



Liberty and Right. A Kantian outline

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1. Introduction

The classical liberal political theory is commonly identified by the acknowledgement of the concept of the so-called “negative freedom” or freedom as “absence of coercion”¹. Of course, on the basis of this acknowledgment there is possible the foundation of a liberal political praxis with a series of many different presuppositions. For example, it is impossible to reject the fact that the tradition of classical liberalism had its origin in the doctrine of empiricism (Locke, Hume), and also at the present day, many commentators believe that political liberalism is compatible only with a kind of political or ethical relativism. My intention in this essay is neither to criticize this perspective nor to talk over the soundness of these statements for the foundation of a really liberal political praxis. What I want to show here, however, is that all these statements become untenable, or, at least, hardly defensible, when we move from the level of political praxis to the one of theoretical foundation, that is the level of theoretical principles of liberalism.

Everyone can be in agreement with the definition of liberty as “absence of coercion”, but everyone has also to admit that this definition *presupposes* something else. The concept of coercion², indeed, can be referred only to the action caused by an intentional agent over another one. It would be absurd to talk about a ‘coercion’ handled by nature: a natural catastrophe, for example, can deprive me of my life or of my properties, but nobody would say that it could deprive me of my liberty (at least in a juridical or political meaning of the term). But, if the same catastrophe is the effect of a human action, in that case the question could have a juridical (civil or penal) consequence. A similar remark can be done about my individual nature: I cannot make claims on someone if I’m not blond or if I’m not fit to play basketball, and so on. This fact means I cannot claim these personal desires as they were *rights* that something else (e.g., the government) has the *duty* to recognize and to realize (at the present day, however, the progressive government of an European state pays the operation for sex changing; obviously, in the case of a male who would become a

¹ For the distinction between *positive* and *negative* liberty, see I. Berlin, *Two concepts of Liberty*, Oxford University Press 1958.

² For the sense of “coercion”, see F.A. Hayek, *The Constitution of Liberty*, University of Chicago Press 1960, Chapter. 9.

woman, the personal condition of being male is -incorrectly- regarded as a limitation of individual liberty). It seems so that we can talk about 'coercion' in strict sense only when we are dealing with intentional agents: agents who can be called to answer for their actions, or, in a word, *free* agents.

Now, we have to ask why the acknowledgment of individual liberty commands that no arbitrary coercion has to be exerted over a man? If the difference between actions handled by individuals and natural events is only one of degree, then it will be completely absurd to talk about "absence of coercion", because something similar to 'coercion' is commonly practiced in the world of nature (e.g., in the animal world) and nothing would be so ridiculous to penalize it (as noted ironically by R. Scruton³, the problem with the so-called "animal rights" is to pretend the respect of them by animals themselves). It may be the case, as Spinoza believed, that the conscience of freedom would be only an illusion, or that it would be only an epiphenomenon of more complex physiological processes, as the contemporary philosophy of mind suggests, but it is an undeniable truth that its presence and efficacy on the human species is something that neither spinozism nor philosophy of mind are capable to cancel, while, on the other side, for a lion is very difficult to understand that it has no right to rend a gazelle.

So, if the object of coercion would be something like a stone or an animal, nobody will have the presumption to speak not only of coercion, but also of limitation or damage to individual liberty. This way of thinking is very near to the Kantian position, which recognizes the freedom as the *ratio essendi* of the man (conceived as moral subject): freedom that cannot be logically derived nor empirically observed, but only inferred by that *ratio cognoscendi* that is the moral law. At first sight, this speech can seem strange, so it will require some word of explanation. First of all, we have to consider the fact (obvious, at first glance) that *freedom* is a property that can be assigned only to *individuals*, and this is a point for the scientific non-demonstrability of its existence. As an absurd, indeed, a scientific demonstration of liberty would sanction its non-existence. Before, we brought back negative freedom to the range of an (hypothetical) intentional agent, who is considered responsible for what he does. So, *to be free* will have the same meaning of to be able to *take the initiative*, but the "initiative", as says the word itself, means the ability to be the *absolute beginning* of an action. But in the range proper of scientific explanations, we could never be legitimate to found an absolute beginning (and, also, an absolute beginner): every scientific phenomenon is in principle to be brought back to its closer cause, which, again, has to be considered as an effect and the product of another cause, and so on. So the process goes to infinite or, as Kant says, goes to the indefinite, and this is the chain of conditions which the human intellect find in the nature. It is obvious that, within this series of conditions, it is impossible to find an ultimate subject, who is capable to "take the initiative". So, to have a real initiative, we need a subject who is the principle of his action without be, at the same time, the effect or the result of another cause. This is exactly what an individual is, and this is also the reason of the impossibility to find him in the range of

³ See R. Scruton, *Animal Rights and Wrongs*, Continuum 2007.

⁴ Kant, *Critique of Practical Reason* (Akademie Ausgabe, V, 4), translated by M. J. Gregor, Cambridge University Press 1997, p. 4.

natural phenomena (phenomena that are objects of natural science)⁴. The only free agent is the individual, but no individual can be found in the natural world.

So, how can we say that someone such as an individual *exists*? Before we mentioned *conscience* that is a (not only physical) phenomenon of which we have a direct experience. Well, conscience can be the road to cross in order to reach the individual. This is also the case of Kantian philosophy, which, however, puts an accurate distinction between psychological (*Bewusstsein*) and moral conscience (*Gewissen*), and says the moral law imposes itself to our conscience. The Kantian *Gewissen* is proper the (non-physical) place where we feel the duty to consider ourselves as free, even if we can never say whether we are free or not. This can be read as a paradox, but it contains no contradiction: indeed, if we scientifically know to be free, then, for the same argument we saw before, we would be sure that freedom is only an illusion, with the result that freedom cannot have any space in moral consideration. Therefore, freedom is not reducible to nature (or to naturalistic explanations), and this result is sufficient to postulate a difference between the human species and all other natural beings. It is a *difference of principle* (not one of degree); because the individual finds in himself the principle of his action, without have to refer it to another cause (as in the case of natural causality). On a similar argument there is based the difference, recognized by Kant, between autonomy and heteronomy of the will.

2. External freedom and autonomy

In his work of 1797, the *Metaphysics of Morals*, Kant maintains that “There is only one Innate Right, the Birthright of Freedom” and freedom in the sense of “independence of the compulsory will of another (...)in so far as it can coexist with the freedom of all according to a universal law, it is the one sole original, inborn right belonging to every man in virtue of his humanity”⁵, that is the basis for those that nowadays we use to call “human rights”⁶. Freedom is a *natural right*, based on a priori principles, of which we dispose before and apart from the constitution of the state (and so the state is forced to recognize it) and which derives from a *moral capacity*, that is it’s a qualification that legitimate us to constrain the others to a certain behavior towards us. What we have to explain, now, is why, in the case of human beings, the possession of a moral capacity can be considered the basis of a natural right. It seems that Kant is falling into a vicious circle, because he’s justifying the human freedom (as natural right) on the basis of the humanity, while humanity is defined recurring to the concept of autonomy, that is the capacity of the man

⁴ Kant explains the coexistence of *freedom* and *necessity* with the double nature (*phenomenical* and *noumenical*) of the man, who is at the same time citizen of the reign of nature and of the one of ends. Anyway, also if one doesn’t accept his philosophical dualism, can understand the universal determinism only as a *regulative principle* of natural science, while, on the other side, the natural science could never find a ground of possibility for freedom, but could also not exclude it, because, in doing so, science would immediately go beyond her proper range to become another form of metaphysical explanation. On this argumentation the defense of freedom is conducted by V. Mathieu in his book *Perché punire. Il collasso della giustizia penale*, new edition, Liberilibri 2007.

⁵ Kant, *Metaphysics of Morals* (AA VI, 237), part one, Science of Right, Division of the Science of Right, B, translated by W. Hastie, consultable at <http://www.mv.helsinki.fi/home/tkannist/E-texts/Kant/Right/>.

⁶ See L. Caranti, *Per una teoria kantiana dei diritti umani*, in C. La Rocca (ed.) *Leggere Kant. Dimensioni della filosofia critica*, Ets 2007, pp. 203-226.

to propose ends to himself (and not simply to propose means to reach some ends which don't depend on him). But it is evident that Kant is considering freedom on two different levels and that only this distinction consents him to distinguish (but not to separate) moral and right.

The moral consists of imperatives which are followed for their own, intrinsic value, for the duty which determine the man to obey them, while the right consists of imperatives which are obeyed for a reason that may be different from the pure respect of duty. Kant calls *legality* the purely exterior agreement of an action with the law, while he says we have *morality* when the pure duty deriving from the law is the one and only impulse to act in a certain way⁷. The content (of the two actions) is the same, but there is a different *intention* by which the individual will is in agreement with the universal imperative.

This clarification leads us to distinguish the *external liberty* from the *moral autonomy* properly said. The second one contains a more strict condition in comparison with the first one, because the external freedom requires only the capacity to act under imperatives in the pursuit of certain ends, but these can be empirical ends and not rational ones or, in a non-Kantian but more common language, these are ends that reason doesn't propose to herself and from herself, but they come to reason from another source (exactly, from subjective inclinations). So it's easy to understand the simple absence of external constraints is a necessary but not sufficient condition for the foundation of morals, while is sufficient to build the legal aspect of the question (for example, legal responsibility). But what distinguishes the Kantian position is precisely that only the second condition, that is the *possibility* of autonomy al moral countersign of the individual, is able to ground and justify the second one that is freedom as absence of coercion.

So, the external liberty seems to consist in the fact that men propose ends to themselves without being determined in that by inclinations, as the case of animals who are lead by instincts, because they have to add to a rational assessment to their inclinations so that these ends can become principles for determining the will (that are principles who justify our decision to will something or something else). The external liberty, as we said,

⁷"What is essential to any moral worth of actions is that the moral law determine the will immediately. If the determination of the will takes place conformably with the moral law but only by means of a feeling, of whatever kind, that has to be presupposed in order for the law to become a sufficient determining ground of the will, so that the action is not done for the sake of the law, then the action will contain legality indeed but not morality. Now, if by incentive (*elater animi*) is understood the subjective determining ground of the will of a being whose reason does not by its nature necessarily conform with the objective law, then it will follow: first; that no incentives at all can be attributed to the divine will but that the incentive of the human will (and of the will of every created rational being) can never be anything other than the moral law; and thus that the objective determining ground must always and quite alone be also the subjectively sufficient determining ground of action if this is not merely to fulfill the letter of the law without containing its spirit." (Kant, *Critique of Practical Reason* (AA,V, 71-72) I, 3, par. 1, p. 62). As was pointed out by L. Fonnesu (*Sulla morale kantiana*, in *Leggere Kant*, p. 134), the distinction between *morality* and *legality* is all internal at the ethics' sphere and so doesn't coincide with the difference between *moral* and *right* (but it's also a matter of fact the Kant based his conception on the notion of a moral law and this because all is moral is linked to a general juridical evaluation. Fonnesu says also that, is legality is only a negative value in comparison with the morality of the right intention (*Gesinnung*), she's yet a positive value if compared to an external behavior opposed to the law. This means that legal behavior is always a necessary condition, even if not sufficient, to talk about morality.

is concerning only with our capacity to act under imperatives in the pursuit of certain ends, but is silent about the nature of these imperatives and, on the other side, on the nature of the ends which moral agents 'rationally' pursue. Kant's point is the sequent: to have moral freedom the deliberation on ends is not enough, because the moral action has not only to be free (that is, to be attributable to an individual), but has to be motivated by anything other than the pure respect of the moral law. Momentum for action, indeed, cannot be determined by any external order (heteronomy), but has to be inspired by intrinsic cogency of the moral law, which is expressed in the formulation of the categorical imperative ("act in such a way that the maxim of your will could always hold at the same time as a principle of a universal legislation"). This is moral autonomy: the very possibility (and not the mere fact) those men purposes to themselves ends in complete independence from any subjective or empirical motive, or, in a positive way, under the pure respect of the law.

3. Kantian anti-consequentialism and the categorical imperative

Before to explain in which manner the moral autonomy can provide a solid basis for the justification of the right to external liberty, we have to consider more specifically the Kantian position on the moral law. When Kant speaks of *practical reason*, he thinks the reason in its function of determining the will that is to choose what we have to will under a certain motivation. If this condition is necessary to characterize the range of action proper of the human being, however it's not sufficient to characterize it as the range of action of a *moral agent*: for the foundation of morality, indeed, there is not sufficient simply the rationality in the determination of means to reach unspecified ends. Kant's attitude, essentially, is a strong denial of the possibility itself of a foundation of moral on a *consequentialist* basis, because, from this point of view, reason involved in determining will operates always in reference to something else (something different from reason itself), in respect of which reason is merely *instrumental*, that is operates only in the choice of means. On the contrary, in Kant's opinion reason has to determinate the will according to no other principle than the reason itself, and only under this condition it's a *pure practical reason*. The pure reason, that is a reason alien to any empirical influence, contains itself the principle sufficient to determinate the will independently from sensible inclinations, and such a principle is the *duty*.

In a consequentialist perspective, on the contrary, the reason for a command (imperative) doesn't lie in the rightness of the command itself, but only in the (subjective) desire to obtain or avoid some specific consequences. Consequentialism follows this scheme: "Do *a* if and only if you want *b* (if you want to obtain *b* or if you want to avoid *b* and so you want to obtain its opposite *non-b*)". In this case, the reason identifies merely the necessary means to satisfy my private inclinations (to be happy, to keep healthy, not be arrested, and so on). The real moral perspective, on the contrary, is such that reason thinks to have to determine the will not in order to one of these particular inclinations (they are particular because can change passing from a subject to another one), but only because my conscience says that act in such a way is a duty, apart from the consequences to which such an action can give rise.

It's easy to understand now that consequentialism operates under *hypothetical imperatives*, that are imperative willed only under an external condition, while the moral

operates under *categorical imperatives*, that are not conditioned from nothing (except from the rightness of the command itself), and so they are the only imperatives fully *rational* in Kant's opinion, because he defines 'reason' exactly as the "faculty of the unconditioned". Kantian moral summarizes in itself the meaning of the expression "acting on a principle" or "it's a matter of principle", while the consequentialism is properly speaking a "matter of consequence". If I have the duty to act in a certain way, this means reason has doesn't order to will such a thing only as a mean to obtain some other thing, but says only that there is a principle to respect and the duty to respect it decides (automatically) what I have or have to will. But if it is easy to understand that the moral law cannot command in the name of another principle, there follows from this that the law can command neither in the name of a *good* to be achieved. For this reason Kant denies the value of moral law derives from the fact it orders to pursue a good end: under this condition, indeed, the *goodness of the end* becomes dependent from our subjective inclination to prefer one thing rather than another one. So, Kantian ethics is not an ethic of *value* (as in Aristotle's perspective or, after Kant, in the philosophy of Max Scheler), because even if I succeed in recognizing an end as ethically good (and so worthy to be choose), however I have no argument to deny that my choice of that good is leaded only by the fear of a grater evil or of a penalty (for example: I do what is commonly regarded as good, only in order to avoid the possible evil which can come to me if I do otherwise). Also in this case, even if we have the same and identical *content*, I am not able to recognize if my action is conduct in accordance with a certain situation or is based on a right moral intention.

So, the value of moral law cannot derive from the value *presupposed* by the content which such a law prescribes. On the contrary, the value of what it commands derives all from the fact that is commanded by the moral law. Kant means this when says that moral laws command *in virtue of its own form*. This aspect deserves a deeper consideration in order to avoid accuses of *formalism* which were moved against the Kantian perspective. The paradoxical aspect, if you want, is surely the *coincidence* of form and content in the formulation of the moral law (although it's the case of a very peculiar kind of *content*): from one hand, the moral law commands me *to be free*, but from the other one, does it in virtue of his form, that is in virtue of the *universal form* of the law. But *to be free* can be considered a material content? Well, as said before, *to be free* means for the subject to be the absolute beginning of an action: an action is free only insofar it depends from me. But freedom is not a fact which can be object of empirical observation. On the contrary, Kant uses to say not only that we cannot have experience of *how* freedom is possible, but we can neither say *that* it exists, because freedom is not an object of reason in his *theoretical* function. We have only the *duty* to think ourselves as free insofar freedom is attested for us by the presence of the moral law, that is, from the categorical imperative which commands to act in respect of the law and not for other motivations. Here seems to us that Kant is falling into a vicious circle because the existence of freedom is attested by the moral law, but the content itself of the moral law consists only in the duty to consider ourselves as free. To resolve the problem we have to clarify what really means that the moral law commands only in virtue of his form, that is, of its universality. This means we can consider ourselves *free* if and only if we are capable to determine our will independently from all that could influence us because of the particular *position* in which we happens to stay. In other words, the universal form of the law entails his *non-partiality*, the fact that the

law determines the will for the simple motivation *to be impartial*. Freedom acquires importance to our conscience when we ask ourselves what is the motivation to act after we have excluded all that concern our particular position (that, *qua talis*, is purely subjective): this motivation cannot be anything by the pure respect of the law. My action is really autonomous (or, better, can be conceived as such) only when is determined independently from any subjective motivation. So moral autonomy is the opposite of the arbitrariness of decision, because is the only thing, in the will's determination, which is able to make abstraction from all that is relative at the particular position of the subject. In this way, we can be sure (always in principle, not as a matter of fact) that the absoluteness of the imperative is coincident with freedom itself, that is, with the independence from any partiality of the will. So the universal form of the law becomes coincident with the absoluteness of the command ("be free"), and the form can determine all a priori his content.

4. Formalism

At this point we can take in consideration the classical objection moved against the theory of the categorical imperative: to express only a so empty formalism that it can receive any content. In particular, this objection was moved by Hegel in his *Philosophy of Right* (1821)⁸. In Hegel's opinion what the categorical imperative tests is whether a maxim (that is, in Kant's language, the subjective principle which leads my action) which has a content and prescribes a determinate action, may be universalized without contradiction. But because the categorical imperative has no intrinsic content and tests only the universalizability of the maxim, his legislation can be only arbitrary. Hegel refers to the so-called *principle of universalizability of the maxim*, proposed by Kant in § 4 of the *Critic of the Practical Reason*. Kant begins saying: "If a rational being is to think of his maxims as a practical universal laws, he can think of them only as principles that contain the determining ground of the will not by their matter but only by their form. The matter of a practical principle is the object of the will. This is either the determining ground of the will or it is not. If this is the determining ground of the will, then the rule of the will is subject to an empirical condition (to the relation of the determining representation to the feeling of pleasure or displeasure), and so is not a practical law. Now, all that remains of a law if one separates from it everything material, that is, every object of the will (as its determining ground), is the mere *form* of giving universal law. Therefore, either a rational being cannot think of *his* subjectively practical principles, that is, his maxims, as being at the same time universal laws or he must assume that their mere form, by which *they are fit for a giving of universal law*, of itself and alone makes them practical laws"⁹.

And the remark continues: "The most common understanding can distinguish without instruction what form in a maxim makes it fit for a giving of universal law and what does not. I have, for example, made it my maxim to increase my wealth by every safe means. Now I have a *deposit* in my hands, the owner of which has died and left no record of it. This is, naturally, a case for my maxim. Now I want only to know whether that

⁸ See on this argument S. S. Sedgwick, *Hegel's Critique of Kant's Empiricism and the Categorical Imperative*, in *Zeitschrift für philosophische Forschung*, 50, 1996, pp. 563-584.

⁹ Kant, *Critique of the Practical Reason* (AA V, 27), I, 1, § 4, p. 24.

maxim could also hold as universal practical law. I therefore apply the maxim to the present case and ask whether it could indeed take the form of a law, and consequently whether I could through my maxim at the same time give such a law at this: that everyone may deny a deposit which no one can prove has been made. I at once become aware that such a principle, as a law, would annihilate itself since it would bring it about that there would be no deposits at all¹⁰.

At this point, Hegel asks: where is the contradiction in the fact that there would be no more deposits? Evidently, the non-existence of deposits would contrast with other things, but other ends or other material reason cannot be invoked here. If the morality of a maxim is functional to his universalizability, then every maxim could pass the test: in this case, for example, the non-existence of deposits is universalizable as their existence. What makes the difference is an assumption presupposed (e.g., the opportunity of deposits), but, properly speaking, in the Kantian perspective nothing is to be presupposed. So, with some surreptitiously presupposed assumption, the practical legislation is based only on a series of tautologies. If a maxim doesn't pass the test of universalizability is only because it contrasts with that content which has been surreptitiously assumed: "From such a position can be derived no inherent doctrine of duties. Materials, it is true, may be introduced from without, and in this way specific duties may be secured; but from duty, whose characteristic is an absence of contradiction or formal concord with itself, a characteristic which is no more than the establishment of abstract indefiniteness, no specific duties can be deduced. Nor, further, if any specific content of action comes up for consideration, is there in this principle any way of judging whether it is a duty or not. On the contrary, all manner of wrong and immoral acts may be by such a method justified"¹¹

In virtue of his own formality, the categorical imperative is also empty and unable to legislate in the practical sphere in a non-arbitrary way, then, if nonetheless it's employed a test for the maxims, it must be guided by surreptitious assumptions (contents which are materials and not a priori); so, the validity of particular duties is not deduced by the general principle and will be relative to those particular contents assumed time from time¹². In the deposit case, the thing presupposed is that the practice of deposits ought to exist and only with assumption we find a contradiction in the universalization of the maxim to deny having received a deposit for which there is no attestation. Against this critique, the most important objection is that Hegel really misunderstands (or, probably, want to misunderstand) the real intention of Kantian test. First of all, the categorical imperative cannot be reduced to an application of the principle of contradiction to the practical sphere: the principle of contradiction doesn't ground the possibility of the categorical imperative (otherwise, it will be a mere analytical principle), but serves only to test the compatibility or non-compatibility of a maxim with the conditions for a morally right action. In other words, this device doesn't serve to test the universalizability of the categorical imperative but that of the subjective principle or maxim: whether my maxim

¹⁰ Ivi, p. 25

¹¹ Hegel, *Philosophy of Right*, § 135, Note, translated by S. W. Dyde, Batoche Books Kitchener 2001

¹² Sedgwick, p. 567.

can be willed as a universal law. As was pointed out many time, Kant doesn't want to demonstrate there is something contradictory in the non-existence of deposits, but that there arises a contradiction (incompatibility) in the subject's will, because he *at the same time* tries to want his maxim and to make it universal. But, in so doing, *he presupposes* the existence of a system of deposits and, at the same time, pretend to except himself from it¹³.

So, it's evident that the test of generalization intends to prove whether my subjective maxim is compatible or not with the objective principle of respecting the moral law. The test is not focused on the content, but on the compatibility of the maxim with the law. Kant has no intention to ground moral on the principle of contradiction (because this will contrast with his theory of synthetic a priori judgments, which are not reducible to tautologies or analytic principles). In this case, the contradiction is a result, a consequence and not a principle of the non-validity of the maxim. In particular, beside, when my maxim damages a strict or *perfect* duty (negative norm), I realize that I'm not able to *think* it would become principle of an universal legislation; instead, when my maxim damages an *imperfect* duty (positive norm), then I'm able to think that all people acts in that manner, but I cannot *will* it¹⁴. This is the ground for the distinction between *juridical* and *ethical duties*, where the first ones order simply what should not be done, under the form a *prohibition*, but this is not sufficient to cover all the sphere of duty, but only the sphere of right. The right falls within the ethics, but the ethics is not exhausted by the right, because it concerns both juridical and ethical duties. Indeed, a duty *qua* duty pertains to ethics and, besides, also juridical duties can be ethically performed, that is, not only to avoid the penalty deriving from their transgression but also for the spontaneous respect of others liberty¹⁵.

5. Kant and the liberal conception of right

Leaving aside the ethical duties (on which Kant dwells in the second part of his *Metaphysics of Morals*), let's consider now only the negative form of the categorical imperative, the *prohibition*, because the nature itself of the prohibition helps us to understand how a pure formal principle can determinate a content. Obviously, it doesn't in a *direct* way but only *indirectly*, saying what we have not to do, again: not if or at the condition I want something else, but regardless for any subjective condition. This aspect is fundamental not only for Kant's conception of right, but for the very idea of external

¹³ See H. J. Paton, *The Categorical Imperative. A Study in Kant's Moral Philosophy*, Hutchinson and Company 1947, p. 139: "There is clearly a contradiction in willing that a maxim should be a universal law and willing at the same time that we should make arbitrary exceptions to it in our favor".

¹⁴ Kant, *Groundwork of the Metaphysic of Morals* (AA,IV, 424), translated by M. J. Gregor, Cambridge University Press 1998, p. 33: "We must be able to will that a maxim of our action become a universal law: this is the canon of moral appraisal of action in general. Some actions are so constituted that their maxim cannot even be *thought* without contradiction as a universal law of nature, far less could one *will* that it *should* become such. In the case of others that inner impossibility is indeed not to be found, but it is still impossible to *will* that their maxim be raised to the universality of a law of nature because such a will would contradict itself. It is easy to see that the first is opposed to strict or narrower (unremitting) duty, the second only to wide (meritorious) duty; and so all duties, as far as the kind of obligation (not the object of their action) is concerned, have by these examples been set out completely in their dependence upon the one principle".

¹⁵ See Fonnesu, p. 128-9.

liberty on which the first one is based. As we know, the moral law orders to make abstraction from the position I occupy in regard to the others (e.g., if I am the debtor or the creditor) and to search only what has to be *objectively* done. This assumption is sufficient to ground a theory of justice, because justice consists precisely in making abstraction from the situation in which I am and asserting only a universal principle. This point is the basis for every liberal doctrine of right. In his *Metaphysics of Morals*, Kant formulates in this manner the *universal principle of the right*: ““Every action is right which in itself, or in the maxim, on which it proceeds, is such that it can coexist along with the freedom of the will of each and all in action, according to a universal law”¹⁶. From this follows that, for Kant, right is the only possible and ethically right device to make compatible the individual’s freedom with the freedom of the others. So, right is defined “the system of freedom”, because is a system which institutes a connection between two or more free agents, who are submitted not to one or another’s will but to the only law which allow them to conceive themselves as free. Only under the condition that I place myself from a point of view which makes abstraction from the position every single subject happens to be (something like “a view from nowhere”), I’m able to conceive myself as a free individual. From this follows that laws of justice are all and only those make one’s freedom compatible with the freedom of the others. So, justice is not the system of an *absolute* freedom, but the system of a *conditioned* one, that is, freedom submitted to law, especially to a principle of *reciprocity* which can be expressed with the formula: “I have the right to behave toward you as you have the right to behave towards me”¹⁷. So, the categorical imperative is respected when the subjective maxim is able to serve as norm of an universal legislation, and, equally, the particular laws are right insofar they are intent only to avoid the individual with his behavior follow a principle which cannot be one and the same passing from a situation to another one, or from a subject to another one.

As was recognized by F. A. von Hayek, indeed, the liberal conception of freedom is always that of freedom under the law¹⁸, that means that the human being is free if and only if he is not subject to any *arbitrary* coercion; but, for the man who lives in society, the protection from this kind of coercion demands the imposition of a bind to all individuals: a limitation which prevents everyone’s liberty from coercing the others. That is the role of the law. So, the meaning of the word “liberty” is dependent from the value we assign to the term “right”. Of course, says Hayek, the legislative activity can be used to destroy the liberty, but this is not the case of the law intended as an indispensable safeguard of liberty. The latter one is composed only by the set of principles of conduct which constitutes the penal and the private right, and not any prescription imposed by the legislative authority. To be conditions for the exercise of liberty, the norms imposed by the government ought to have a fundamental characteristic: “They must be general rules of individual conduct, applicable to all alike in an unknown number of future instances, defining the protected domain of the individuals, and therefore essentially of the nature of prohibitions rather

¹⁶ Kant, *Metaphysics of Morals*, Science of Right, Introduction, C.

¹⁷ See Mathieu, p. 82.

¹⁸ F. A. Hayek, *Liberalism*, written in 1973 for the Italian Enciclopedia del Novecento where the article appeared in an Italian translation. Reprinted as Chapter Nine of Id., *New Studies in Philosophy, Politics, Economics and the History of Ideas*, Routledge & Keagan Paul 1978, pp. 119-151.

than of specific commands. They are therefore also inseparable from the institution of several properties. It was within the limits determined by these rules of just conduct that the individual was supposed to be free to use his own knowledge and skills in the pursuit of his own purposes in any manner which seemed appropriate to him"¹⁹. Hayek also recognizes that the fundament which limits the coercion to the imposition of general and abstract norms finds an identical expression in the conception of natural or inalienable human rights: "The idea of specially guaranteeing certain fundamental rights (...) is, however, only an application of the general liberal principle to certain rights which were thought to be particularly important and, being confined to enumerated rights, does not go as far as the general principle. That they are merely particular applications of the general principle appears from the fact that none of these basic rights is treated as an absolute right, but that they all extend only so far as they are not limited by general laws. Yet, since according to the most general liberal principle all coercive action of government is to be limited to the enforcement of such general rules, all the basic rights listed in any of the catalogues or bills of protected rights, and many others never embodied in such documents, would be secured by a single clause stating that general principle"²⁰.

At this point, we have to avoid a possible equivocation or a misunderstanding of the expression "freedom under condition", that is, the possibility to fall again into a consequentialistic conception of the right. What is to be avoided is the idea by which individual freedom is functional to the order; on the contrary, it's the order which serves to create the condition for the exercise of that liberty which, alone, is the "point of departure". An order, indeed, is regulated by laws, that are "abstract and general norms"²¹. Now such a norm, obviously, is not an end in itself, because the end is liberty and the norm serves only to make possible a system in which one's liberty is compatible with others one. Clearly, this implies a limitation of everyone's liberty (a coercion), but – and here there's the difference- in this case this is a limitation (*condition*) which is not *willed* by someone. In order all can be submitted to the same condition (equality before the law) it's necessary that such a condition doesn't express a particular content but will be purely formal, that is: abstract and general. This idea derives from the (at least platonic) conception, by which the right is not right because it's worth to be choose, but, on the contrary, it's good and worth to be choose only because is right: an idea which contrasts any form of juridical voluntarism (e.g., "right is the advantage of the stronger") which, finally, has the consequence to destroy the difference itself between matter of fact and matter of right.

The law at the order's basis is willed only in function of that liberty it has to respect. The order which guarantees the exercise of liberty, so, has not to be chosen under a principle of *utility* or *efficiency*, because those principles are unable to escape from the particularization of will. For example, *efficient* is always said of a mean referred to an end and to an end someone has in mind to realize (an end *willed* by a particular one). Then, there are only two possibilities: there is an explicit particular end (expression of someone's

¹⁹ Ivi, p. 134.

²⁰ Ivi., p. 137.

²¹ See on this point Chapter. 10 of F.A. Hayek, *The Constitution of Liberty*.

will) but so we fall in the construction of a teleological order which is (rightly) excluded by Hayek and other classical liberals, otherwise there is no specific and explicitly presupposed end, but only a formal order which makes compatible and non-hostile different individual ends. The first kind of reasoning, that is proper not only of strict utilitarianism, is a betrayal of authentic liberalism, because transforms individual freedom from an end into a mean; and, for absurd, when we are able to find a more powerful or efficient mean in order to obtain the same end, we can abandon liberty without problem. On the contrary, in a Kantian perspective, freedom is a value because is an end in itself and can never be abandoned or substituted, even if, paradoxically, the order based on it will be less efficient of another one. This is not a consequentialistic argument, as if I say the norms which enable the exercise of liberty are necessary for the existence of the order (in this case the order would be the end). On the contrary, this kind of argument is very similar to the principle of Popper's open society: the open society has to accept all people, with the exception of those whose convictions are in contrast with the possibility of the open society itself. The argument is not based on the more or less opportunity of a certain order, but on the condition which only makes possible or impossible the possibility of any order. The argument is not referred to its consequence, to the end it pretends to realize (order, open society and so on), but only to those Kant would have defined *conditions of possibility* not of a particular order but of the coexistence of two or more free individuals. At the ground of this conception there could never stay a norm that, being particular (e.g., this is valid for me but not for you), would make impossible the system itself.

In an analogue way to the case of the categorical imperative, also here it's not correct to say the possibility of an order can be grounded on the principle of contradiction. Also in the case of a norm that contrasts with the possibility of the system itself, indeed, the contradiction is a result and not a principle. It's only a sign, whose meaning is that there is something wrong. The principle of contradiction alone is not sufficient to guarantee that an order ought to exist, but, under the hypothesis that order is better than chaos, its possibility cannot be inconsistent. The choice for the order, then, may derive from the acknowledgment of freedom as a value to respect in every way. Because it's something we cannot produce, freedom is not a mean and is neither alienable, but is an intrinsic value who pertains to human being's essence or nature.

6. Conclusion

Returning to Kant, now, we must pay attention to understand in which manner the moral autonomy of individuals can ground the external liberty (and, so, also the right as "system of liberty"). First of all, the pure possession of a quality peculiar to the man is a fact which can't ground any right, unless this peculiarity has an intrinsic value, and that is proper the case of Kantian autonomy. Because the individual autonomy has to be regarded as an intrinsic value, the principal duty of a juridical system is to create the best conditions for its expression. But what kind of bound there is between the categorical imperative and the so-called universal principle of right? Maybe the normative cogence of the second derives from the first one? Of course in Kant's opinion only our capacity to submit ourselves to the moral law constitutes our humanity and is the source for the particular dignity of the man, and therefore there is the moral duty to abandon the natural state to

enter into a civil state regulated by the universal principle of right²². But, again, this doesn't mean that the civil state grounds that right, but only that to enter in the civil state is the only device we have to respect, in the others and in us, that intrinsic dignity of the man which come before the constitution of the state. This doesn't mean the moral autonomy presuppose the external liberty or the second is a condition of the first one, because our moral autonomy is something that nobody (individual or state) can remove to us, even if, in fact, there exist many states or regimes in which the individual autonomy is not recognized. Following L. Caranti²³, we can articulate this argument in five points:

- 1) Human beings have the property to be autonomous
- 2) This property confers them an unconditioned value, to make them unavailable to be used as simple means
- 3) Any limitation to the external liberty proper of a being whose value is unconditioned can be justified only in virtue of the respect ought to another being of the same value
- 4) So, the only limitation to the external liberty which can be justified is that necessary to make compatible one's external liberty with the liberty of the others
- 5) Every man has a natural right to the widest possible liberty that is compatible with the liberty of all others man.

The most important point, as rightly noted by Caranti, is the n. 2, that is, the unconditioned value the man owns in virtue of his humanity itself, again, intended as autonomy or capacity to act for the pure respect of the moral law. From this point descends the prohibition to deny or limit in an arbitrary way the external liberty of every man (not his autonomy, because it's a value which pertains to man's essence and, *qua talis*, can never been alienated). But, at least, on what basis is grounded this fundamental point? In other words, what is the bound between man's dignity and respect of the moral law?

From this position Kant's answer may seem, under certain aspects, unsatisfactory. The existence of moral law, indeed, is conceived by Kant as a fact, but not as an empirical one but as a *fact of the reason* (*Faktum der Vernunft*). If I'm able to conceive myself as free, then I have to do (*sollen* and not *müssen*, it stays for a moral necessity) and to do all I can to act in that manner the law commands. With this position, however, there is always the risk to misunderstand this duty to be free and to interpret it as a voluntaristic choice. In order to avoid this possibility, let me recall the resuming of Kantian position proposed by V. Mathieu in his reflection on the concept of justice. If we take what we called system of freedom (what makes possible free agents exercise their freedom without contrasting the exercise of others freedom), we can always think a situation in which this condition will be not respected. Some individuals, then, will act without this limitation, and their action, being less limited, will result more efficient, but this situation will be perceived as a violation of right and will require a restoration of the initial conditions. But whence come to us this exigency to obtain justice? This question is identical to that which asks whence the moral law come to us, because the two principles are coincident. The command is always to make abstraction to the position one occupies in regard to the others, in order to

²² See G. Fassò, *Storia della filosofia del diritto*, vol. II, Laterza, 2001, p. 325

²³ Caranti, p. 224.

determinate only what objectively has to be done. But this command seems unnatural, because it contrasts with my particular position, and, at first sight, my position is what for me is most important. But the moral law doesn't order to deny at all my particular position, but only to act in a manner in which my particular condition is not an obstacle which makes impossible a law capable to be applied to all individuals. In order to maintain such an abstract structure like justice, man is lead to subordinate to it his particular interests. To explain this possibility Mathieu introduces the notion of individual. In effect, what characterizes my individuality (the fact to be 'me' and not another one) is something radical (a phenomenon of which is our consideration about death: our impossibility, would say Heidegger, to experience the death of the others). The difference between individual and the rest is the most radical one man can ever think, but, paradoxically, the moral law impose me to make abstraction proper from this radical difference, the difference between 'I' and 'other', in order to establish what is right not for 'me' or for 'other' but objectively. But, says Mathieu, this *making abstraction of my 'I' from the position it occupies* is nothing more than the possibility itself to be an *individual*, to be a reality which is not reducible to the situation or to the elements which compose it. If there is such a reality indicated by the word 'I', which is installed in a body but doesn't coincide with it or with its mental states, then this reality will be able to abstract itself from the situation and nonetheless to be conceivable. The reality of self, because of its irreducibility to the sum of its (physical or psychical) contents, is only susceptible of a formal consideration. So, following Mathieu²⁴ we can propose another scheme:

- 1) We are subject capable of initiative
- 2) We are individuals
- 3) So, we are not reducible to the situation or to the sum of the elements which compose ourselves
- 4) We can abstract ourselves from the situation (in which we are embodied) as moral subjects.

From this follows that it is identical to say 'I am an individual' and 'I am free' and 'I am subject to the moral law', and this can explain why is so important for *me* this possibility of abstract from my situation, because or I remain 'I' also abstracting from all that constitutes my situation or I am reducible to my situation, but this second option implies I am not able to be the origin of free acts but simply the place of transit of actions which come from other. In this manner, the existence of an individual becomes identical with the existence of the moral law and shares with it the same status of "fact of reason". If this can be the object of a discipline like metaphysics, it's not to be discussed here.

What is important to remark, in conclusion, is that the existence of freedom cannot be denied from none scientific doctrine; but only its postulation allows us to understand the legitimacy of what we have called the system of liberty, because constitutes its condition of possibility. Without it, there not only falls the possibility of one or another kind of system of coexistence between individuals, but the possibility itself that such a system can be even conceived.

²⁴ Mathieu, p. 86.

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