

## ARTICLE

# Property and the Will: Kant and Achenwall on Ownership Rights

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### Abstract

This article examines Kant's theory of property through a comparative analysis of Gottfried Achenwall's justification of ownership rights. I argue that at the core of Achenwall's and Kant's understanding of ownership rights lies the idea that rights are to be acquired through a juridical act (*factum iuridicum, rechtlichen Act*) of the will. However, while Achenwall thinks of this act as emerging from a *private* will, Kant holds that rights and obligations can only be brought about by an act of the *general* will. By contrasting these two views, I aim to illuminate one of the main features of Kant's theory of property, namely, that ownership rights are only possible in a rightfully constituted state. I conclude with a suggestion regarding Kant's view of the notion of 'provisional' possession in the state of nature.

**Keywords:** Kant; Achenwall; property; general will; state

### 1. Introduction

In the natural law tradition of the seventeenth and eighteenth centuries, the justification of property rights is not an isolated issue but one embedded in a particular understanding of laws of reason and principles of justice, the scope of natural rights, and the role of the state. Accordingly, early modern theories of private property have been widely examined, not only because they refer to a philosophical question that is relevant in itself, but also because they are a key element of any rational theory of the state. In the past few decades, Kant's theory of property, as found in the section of the *Rechtslehre* titled Private Right, has received considerable attention. However, core issues concerning Kant's view on private acquisition – such as the status of ownership rights in a pre-political condition and the role of property in grounding the necessity of the state – remain unsettled.<sup>1</sup>

In this article, I examine Kant's theory of property through a comparative analysis of Gottfried Achenwall's justification of ownership rights – a connection that has not been sufficiently explored in the literature. Achenwall's *Ius naturae* served as a basis for Kant's lectures on natural right for more than a decade and had an important influence on his political philosophy.<sup>2</sup> Much has been said on the relationship

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between Kant's theory of property and other prominent doctrines of natural law – especially Locke's and Grotius' theories – and this has clarified many aspects of his view.<sup>3</sup> Nevertheless, we can gain better insight into Kant's own ideas on the topic by (also) looking into his immediate source. That Kant targeted Achenwall's theory, as opposed to others, when e.g. discussing the notions of 'right to things', 'juridical possession', 'property' (*dominium*), 'common possession of the earth', etc., becomes clear when looking at the *Naturrecht Feyerabend* lecture notes (1784) and annotations that Kant made to his own copy of the handbook.

I focus on Kant's theory of property as expounded in the *Rechtslehre*, and not in the lectures, because I am concerned with his theory of right in its systematic and final form. I am aware that Kant's criticism of Achenwall is less visible in his published work; after all, Kant does not usually cite the authors whose position he is criticizing (an explicit reference to Achenwall is found, however, in *Metaphysics of Morals* (hereinafter, *MM*), 6: 306, 6: 286, and 'Theory and Practice', 8: 301 – and of course throughout the Feyerabend lectures notes and the *Reflexionen*). Yet there are many places in the *Rechtslehre* in which one can see that Kant is adopting Achenwall's language and reasoning but drawing radically different conclusions. I will argue that Kant, in his theory of private acquisition as expounded in the section on Private Right, follows Achenwall in affirming that property rights stem from an *act of the will*. Kant holds that property rights are not innate and must be acquired through an empirical act of occupation joined by an act of willing to possess something as one's own. The exact claim can be found in Achenwall's *Ius naturae*. However, whereas Achenwall thinks of this 'juridical act' (*factum juridicum*), which creates new rights and obligations, as emerging from a *private will*, Kant argues that the acquisition of property rights can only take place through an act of *public will*. By contrasting these two views, I aim to illuminate one of the main features of Kant's theory of property, namely, the notion that ownership rights are not *natural* but essentially *political*. Since they demand the formation of a general will, they are only possible within a rightfully constituted state.

The article proceeds as follows. Section 2 examines Achenwall's doctrine of acquisition. I first analyse the distinction between innate and acquired rights and the scope of each subset of rights (2.1). I then deal with the question of how to acquire ownership rights (2.2) and discuss Achenwall's rejection of the idea of common possession (2.3). Section 3 is devoted to Kant. I first analyse the distinction between innate and acquired rights (3.1) and then turn to the question of how to acquire ownership rights (3.2). Lastly, I examine the idea of *Gemeinbesitz* and highlight its relationship with the general will (3.3). Section 4 concludes.

## 2. Achenwall

### 2.1 Innate and acquired rights

As was common in the natural law tradition, Achenwall distinguishes between the 'absolute natural law' and the 'conditional natural law'. *Ius naturae* considered *absolutely* is 'the knowledge of the natural laws that must be observed in the original natural state' (*IN*, I, §63).<sup>4</sup> It therefore encompasses 'purely natural rights and obligations' that 'can be conceived of without any juridical act being given'. These rights and obligations apply to human beings due to their nature as such; that is, they are valid

independently of, and prior to, any juridical act (i.e. a human act, *IN*, I, §62). Rights that one has 'by mere humanity' are called *innate* rights. By contrast, *ius naturae* considered *conditionally* is 'the knowledge of the natural laws that should be observed in the acquired natural state' (*IN*, I, §109). It contains the natural rights and obligations that 'can be conceived of once a juridical act is given'. These rights and obligations do not apply to human beings *only* due to their nature as such; rather, they are introduced, or acquired, through a juridical act. Rights that one has once a juridical act is given are called *acquired* rights.

According to Achenwall, innate rights revolve around self-preservation. In virtue of our humanity, we have a natural right to preserve our own body and life and a 'right to do anything that does not go against another person's preservation' (*IN*, I, §64). In addition to this, Achenwall argues that, in the state of nature, human beings enjoy natural equality and freedom. All men are by nature equal; they all have the same rights and obligations. Hence, everyone has an innate right 'not to acknowledge another's right to be more or greater than his own' (*IN*, I, §73), and no one can be obliged 'to recognize another's overlordship' (*IN*, I, §76).<sup>5</sup> From this Achenwall concludes that everyone has an innate right to freedom, understood as the 'independence of another person's will in acting' (*IN*, I, §79).<sup>6</sup> However, Achenwall does not restrict the content of natural freedom to the idea of not being dependent on another person's will. He also claims that innate freedom includes a right to act – in particular, to perform those actions that are necessary to fulfil our natural obligation to preserve and perfect ourselves. In this regard, natural liberty encompasses the right to accomplish one's natural duties, the right to do whatever is required to perfect oneself, the right to use what is one's own, the right to acquire and the right to preserve what is one's own (*IN*, I, §81). Nevertheless, this *original* unlimited natural liberty is restricted in the *conditional state of nature*, namely, once men begin to acquire new rights.

The set of innate rights does not include property rights, as Achenwall believes that these must be acquired. He affirms that 'proprietaryship of things is innate to no one' and that 'by nature, the use of things is open to all' (*IN*, I, §108, cf. I, §116). Ownership rights are not innate, but we do have a use-right to external things (in general) by birth. To support this claim, Achenwall follows a chain of reasoning found among natural law thinkers such as Grotius, Locke and Wolff: since we have a natural duty to pursue our natural end, we have a right to the means that allow us to comply with the laws of nature. This means that we have a right to procure the goods and use the resources without which the preservation (or perfection) of our own condition could not be achieved, as long as we do not wrong anyone. Achenwall emphasizes, however, that 'the right to use vacant things' should not be confused with 'a right to use a thing that is one's property'. Whereas the former is innate, the latter is acquired (*IN*, I, §116). Ownership rights thus have a twofold nature: they are both acquired and natural; they originate in a human act, a *factum iuridicum*, without being conceptually connected to the existence of the state. This is not an unconventional claim among modern natural law thinkers. Grotius and Locke, for instance, believed that ownership rights and their corresponding duties were natural but normatively dependent on some 'human act' (i.e. based on *occupancy* in the first case, and *labour* in the second). In the next sub-section, I will examine Achenwall's view on the type of juridical act that can produce a *right to a thing that is properly one's own*.

## 2.2 On how to acquire ownership rights

In the natural law tradition, it was disputed whether occupancy or labour was the method of private acquisition, that is, the human act (or activity) through which an ownerless thing (or, put positively, a thing owned commonly by everyone) can become one's own. In connection to this, natural law thinkers sought to provide an answer to the question whether some form of consent (tacit or explicit) on the part of mankind was necessary following the corresponding 'act' of appropriation by an individual person. Paradigmatically, whereas Grotius argued that the legitimate method of private acquisition was occupancy, to which fellow inhabitants were to agree, Locke contended that appropriation must occur through labour, without consent being required.<sup>7</sup> Achenwall combines these two positions. Like Grotius, he holds that the act through which an external thing (or land) can become one's own is occupancy, but he claims, with Locke, that individual acts of appropriation do not need the agreement of others.

Achenwall distinguishes between the *method* of acquisition (*modus acquirendi*) and the *title* of acquisition (*titulus acquisitionis*) (*IN*, I, §117). The title of acquisition refers to the *validity* of acquisition, i.e. why the occupant has a right to acquire an ownerless thing. The answer to this is quite straightforward: since we need to use goods and natural resources efficiently in order to pursue our preservation and perfection, the right to acquire belongs to our set of innate rights. In other words, we have an innate *titulus* to own things *in general*. For a certain thing to become one's own property, however, one must perform a specific act, and this refers to the *modus acquirendi*. If the way in which one tries to appropriate a particular thing does not accord with the laws of nature, the act of acquisition is rendered wrongful (*iniustum*), and instead of bringing about a conditional state of nature, it will produce a state of war (*IN*, I, §62). Achenwall argues that occupancy as a method of acquiring a thing *originally* (i.e. not previously owned by another) involves two elements: an *act* (*factum*) and an *intention* (*animus*). In the first place, acquisition requires a corporeal or physical act 'by which someone brings a thing into his power to the exclusion of others'. But a *factum* alone is not sufficient for acquisition. It must be accompanied by an 'intention to make it one's own'; namely, the occupant must *will* that the thing becomes his own. Achenwall goes on to say that there is no need for a verbal declaration of will; the mere act of taking control of a thing suffices as a tacit declaration (*IN*, I, §115). Since the vacant thing does not originally belong to anyone, a tacit or explicit declaration of will (i.e. consent) by others is also not required for that thing to legitimately become one's own.

Finally, Achenwall draws a distinction between *natural* possession and *juridical* possession (*IN*, I, §120). The natural possession of a thing refers to the *physical capacity* or *faculty* (*facultas physica*) to use something, the act of having something in one's own power to the exclusion of others. Juridical possession takes place when a man 'has in his power the use of a thing that *he wants* to be his own, to the exclusion of others'; 'he possesses it with the intention to have it as his property' (*IN*, I, §120). *Willing* to have something as one's own does not express a physical ability but rather a *legal capacity* (*facultas legalis*). Juridical possession therefore originates in a juridical act that involves two conceptual elements: the physical act of taking control of a thing and the intention to acquire it. Achenwall points out that occupancy generates

not only a new right on the part of the (now) proprietor of the thing but also a new obligation on the part of others, namely, the obligation to refrain from making use of the thing occupied by the former. As he states: 'someone's legitimate act can create an obligation, certainly a negative one, for others to omit what they were not obliged to omit so far' (IN, I, §122). In a nutshell, Achenwall believes that the introduction of property rights in the state of nature, and the corresponding acquisition of rights, has its origin in a human act which is described not only as a physical or corporeal act but also as an *act of the will*. This *private will* (of an individual man) has the juridical power not only to create rights but also to impose obligations on others *unilaterally*. This is why the generation of ownership rights removes innate equality (i.e. the original natural condition in which we all have the same rights and obligations) (IN, I, §122) and does so rightfully, given the fundamental duty to preserve and perfect ourselves.

### 2.3 Common possession of the earth

Arguments regarding private ownership in natural law theories usually commence with the thesis that God gave the earth to mankind to use it communally.<sup>8</sup> Achenwall briefly refers to the thesis of a *communio primaeva* and rejects it, both in its positive and in its negative manifestations.<sup>9</sup> According to the positive account, which he ascribes to Grotius, in the original state all things were possessed in common. According to the negative account, proposed by Pufendorf, all things were originally ownerless, although men shared a use-right to things (IN, I, §116).<sup>10</sup> Achenwall criticizes both Grotius and Pufendorf for presupposing that, at an early stage of human history, the earth and its resources were given to us in common. He maintains that, given that both authors premised their explanations of acquisition on a form of common possession, it was necessary for them to introduce some sort of agreement (for everyone is equally entitled to use the particular thing that an individual man is willing to acquire).<sup>11</sup> Furthermore, Achenwall argues that if things were originally vacant, they were not possessed in common. And if the original condition featured neither proprietorship nor community, there is no need for agreement on how to extract from the common bounty (IN, I, §116). Achenwall's rejection of the existence of a primeval community of goods thus reinforces his claim that acts of acquisition do not need subsequent justification by consent. The reason for this claim is twofold: first, we have a natural right to do whatever is needed to achieve self-perfection and preservation, and therefore a right to acquire vacant things; and second, we have the natural authority to create obligations on the part of others through unilateral acts of appropriation, since, by acquiring external things, we are fulfilling our natural obligations established by the laws of nature, and ultimately, following the commands of God.<sup>12</sup>

In sum, Achenwall understands property rights as stemming from an exclusive relationship between an individual human will and a particular thing, in accordance with the laws of nature. The fact that a *right to a thing* generates new correlating duties that others did not have prior to the act of private acquisition does not give rise to conflicting rights. Since the private appropriation of goods and natural resources is needed to comply with natural law, ownership rights override innate equality. This prompts the main question that, as I will argue in what follows, Kant's theory of

property attempts to answer: how can a non-natural juridical obligation be generated and justified such that it remains compatible with innate equality? As even Achenwall acknowledges, a unilateral will (which binds others without reciprocally being bound) inevitably conflicts with innate right. Before turning to Kant's theory of acquisition, however, let us summarize the main points of Achenwall's account of private ownership. Property rights:

- a) are *natural* (i.e. independent of the existence of the sovereign state),
- b) are non-innate but *acquired* through occupancy,
- c) *have their source in a private will* that is able to unilaterally bring about rights and obligations relating to private appropriation (rights and obligations that did not exist prior to an act of this will) and
- d) are not conceptually dependent on the idea of the common possession of the earth.

### 3. Kant

#### 3.1 Innate and acquired rights

Following Achenwall, Kant draws a distinction within subjective right (i.e. *ius* considered as a moral faculty) between innate and acquired rights. On his view, while the former belongs to everyone by nature, the latter depend on a juridical act (*rechtlicher Akt, factum juridicum*) (MM, 6: 237). When introducing this division, however, Kant claims that 'there is only one innate right', clearly opposing Achenwall's account of *iura connata* – in the plural – as a list of different substantive *tituli* related to self-preservation. The 'only original right' is freedom, understood as 'independence from being constrained by another's choice' in accordance with the freedom of others under universal laws (MM, 6: 237). Freedom as innate right includes a set of moral powers (*Befugnisse*) (such as innate equality, the 'independence of being bound by others to more than one can reciprocally bind them' and the quality of being one's own master). These powers do not consist in 'independent' rights or *tituli* but 'lie already in the principle of innate freedom and ... are not really distinct from it' (MM, 6: 237).

Kant uses the term 'mine and yours' (*Mein und Dein*) to refer to subjective rights (i.e. when speaking of a *right* as something that someone *has*). This is why he calls innate right an innate 'mine and yours' (*angeborene Mein und Dein*). He holds, however, that innate right can also be called the *internal* 'mine and yours' (*innere Mein und Dein*) insofar as it does not presuppose any act of acquisition (i.e. it belongs to us by nature). The *external* 'mine and yours', by contrast, 'must always be acquired' (MM, 6: 237). Like Achenwall, he argues that rights that refer to the use of external objects of choice are not innate but must be acquired through a *juridical act*. Therefore, they must be brought about by an *act of the will*. Nevertheless, he also claims that property rights, and their corresponding obligations, cannot be generated by a private will because this would contradict the requirement of innate equality with regard to the (reciprocal) form of the obligation. The acquisition of ownership rights requires the formation of a general will and therefore the existence of a rightful political authority.

Kant's so-called theory of property (he does not use the term *Eigentumslehre* himself) is found in §§1–17 of the section titled Private Right, which is in turn divided into a subsection devoted to the notion of possession (*possessio, Besitz*) (§§1–9) and a

subsection on the notion of acquisition (*acquisitio, Erwerbung*) (§§10-17). Accordingly, I will flesh out his argument on property and the will by first discussing the notion of juridical possession (3.2a) and then that of acquisition in the strict sense of the term (3.2b). I will then briefly examine the idea of the common possession of the earth, focusing on its relationship with the general will (3.3).

### 3.2 On how to acquire ownership rights

#### (a) Juridical possession and the will

Recall that Achenwall distinguishes between natural and juridical possession of external things by arguing that, whereas the former refers to a *physical* ability to use a thing, the latter denotes a *legal* capacity to have something as one's own. This distinction also plays a key role in Kant's theory of property. The aim of §§1-9 ('How to have something external as one's own') is to show that there is a form of possession that goes beyond *detentio* (the empirical act of holding a thing) and that this way of possessing something (intelligibly or juridically) is authorized by pure practical reason.

Kant holds that 'what is juridically mine' (*das rechtlich Meine, meum iuris*) is something 'with which I am so connected that another's use of it without my consent would wrong me (*lädiren*)' (*MM*, 6: 245). A significant element of this definition of *meum iuris* is the notion of a *wrong* (*Läsion, laesio*): I can claim that I possess an external object of my choice if I can prove that any use of this object against my will would wrong me. As Kant argues in §6, if I am 'physically connected' to an external object of my choice (e.g. I grab an 'ownerless' apple) and someone takes it against my will, I can demonstrate that this act is wrong by appealing to the principle of right. According to this normative principle, any act that infringes upon my innate freedom ('the independence from being constrained by another's choice', 6: 237) is wrong (*unrecht*). Now, the physical connection between an agent and an external object (to which the concept of empirical possession refers) turns out to be irrelevant for developing a normative theory of property, since the starting point of such a theory is precisely to show how a wrong, a *Läsion*, can take place even if one does not physically have in his power an object that he considers to be his.<sup>13</sup> In the preparatory notes for the *Rechtslehre*, Kant phrases it thus: 'the problem is: how is a merely juridical possession possible? How is it possible that I wrong someone by my use of a thing with which he is not physically connected, or: how can someone through his mere power of choice preclude me from using a thing?' (*VARL*, 23: 284). When focusing on the possibility of an existing *Läsion*, Kant centres the problem of possession on the justification of *obligations* (rather than framing it in terms of acquiring *rights to things*), for a wrong cannot occur if there is no obligation to refrain from using a certain object in the first place. Hence, showing how juridical possession is possible amounts to showing *how we can acquire (new) obligations* that we do not have innately (or exclusively according to the universal principle of right).

In order to demonstrate the possibility of juridical possession in accordance with principles of reason, and given that such authorization cannot be derived from the supreme law of right, Kant introduces the juridical postulate of practical reason.<sup>14</sup> I will not analyse the postulate (§2) and the deduction (§6) in detail here, but I will sketch the main argument. Accordingly, I will set aside the issue of the association of the postulate with the notion of 'permissive law'. In virtue of the formal feature

of right (i.e. it abstracts from the matter or end of the action), juridical *a priori* principles with regard to external objects of choice can determine either the possibility of juridical possession ('something could be mine and yours') or an absolute prohibition against it ('nothing can be mine and yours').<sup>15</sup> Kant argues that the second option would entail a 'contradiction of external freedom with itself' and that 'it is therefore an *a priori* presupposition of practical reason to regard and treat any object of my choice as something which could objectively be mine and yours' (MM, 6: 246). His explanation as to why a prohibition against possession leads to an absurd scenario is both obscure and condensed into two sentences. The idea behind this claim is that, since we are beings endowed with external freedom, we can *de facto* use external things. An external object of my choice is something that 'I have the capacity to use as I please' (*ibid.*). If reason (through its laws) forbade me to regard external things as possibly mine, 'annihilating them in a practical respect', external things would not be objects of my choice. And this would contradict a property of external freedom, namely, the capacity to consider external things as objects of my choice (*ibid.*).<sup>16</sup> In any case, it is important to highlight that the postulate *does not authorize* a right to property in a definitive way but only aims to demonstrate that the juridical possession of objects of choice is *possible*. Possession is in fact defined as the 'subjective condition of any possible use' (MM, 6: 245), and thus it is not equivalent to a property right or a 'right to things'.<sup>17</sup>

The postulate of practical reason raises the question of how to justify obligations that correspond to the claim of having some (particular) thing as one's own. As I argued before, this is the salient issue when it comes to property, according to Kant: if I claim that *x* is mine, I am claiming that others are bound to refrain from using *x*, such that I would be wronged if they made use of it without my consent. Now, a unilateral claim to impose an obligation on others comes into conflict with innate *equality*. Kant distances himself from Achenwall on this point, for he believes that this element of innate right imposes a normative requirement on the form of juridical obligations that cannot be suppressed. Kant defines innate equality as 'independence from being bound by others to more than one can *reciprocally* (*wechselseitig*) bind them' (MM, 6: 237). This means that the generation of (new) juridical obligations (and the correlative acquisition of rights) must satisfy the 'reciprocity criterion' that is demanded by innate freedom. In fact, Kant views reciprocity not only as an element of right in a subjective sense (*Recht* as a *Befugnis* or *facultas*) but as an element of right in an objective sense (*Recht* as a *Lehre* or *lex*). In this latter sense, right is defined in §E as 'the possibility of a universal *reciprocal coercion* (*wechselseitigen Zwanges*) that is consistent with everyone's freedom in accordance with universal laws' (6: 232).

In the previous section, we saw that Achenwall seems to recognize that the acquisition of rights comes into conflict with equality (although he thinks of this innate symmetry in terms of rights rather than obligations). However, Achenwall deals with this problem by pointing out the overriding aim of property rights, namely, self-preservation and, ultimately, perfection. After all, becoming a proprietor is a means of realizing our *télos* as rational beings. In §8 of the doctrine of possession, Kant tackles this issue by offering a radically different answer, in which the reciprocity of the obligation (required by innate equality and the normative concept of right) leads to the necessity of the general will as an *a priori* principle of legitimate possession.<sup>18</sup> Let us examine the argument more closely.



Kant begins §8 by stating the following:

When I declare (by word or deed), I will that something is to be mine, I thereby declare that everyone else is under obligation to refrain from using that object of my choice, an obligation no one would have were it not for this juridical act (*rechtlichen Act*) of mine. (MM, 6: 255)

The point of departure of the argument is the same as in Achenwall's theory of property: claims to possession originate in a *juridical act* performed by an *individual will* – 'I will this to be mine'. By means of this act, by taking something and willing to possess it, I am stating that others acquire an obligation that they did not have before (i.e. innately or by virtue of their humanity). Kant goes on to say:

This arrogation (*Anmassung*) involves, however, acknowledging that *I am reciprocally (wechselseitig) under the obligation to every other to refrain from using what is externally his . . .* I am therefore not under obligation to leave external things untouched unless everyone else provides me assurance that he will behave in accordance with the same principle regarding what is mine. (MM, 6: 255, emphasis mine)

Note here that Kant describes this act of willing not as a *claim* (as e.g. Mary Gregor's translation would suggest) but as an *arrogation* (*Anmassung*), the German word corresponding to the Latin legal term *arrogatio*. Whereas a *claim* is a statement that has not yet been proved to be right or wrong, an *arrogation* is by definition an unjust assumption of a right.<sup>19</sup> This means that the act of willing to *unilaterally* bind others is immediately rendered illegitimate. Therefore, Kant argues that nobody is bound to refrain from using an external thing unless there is some assurance regarding the reciprocity of the obligation. Accordingly, if someone is to possess something in accordance with the normative principles of right, he must acknowledge that binding others regarding what he wants to be his involves *reciprocally being bound* regarding what others want to be theirs. Kant concludes:

[A] unilateral will cannot serve as a coercive law for everyone with regard to a possession that is external and therefore contingent, since that would infringe upon freedom in accordance with universal laws. So it is only a will putting everyone under obligation, hence only a collective general (common) and powerful will, that can provide everyone this assurance. (MM, 6: 256)

A unilateral will is thus a will that is incapable of meeting the reciprocity requirement set by the principle of innate right and, consequently, of bringing about obligations rightfully. A juridical obligation can be compatible with innate equality only if we presuppose the formation of a general will as a source of coactive laws. If the postulate of private right shows that *juridical possession is possible*, the general will as a principle of reason shows *how* it is possible: since 'a general external (i.e. public) lawgiving accompanied with power is the civil condition', 'only in a civil condition can something external be mine and yours' (MM, 6: 256).

*(b) Acquisition and the will*

If the idea of possession deals with the subjective conditions of use, the idea of acquisition refers to its objective aspect: 'I acquire something when I bring it about (*efficio*) that it becomes *mine*' (MM, 6: 258).<sup>20</sup> The section 'How to acquire something external' (§§10–17) revolves around the concept of original acquisition and introduces the idea of the common possession of the earth. For the sake of clarity, I will here focus on the former concept and will leave discussion of its relationship with the latter for a separate section.

The 'principle of external acquisition' states the following:

What I bring under my *control* (in accordance with the law of external *freedom*); which, as an object of my choice, is something that I have the capacity to use (in accordance with the postulate of practical reason); and which, finally, I *will* to be mine (in conformity with the idea of a possible united *will*), that is mine. (MM, 6: 258)

After introducing this principle, Kant spells out three aspects or 'moments' (*Momente*) involved in acquisition: apprehension (*Apprehension*), declaration (*Bezeichnung, declaratio*) and appropriation (*Zueignung, appropriatio*). The first step involves bringing something into one's empirical possession, that is, an act of 'taking possession of an object of choice in space and time' (MM, 6: 258). Although no conclusive ownership right can be obtained from occupying a piece of land or holding an object, acquisition begins with an empirical act. Kant agrees with Achenwall in identifying the method of acquisition with occupancy rather than labour. All that is needed in order to have an empirical title to a thing is to take control of it (*bemächtigen*). This notwithstanding, the apprehension of an object must be done in accordance with external freedom; that is, the object must be ownerless (in the case of possession of a thing) or uninhabited (in the case of occupancy of land). Taking control of a thing or land already possessed by someone else (even in an empirical sense) would affect that person's innate freedom and thus entail a wrong.

The second step or moment of acquisition, *declaration*, entails a transition from empirical to juridical possession. Recall here that both Achenwall and Kant argue that to have something as one's own *juridically* involves not only an empirical act but also an intention, an *act of the will*. When I *will* this to be mine, Kant states, I *declare* 'the possession of this object and the act of my choice (*Act meiner Willkür*) to exclude everyone else from it' (MM, 6: 258). This moment introduces the unilateral claim to bind others that accompanies every pretension to acquire a right. The tension between the unilaterality of acquisition and innate equality is resolved in the third, conclusive, moment by drawing on the *a priori* principle of the general will.<sup>21</sup> *Appropriation* must be thought of not as an act of individual choice but 'as the *act of a general will* (in idea) giving an external law through which everyone is bound to agree with others' (6: 259, emphasis mine). In this last moment of acquisition 'rests the conclusion "this external object is *mine*"' (6: 259). Therefore, ownership rights depend on the *a priori* principle of the general will and thus on the sovereignty of the state. Kant seems to take Achenwall's premise, i.e. property rights stem from an 'act of the will', for they require both an empirical act of seizing a thing and the *intention* to possess it juridically. This is clear in his description of acquisition as having three different 'moments'. There is a

first 'empirical moment' of occupation followed by a 'juridical moment' in which one *wills* to have something as his own and to put others under a new obligation. However, in the third 'moment', Kant draws a radically different conclusion than Achenwall's, namely, the necessity of the formation of a collective will for a legitimate form of private property to exist.

### 3.3 Common possession of the earth

*Contra* Achenwall, and building on the idea that an individual act of willing is unable to generate property rights, Kant argues in favour of the *communio possessionis originaria*. His thesis also involves a radical rejection of the view of Achenwall's 'opponents' on the matter, namely, Grotius' and Pufendorf's doctrine of *communio primaeva*.<sup>22</sup>

The discussion of the common possession of the earth is found in §§11, 13 and 16 of the doctrine of acquisition.<sup>23</sup> When introducing this idea, Kant affirms that it is 'the only condition under which it is possible for me to exclude every other possessor from the private use of a thing' (*MM*, 6: 261). This statement raises important questions. Why is the concept of the common possession of the earth not mentioned earlier (namely, in the doctrine of possession) if it is nothing less than the condition of possibility of private acquisition? Why does he now say that it is necessary to presuppose this idea, in addition to the juridical postulate of practical reason and the principle of the general will, if we are to explain the acquisition of ownership rights? In sum, what is the systematic place of the *Gemeinbesitz* in Kant's doctrine of property? Providing an exhaustive answer to these questions would take us beyond the aim of this article. But I will sketch the main features of the idea of original common possession and highlight its connection with the general will.

To begin with, the common possession of the earth refers specifically to the original acquisition of land, as is indicated in the reference to the latter in the titles of §§12, 13 and 16. This principle is said to ground the possibility of acquiring land, and in this sense it complements the postulate of private right.<sup>24</sup> In §13, Kant argues that 'all human beings are originally (i.e., prior to any juridical act of choice) in a possession of land that is in conformity with right, that is, they have a right to be wherever nature or chance (without their will) has placed them' (*MM*, 6: 262). This right, which is not obtained by means of a *juridical act* (and therefore it is not acquired), has to do with the necessity of occupying a portion of land. It is a title based on (an empirical) form of possession (since a '*lasting* possession' of land must be juridically acquired), which is in turn derived from the mere fact that we are physically embodied beings who exist in a certain place in the world, *ohne Wille*.<sup>25</sup> The idea of original possession in common is not an 'empirical concept' and 'must be sharply distinguished from a primaeval community (*communio primaeva*), which is a fiction' (6: 251). For Grotius and Pufendorf, the common possession of the land was part of an evolutionary story that finished with the necessity of transitioning to a system of private acquisition, according to principles of natural justice. By contrast, Kant argues that 'original possession in common is a practical rational concept *which contains a priori the principle in accordance with which alone human beings can use a place on the earth in accordance with laws of right*' (6: 262, emphasis mine). As a concept of practical reason, it performs a normative function: given that we are beings in need of occupying a space on earth, and given that both physical occupancy and claims to

the acquisition of land potentially give rise to conflict, reason commands us to conjointly make use of the earth and its resources *rightfully*. But what is the principle, contained *a priori* in the rational idea of *Gemeinbesitz*, that ought to shape the legitimate use and division of land?

Kant's response is found in §16. There, he claims that 'all human beings are originally in common possession of the land, and each has by nature the *will* to use it' (*MM*, 6: 267). Since the individual uses of choice are 'unavoidably opposed by nature', and since claims to the acquisition of land that originate in empirical possession would clash with each other, this concept must also include 'the principle for choice by which a *particular possession* for each on the common land could be determined' (6: 267). Kant goes on to argue that *the law* that determines rights and distributes a portion of land to each can do so 'in accordance with the axiom of external freedom' 'only if it proceeds from a will that is united *originally* and *a priori* . . . Hence, it proceeds only from a will in the civil condition (*lex iustitia distributivae*)'. With the idea of the original common possession of the earth Kant underpins the thesis that acts of acquisition are always initiated by a private will but lead, simultaneously, to the necessity of a public will as the only legitimate source of law. Furthermore, by placing the general will within the *Gemeinbesitz* as an idea of reason, he presses the fact that the unilaterality of acquisition, and the consequent necessity of omnilateral legislation, is a problem to be solved not only on a domestic but also on an international and cosmopolitan level, which concerns human beings as a united community that must coexist in the same finite, spherical space.<sup>26</sup>

Let us now summarize the main points of Kant's theory of private ownership. Property rights:

- a) are not *natural* (i.e. they are dependent on the sovereignty of the united will of the people),
- b) are non-innate but *acquired* through occupancy,
- c) *ultimately have their source in the general will*, which is able to reciprocally bring about rights and obligations relating to private appropriation (rights and obligations that did not exist prior to an act of this will) and
- d) are normatively dependent on the idea of the common possession of the earth.

#### 4. Conclusion

Achenwall's *Ius naturae* was essential in shaping Kant's understanding of property rights, and his theory of right in general. Following Achenwall, Kant holds that acquired rights are bound up with an act of the will. Achenwall claims that this act is carried out by the will of an individual man, thus introducing property into the pre-judicial condition. By contrast, Kant conceives of this act as one performed by a public will. To his mind, a unilateral will is by definition incapable of creating obligations in a way that preserves innate equality. This amounts to the view that property rights are not natural but essentially *political*.<sup>27</sup> By this I mean that, for Kant, the structure of property rights is not formed by the idea of natural rights of possession through which an individual will is able to coerce others, as was the case for Achenwall. Since the acquisition of rights depends on the formation of a

law-giving general will, ownership rights can only come into existence under a rightful public authority.<sup>28</sup> With this thesis, Kant was reacting to a widespread theory of acquisition of his time, one that presents property rights as stemming from an exclusive relationship between things and a private will, whose natural authority to bring about obligations is granted by the laws of nature.

Moreover, the political character of Kant's account of property is also expressed in the reformulation of the common possession of the earth as a necessary idea of reason. Achenwall denies that a doctrine of acquisition requires such a normative idea, because he rejects the need for agreement on how to extract or appropriate natural resources. To Kant, the idea of common possession is central, for it shows that the use and distribution of land should include a collective process governed by the principle of the general will, which must take place not only *within* the state but also *between* states. If states remain in a pre-judicial condition, unilateral claims to acquisition or over a territory can only give rise to provisional titles of acquisition.<sup>29</sup> It is only by establishing a legal system of reciprocal obligations at an international level that empirical titles to acquisition can gain the status of actual property or territorial rights.

This last point raises an important issue on the provisionality of right. More remains to be said on the question of how to understand Kant's claim that there might be a provisional form of possession, or a provisional 'external mine and yours', in the state of nature (cf. *MM*, 6: 257).<sup>30</sup> I would like to suggest that the idea of rights being provisional reflects tensions in Kant's own thinking about the status of property rights originating from his intention of both delineating the state under ideal principles (or the 'state in the idea', in his own words) and providing a theory of law that concedes some degree of legitimacy to actual states. In effect, the *Rechtslehre* aims to establish a 'universal criterion' 'by which one could recognize right as well as wrong' and 'the basis for any possible giving of positive law' (6: 230). The result of this investigation is nothing less than the manifestation of the *idea* of a 'perfectly rightful constitution' (6: 371). As a concept of practical reason, this idea of a civil constitution will never take place in experience, yet 'none must contradict it as a norm' (6: 372). However, the fact that an actual state, or a system of rights of property, does not accord with this ideal cannot ground resistance to political authority (nor justify the use of force against unilateral appropriations of land). Rather, Kant's reflection on territorial and ownership rights presents the political ideal that states should approximate for these forms of acquisition to be part of a legal system based on true freedom and equality, while also granting some legitimacy to actual states so as to make the necessary collective process of reforms possible. These tensions are absent in Achenwall's doctrine of natural right, since the ideal character of Kant's theory of right, and thus of his account of property, is a product of his critical project. A related source of difficulties is inherent to his own argument on ownership. Even though 'all right is to proceed' from the united will of the people (6: 313), any claim to possess a thing juridically necessarily begins with an individual act of appropriation. Therefore, this initiation of a process of acquisition by unilaterally taking possession of a thing, or a piece of land, must involve some degree of validity. These issues are of course a matter for future work.

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## Notes

1 Some interpreters, e.g. Saage (1976), Ludwig (2005) and Byrd and Hruschka (2010), see Kant as defending property as a natural institution authorized by laws of reason (thus attributing a Lockean view to him), whereas others, e.g. Flikschuh (2003), Ripstein (2009) and Williams (2012), emphasize the provisionality of property rights in the state of nature, attributing to Kant an intermediate position between a Lockean and a Hobbesian (or 'positivist') view. A reading of Kant as a 'positivist' when it comes to property rights is less common. It can be found in Waldron (1996), for example, who highlights the role of the legislator in distributing and assigning individual rights.

2 For a general view of the influence of Achenwall's *Ius naturae* on Kant's *Rechtslehre*, see for instance Byrd and Hruschka (2010), Guyer (2020).

3 A comparison between Kant's and Locke's theories of property can be found, among others, in Brandt (1974), Williams (1977), Kersting (1991) and Flikschuh (2003). For a discussion of Kant and Grotius, especially regarding the idea of common possession of the earth, see Flikschuh (2003), Loriaux (2017) and Pinheiro Walla (2016).

4 English quotations of Achenwall's *Ius naturae* are taken from Achenwall (2020). I cite Achenwall's text by using the abbreviation *IN* followed by the number of the book and then the number of the paragraph. Kant's works will be cited by the standard notation of the Academy edition (Kant 1900–). Citations in English are taken from the Cambridge edition of *Kant's Works*. Occasional amendments are my own. The abbreviations used for Kant's texts are the following: *MM* = *Metaphysik der Sitten*, *VARL* = *Vorarbeiten zur Rechtslehre*, *Vor-Nat-Fey* = *Vorlesung Naturrecht Feyerabend*. Other abbreviations of primary sources used are: *DBIP* = *De jure belli ac pacis* (Grotius 2005), *DJNG* = *De jure naturae et gentium libri octo* (Pufendorf 1964), *GNV* = *Grundsätze des Natur- und Völkerrechts* (Wolff 1754), *ST* = *Second Treatise of Government* (in Locke 1960).

5 Streidl (2003: 246ff.) points out that Achenwall's account of equality is merely 'formal' (i.e. it describes the way in which men must be handled). This account opposes the 'material' conception of equality found in the natural law tradition (e.g. in Hobbes and Wolff), according to which equality among men is explained in anthropological terms.

6 A similar definition of freedom as independence is provided in Wolff's *Grundsätze des Naturrechts* (*GNV*, §77).

7 Cf. *DIBP*, II. ii. 2; *ST*, v. 32.

8 See e.g. *DIBP*, II. 2. ii.; *ST*, v. 26; *GNV*, §186; *DJNG*, IV. iv. 4.

9 For a discussion of Achenwall's criticism of this doctrine, see also Byrd and Hruschka (2010: 124ff.).

10 Pufendorf in fact argues that a positive community is introduced by agreement at a later stage: 'things were created neither proper nor common (in positive community) by any express command of God, but these distinctions were later created by men as the peace of human society demanded' (*DJNG*, IV. iv. 4); cf. Buckle (1991: 94ff.).

11 Cf. *IN*, §116: 'both Grotius and Pufendorf fall for the same mistake, each on the basis of his own idea: as if a man were violating the rights of others and disturbing the *primeval communion* ... so in order to save the rightfulness of occupancy, they had to make up mankind's consent, which however has never existed and is not necessary to assume'.

12 According to Achenwall, to act according to natural laws is to act in accordance with the will of God (*IN*, §20). Moreover, he endorses the Pufendorffian definition of law as the command of a superior. Natural laws, says Achenwall, 'are made by the superior and obligating the subjects with the threat of punishment ... God thus is the legislator of all natural law, i.e. the superior who is the creator of the juridical laws' (§44).

13 I am using male rather than gender-neutral pronouns to avoid obscuring the fact that, according to Kant, proprietors (heads of the household and active citizens) are exclusively men. See Kleingeld (2019: 16ff.).

14 The principle of right refers only to the relationship between choices and states, such that the exercise of one's own freedom should not infringe the freedom of others, but it says nothing with regard to external objects of choice and the possibility of possessing them juridically. Hasan argues that the postulate must be grounded on the universal principle of right (Hasan 2018: 863). As I see it, the postulate (i.e. the possibility of juridical possession) is grounded on freedom itself, not on the axiom of right, and it is not even fully compatible with it (since this principle does not allow for unilateral coercion). Since the postulate grants a provisional permission to act in a way that may violate the universal principle of right, Kant calls it a permissive law (cf. Flikschuh 2003: 141ff.; Brandt 1982). For an alternative interpretation of the concept of permissive law as a power-conferring norm that creates juridical obligations in a definitive manner, see Byrd and Hruschka (2010: 94–106). On the role of permissive law in the natural law tradition and its relationship with Kant's reformulation of this concept, see Tierney (2001a, 2001b), Szymkowiak (2009).

15 Cf. Ludwig 2005: 113.

16 As Westphal puts it, external freedom 'would block any prospect of outer action' (Westphal, 2010: 92). A similar explanation is found in Kersting (1984: 128). I am not certain, however, whether Kant's argument succeeds in explaining the contradiction as one that is entailed by the mere concept of external freedom.

17 For example, Mulholland (1990: 233) seems to argue that the postulate is introduced by Kant to justify a *right to a thing*. On the distinction between possession (*Besitz*) and property (*Eigentum, dominium*), see also Westphal (1997).

18 Throughout this article, I use the notion of 'general will' instead of 'universal will'. The German word *allgemein* can be translated into English either as 'universal' or as 'general'. I am aware that Kant himself distinguishes between general and universal rules. However, I wish to retain in the English translation of *allgemeiner Wille* the connection between Kant's uses of this concept and Rousseau's *volonté générale* (which is intrinsically a political idea). The relevance of this connection has been widely discussed, although I cannot explore it in this article. On the translation of *allgemeiner Wille* as universal/general will, see also Kleingeld (2017: 101).

19 Kant seems to argue, however, that the act of arrogation (of unjustly assuming a right) involves a later acknowledgment of having to be reciprocally bound if one claims to bind others.

20 Put differently, while juridical possession deals with the subjective condition of the possibility of having something as one's own, acquisition refers to the actual realization of this possibility (Kühl 2009: 231).

21 Tierney (2001a, 2001b) and Szymkowiak (2009) believe that Kant does not successfully resolve this tension and argue that it ends either in an 'aporia' (Tierney) or a 'form of scepticism' (Szymkowiak). Tierney holds that there is an unresolved conflict between the postulate (which allows acquisition to the first possessor) and the standard set by the universal principle of right (which forbids acting in a way that encroaches on the freedom of others) (2001a: 304; 2001b: 381). As I see it, he is not able to see the way out of this conflict because he deems the permissive law as allowing unilateral coercion in a definitive manner. In my reading, the postulate is one step in a complex argument that results in the necessity of the general will (as the previous analysis of the three 'moments' of acquisition shows). Szymkowiak (2009), for his part, argues that the permissive law does not conflict with the universal principle of right but it is rather 'a full exposition of it' that grants the 'first taking' the status of a 'putative starting point for intelligible possession' (2009: 591). The permissive law, however, is not able to assign a particular right to a person with regard to property; Szymkowiak calls this 'a sceptical aspect of Kant's conception of right' (2009: 591, 594). I consider that the author overlooks the role of the general will as the principle that, once incarnated in the state, makes it possible to reconcile the unilateral claim of the first possessor and the existence of obligations universally justified and their corresponding allocation of property rights.

22 Cf. Vor-Nat-Fey, 27: 1341: 'the author denies *communio primaeva* . . . The author and his opponents have not understood this correctly'. In the lectures, Kant did not present a clear, positive thesis on common possession and, at that time, still endorsed a version of labour theory that would be completely abandoned in 1797. On the evolution of Kant's theory of property, see Rivero 2021.

23 Kant also discusses the *Gemeinbesitz* in §6 of the doctrine of possession; however, in Ludwig's reconstruction of the text (followed by the Cambridge edition), those paragraphs are deleted. See Ludwig (2005: 65ff.).

24 See Kühl (2009: 236).

25 Flikschuh (2003: 157).

26 For an analysis of the common possession of the earth and its relationship with cosmopolitan right, see Pinheiro Walla (2016).

27 For an interpretation that portrays Kant as defending, à la Locke, the existence of pre-political, or natural, ownership rights, see Ludwig (2005: 185); Byrd and Hruschka (2010: 46, 95). On Byrd and Hruschka's view, the institution of property is grounded in *a priori* principles of reason (in particular, the postulate of private right); a reference to the general will (and to Kant's arguments of §8 and §14) is significantly absent in their explanation of the justification of rights of property. An exhaustive discussion of this reading can be found in Friedrich (2004).

28 Cf. Friedrich (2004: 149).

29 On the provisionality of territorial rights, see Ypi (2014).

30 Some interpreters argue that property rights do exist in the state of nature but are not conclusive until the transition to the civil condition is realized (see, for instance, Williams 2012: 82; Flikschuh 2003: 149; Ripstein 2009: 87). Accordingly, a unilateral will would be able to bind others, yet *provisionally*. I cannot do justice to the complexity of this issue nor discuss this interpretation in the present context. I would like to make a small remark, however, on a main passage that is often referred to as textual evidence for this reading. In §16 of the Doctrine of Right, Kant affirms: 'before the establishment of the civil condition ... there is also a juridical capacity (*rechtliches Vermögen*) of the will to bind everyone to recognize the act of taking possession and of appropriation as valid, even though it is unilateral' (MM, 6: 267). As I see it, Kant is not claiming here that a unilateral will can impose 'provisional' obligations. He is only stating that the unilateral act of appropriation (that certainly *always begins* with an empirical *individual act*) must be recognized as a valid one according to the juridical postulate of practical reason. *Claiming* something as one's own is a valid act, but this does not imply that a property right must arise *ipso facto*. Accordingly, the unilateral claim to have something as one's own cannot bring about an *obligation* regarding the use of a particular thing, but it grounds the power to coerce others to enter a condition in which external objects can be conclusively acquired.

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