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Kant on Provisional Property Rights and the Idea of General Will

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Summary

The provisionality of property in the Kantian state of nature implies two things: firstly, its rights status is deficient, meaning property is not a fully valid right, and secondly, possession of external objects is normatively significant, i.e., it produces certain legal effects. This paper focuses on the normative aspect of the provisionality. I show that normativity of provisional possession is neither the result of the Postulate and the permissive law, nor of the 'anticipated' general will in the civil condition, but of the 'a priori' and 'originally' united will of all in the state of nature. Accordingly, we must distinguish between two instantiations of the general will: one in the state of nature, and another in the civil condition. The latter is, however, not just a 'reflection' of the former: the general will in the state of nature does not already recognize property rights over objects, but only makes our unilateral property claims to external objects morally valid. Only the state can provide the title to property rights. Although its role is not just to 'recognize' and 'secure' what we possess in the state of nature, the actual general will in the civil condition remains, to some extent, normatively bound by the 'originally united will' in the state of nature.

Keywords: Kant, Provisionality, Property Rights, General Will, Original Common Possession

1. Introduction

The significance of property rights in Kant's philosophy of right is widely acknowledged in scholarly literature. The right to own external objects of choice is not only an immediate reason for the transition from the state of nature to the civil state, but also the condition for grounding that transition as an unconditional duty of right. 'If external objects of choice were not even *provisionally* mine or yours in the state of nature, there would also be no duties of Right with regard to them and therefore

no command to leave the state of nature' (Kant, 6: 313).[1] However, as soon as we ask what it means to have some external object as 'provisionally mine or yours', things get more complicated. Kant's remarks on that matter are far from unequivocal. He sometimes treats property in the state of nature as a genuine right, which assumes correlative obligations of others, but he also says nobody is obligated to refrain from 'encroaching on what another possesses' (6: 307); he asserts that original acquisition must occur through a unilateral act (6: 258, 263), but also that I cannot impose an obligation on others by my unilateral choice (6: 261, 263, 264); he charges the state only with the task of securing property rights (6: 256), but he also says that in the civil condition the possession is 'determined *by law*' and 'allotted' to everyone 'by adequate *power*' (6: 312). Finally, he tells us that provisional possession becomes conclusive in the civil condition, but also that only 'in a *universal association of states*', i.e. with the establishment of the rightful condition on an international level, which implies attainment of perpetual peace, or at least striving for it, 'can rights come to hold *conclusively*' (6: 350).[2]

It is then not surprising that Kant's notion of provisionality provoked contrasting readings in the scholarly literature. On the one side are commentators who argue that it is possible to have property rights already in the state of nature, but that, due to the absence of public authority, possession of external objects remains insecure. The role of the state would then be to sanction and protect rights to external objects that are properly acquired in the state of nature (Byrd and Hruschka, 2010; Pinzani, 2005). Others maintain that only property right *claims* in the state of nature are possible, whereby most of those adhering to this view, moreover, hold that such claims constitute a transgression against the freedom of others, which, however, is morally justified. Nevertheless, according to this understanding, only the state can provide a proper title to owning an external object of choice and transform a property rights claim into a fully valid right (Flikschuh, 1999; 2000; Ripstein, 2009).[3]

[1] All citations from the *Doctrine of Right* are taken from Mary Gregor's 1991 translation of the *Metaphysics of Morals*, with a few of my own amendments. *A Perpetual Peace* is cited according to H. S. Nisbet's translation from 1991. Volume and page numbers, e.g., (6: 256), refer to the German edition of the Prussian Academy of Sciences.

[2] Brian Tierney mentions some of these 'apparent anomalies' and treats them more extensively in Tierney (2001). For interpretations arguing that property rights remain provisional even in the civil condition, see Ellis (2008), Messina (2019), and Yeomans (2021). In addition to seeing Kant's 'conception of provisionality as our permanent condition' (*ibid*., p. 276), Christopher Yeomans gives a contextualist reading of Kant's 'provisionality thesis', finding his solution to be 'unique and distinctive of the German social condition in the *Sattelzeit* period (1770-1830)' (*ibid*., p. 253).

[3] Rafeeq Hasan deems the first reading the 'weak provisionality' and the second the 'strong provisionality' thesis (Hasan, 2018). Helga Varden considers them 'libertarian' and 'liberal republican' readings (Varden, 2024, pp. 417-419).

According to the first reading, the state is bound by the history of acquisition in the state of nature; if an external object is properly acquired, the state should merely sanction the right to it and protect its exercise. The second reading allows the state considerable discretion regarding the distribution of property and deciding between different property regimes.[4] The first reading gives essentially a Lockean account of property as a pre-political right, while the second brings Kant closer to Hobbes' view on the state as a source of property rights.

Notwithstanding all the differences, all readings, however, agree on two things. Firstly, we are entitled to raise property claims in the state of nature. Provisionality, in this respect, refers to a morally valid *claim*, or a claim it is rightful to raise.[5] Secondly, the question of property rights remains unsettled – at least in one respect (i.e., their exercise) – until the civil condition is established. The right to property is, in other words, to a higher or lesser degree defective in the state of nature. The focus of this paper is on the first aspect of the property rights' provisionality, i.e., their normative force in the state of nature. As indicated above, Kant states that provisional acquisition of an external object results from our unilateral act. But if by a unilateral act we cannot obligate others, where does the normative validity of our provisional possession come from? Some commentators find that our property-rights claim is morally justified on account of the permissive law (Brandt, 1982; Flikschuh, 2000; 2004; Weinrib, 2003), which they see as a law that temporarily (provisionally) allows an exception to general prohibition: in this case, it authorizes us to impose an obligation on others by our unilateral choice. More recently, Rafeeq Hasan has offered an 'anticipatory' reading of the 'provisionality thesis': provisional possession draws its legitimacy from the anticipation of its *ex-post* au-

[4] For clear cases of 'strong provisionality' readings in this respect, see Waldron (1996) and Brudner (2011).

[5] Although Katrin Flikschuh, as exemplary for the first reading, sees a claim to an external object as a transgression against the freedom of others, and as such as initially wrong, she finds that the permissive law permits such a transgression as instrumental to the establishment of the civil condition. On account of the permissive law, an act of appropriation in the state of nature is thus 'provisionally just, i.e., as just in anticipation of a more permanent solution' (Flikschuh, 2000, p. 139), in which property rights will be reconciled with the innate right to freedom. In a later article, Flikschuh treats both innate and acquired right as 'morally valid pre-civil claims to Right', meaning they are justified claims 'to being in a condition in which it is possible to have rights' (Flikschuh, 2008, p. 383, n. 11). On the other hand, advocates of the second reading admit that property rights in the state of nature suffer from problems of 'indeterminacy' (e.g., where are the boundaries of the piece of land that I claim as mine, or did I intend to keep a thing that I have taken into my possession as my property or just to use it, etc.) and 'assurance' (the promise another gives me that they will refrain from encroaching on my possession, which is condition of my reciprocal obligation toward them, is not credible in the absence of public authority that would enforce it) (cf. Guyer, 2002).

thorization by the general will in the civil condition (Hasan, 2018; see also Stone and Hassan, 2022). James Messina, on the other hand, points to the role of the general will (and the corresponding idea of the original common possession) already in the state of nature, whereby he, however, equates the general will with the Juridical Postulate (Messina, 2021). Before Messina, B. Sharon Byrd and Joachim Hruschka have also pointed to the importance of the general will in the state of nature, but they found that will to be identical with the one in the civil condition: the latter has only to sanction and secure the possession which is 'recognized' as a right by the former (Byrd and Hruschka, 2006). Lastly, Hongjian Tan challenges both Hasan's and Messina's reading, finding that provisional possession receives its normativity from the 'pure concept of understanding of possession', which abstracts from the empirical conditions of our relation to an object (Tan, 2025).

I will say more about these readings immediately. Although I do not consider any of them wrong, I find that they do not distinguish the input of every step leading to the 'provisional possession' carefully enough. The first aim of my paper is thus to show how these steps – Juridical Postulate, permissive law, original possession in common, idea of general will – add up to the provisional status of property rights in the state of nature. The second point of the paper is to show that, notwithstanding the importance of the preceding steps, the immediate source of the provisional possession is the idea of general will as contained in the original possession in common, i.e., the general will as presupposed in the state of nature, which is not identical to the Postulate. Moreover, this general will does not already recognize our property rights over external objects and is thus not identical to the 'actual' general will in the civil condition. Although making provisional property conclusive presupposes the actualization of the originally united will of all in the civil condition, some difference between these two instantiations of general will remains.[6]

In the first section, I expound more thoroughly different readings of the normative aspect of Kant's 'provisionality thesis' and present points of my disagreement with them. In the second section, I discuss Kant's justification of property rights, focusing first on the Juridical Postulate and the permissive law and showing that neither of them, on its own, suffices for grounding provisional property rights. After that, I discuss the idea of the original common possession and the originally united will of all as necessary conditions of the provisionally rightful possession, as well as their relation to the 'actual' general will in the civil condition. The final section concludes.

[6] I will use 'general will', 'united choice of all', 'united will', and 'omnilateral will/choice' interchangeably.

2. Interpretations of Provisionality

In distinction to both 'weak' and 'strong provisionality' reading,[7] Hasan argues for a third reading, which he calls 'anticipatory provisionality'. According to him, provisional property rights are rights in 'anticipation' of the civil condition, whereby the meaning of the 'anticipation' is twofold: firstly, they prompt leaving the state of nature and establishing the civil condition, and secondly, 'they draw on a public authority they lack' (Hasan, 2018, p. 856). Since, according to Kant, every right is an authorization to use coercion, the provisional right to property is, in fact, an authorization to coerce others into entering the civil condition. But if others 'shirk their duty' to enter the civil condition, 'I still have unilateral authorization to defend my rights claim' (*ibid*., p. 866). In this respect, Hasan's reading evades, in my view, errors of both the 'weak' and the 'strong' accounts of provisionality. In contrast to the latter, it acknowledges that provisional property rights include the authority to use coercion.[8] Contrary to the former, it sees the unilateral choice (or lack of omnilateral authorization) as a primary defect of property rights in the state of nature, and thus the reason why they are not full-fledged property rights.

Although I, for the most part, agree with Hasan's description of provisional property rights, I detach from his reading regarding the question of what makes our property rights claims morally valid in the state of nature, i.e., why is provisional property a *right*. His answer relies again on the anticipatory character of provisional property rights. Property claims are rightful in the state of nature from the perspective of a subsequent creation of the civil condition in which property rights will be omnilaterally determined (*ibid*., p. 856). To be clear, I do not find this explanation wrong. We can provisionally possess an external object only because such a posses-

[7] See note 3 above.

[8] Hasan assesses his disagreement with the 'strong' provisionality somewhat differently. In his view, the main problem with the 'strong provisionality' is that it sees property-rights claims in the state of nature as wrong (Hasan, 2018, pp. 852-853). That is, however, not entirely true, as shown above (see note 5). Both Flikschuh and Ripstein, whose readings are among the 'strongest' variances of the 'strong provisionality', see property claims in the state of nature as valid entitlement claims. They also admit that they include enforcement claims, but deny that anyone has the authority to enforce them (Flikschuh, 2008, p. 391, Ripstein, 2009, p. 165). This divorcement of 'entitlement claims' from 'the authority to enforce them' is, in my view, the main problem of the 'strong provisionality' thesis. Kant says that prior to entering the civil condition, 'a subject who is ready for it resists with right those who are not willing to submit to it and who want to interfere with his present possession' (6: 257). Both wills – the one that claims, and the one that contests the claim – are unilateral. However, the former 'has the advantage of being compatible with the introduction and establishment of a civil condition' (*ibid*.). But even if we all remain in the state of nature, the one who claims is right, because property rights are indirectly required by the innate right to freedom. For both reasons, as Hasan rightly warns, I am authorized to coercively defend my property rights claims in the state of nature (Hasan, 2018, p. 866).

sion invokes the state as a condition of it becoming a fully valid right. The provisional possession is a function of our duty to leave the state of nature and enter the civil condition. In short, our duty to establish the state depends on raising property claims in the state of nature, and these property claims being rightful hinges on establishing the state, which will authorize our property rights to certain objects. That is all true. But it is only half of the story. Strict 'anticipatory' reading overlooks the role Kant ascribes to the general will already in the state of nature. Kant says that I can 'bind another to refrain from using a thing' only 'through the united choice of all who possess it in common' (6: 261). I will say more on this later. Here, I just want to point out that Kant presupposes an 'a priori' and 'originally united choice of all', which is 'contained' in the original possession in common, as the ground of moral validity of our (empirical) unilateral act by which we claim a right to a particular external object. This general will is the one, the actualization of which in the civil condition is 'anticipated'. But the two should be distinguished.

Admittedly, in a later article, written by Stone and Hasan, the authors emphasize the idea of general will as a 'meta-condition' of the provisional right (Stone and Hasan, 2022, p. 70). But they always put the general will on the same level as the state, or identify it with the *political* will. When arguing that an original acquisition is justified because it is included in the a priori united will, they thus say:

> We come into property together when our acts are grounded in the same totality. This totality is not some third entity (it's just you and me here), but rather our acts conceived as parts of a nexus that isn't merely additive: I acquire *because* you acquire and *vice versa*. Kant calls this totality 'the state' (*ibid*., p. 76).

And a couple of pages later:

> 'Provisional acquisition' would be imperfect acquisition, in the manner of an action that has not reached its end; and it would be something to be 'included in' a politically united will (*ibid*., p. 78).[9]

Again, all of this is true. But Stone and Hasan rush too quickly to reach the civil condition. Something important for the justification of provisional property rights happens prior to the civil condition.[10]

[9] Similarly, Fiorella Tomassini acknowledges the importance of the general will for resolving the 'tension between the unilaterality of acquisition and innate equality' (Tomassini, 2023, p. 306). However, she immediately relates the general will to the state, not distinguishing between the input of the general will in the state of nature and in the civil condition. 'Therefore, ownership rights depend on the *a priori* principle of the general will and thus on the sovereignty of the state' (*ibid*.).

[10] In the same article, Stone and Hasan suggest we should treat provisional right not as some substantial right, but as 'part of a strategy (...) for explaining right through a progressively more

Hongjian Tan is thus right to warn that there 'must be actual legal grounds in the state of nature, which are relatively independent of conclusive possession but serve as a necessary reference point to it' (Tan, 2025, p. 476). There must be something that gives normative relevance to our empirical act of unilateral appropriation before the civil condition. Kant says that in the state of nature, there is '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' (6: 267). We must, in other words, explain why provisional possession is a rightful claim to intelligible possession, and not just mere empirical possession, which does not extend beyond the innate right. Byrd and Hruschka (2006) recognize that the authorization to acquire property comes from the united choice of all *in the state of nature*, i.e., from the a priori and necessarily united will that corresponds to the idea of the original common possession. However, they do not see any difference between this will and the general will in the civil condition. 'It is important to emphasize that the *a priori* universal will in its role of recognizing property ownership rights is the same as the *a priori* universal will in its role of legislating laws of freedom within the civil social order' (*ibid*., p. 270). In contrast to Stone and Hasan, who do not acknowledge any distinctive role to the general will in the state of nature, finding that the 'authorisation' comes from the 'anticipated' general will in the civil condition, Byrd and Hruschka dismiss every distinctiveness of the general will in the civil condition. The reason is that, according to them, the former does not only authorize us to *claim* property over external objects, but already 'recognizes and secures individual property ownership rights' (*ibid*., p. 221). The property is, in other words, properly acquired in the state of nature, and the role of the state is just to protect its exercise.

Tan, on the other hand, distinguishes between two stages of normativity in Kant's history of acquisition, relating the question of an appropriation by a unilateral act to the first stage. Here, the idea of the original community matters. It explains the empirical title to an external object, i.e., why our unilateral act of the first appropriation is rightful. 'Empirical title is derived from original community' (Tan, 2025, p. 476). However, the normativity of empirical possession is, according to Tan, in fact the result of the postulate of practical reason, and not of the original community. It is the postulate 'which confers an empirical title on empirical pos-

adequate exposition' (Stone and Hasan, 2022, p. 54). Provisional right is 'an instance of a concept, which, standing alone, has no application in juridical experience but is in service of elucidating a concept that does' (*ibid*.). It could be objected to my reading that it misses the point of Stone's and Hasan's sequential understanding of Kant's argument, according to which the later step in the exposition is a 'more concrete specification' (*ibid*., p. 81) of the preceding one and a condition of its 'consistent realisation' (*ibid*.). But even if we accept this account of Kant's method – and I do not think we should not – one step in the sequence is omitted, and that step is the originally united choice of all, which belongs already to the state of nature.

session based on priority in time' (*ibid*., p. 484). Leaving aside for the moment this equation of the postulate with the original community, the legitimacy of empirical possession is, in Tan's view, not sufficient for establishing the normativity of provisional possession. Crucial in that respect is the Pure Concept of Understanding of Possession (hereafter PUP), which leaves out conditions of space and time from the concept of possession (I possess an object even when I am not physically connected to it) and thus prepares it for the 'universal juridical legislation' (*ibid*., p. 481). Due to this abstraction from empirical conditions, provisional possession occupies an intermediate position between empirical possession and intelligible possession (*ibid*., p. 476). The normativity of provisional possession is, in other words, achieved at the second stage, with PUP.

That, however, cannot be true. PUP is a theoretical tool, which is necessary because 'merely rightful possession' (6: 252), as a pure rational concept, cannot be directly applied to empirical possession. It is thus indeed necessary, but as a theoretical concept, which enables practical employment of intelligible possession, i.e., it is a theoretical condition of such an employment. PUP concerns our relation to an object, creating the possibility to think that relation independently of the empirical conditions ('holding', i.e, physical possession), while intelligible possession as a right concerns our *relation to others*, with respect to some object. The latter is, of course, impossible without the former, but PUP adds nothing to the practical normativity of the intelligible possession, which, as a right, must be justified from the standpoint of the freedom of others. PUP belongs, in other words, to the deduction of the concept of intelligible possession, not to the justification of the right to it.[11]

The question is not what comes between empirical (unilateral) possession and (conclusive) intelligible possession – PUP is here undoubtedly important, although without contributing anything to the *practical normativity* of empirical possession – but, as said above, what legitimates our empirical act of unilateral appropriation? Or why is such an act not arbitrary, but creates legal consequences for others? The answer to that question is already an answer to the question about the normativity of provisional property rights. For Tan, our unilateral act is morally valid, ultimately, because of the Postulate: it is the Postulate that authorizes us to claim a right to an object because we were the first to take it into possession. That is, however, according to Tan, not enough for the provisionality of property rights in a normative sense –PUP is additionally needed. But, apart from this, there are two additional problems with Tan's answer: firstly, it remains unclear what the specific contribution of the original community of land is to the provisionality, and secondly, Tan denies any normative relevance to the idea of general will in the state of nature. Omnilaterality

[11] For this distinction, see Tuschling (1988).

is normatively significant for him only with respect to making provisional property rights conclusive in the civil condition (*ibid*., p. 477).

In contrast to Tan, Messina recognizes the significance of both original common possession and the idea of general will already in the state of nature. 'Kant claims that taking possession is sanctioned (1) by an innate possession in common of the surface of the earth, (2) a general will to possess' (Messina, 2021, p. 73). However, Messina finds that 'each of these points, properly understood, follows directly from his argument for the postulate' (*ibid*., p. 74). Same as Tan, Messina then identifies original common possession (and the general will) with the Postulate. Or, the Postulate is, according to him, 'omnilaterally willed' (*ibid*., p. 76), which is why we can consider our empirical act of taking control as omnilaterally authorized, and thus rightful.[12] There are two problems with this interpretation. Firstly, the specific contribution of both original possession in common and the general will to provisionality again remains unclear. Secondly, although the Postulate is fundamental to Kant's justification of property rights, it does not authorize us to do anything. We must therefore revisit Kant's justification of property rights in order to discern the specific import of its different steps to the normative aspect of provisional property rights.

3. Kant's Justification of Property Rights

3.1. The Postulate

Kant defines rights as '(moral) *capacities* for putting others under obligations' and distinguishes between the innate and acquired right, the former being 'that which belongs to everyone by nature, independently of any act that would establish a right', and the latter the one 'for which such an act is required' (6: 237). He then states that there is only one innate right, which is 'independence from being constrained by another's choice' (*ibid*.). To put it simply, it is a right to act in a way which is the result of one's own choice and not of the choice of others, whereby the only limit of my innate right is the same right of others. Kant thus formulates the Universal Principle of Right (hereafter UPR), which sets the criterion for judging whether any action is right or wrong in its universal compatibility with the innate right of others.[13]

[12] Because of that, Messina concludes that 'one can in truth dispense with Kant's claims about common possession of the earth'. They are nothing more than 'part of his effort to translate his principles into language employed by his predecessors and the dominant theological doctrine of the time' (Messina, 2021, p. 74, n. 17).

[13] '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' (6: 230).

If we understand the innate right as a right to act freely in this sense, it then includes everything indispensable for a free action, i.e., all without which an action cannot happen at all. And the least we can say about the necessary requirements of our actions is that we must have control over our bodies. The innate right thus restricts others with respect to our life and bodily integrity. However, it also binds them to refrain from interfering with the objects we are physically connected to. Our innate right covers physical use and physical possession, because others cannot snatch an object I hold in my hands or move me from the place I occupy without affecting my bodily integrity. Everything included in the scope of the innate right (life, bodily integrity, physical possession) is, therefore, according to Kant, '*internally* mine or yours' (6: 237).

The crucial question is, however, whether *externally* mine or yours is morally possible, or can I have a right to an object with which I am not physically connected? That amounts to asking whether I can put others under obligation regarding some external object, i.e., an object I do not physically possess. And to ask the question about the moral possibility of external possession means to bring it into relation to the innate right. For anything that does not conflict with the innate right, or can be justified from the standpoint of the innate right, is morally possible, i.e., rightful. Now, Kant denies that the right to external possession is analytical to the innate right. To say that I have an innate right does not imply that I must have property rights, since we would be able to act even without having property rights.[14] On the other hand, one could ask: why would there not be property rights? Acting in a world without property rights would diminish our external freedom, because we would be able to act only under the condition of our empirical connection to an object. Put differently, property rights maximize our external freedom, as they widen the possible scope of our free action (cf. Steigleder, 2002, pp. 162-164). Furthermore, it is a fact that we have the ability to use objects in ways that do not require

[14] I will use 'private property' synonymously with 'intelligible possession'. This, however, is not how Kant uses these terms. For him, intelligible possession encompasses three classes of objects: corporeal things, choice of others (e.g., contract law), and their status in relation to me (parental and matrimonial law). Since the right to private property implies free and full disposal over objects, Kant uses the term 'property' only for corporeal things. To refer to the other two classes of objects as 'property' would suggest we can own other persons, which would contradict their innate humanity. However, in the chapter on private right, Kant primarily addresses the origin of property rights, i.e. of the right to intelligible or external possession of corporeal things. The reason is that only property rights can be originally acquired, i.e., through a unilateral act. Apart from the specific case of parental rights (which are conditioned upon the duty of parents towards children) and marginal cases of someone losing legal capacity due to physical and mental incapability (which Kant does not mention), obligations correlative to other rights result from the consent of the obligated party or some antecedent act they have committed.

physical connection to them, e.g., I can use an apple not just for eating, but I can also place it away from myself in order to practice crossbow shooting. We could then conclude that the right to external possession is somehow required by our innate right, as necessary for its full exercise.

The problem, however, is that the right to property conflicts with the innate right of others. My property over some object prevents others from physically using that object, and physical use is, as we saw, part of the innate right. In the section on the Juridical Postulate of Practical Reason, Kant aims to show that, on account of the laws of pure practical reason, the conflict between the two rights can be resolved. His argument is somewhat obscure, but it can be summarized as follows: pure practical reason can issue only formal laws, which, as such, abstract both from the content of the choice and the particular properties of the objects (6: 246). That implies two things.[15] Firstly, because of the formality of its laws, pure practical reason cannot determine specific purposes for which objects should be used, e.g., that a chair can be used just for sitting. Any use which is possible on account of the natural properties of an object must be allowed. Since objects can be used as means for purposes, the realization of which does not require physical possession of an object (recall apple and crossbow shooting), non-physical or intelligible possession cannot be prohibited.[16] Let us refer to this as the first aspect of the formality argument (FA1). This argument, however, addresses only the issue of our relation to an object and does not resolve the problem of the incompatibility between intelligible possession and the freedom of others. Crucial in that respect is the second implication of the argument. Again, due to the formal character of its laws, pure practical reason cannot establish any relation between specific persons and specific objects, i.e., it cannot allot certain objects to particular individuals. All persons and all objects are treated 'abstractly', which means that every object is a possible property of any person. Neither can anyone have an advantage in becoming the owner of some object because of empirical traits of their choice (privileges, needs, physical strength, etc.), nor are some objects predetermined for use by some persons because of their natural properties (scarcity, utility, etc.). And if everyone can become the owner of any

[15] Here I broadly follow Steigleder's (2002, p. 172) and Hespe's (2002, pp. 130-136) reading of the Postulate.

[16] 'The subjective condition of any possible use is *possession*' (6: 245). Since pure practical reason cannot determine the purposes for which the object should be used, I must be able to use an object 'as I please' (6: 246). That is why I agree with Stone and Hasan that intelligible possession 'entails ownership in its classical sense – ownership as dominion' (Stone and Hasan, 2022, p. 58). In order to be able to use a thing as we please, we must have complete and lasting control over it (including the right to destroy it). For a view that intelligible possession includes only some sort of restricted use-rights, see Westphal (1997).

object, then non-physical possession does not infringe on anyone's freedom,[17] or it is 'formally consistent with everyone's outer freedom in accordance with universal laws' (6: 246). We shall call this the second aspect of the formality argument (FA2).

It would be, however, too hasty to infer that property rights are justified already by the Postulate. FA2 only shows that property rights *are possible*, i.e., that they are not irreconcilable with the freedom of others. This is a general *theoretical* assertion, rather than a practical principle that would authorize us to do anything. As Flikschuh points out, 'the form of the postulate's proposition is assertoric, not imperatival' (Flikschuh, 2004, p. 20).[18] The Postulate itself does not establish either property as a *subjective right*, nor does it (*pace* Messina and Tan) entitle us to claim the right to a *particular* object of choice. But it is an essential precondition of both, as a rebuttal of the incompatibility between the innate and acquired right. It formulates the requirement that must be satisfied in order for property rights to be introduced (i.e., that there is no predetermined relation between specific persons and specific objects). By stating the 'formality argument', Kant suggests that we can move forward to the next step in the justification of property rights, which is the permissive law of practical reason.

3.2. Permissive Law

Kant sometimes treats the permissive law as identical with the Postulate, most notably the first time he mentions it, in the last subsection of the section on the Postulate, when he says: 'This postulate can be called a permissive law (*lex permissiva*) of practical reason' (6: 247). The permissive law, however, is not identical to the Postulate. It brings something new to the argument of the Postulate. It authorises us 'to put all others under an obligation, which they would not otherwise have, to refrain from using certain objects of our choice because we have been the first to take them into our possession' (6: 247). The permissive law thus transforms the general possibility of intelligible possession, demonstrated by the Postulate, into a subjective right (Hespe, 2002, pp. 135-136). We now obtain a legal ground for obligating others with respect to external objects of choice. We also know how we properly acquire a right to an object: by being the first to take it into our possession. Priority

[17] To be precise, it does. However, the Postulate shows it is an infringement that can be compatible with the freedom of everyone according to a universal law, i.e., universally compatible with the same infringement implied in the right to external possession of others, under the conditions displayed in the Postulate. An action being a hindrance to the freedom of others does not make it *ipso facto* unrightful (Steigleder, 2002, p. 164; Flikschuh, 2008, pp. 389-390).

[18] This is not to deny the practical significance of the Postulate's theoretical proposition. The Postulate is a 'practically necessary theoretical proposition' (Flikschuh, 2004, p. 19). For an account of the Postulate as a theoretical proposition with practical implications, see also Guyer (2002).

in time is the only way of acquisition that abstracts from all material considerations of choice and object, and therefore conforms to FA2 (Mulholland, 1990, pp. 254-255; Szymkowiak, 2009, pp. 588-589).

But why do we need the authorization of the permissive law at all? Could we not just assume that the general possibility of property rights, which the Postulate demonstrates, is enough for us to acquire a right to an external object? After all, the Postulate shows that external possession is not in conflict with the innate right, and such a conflict is the only relevant obstacle to the moral possibility of property rights. In order to see why FA2 does not suffice and why we need the permissive law, consider that pure practical reason could issue a law that prohibits intelligible possession. As Burkhard Tuschling has shown, such a prohibition would also be a 'legislation of freedom' (Tuschling, 1988, p. 289). Recall that the world without property rights is conceivable, i.e., we could act to some extent even if there were no property rights. Prohibition of property rights would be a 'law of freedom' because it also conforms to the 'formality' requirement of the Postulate. Admittedly, it conditions the use of an object upon physical possession and thus reduces the number of purposes for which any object can be used, but it does not prescribe any particular purpose for which an object must be used within the limits of physical possession. It also does not discriminate between persons with respect to them having a possibility of taking objects into their physical possession and using them physically. However, the Postulate has shown that non-physical possession is also a 'law of freedom' because it does not conflict with the innate right. And since (1) we have the ability to use objects in non-physical ways, and (2) non-physical possession widens the scope of our freedom, the possibility of non-physical possession should be given advantage over the prohibition. The permissive law affirms that advantage by introducing intelligible possession as a subjective right. It elevates the justification of property rights to a higher level, from which we can no longer recede. If the Postulate has demonstrated the *possibility* of property rights, the permissive law demonstrates their *necessity*.

The permissive law is thus, as Joachim Hruschka has shown, a 'power-conferring norm' (Hruschka, 2004, p. 47).[19] It establishes a new legal institution, in

[19] According to another, more prevalent, strain of interpretation, the permissive law is a law of exception: it allows temporary violation of a prohibition, in this case of UPR, which coordinates only the exercise of the innate right (Brandt, 1982; Gregor, 1988; Baynes; 1989; Flikschuh, 1999; Weinrib, 2003; Ypi, 2014). My problem with this reading is that UPR does not, strictly speaking, prohibit property rights; it is only silent on them. If it did prohibit them, property rights would be impossible altogether, since nothing prohibited by a universal law can be allowed, i.e., there can be no exceptions to a universal law. In my view, UPR is a contradictory norm: both advocates of property rights and those who propose their prohibition could refer to it in defending their claims. The latter could argue that UPR does not mention property rights and that we can

this case property rights, making possible an action which was not possible before. However, I disagree with Hruschka that the permissive law refers to a special class of actions that are neither required nor prohibited, i.e., to some 'merely allowed' or morally indifferent actions (*ibid*., pp. 49, 51, n. 16). It is not morally indifferent in any sense whether there will be property rights or not. The permissive law is a commanding law: on the basis of the previous steps of the argument, it states that there must be property rights. It does this by prohibiting others from interfering with an object I have been the first to take into possession, or by obligating them not to prevent me from taking an unowned object into my possession.[20] What, on the other hand, indeed is morally indifferent is whether I will exercise my property rights by acquiring something or not. But I must have the possibility to do so, and I can have that possibility only on account of the correlative obligations of others. The permissive law thus contains both command and permission, but they refer to different actions: permitted is the acquisition of some external object, commanded is the non-prevention of the acquisition or the non-interference with an object of the first possessor.

However, the permissive law is not sufficient in order for our claim to a particular object to be rightful.[21] Kant must, additionally, show that the partition of land (which is a condition of the partition of all movable things on it) is necessary, i.e., that it is somehow willed by all (Mulholland, 1990, pp. 266-268; Byrd and Hruschka, 2006, pp. 255, 259). This problem solves the idea of original possession in common and the idea of the originally united will of all that corresponds to it.

3.3. Original Common Possession and the Idea of General Will

Kant discusses the idea of original possession in common and the general will in the second section of the *Private Right*, as part of the theory of acquisition, in order to explain the origin of property rights. The problem that must be addressed is that, on the one hand, original acquisition must occur through a unilateral act (6: 258) – otherwise, every acquisition would be derived from another's will (e.g. through contract)

act without them in accordance with UPR. The former could contend that UPR does not prohibit property rights and that they can be introduced because they extend the scope of our free action. The permissive law then solves that contradiction by deciding in favour of the latter, for reasons explicated above. This reading seems to me in line with Kant's remarks from the *Perpetual Peace* that the permissive law ought to be included in 'the law itself as a limiting condition', instead of 'added to cover exceptional cases' (8: 347). The law in which the permissive law would be included, as its limiting condition, is, in this case, UPR.

[20] Kant formulates the permissive law also as a command of non-prevention, i.e., as 'a duty of Right to act toward others so that what is external (usable) could also become someone's' (6: 252).

[21] Here I agree with Hruschka (2004, p. 70; see also Byrd and Hruschka, 2006, p. 259).

and as such not original – but, on the other hand, that I cannot put others under obligation by my unilateral will (6: 261). The problem exists because our claim to an external object must be justified to others (6: 262). The starting point is, in other words, the non-factual situation (or the idea of a situation) in which everyone originally possesses everything on the earth, and thus has the right to claim the same thing as anyone else. This latter point (that anyone has the right to claim ownership over anything) is, however, yet to be proven. For now, let us just say that to possess originally with others means that everyone has an equal right 'to be' anywhere on the earth and to possess any particular thing on it physically.

The idea of original common possession must be assumed because of the two unchosen preconditions of human existence. Firstly, my coming into this world is not the result of my act, and secondly, we all share the same space of the earth's surface, which is limited (6: 262). This is all we can say with certainty about the original human situation. That situation is the one in which there is only the innate right, and we know that such a situation is conceivable. In a world where there is only the innate right, all land is undivided, and I can physically occupy one piece of land equally as any other. Everything is, in this sense, 'mine', just as it is 'yours'. This is what Kant has in mind when he says that possession is '*in common* because the spherical surface of the earth unites all the places on its surface' (6: 262). Since we only have an obligation to the innate right of others, we must withhold from occupying the space they already occupy with their body. If they change their location, we again must not move to the spot they stand on. But as soon as they leave it, we can step on it. An obligation is always owed to their innate right. In short, since no one came into existence by their own choice, everyone has an innate right to be somewhere in the world. And since all the places on earth's surface are united, we all have the right to be on any place on earth and to use the things we physically possess.

The idea of original common possession is then a direct consequence of the innate right under the given conditions of our existence in this world (cf. Weinrib, 2003, p. 823). On account of the innate right, we all possess everything in common, which means that the earth's surface in its entirety and every particular thing on it belongs equally to each of us. Original common possession gives us only the right to physical possession and the use conditioned upon it, since physical possession and physical use are implied by the innate right. But, if I claim a property right over a thing, I do more than just exercise my innate right. I claim that you are not allowed to exercise your innate right by physically using that thing, although I am not exercising my innate right over it. Put differently, I 'divide' the land that was previously united and take for myself (i.e., exclude you from) something that belongs to you no less than it does to me. It is clear that I cannot do this 'unilaterally', i.e., with-

out the 'approval' of others, who possess everything jointly with me. Even more, the property-rights claim itself cannot be justified only because I raise it, if such a claim should have any legal consequences for others – and Kant insists it does – i.e., if there is to be any difference in the state of nature between some arbitrary act of mine (e.g., me taking you as my slave) and a rightful claim. A unilateral act which is not the exercise of my innate right in the state of nature would be an 'arrogation' (6: 255), not a claim (cf. Tomassini, 2023, p. 305).[22]

And yet, as we saw, original acquisition must occur through a unilateral act. Kant solves this contradiction with the aid of the idea of an a priori and originally united choice of all that corresponds to the original possession in common. More precisely, the idea of the united choice of all is the 'rational title' of acquisition, the 'empirical title' is 'the original community of the land' (6: 264), and my unilateral act of 'taking physical possession (*apprehensio physica*)' is a 'manner of acquisition' (6: 268). Taking a thing (a piece of land) into physical possession ('manner of acquisition') thus has an empirical title in the original common possession, which is, as shown, the result of our innate right under the empirical conditions of our existence. However, such an act can have a presumption of intelligible possession, i.e. count as the 'initiation' of the acquisition of the right to property, only if it is rationally grounded in the idea of general will, i.e. if it can somehow be seen as 'willed' by all, and not just by me.[23] A unilateral act of taking a thing into our possession is then just an outward expression of an implicit omnilateral authorization (Kersting, 1991, p. 122).

But why does the omnilateral choice 'will' the partition of land? The answer is:

> All men 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 law for choice by which a *particular possession* for each on the common land could be determined (*lex iuridica*) (6: 267).[24]

Four things must be explicated here: 1) what does it mean that 'each has by *nature* the will to use' the land (*nature* emphasized by me); 2) why do we have (by nature) the will to use the land 'of the entire earth'; 3) why are our choices 'by na-

[22] Gregor translates 'Anmassung' in this sentence with 'claim'.

[23] The precondition is, of course, that I have an intention to acquire property rights over a thing and not just use it physically. The second moment of the original acquisition is, therefore, '*Giving a sign* (*declaratio*) of my possession of this object and of my act of choice to exclude everyone else from it' (6: 258-259).

[24] Gregor translates 'the law' (Gesetz) in this quotation with 'the principle'.

ture' in conflict over the use of land, and; 4) what is the 'law' that our will contains and which 'commands' the partition of land? Regarding 1-3, Kant is not suddenly introducing an anthropological argument into his explanation of the origins of property rights.

1) He is not implying that private property is, in any sense, the result of our natural inclinations. Rather, he is saying that we have a natural capacity to use things for purposes that do not depend on the physical possession of an object (recall again the example of an apple and crossbow shooting). This is indeed a fact we can assume. And that fact was the basis of FA1 in favour of the possibility of property rights.[25] The 'natural will to use land' is, in other words, a restatement of FA1. This is the first reason why Kant uses 'will' and not 'choice'. The 'will' is here identical to pure practical reason, which 'abstracts' from material purposes for which an object can be used.

2) since each of us possesses the whole earth's surface jointly with others, each of us has a will to use *the whole land* on the earth's surface. Each of us has that will 'by nature', meaning 'necessarily', or each 'must have it', because the land is possessed undividedly, i.e., as 'united'. Of course, each of us may want to possess this or that part of the earth's surface, but we do not have a right to it unless the partition of land is authorised by the general will. Strictly speaking, there are no 'parts' of the earth's surface at all, only the totality of the united land on it. Moreover, we cannot even *claim* a right to some portion of the land if the partition of the land is not authorised by the will of all who possess it in common. Our claim would be mere 'arrogation', a unilateral decision to divide the land. In a sense, then, we 'naturally' claim a right to the whole of the earth's surface.

3) However, since we possess the earth's surface jointly with others, they have, by nature, the same will to possess all the land. Our choices are thus 'by nature' opposed to each other. But the conflict is not existential. All of us could spontaneously harmonize our 'dwellings' on earth and agree on the terms of physical use of things. Neither does the conflict arise because we would want to physically possess the same thing (e.g., occupy the same space). Under the conditions of the original

[25] We should not be confused with Kant saying that natural conflict of choices 'would do away with *any use* of' the land (6: 267, emphasis mine). The possibility of physical use would remain. When Kant says 'any use', he has in mind non-physical use. Compare §2 (the Postulate) where he argues that if non-physical use was not possible, i.e. if the use of an object was not within my rightful power, 'that is, if the use of it could not coexist with the freedom of everyone in accordance with a universal law (would be wrong), then freedom would be depriving itself of the use of its choice with regard to an object of choice, by putting *usable* objects beyond any possibility of being *used*; in other words, it would annihilate them in a practical respect' (6: 246). The choice could, in other words, use objects only physically, rather than 'practically', i.e., according to its own freedom.

common possession we have, as shown above, an obligation to the innate right of others. The original common possession is, in this (non-existentialist) sense, not a 'factual' or 'historical' condition, but an idea which implies that 'originally', i.e., prior to 'any act of choice that establishes a right' (6: 262), we stand in a relation of rights and duties to each other. Our acts must therefore be justified to others. If these acts are undertaken on the basis of the innate right, they are already justified by the innate right, i.e., they are not acts of choice that establish a right. But if they go beyond the innate right (which is the case with the acquisition of property rights), they must be additionally justified. It must be shown that somehow such acts must be accepted by others. And that can be shown because the situation in which each of us has 'by nature' the will to use 'the land of the entire earth' is legally impossible. Therefore, the will of each of us must 'contain the law for choice by which a *particular* possession for each on the common land could be determined'. This is the second reason why Kant uses 'will' instead of 'choice' here. The will, as identical with pure practical reason, is universal, the one that prescribes the law for all. If I will for myself the possession of the whole earth (and I cannot will otherwise under conditions of common possession), I must concede that others will the same. Since such a situation is impossible, each of us must *choose* the partition of land (cf. Mulholland, 1990, p. 279).[26]

4) The question that remains is: what is the law that this 'will' contains? We cannot know that before the civil condition is established. That law 'proceeds only from a will in the civil condition' (6: 266), because only in the civil condition is the will of all 'actually united for giving law' (6: 264). But we know the principle, according to which our act of appropriation is provisionally rightful: it is the first possession. That principle was provided by the permissive law. It establishes property as a subjective right and provides us with the criterion of the appropriation, which is strictly formal and thus complies with FA1 of the Postulate, i.e., makes the acquisition compatible with the freedom of others. But our act is justified in the first place, and can be considered as an initiation of the acquisition of a right to property only because it is pre-authorized by the a priori and originally united will of all.

[26] Mulholland suggests something similar to this, but he imports too much of an anthropology into Kant's argument. He finds that the reason why *Wille* issues a law for the use of land results from some sort of our natural dependence on land or of our need to use it (Mulholland, 1990, pp. 278-280). Contrary to that, I see the 'will' we have 'by nature' strictly as a rational concept, or, as shown above, as a restatement of FA1. For the distinction between 'will' and 'choice' see: Beck (1960, pp. 38-39, 176-181); Gregor (1963, p. 37, n. 7). Regarding Kant's use of these two terms, Beck warns: 'Even in the *Metaphysics of Morals*, where the attempt is made to draw a good distinction and to avoid confusing them, he does not often succeed in keeping discussion of one of them from interrupting discussion of the other' (Beck, 1960, p. 177).

The idea of original common possession and the united will that corresponds to it thus provide a new argument in favour of property rights, one that is not contained in either the Postulate or the permissive law. They consider our claims in the context of the given empirical conditions of our actions and bring them into relation with the choices of others.[27] *Pace* Messina, then, the idea of original common possession is not just a concession to the theological rhetoric of the time. And *pace* Stone and Hasan, the will implied here is not already the general will of the civil condition, but the general will 'originally' united in the original common possession. In distinction to this 'originally' united will, the general will in the civil condition is 'derived' from the presumed agreement of particular wills.[28] An originally united will authorises us to something before the civil condition is 'in sight', and the civil condition comes 'in sight' because the partition of land is willed by all, i.e. because we are authorised to claim a part of land as our own. Byrd and Hruschka are thus right when they emphasize that *this* will, i.e., the united will of all in the state of nature, authorises the division of land and makes our unilateral act rightful. They are, however, wrong when they suggest that, already on account of the authorization of the general will in the state of nature, we acquire a right to a particular external object. In their reading, provisionality is only a question of the insecurity regarding property rights to objects properly acquired in the state of nature. However, Kant says not only that others *can* interfere with our possession in the state of nature because there is no coercive authority that could prevent them, but that they do not have an obligation to refrain from such interference. The reason is, ultimately, that we do not have the right to any external object in the state of nature, because that right can be conclusively acquired only in the civil condition, 'in which the will of all is actually united for giving law' (6: 264). If we were to choose to consider our claim in the state of nature already as a conclusive acquisition of a right, others would be equally justified in denying us that right. From that perspective (i.e., of conclusive possession), our act would still count as unilateral, because it is not authorized by the actual general will in the civil condition. In this sense, Kant warns that both the will that asserts possession and the one that challenges it are unilateral. However,

[27] The Postulate only disqualifies the 'matter' of choice (i.e., empirical traits of other's choice, such as needs, privileges, etc.) as relevant for deciding on the possibility of property rights; the permissive law affords us with legal ground for obligating others regarding external objects, but it does not tells us why they should accept that obligation; the 'reciprocity argument' from §8 conditions the validity of an obligation we impose on others on our acceptance of the same obligation towards them. But only the idea of the a priori and originally united will tells us why others should accept the obligation we impose on them at all.

[28] 'For the acquisition of a public rightful condition by the union of the will of all for giving universal law would be an acquisition such that none could precede it, yet it would be derived from the particular wills of each and would be *omnilateral*' (6: 259).

the former 'has the advantage of being compatible with the introduction and establishment of a civil condition' (6: 257). The general will in the state of nature authorizes our unilateral act, but that authorization makes it a rightful *claim*, or a claim which has legal effect on others, instead of being an 'arrogation' or just an arbitrary act. The 'legal effect' is, however, not the obligation of others to recognize our property rights in the state of nature, but their duty to enter the civil condition with us, so that property rights claims can be transformed into conclusive rights. And we all have a duty to enter the civil condition, because, as shown before, on the one hand, there must be property rights (the Postulate and the permissive law), while on the other, we cannot exercise our right to property by acquiring something in the state of nature, since nothing can be conclusively acquired prior to the civil condition.

There are thus two instantiations of the general will: one 'presumed' in the state of nature that legitimizes our claim to an object, and the other 'actual' in the civil condition that gives us a right to an object. Two instantiations of the general will can be distinguished by their differentiation, with respect to two points: 1) the general will in the state of nature is the will of the whole 'humanity'. Since the earth's surface in its entirety is originally in common possession, its partition must be seen as a priori sanctioned, i.e., 'willed' by everyone. The 'actual' general will, on the other hand, is the will of a part of humanity, organized in a distinct civil condition. 2) Related to that, the general will in the state of nature does not presume a decision in favour of any specific regime of private property. The 'actual' general will, on the other hand, must introduce such a specific regime. Discussing the relation between the two 'general wills' regarding this point deserves another paper. It would have to include, among other things, an examination of the extent to which the 'history' of acquisition in the state of nature obligates the lawgiver in the civil condition, i.e., in what sense is the 'actual' general will in the civil condition bound by its idea in the state of nature. Here, I can only indicate that, in my view, the latter is compatible with diverse property regimes, ranging from collective ownership to individual property rights regimes, with all the possible variations of their combination in between. The general will in the state of nature is a regulative idea for the 'actual' general will only in a negative sense: it demands that property rights be introduced, or more precisely, that humanity does not remain in a condition where only physical possession and physical use are possible. It also contains the condition of non-discrimination (as stated by the Postulate): all external objects are possible property of everyone, i.e., no one can be denied a legal possibility to acquire a right over some external object. And regarding further traits of an established property regime, one can generally say that the 'actual' general will in the civil condition cannot decide anything that could not be rationally approved by all who are united in it. However, the general will of humanity also points to the necessity of some form

of its institutionalization on the global level. The general will, in a particular civil condition is, in other words, only a partial instantiation of the will of humanity. The latter must become actual as the will of the whole of humanity. And it can become actual as such only if some kind of global civil condition is established, which, in the long run, assumes the realisation of the perpetual peace.[29] Kant is, however, not unequivocal about the organisational form of the civil condition that would encompass the whole world.[30] In the *Doctrine of Right* he suggests that the 'true condition of peace' could come about in a permanent, but voluntary congress of states. Be that as it may, until some global institutional form of civil condition is established, with its own will, which can be credibly taken as an expression of the general will of humanity, all territorial rights of individual states, together with their particular property rights regimes, remain, to a certain degree, provisional.

4. Conclusion

Provisionality of property rights implies two things regarding their status in the state of nature. Firstly, *deficiency*: they are not full-fledged rights, because a right to an external object cannot be acquired in the state of nature. We cannot say we own anything, or that others have an obligation regarding an object we consider our property. Secondly, *normativity*: rather than being an arbitrary act without any legal consequences for others, our claim to an external object is rightful. It initiates the process of acquiring a right, which is to be finalized in the civil condition. This paper focused on the second aspect of provisionality, with the intention of showing that its necessary condition is the implicit authorization of the general will in the state of nature. Although contributions of the Postulate and the permissive law are indispensable for the provisionality of property rights, they are not sufficient for it. The Postulate and the permissive law establish the right to property as an abstract legal title, providing us with the legal ground for obligating others with respect to external objects. But our claim to this or that external object is justified in the last instance because it is willed by all who possess in common. And it must be willed by all of us, since otherwise the natural conflict of choices, implied by the original common possession, would prevent everyone from using things according to their freedom.

The idea of general will explains the contradiction of the original acquisition, which consists, as we saw, in the following: on the one hand, the original acquisition occurs through a unilateral act, and on the other, a unilateral act cannot obligate others. A unilateral act is necessary because, in empirical reality, the connection

[29] Here I agree with Messina (2019).

[30] For Kant's changing views on this matter, see Kleingeld (2006).

between *this* choice and *that* external object must somehow be established. And if the original acquisition is to be original, i.e., not derived from the choice of others, such an empirical connection can be established only through a unilateral act. But the act itself is justified because it is rationally pre-authorized by the general will. For the same reason, an empirical act of taking a thing into possession is not only an exercise of our innate right (physical possession) but carries with it the presumption of a right to property. At the same time, however, the authorization by the general will in the state of nature is 'imperfect' or 'incomplete'. The general will becomes actual and effective only in the civil condition. Prior to its establishment, our act remains, in an important respect, unilateral – it is not authorized by the actual general will. In other words, on account of the idea of general will in the state of nature, we are entitled to claim a right to an external object, but we do not acquire a right to it. Possession remains provisional, i.e., defective, as yet to be authorized by an actual general will.

Provisional possession is then possession 'in preparation for' and 'in anticipation of' the civil condition (6: 257). But what is in this way 'expected' and 'anticipated' is the actualization of the a priori and originally united will of all, which is the title of our right claims in the state of nature. Put differently, there are two instantiations of the general will: one 'original' that corresponds to the idea of original common possession in the state of nature, and another 'derived' and actual in the civil condition. The entitlement the former gives us to claim property rights assumes an obligation to establish the civil condition and instantiate general will as the general will of a particular state. At the end of the last section, I have roughly sketched the relation between these two instantiations of the general will. The fundamental principles of private right remain binding for the lawgiver in the civil condition. However, these principles are consistent with more than one property regime. The choice between them must be the result of a combination of general principles of private right and concrete requirements of social life in a given historical context. The idea of general will in this sense demands only that the particular property regime must be rationally acceptable to all members of a political community. However, in the final instance, it also invokes the necessity of its third instantiation, i.e., the one on the global level. Kant makes clear that in the absence of a global civil condition, in which perpetual peace can be attained, not only the exercise of every right remains insecure, but property rights also remain provisional.

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