysics of Morals to conclude, that the conceptual justification of right as coercion lays in Kant's version of the Ulpian duties of right. I argue that the dual obligation towards humanity both in oneself and in others results in the necessity of creating a rightful condition and therefore makes space for legitimate institutional coercion. In the last step of the argumentation, I show that innate right to freedom, which in Kant's legal theory is the basis for the entire structure of rights, is inconceivable or purely arbitrary in abstraction from Kant's practical philosophy as developed in the *Groundwork of the Metaphysics of Morals* and the *Critique of Practical Reason.*

Key words: Kant's concept of right, autonomy, agency, coercion, dependency.

In this paper, I aim at showing the dependency of Kant's concept of right on the general principles of his moral theory.[1] My arguments for the interpretation of the source of right in Kant's practical philosophy presented in this paper contribute to the ongoing debate upon the systematic connection between categorical imperative and Kant's legal theory (so-called dependency/independency debate), especially between Guyer, Willaschek and Nance.[2] I do not intend to provide a *derivation* of the Universal Law Formula *from* the Categorical Imperative[3], because, in my view, such procedure is neither possible nor necessary for proving that Kant's legal theory rests on the general principles of his moral theory. Some very weak connection of this sort has not been denied even by the most vigorous opponents of the 'dependency thesis',[4] yet in my reading proposed

1] Immanuel Kant's works are referenced to 'Akademie-Ausgabe' edition of *Kants Gesammelte Schriften* (with pagination and abbreviations) of Prussian Academy of Sciences (Berlin: 1902 ff), with the exception of *Critique of Pure Reason,* cited in accordance with the page number of the first and second edition of the work (A/B). The translation cited in this text comes from *The Cambridge Edition of the Works of Immanuel Kant*, volume 'Practical Philosophy', translated by Mary J. Gregor and edited by Allen Wood, New York: Cambridge University Press, 1996 ff.

2] The discussion of the non-critical and non-moral source of Kant's doctrine of right among Kant scholars has begun much earlier, as it is described by Oberer (1973). H. Oberer also took part in the debate, arguing against Georg Geismann, see Oberer 2010.

3] There have been numerous attempts to do it, e. g. Guyer 2002 and Michael 2012.

4] See Willaschek 2012. Note that this author enters the discussion with a claim that Doctrine of Right does not belong to the metaphysics of morals at all (Willaschek 1997) but eventually admits, that the source of Kant's concept of right needs to be found in practical rationality, i. e. the sphere of morals,

below the moral law presented to humans as categorical imperative remains the supreme principle for the entire theory of morals (which, for Kant, encompasses both ethics and law) and not just one of the many practical postulates that lack further proof.

The main problem I aim to address is the relation between the general concept of right in Kant's legal theory and the categorical imperative, understood in a sense, which Kant uses in his writings. Willaschek, as the representant of the independency thesis, claims that both concepts are independent of each other, since one cannot derive the concept of right from the concept of the moral law. Moreover, he claims that coercion – the crucial element of the concept of strict right cannot be reconciled with Kant' moral theory from *Groundwork* and second *Critique*.[5] In this paper, I aim to propose an interpretation that opposes these two claims. The traditional reading, which stands for dependency thesis and is represented by Guyer and Nance acknowledges the problem recognized by Willaschek and aims at providing a (more or less) indirect derivation of the concept of right from the categorical imperative. Nevertheless, I consider these attempts flawed because both authors fail to provide arguments that are not circular.

My reading of Kant can be somewhat categorized as defending the dependency thesis but drawing on the vital input of Willaschek's interpretation. In arguing against his conclusions, I want to highlight two important aspects of Kant's conception of right. Firstly, in every legal theory, it is vital to give an account of an individual, who is acting, i.e. there is a need for some theory of agency. If the *Doctrine of Right* were considered independent of Kant's concept of practical rationality, or worse, reduced to instrumental rationality of hypothetical imperatives, the normative potential of such a theory is drastically reduced. One reason for this is that the (non-arbitrary) source of validity of norms would be missing since it is not lawgiving of practical reason, which commands what is just, good, right. Secondly, because there is no justification of why freedom must be the core value of the system of juridical laws, freedom as the founding concept of Kant's right becomes replaceable with anything else (e.g. security, happiness, order, tradition), as long as such other 'core value' can be agreed upon in a contract. I do not claim, that Willaschek and the adherents of the 'independency thesis' really do not care for protecting freedom or agency while objecting to the connection of the *Doctrine of Right* to Kant's ethical theory: nevertheless if one rejects one source of normativity and theory of agency, one must provide something in its place. Willaschek, whose work I take as an essential reference for this paper, suggests at the end of his meticulous critiques of 'standard interpretations', that Kant's concept of right must rest on some rational agency and autonomy[6]. Yet, this agency and autonomy must be *different from the ones which ground Kant's ethics*, because Willaschek

although in parallel and not dependency relation to the categorical imperative.

5] See Willaschek 2009.

6] See Willaschek 2012.

aims at developing the juridical sphere without referring to the categorical imperative as the *ratio cognoscendi* of freedom. In my view, such an approach is not sufficient to prevent a collapse of Kant's legal theory into Hobbesian-style contractualism. The above-listed issues are an incentive to look for interpretation overcoming the problems of traditional reading without depriving Kant's theory of its normative potential.

For the purpose of my analysis, I use Kant's account of the categorical imperative from the *Groundwork* and later works, as well as his conception of freedom as developed in the *Critique of Practical Reason.* I will elaborate upon the connection between moral law as the fact of reason and the practical freedom[7] (the one which allows humans to act freely, i.e. from duty) presented by Kant in the *Second Critique.* My analysis aims at showing that, in Kant's theory, the general basis of all normativity is moral law, which is universal, necessary and delivered to us by the autonomous activity of lawgiving reason. Further, I discuss various divisions of duties that Kant provides in the Introduction to the Metaphysics of Morals. I claim, against Willaschek, that the table of the division of duties is not coextensive with Kant's division of types of lawgiving into juridical and ethical since the first is a logical division[8] and the second is not. I rely here on the interpretation of the systematicity of duties provided by B. Ludwig[9].

By drawing these distinctions, I show that Kant's notion of right corresponds to the protection of freedom in both internal and external relations, but the strict right only concerns the interpersonal external relations. Because of that fact, this class of duties has a different status from all other duties, which are obliging to adopt moral motivation. Nevertheless, I argue while following the reading of Willaschek, who criticizes the positions of Guyer and Nance,[10] that the exercise of freedom in external relations and freedom as a right are not identical and therefore one cannot perceive internal and external freedom as two sides of the same coin. I argue that freedom as a right *in a strict sense* (connected to the permission to use coercion) must be introduced and justified on further grounds, and there I refer to Kant's account of Ulpian division of duties of right. Still, I do not deny that right as a normative concept (so Kant) is a postulate 'incapable of further proof', just as all practical (moral) laws in Kant's moral philosophy (AA RL 6:225 and 231).[11] In the last step, I reflect upon the concept of right in general and the innate right

7] As we know, Kant also develops an empirical concept of practical freedom, presented in the Canon of *Critique of Pure Reason* (KrV, A 802/B 830–A 804/B 832). About this issue see most recently Kohl 2014. In my text, I refer to the notion 'practical freedom' in a sense developed by Kant in the *Critique of Practical Reason* and continued in the *Metaphysics of Morals.*

8] About logical divisions see for example I. Kant, AA Logik, 9:146.

9] See Ludwig 2013.

10] But also other adherents of the standard interpretation, see for example Oberer 2010.

11] Willaschek (2002) grounds his argument of non-prescriptive character of the duties of right on Kant's assertion that the freedom *is* by its definition limited by freedom of others and therefore no moral

to freedom as the source of all further rights. I argue that in Kant's theory, these normative notions would not be reasonable if not for the particular account of moral agency and autonomy built upon the concepts of freedom and moral law. I propose a different strategy of justification of coercion, by means of presenting a more complex and comprehensive understanding of the concept of right than the one, which is used by Willaschek. I intend to show that although the emergence of *right* cannot happen by means of *derivation* of the Universal Principle of Right *from* Categorical Imperative, the concept of right rests on the fundamental concepts of Kant's moral philosophy: his account of practical freedom, his theory of agency, and his understanding of moral laws as such.

Freedom, Moral Law, and Human Agency

After establishing the categorical imperative as the supreme principle of morality in the *Groundwork to the Metaphysics of Morals,* Kant moves on to the analysis of practical reason in the *Second Critique.* He forgoes the justification of categorical imperative *via* the idea of freedom (presented in GMM) and instead introduces the *fact of reason,* which roughly speaking is the representation of moral law within us in the form of CI, and the starting point of his practical philosophy (AA KpV 5:31). Only this *factum* can give objective (practical) reality to the concept of freedom (as it is the *ratio cognoscendi* of freedom), whereas the *ratio essendi* of Kant's moral philosophy is practical freedom (AA KpV 5:4, footnote).[12] Practical freedom has both a negative and a positive component. The negative freedom allows us to remain independent of any empirical determination of the will, while the positive freedom – which can be considered as the essence of pure practical reason – allows the will to be determined solely by the representation of moral law. Moreover, according to Kant, the positive aspect of freedom, exercised by practical reason, is the autonomy, i.e. self-lawgiving (AA KpV 5:33). The concept of freedom is not only grounding for the moral law (*Sittengesetz*), but also Kant's theory of agency.

Let us extract the most fundamental features of Kant's theory of agency for the purpose of my argument. The human being as an agent is constructed from an irrational and rational component. As embodied beings, humans follow their instincts, desires and needs, but they also develop preferences, just as many other animal species. As rational beings, humans can set goals and implement proper means

incentive is needed. Taken the context, in which Kant presents the universal law of freedom as practical postulate, the argument fails to be convincing. Although right does not require the inner motivation of the agent, its fundamental principle is *per se* normative, just like the postulate of intelligible possession and of public right. Otherwise we would have to do with practical postulates that are subjective, such as the ones introduced for the sake of Kant's concept of The Highest Good in the *Second Critique.*

12] In this paper, I generally hold on to a presupposition that Kant's transcendental account of both practical freedom and moral law is not a failed project. For arguments against this claim, see for example Guyer 2007.

for these goals. Further, they can recognize the necessary moral laws (by means of the *fact of reason*), consider themselves as their authors (to the extent that the reason is something common to all humans), as well as act according to these laws, just because they are moral (i.e. with no additional incentive). Freedom in a negative sense means that whatever needs and wishes humans have, they do not necessarily determine human conduct (although they might, and in fact, very often they do). Without the negative freedom, we would merely be more complex animals: although some of them have an ability to follow specific rules, they act on instinct, and so they cannot be held accountable for their deeds. We do not put animals on trial, even when they do not follow some learned rules, but we do impute deeds to persons (as the authors of the deeds) equally and without reference to their empirical character. The freedom of persons is the basis of their personality and consequently, their imputability (AA RL 6:223). This means that humans can have duties only because they are capable of fulfilling them. Without negative freedom, we could hardly be considered authors of our deeds, i.e. agents. We would instead do as our nature dictates us to do, and the responsibility for our actions could not be attributed to us.

My claim is that this conception of accountability for one's deeds is a fundamental basis for the entire moral theory, including the *Doctrine of Right*. The adherents of the independency thesis would want to consider Kant's legal theory as based on some weaker type of agency, which does not rest on practical freedom, but rather on the faculty of choice alone, which to a certain extent is also a feature of animals other than humans.[13] In my view, without reference to the *positive freedom* (the positive aspect of practical freedom in Kant's terms), the *Doctrine of Right* would need to be reduced to a contractualism hardly different from the theory developed by Hobbes.

The positive aspect of freedom presents human agency as not only independent of any empirical, pathological or even goal-oriented reasons for action, but also as capable of autonomy and morality. For our purpose, it is crucial to differentiate these two concepts. Autonomy means that reason, both in theoretical and in practical use, is always lawgiving, i.e. it gives universal laws not only in theoretical sense (the spontaneity of intellect), while constituting human experience, but also in a practical sense, defining the 'laws of noumenal nature' or laws of freedom. In lawgiving of reason, Kant sees the ultimate chance of humans to be truly free. If moral laws were given by God or normatively understood nature, freedom as such would not be possible, because humans would always be subordinated either to their own needs and desires or the external lawgiving authority (God or Nature). Therefore the proof of the existence of internal

13] If so, then it would be difficult to rationally justify why we consider some animals (humans) accountable for their deeds, while other animals are denied such accountability. Kant himself claimed that without practical freedom, normativity would be inconceivable since laws of nature would fully determine human conduct and applying sanctions for breaking laws would be no different from putting on trial animals.

lawgiving authority of reason in practical use is the most important topic of the second *Critique* (AA KpV, 5:42, 4-8). The moral law is the product of reason, and only while acting on it as the only incentive, human beings can be both free and moral. The morality of an action and an agent is bound to humans not only having the capacity to be free (because of the autonomy of practical reason), but also to them realizing this capacity.[14] The autonomy of a human is merely the ability of giving universal practical laws. Both concepts – autonomy and morality – make up for Kant's account of positive freedom, which is the foundation of normative laws of reason:

> On this concept of freedom, which is positive (from a practical point of view), are based on unconditional practical laws, which are called *moral*. For us, whose choice is sensibly affected and so does not of itself conform to the pure will but often opposes it, moral laws are *imperatives* (commands or prohibitions) and indeed categorical (unconditional) imperatives. As such they are distinguished from technical imperatives (precepts of art), which always command only conditionally. By categorical imperatives, specific actions are *permitted* or *forbidden,* that is, morally possible or impossible, while some of them or their opposites are morally necessary, that is, obligatory. AA RL, 6:221

The binding force of all laws must, therefore, be freedom in a positive sense. Freedom in a practical sense means that we can act according to the rational norms without regard to all of the empirical conditions connected to our empirical nature. Moreover, reason commands moral norms in the form of imperatives, because our sensuous nature can incline us to act against reason and this is the core of Kant's concept of autonomy.[15] We have a choice either to follow rational prescriptions (i.e. moral laws) or to subjugate ourselves to our impulses and urges, always present due to our anthropological profile. Therefore, in Kant's theory of internal morality, there arises the concept of inner coercion. We must force ourselves to act morally, i.e. rationally in the Kantian sense. In the sphere of legality, the coercion will also be institutional and external, although the justification for this is far more complex. What is essential for further reflection is to establish that

14] Acting only in accordance with moral laws, but on some external incentives is called legality of actions. Willaschek claims that Kant presents two different versions of morality and legality in *Critique of Practical Reason* and *Metaphysics of Morals*, which I do not find convincing. While his argument is rather complex, I do not see a substantial difference between obeying and acting in accordance with an imperative, if the legality is concerned. If I respect a promise because I am afraid of being caught lying or because it serves me right in the given situation does not matter – the law (moral law, no matter if ethical or juridical) has not been violated. Moreover, I do not agree that in the *Metaphysics of Morals*, Kant only attributes legality to the sphere of 'right'. We may perform all different kinds of acts, which may seem 'moral', but are done with the absence of moral motivation. There, their 'legality' means that we comply with moral law, but we do not act 'morally'. The confusion with the term 'law' in reading Kant lays in his usage of the term *Gesetz*, which means 'norm', 'normative prescription' and may have absolutely nothing to do with the juridical or political domain. Yet, it is also common to call Kant's philosophy of right 'legal theory', since this is the area of research relevant to his *Doctrine of Right*. See Willaschek 2002.

15] Katrin Flikschuh argues, conversely, that autonomy needs not to be the vital source of the obligatory character of norms. See Flikschuh 2010.

the binding force of all normative laws is practical reason itself and its ability to fully determine the will. In order to demarcate the sphere of strict right, which in Kant's works is connected to the use of external coercion, we need to analyze Kant's division of duties and his consideration of forms of lawgiving.

Categorical imperative and categorical imperatives

Before we analyze Kant's system of duties, we must consider in what way Kant uses the term 'categorical imperative', especially since the debate around the normative source of the concept of right focuses on the connection of the latter to the Formula of Universal Law. There is a tendency to consider CI as *only* the formulas, as presented by Kant in the *Groundwork* and second *Critique*. While analyzing the various formulas of the CI from *Groundwork*, one can get a better understanding of what moral law – the most general practical principle – really commands. First, we know that moral law is the law of the noumenal world, analogous to laws of nature in the empirical world. Therefore, it is universal and necessary (human beings experience this necessity as internal coercion/necessitation). Moreover, it prohibits the instrumentalisation of any member of humankind (because of their practical freedom, which gives them unconditional worth). Finally, it provides us with all rational rules of conduct (completeness of moral law).[16] Yet, all that knowledge concerning moral law does not exhaust how Kant construes the concept of CI. Namely, also in the *Groundwork,* he claims that a norm, which presents itself to reason as good in an unconditional way (without reference to some end, like in the case of hypothetical imperatives: technical rules and rules for bringing about happiness), is called categorical imperative (AA GM 4:414). So, while Kant uses this term *also* to describe the formulas, which would allow us to test our maxims for their morality, he considers all practical laws to be *categorical imperatives.*

Imperatives, which oblige us not to lie, respect the freedom of others and foster their happiness as well as leave the state of nature and establish a rightful condition are all categorical imperatives in Kant's vocabulary.[17] They are normative prescriptions of reason, which command unconditionally. This means that they are obligations even in the absence of any statutory laws, and the permissibility of coercion (in certain instances of those imperatives) does not deprive them of their universal validity. The CI as the general principle of moral theory (*Sittenlehre*) needs not to be considered as the one, which generates moral laws via testing of maxims. The categorical imperative is rather the form,

16] See Kant, GMM, 4:421, 429-34.

17] For further reference why all laws, both juridical and ethical, are categorical imperatives, see also Oberer 2010. Note that Oberer that internal freedom (which is a capacity) and external freedom (which is a right) are just two aspects of one concept (of freedom) applied to internal and external use of it respectively. I argue that external freedom as a right cannot follow from the external *use* of freedom as a capacity. See my argumentation below.

in which humans *recognise* moral law that in abstraction from the human condition, has only one feature: it is universal. For humans *in concreto*, reason commands to act on a maxim, which can be universally employed by all people in such a way that they exercise their practical freedom, i.e. they follow universal laws given by (their) reason.

Nevertheless, in the application of the universality of moral law to human condition we need to take into account two most essential aspects of our empirical reality, namely that we are embodied, which means we have needs and our inclinations influence our conduct and that we are living among other human beings on a limited space (planet Earth).[18] The moral law gives us duties, which apply to those facts, and therefore, we have duties both to ourselves and to others. Moreover, the duties commanded by reason refer not only to the inner nature (which is freedom) of humans but also to our empirical conditions: being embodied, having needs, desires and the physical impossibility of avoiding any human interaction. Otherwise, for Kant, there would be nothing moral about pursuing the ends of others or natural ends in us (for example by cultivating our talents) – but we learn from Kant's *Doctrine of Virtue* that these are our moral duties. In his paper, Nance argues that the derivation of the concept of right from CI becomes possible when one adds the social dimension of normativity to the individual one.[19] In my view the social context of human life cannot be the condition that would enable a *derivation* of the Formula of Universal Law from Categorical Imperative, as an extension of (inner) morality by a social domain of rights. It cannot be a successful stategy, because the concept of categorical imperative cannot be reduced to one single principle, but conversely, encloses it all: the principle, all its specific formulas, as well as all normative moral prescriptions generated by lawgiving reason. Moreover, a brief look at Kant's theory of ethics (of inner morality) starting from the *Groundwork* makes it clear that it *already* presupposes not only individual but also the social dimension of human existence. While I believe that Nance fails in his strategy, I want to propose a different one, which may succeed in connecting CI to the concept of right.

For this purpose, let us consider the table of the division of duties dictated by moral law as presented in the *Introduction to the Doctrine of Right*. According to Kant, three different logical divisions of all duties can be carried out. First, one can divide all duties into obligations towards oneself and towards other people – so we have to deal with internal (towards oneself) and external (towards others) duties. Second, both types of duties are either perfect or imperfect. Kant explains elsewhere (e.g., AA TL 6:380 ff)

18] It is a rather sad observation that while discussing Kant's moral theory, especially with regard to its fundamentals, the attention is given mostly to the individual aspect of *the morality* of a person, i.e. one investigates what makes up for the *moral worth*, which was the focus of the first part of *Groundwork*. The social dimension of morality understood broadly (*Sittlichkeit*) is often overlooked and neglected. Although it is important to mention that for Kant *moral worth* of action comes from the inner motivation of the agent, Kant is also very much interested in the social domain of both the duties of right and duties of virtue. The exercise of morality is directed towards others, which can be well inferred from the humanity formula of CI.

19] See Nance 2012.

that the perfect duties always command a specific action (command or prohibition).[20] Imperfect duties, on the contrary, do not command any specific action, but only a maxim according to which we should act. These last duties allow, therefore, a space for different ways of fulfilling such duties (*latitudo*). This division is co-extensive with the third division, namely, the division into duties of right and duties of virtue. All the duties of right are perfect, and the duties of virtue are imperfect.[21] These operations bring about four classes of duties: perfect duties of right towards oneself, perfect duties of right towards others, imperfect duties of virtue towards oneself, imperfect duties of virtue towards others.

<table>
<tr><td rowspan="4">Duty to oneself</td><td colspan="3">Perfect duties</td><td rowspan="4">Duty to others</td></tr>
<tr><td>The right of humanity in our own person</td><td rowspan="2">(of right) Duty (of virtue)</td><td>The right of human beings</td></tr>
<tr><td>The end of humanity in our own person</td><td>The end of human beings</td></tr>
<tr><td colspan="3">Imperfect duties</td></tr>
</table>

Table 1. Kant's table of division of duties: objective relation of law to duty[22]

Kant did not explain further the table of divisions in the text of *Metaphysics of Morals* but did so in his lectures, and a thorough discussion of it can be found in his lecture's notes (especially in *Metaphysik der Sitten Vigilantius*). These divisions, in my opinion, allow a clear interpretation of the difference between duties of right and duties of virtue. Kant claims that the duties of virtue concern the goal of humankind (in our person as well as in other people) and that duties of right correspond to the right of humankind. The former are imperfect, as they command to pursue specific ends and the latter are perfect because they command and forbid specific actions. What Kant aims at showing with this table of divisions is how moral law in the form of categorical imperatives presents itself to free and autonomous subjects in the manifold of duties. Not all of them must be fulfilled because of inner, moral motivation. The sphere of

20] In the case of duties of right towards others, there is also the *permissive* law. It may be argued that permissive law, which allows a unilateral acquisition of objects, can also be formulated as a command since this permission is always accompanied by reason's command to enter the rightful condition. The main difference between duties, which are perfect and imperfect lays in the fact that the latter ones oblige us to pursue certain ends, whereas the first ones state the general framework for pursuing whatever ends we please.

21] I abstain here from discussing the problematic issue of perfect duties towards oneself, which Kant introduces in his *Doctrine of Virtue*. There are many attempts to solve this issue, and I follow a version of the interpretation by Ludwig (2013) , who claims that these duties are protecting freedom and hence must be considered duties of right in some sense. In my view they belong to the *Doctrine of Virtue* since the lawgiving for these duties must always be internal and so must be the coercion (internal coercion).

22] Source: AA RL 6:240.

legal relations, which emancipates itself from the necessity of inner motivation and autonomy of practical reason, can be discerned on the basis of different forms of lawgiving (*Gesetzgebung*), for which the source of duties (lawgiving of practical reason) and the fact that they can be duties at all (because of human personality, which entails imputability) remains unchanged.

The forms of lawgiving and the duties of right

The second division brought about by Kant in the *Introduction to the Metaphysics of Morals* concerns not the duties, their character and content, but the forms of lawgiving. I claim that not the division of duties, but the recognition of two possible forms of lawgiving determines the structure of the *Metaphysics of Morals*, where Kant discusses *strict* right in the *Doctrine of Right* and the rest of the duties, to which only the internal, ethical lawgiving can be applied, in the *Doctrine of Virtue*. For Kant, any lawgiving, understood both as the result of the spontaneity of (practical) reason and as the activity of an external authority, can only be constructed out of the following elements: first there is a law, and second, there is an incentive to obey this law. The first element is the theoretical recognition of what is objectively necessary, what is the prescribed law. The second element, which is the incentive, binds the law to the subject and creates an obligation. If the incentive is the representation of the law, i.e. it is internal, then we have to do with ethical lawgiving. If, however, the incentive is external (for example, the threat of punishment or the hope for remuneration), then the lawgiving is called juridical (AA RL 6:218-219). Although we do not yet know what these laws are, the names 'ethical' and 'juridical' already suggest particular contents. It is so because this dichotomy does not constitute a logical division in the sense that the sets created by the division exclude each other. While juridical legislation only concerns a particular set of practical laws, all laws may be subject to ethical legislation:

> Duties in accordance with rightful lawgiving can be only external duties, since this lawgiving does not require that the idea of this duty, which is internal, itself be the determining ground of the agent's choice; and since it still needs an incentive suited to the law, it can connect only external incentives with it. On the other hand, ethical lawgiving, while it also makes internal actions duties, does not exclude external actions but applies to everything that is a duty in general. But just because ethical lawgiving includes within its law the internal incentive to action (the idea of duty), and this feature must not be present in external lawgiving, ethical lawgiving cannot be external (not even the external lawgiving of a divine will), although it does take up duties which rest on another, namely an external, lawgiving by making them, *as duties,* incentives in its lawgiving. (AA RL, 6:219)

Kant writes again at the end of this section: "So while there are many *directly ethical* duties, internal lawgiving makes the rest of them, one and all, indirectly ethical." (AA RL, 6:221) From the penultimate quote, we can draw two valuable lessons concerning Kant's sources of normativity. First, we already know that the juridical lawgiving is connected to the domain of law ('obligations under the legal legislation'). However, this does not

mean that legal/juridical lawgiving constitutes the most important feature (or indeed the *differentia specifica*) of the legal norms (and consequently also duties of right). Kant's argument is indeed the opposite: duties under juridical lawgiving can only be external duties because in this form of lawgiving, the incentive for action is also external. So, we could imagine an objective law that prohibits hitting others with a stick. Of course, such a law can be subject to both internal and external legislation. If it is a subject of juridical lawgiving, the incentive is external (threat of punishment), but such lawgiving does not by itself determine the character of the law (if this law belongs rather to legal or ethical domain), because it is not the incentive but the substance of the law that decides upon it. Second, we may infer that since all the duties belong to ethical lawgiving, the source of such norm (and what makes it a rational norm) always needs to be considered internal, even if the incentive remains external. Hence, all moral laws (i. e. rational laws, which belong to both legal and ethical domain) are categorical imperatives, and the external incentive does not make them any less 'moral' than the laws, which are only subject to internal lawgiving.

Let us finally investigate what exactly determines whether a law belongs to the domain of what is right or to the domain of virtue, as indicated in the *Metaphysics of Morals.* Kant provides us with the division of the duties of right,[23] in which we find the third (after perfect duties towards ourselves and towards others) category of such duties, namely the duty to establish a rightful condition, i. e. to arrange interpersonal relations in such a way, that no person is being treated as a mere means:

> One can follow Ulpian in making this division if a sense is ascribed to his formulae which he may not have thought distinctly in them but which can be explicated from them or put into them. They are the following:
>
> 1) Be an honorable human being (honeste vive). Rightful honor (honestas iuridica) consists in asserting one's worth as a human being in relation to others, a duty expressed by the saying, "Do not make yourself a mere means for others but be at the same time an end for them." This duty will be explained later as obligation from the right of humanity in our own person (Lex iusti).
>
> 2) Do not wrong anyone (neminem laede) even if, to avoid doing so, you should have to stop associating with others and shun all society (Lex iuridica).
>
> 3) (If you cannot help associating with others), enter into a society with them in which each can keep what is his (suum cuique tribue) – If this last formula were translated "Give to each what is his," what it says would be absurd, since one cannot give anyone something he already has. In order to make sense it would have to read: "Enter a condition in which what belongs to each can be secured to him against everyone else" (Lex iustitiae). (6:236-37)

23] For a more exhaustive interpretation of Kant's Ulpian duties see for example Pinzani 2005.

The first type of duties of right expresses duties that an individual has towards herself. The most of these duties, otherwise called internal/perfect duties to oneself, cannot belong to the *Doctrine of Right*, as Kant claims that the strict concept of right is interested only in external duties in relations with other individuals(AA RL 6:232). Nevertheless, one of the duties belonging to this class has an interpersonal significance, namely: we must *never* let others treat us as mere means. The further two types of duties refer to legal obligations with regard to others and the general duty to exit the state of nature. I will aim to prove that the third of these duties, which, so Kant, *is derived from the two former* determines the construction of the entire concept of *right* in the *Doctrine of Right.* This is a special duty, that is necessary if we cannot avoid interpersonal interaction and must not (1) treat others as means and (2) allow others to treat us as means. From this double obligation (based on the formula of the humanity of CI), we can observe the *emergence of the juridical dimension*. Kant states that the third type of duty is *necessary* in order to fulfil the two previous ones jointly. From this duty, jointly with both previous ones there arises the postulate incapable of further proof: 'Any action is right if it can coexist with everyone's freedom in accordance with a universal law, or if on its maxim the freedom of choice of each can coexist with everyone's freedom in accordance with a universal law.' (AA RL, 6:230). Only if we take a *strict right* as a concept that arises from the Ulpian division of duties, or more precisely, from the conclusion that can be drawn from the two previously recognized (in the table above) types of duties of right, we can understand why coercion is *analytically* derivative of the concept of right.

The Universal Law Formula, which I quoted above, commands harmonization of freedom of choice of all persons because arbitrarily denying choice to another human being is the most grievous example of instrumentalization. In order for such harmonious state to emerge, all people must enter a *rightful condition* or *condition of distributive justice.* In Kant's theory, people do have rights in abstraction from being either in state of nature or a civil union.[24] Nevertheless, these rights are only granted under the requirement of establishing a rightful condition. Moreover, the concept of the rightful condition is the reason why the structure of 'right' must entail the element of external coercion. The *rightful* use of coercion is never an interpersonal act, as Willascheck would argue,[25] it must always be mediated by the idea of general united will and exercised by state institutions. Coercion is only then justified as an indispensable element of the concept of right if this concept entails the necessity of a rightful condition, in which such coercion can take place in a legitimate way.

24] See section on Innate Right and Private Right in the *Metaphysics of Morals.*

25] Willaschek (2009) seems to suggest that we can use coercion in our private matters, even if the institutions of distributive justice are present and well-functioning, i. e. in a rightful condition. I believe it is false, for coercion in the concept of right is only legitimate in the rightful condition. What is more, according to Kant, there can be no coercion in the state of nature, only violence. See Willaschek 2009, 56, and for comparison Kant, AA RL 6:307.

With this analysis of the concept of right that entails presupposition of a state and *therefore* also of rightful coercion I address the main objection of Willaschek to the dependency thesis. Taking only bare definitions from the *Introduction to the Doctrine of Right,* it may seem hard to reconcile the necessary element of coercion with the freedom of everyone. Coercion, even if understood as mechanistically as Kant presents it,[26] is the opposite of freedom, unless it has been legitimized in some way. My argument is, that the idea of general united will, which is a concept provided by Kant to replace the actual procedure of giving consent to any limitation of freedom is also the necessary element of giving consent to the use of force for the sake of protecting rights. And as consent is the expression of choice, Kant uses the Latin formula *volenti non fit iniuria* to claim that adding external incentive to the normative laws in the case of external use of freedom does not annihilate this freedom. This is precisely the point Willaschek misses in his critique of Guyer, even though he is right when he claims that not every violation of rights is a crime.[27] From such interpretation of the concept of right (as entailing three Ulpian duties and therefore presupposing coercion only in an institutional context), one can easily understand how external lawgiving determines the scope of the whole *Doctrine of Right*. External lawgiving binds the subject with the norm in such a way that it appeals rather to her pathological than rational nature. It is permitted or even necessary in the case of harmonization of the freedom of choice, i.e. in all the moral, rational laws that are dictated within the sphere of external use of freedom.

The innate right to freedom and other rights

If my argumentation is correct, then the claims about the independency of Kant's theory of right from his previously developed moral theory are far less convincing. As many have mentioned before (Guyer, Nance, Willaschek) I also believe that the source of all these difficulties is that Kant's analysis in the *Doctrine of Right* does not entail the justification of the transition from inner freedom of the will to external freedom understood as a right. As Kant claims, the only innate right that every person possesses by virtue of her humanity is freedom, which he initially defines as 'independence from being constrained by another's choice' (AA, RL 6:237). The question that arises here is the justification of this right with reference to the categorical imperative. According to the latter, the exercise of freedom entails acting on moral maxims and for the sake of moral

26] 'Resistance that counteracts the hindering of an effect promotes this effect and is consistent with it. Now whatever is wrong is a hindrance to freedom in accordance with universal laws. However, coercion is a hindrance or resistance to freedom. Therefore, if a certain use of freedom is itself a hindrance to freedom in accordance with universal laws (i.e., wrong), coercion that is opposed to this (as a *hindering of a hindrance to freedom*) is consistent with freedom in accordance with universal laws, that is, it is right. Hence there is connected with right by the principle of contradiction an authorization to coerce someone who infringes upon it'. Kant, AA, RL, 6:231

27] See Willaschek 2009.

law alone. If this is the essence of morality, we do not need external freedom to be moral beings and act on duty,[28] we also do not need even to consider any external actions as based on Kant's moral theory alone, because some duties do not command actions, but rather pursuing certain (moral) ends. Nevertheless, this can only hold if one focuses solely on the individual aspect of Kant's moral theory. For a monk or a prisoner, it is perfectly possible to be a moral person without interacting with other persons, because the inner freedom is not affected by external circumstances. Yet, Kant addresses his moral theory not only to renunciates and eremites, but to humans in general, and people, in general, do not live in isolation from each other.

In the last step of my argument, I will try to show that, for the adherents of the independency thesis, assuming that freedom is the most fundamental and inalienable right is purely arbitrary. Namely, I argue that accepting the right to external freedom as the very basis of Kant's legal theory and source of all further rights must appear to be anything but self-evident, *if we do not take into account* the theoretical background of this theory, i. e. fundamental concepts of Kant's practical philosophy. Being devoid of the justification of the profound significance of freedom with reference to the inner morality and considering humans only in their empirical nature and empirical character, it must be challenging if not impossible to prove that freedom is the foundational political value. We can observe in many well-functioning empirical legal systems that they can exist with sufficient justification and without considering freedom as a core value to be protected. If we conclude that happiness is the primary goal of these systems, because it is also the natural goal of humans, freedom can be considered merely superfluous.[29]

If the original right to external freedom is not necessary for exercising morality and cannot be inferred from the phenomenal nature of humans, there arises the need to justify it on different grounds.[30] I argue that the only plausible justification of this right rests on the application of Kant's formula of humanity to empirical circumstances of the human condition. I have argued above that practical freedom is necessary to ground any norms because of the imputability of persons and that moral law is the only source of the obligatory character of norms. Those two concepts play an equally fundamental role in the justification of freedom as an external right. First, practical freedom constitutes the moral personality of all human beings and therefore turns them into ends-in-themselves.

28] To a certain extent, I agree here with Willaschek 2012.

29] See Kant's reflections on the paternalistic government in the essay *On the common saying: That may be correct in theory, but it is of no use in practice*, AA TP, 8: 290-91. As an example of a rational justification of legal system which existed without freedom, we can bring by many apologies of feudalism performed in the Middle Ages, which did not question in any fundamental way the inner freedom of individuals as the children of God.

30] More about the innate right, and its moral status one can read in Höffe 2002. About the issue of "postulate incapable of further proof" and justification of the right to external freedom see Ripstein 2009.

Second, the categorical imperative in its 'formula of humanity' forbids to instrumentalise human beings for any purposes, even if the goal of the conduct were their happiness. If we consider humans as embodied creatures, which by the power of free choice, act on their interests and strive to fulfil their desires, the first rational norm is the prohibition of treating others as mere means – because this violates their humanity. Constraining the will of others is the most grievous example of instrumentalization because it is equal with turning persons into objects, as their free choice (but indeed not their inner freedom) is annihilated by such conduct. Violation to innate right to freedom is not equal with depriving persons of their (practical) freedom but taking away their free choice must be nevertheless ruled out because it fails to acknowledge them as persons and not objects.

Further, we need to mention that Kant's right to external freedom is not one that permits unlimited use of it (like it is the case with Hobbesian freedom of individuals in the state of nature), but it is always limited by the same extent of freedom of everyone else. The question, which arises here is why the freedom as right needs to be distributed equally to everyone, even though experience teaches us that people are so different in many ways and so it might be beneficial to every particular person and the society as a whole to give different scopes of freedom to different individuals? Based on empirical knowledge alone and with happiness as the main goal of building a just society, we will not be able to justify equality as the inherent element of freedom sufficiently. But if we refer to Kant's metaphysical source of moral philosophy, then we are reminded that the shared feature of humans is their humanity understood as practical freedom, i.e. the ability to act morally, which also builds the very ground of the right to external freedom. Therefore, if external freedom is given to anyone as a legal title (a right), then it must be given to every person in an equal share.

While reconstructing Kant's application of his pure moral concepts to the human condition, we have arrived at the fundamental right to external freedom. Kant defines it in a republican way as non-domination,[31] i.e. being independent of an arbitrary will of another person. Yet, in the reflections following the definition he equips this right with further elements – human beings are therefore originally granted the right to equality (in being bound by others in a reciprocal procedure), being one's own master, being beyond reproach (often explained as legal innocence) and being authorized to do anything they please as long as they do not infringe upon the right of others. All the further elements must be considered an extension of this original right to freedom (AA RL, 6:237-38), but it is evident that they are a result of inferences drawn by Kant, who is applying external freedom to empirical conduct. We must not, therefore, be obstructed in our free choice by the domination of others and this rule applies equally to establishing legal relations (such as a contract), being held responsible for only one's own deeds and doing anything

31] I refer here to the new version of the classical republican account of freedom presented by Petit 1997.

we are pleased to (also while violating moral duties), as long as we respect the equal freedom of others. By means of the innate right to freedom Kant grounds his system of all further rights, which constitute the entire (rational) juridical domain and I agree that this one right, while applied to the human condition, is sufficient to ground Kant's entire legal theory. Therefore, external freedom, understood as innate right, is a necessary and sufficient condition to secure the use of free choice by embodied creatures such as humans, and even this would not be justified if not for the practical freedom as the fundament of humanity,[32] autonomy and agency.

CONCLUSIONS

I argued that Kantian concept of right rests on the moral identity of a human being, but in the end unveils a system of external laws that have juridical character and are bound to the state's monopoly for the use of coercion. This by no means undermines the rational source of Kant's doctrine of right, which can only be grounded in practical freedom and derived from the pure concept of the moral law. The connection between categorical imperative as we know it from *Groundwork to the Metaphysics of Morals* and *Critique of Practical Reason* and the concept of right is far from evident and straightforward. I argued that the dependency of the latter on the former is much more plausible than the opposite view.

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32] I mentioned humanity, because of the formula categorical imperative best suited to justify external freedom: "So act that you use humanity, whether in your own person or in the person of any other, always at the same time as an end, never merely as a means" (AA GMM, 4:429). This formula dictates that we must never violate the humanity (understood both in the narrow sense, which is equal to practical freedom as well as broader sense derived from empirical knowledge) of all persons.

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