

## Kant on 'Selbständigkeit'<sup>1</sup>

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*Liberté, égalité et fraternité* – was the slogan of the French Revolution. *Freiheit, Gleichheit, Selbständigkeit*<sup>2</sup> – was the formula around which Immanuel Kant arranged his legal philosophy and what we today would call his philosophy of economics. Evidently 'Selbständigkeit' is no translation of 'fraternité' it replaces the term 'brotherhood' with quite a different philosophical concept.<sup>3</sup> Kant's change of the French slogan mirrors not just a different literary fancy but stems from deliberate systematical reasonings. I will try to examine what could be understood by the term 'Selbständigkeit' in the context of a critical practical philosophy as it can be derived from Kant's *Metaphysics of Morals*. I suggest that Kant's idea of 'Selbständigkeit' could contribute to a modern understanding of the ambivalent relation between the state and the individual.

The following arguments shall lead us to this: 1) I will attempt to show what Kant meant by 'Selbständigkeit' in the context of his society; 2) I shall then try to locate this term in Kant's philosophy systematically, especially 3) to examine its systematic function in the scope of his philosophy of law, so that we 4) may try to derive from that a concept of 'Selbständigkeit' with which we could work today.

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1 I usually quote according to the Cambridge Text Edition (C.U.P. 1996, edited by M.J. Gregor & A. Wood) but I shall not always follow its translations completely for it does not always render the exact notion Kant had in mind. In those cases I will point that out and use my own translations. The quotations (AA X, Y) indicate the relevant book / page of the 'Akademieausgabe'.

2 Cf. W. Bartuschat, Zur kantischen Begründung der Trias 'Freiheit, Gleichheit, Selbständigkeit' innerhalb der Rechtslehre, in: G. Landwehr (Ed.), *Freiheit, Gleichheit, Selbständigkeit. Zur Aktualität der Rechtsphilosophie Kants für die Gerechtigkeit in der modernen Gesellschaft*, Hamburg 1999, p. 11-25; S.O. Hansson, Kant and the revolutionary slogan 'Liberté, Egalité, Fraternité', *Archiv für Geschichte der Philosophie* (76) 1994, p. 333-339; W. Schild, *Freiheit – Gleichheit – 'Selbständigkeit' (Kant): Strukturmomente der Freiheit*, in: J. Schwartländer (Ed.), *Menschenrechte und Demokratie*, Kehl am Rhein 1981, p. 135-176.

3 Cf. W. Schieder, Art. 'Brüderlichkeit', in: *Geschichtliche Grundbegriffe. Historisches Lexikon zur politisch-sozialen Sprache in Deutschland*, Vol. 1, p. 565 pp. (568).

1 The German language makes a twofold use of the adjective 'selbständig'. To *become* 'selbständig' means to grow up, to become an adult, whilst to *be* 'selbständig' either stands for running your own business or – used as a compliment – for being thought of as a person with much autonomy. By this the ordinary language links the concept of *moral* and *economic* autonomy (Selbstbestimmung). Someone who eminently has the ability to establish and defend his state of autonomy shows 'Selbständigkeit'.

These aspects derive from the former use of the term in the philosophical works of the pre-Kantian period.<sup>4</sup> The Greek term 'autarkia' and the Latin concept of 'sibusufficiencia' in the old Roman Right were usually translated into German by the term 'Selbständigkeit'.<sup>5</sup> Thus 'Selbständigkeit' meant, to be the owner of a household, to govern your own properties according to the specific laws of the 'oikos', and in a wider sense it indicated the financial or bourgeois independence of a citizen.<sup>6</sup> The bourgeois 'Selbständigkeit' functions as the pendant to the civic or political freedom of a state's citizen. And this was the stricter sense in which Kant made use of the term.

Kant himself confessed: 'It is, I admit, somewhat difficult to determine what is required in order to be able to claim the rank of a human being who could be called "selbständig"' (AA 8, 295). For Kant a hairdresser, e.g. who worked in his own house and let his customers come there *was* economically 'selbständig.' On the other hand, a hairdresser who instead had to go into his client's houses, *was not* (AA 8, 295). The difference expressed in this example is due to Kant's thought that anyone who managed to earn his living independent from the benevolence of others was not only free in his economic affairs but also in his social and political views. He thought that having sovereignty over your own business and household would educate you to participate adequately in the affairs of political government and sovereignty.<sup>7</sup>

Kant might have been remembering the old Roman practice that the political voice of someone belonging to another's household in fact belonged to the owner of the house and not to the owner of the voice itself and he might have thought that being economically dependent on another's judgement and order made you incapable to judge your political belongings indepen-

4 For the historical context of Kant's legal philosophy see: R. Brandt, *Rechtsphilosophie und Aufklärung*, in: R. Brandt, *Rechtsphilosophie der Aufklärung*, Berlin/New York 1982, p. 1-11.

5 Cf. T. Maissen, *Eigentümer oder Bürger? Haushalt, Wirtschaft und Politik im antiken Athen und bei Aristoteles*, in: M. Held & H.G. Nutzinger (Ed.), *Eigentumsrechte verpflichten. Individuum, Gesellschaft und die Institution Eigentum*, Frankfurt/New York 1998, p. 65-84.

6 Cf. M. Riedel, *Herrschaft und Gesellschaft. Zum Legitimationsproblem des Politischen in der Philosophie*, in: Z. Batscha (Ed.): *Materialien zu Kants Rechtsphilosophie*, Frankfurt am Main 1976, p. 125-151 (138 pp.).

7 Cf. Bartuschat, *Zur kantischen Begründung der Trias 'Freiheit, Gleichheit, Selbständigkeit' innerhalb der Rechtslehre*, l.c., p. 13.

dently, too. But, regardless of what his exact motives were, by this Kant excluded not only the poor, but also women, children and in fact anyone of his contemporaries who could not afford his own economic business from active political rights. And it seems he thereby corrupts his transcendental argumentation confusing it with contingent empirical reasonings.<sup>8</sup> Kant differentiated between 'Staatsbürgern' and 'Staatsgenossen'. One cannot translate this properly but I think speaking of 'members of the state' versus 'charges of the state' gives us a first idea of what he meant. Those persons who achieve no economical 'Selbständigkeit' are only passively integrated into the state: they enjoy their fundamental rights as human persons but lack political options. Neither may they vote, nor can they be elected nor can they make any political initiatives at all. Thus their status is not only somewhat lower than that of the full members of the state, but substantially different;<sup>9</sup> whilst Kant speaks of the latter as 'Glieder' (the organic limbs) of the community, he refers to the former only as 'Teile' (the mechanical parts) of it.

'Not all people qualify with equal right to vote within this constitution, that is, to be citizens and not mere associates in the state. For from their capacity to demand that all others treat them in accordance with the laws of natural freedom and equality as *passive* parts of the state it does not follow that they also have the right to manage the state itself as *active* members of it, the right to organize it or to cooperate for introducing certain laws.' (AA 6, 315)

Now, there have been many suggestions why Kant took this option and wrote accordingly. Some suggest that Kant had wanted to stabilize some political interests of the ruling class of his time.<sup>10</sup> But if one only takes one glimpse at Kant's fearless attacks on what he knew to be the public's or the ruling classes' opinion in the fields of metaphysics, religion etc., it does not seem very plausible that he should then have corrupted his philosophy of

8 Cf. W. Kersting, *Wohlgeordnete Freiheit*, Immanuel Kants Rechts- und Sozialphilosophie, second edition, Frankfurt 1993, p. 381 pp.

9 W. Kersting criticizes Kant for that: 'Thus the concept of the passive citizen of a state is a contradictio in adjecto and vice versa the concept of the active citizen a tautology.' (in: *Wohlgeordnete Freiheit*, p. 384, my translation).

10 Cf. H. Klenner, *Zur Rechtslehre der reinen Vernunft*, in: M. Buhr & T. Oiserman (Ed.), *Revolution der Denkungsort oder Denkart der Revolution*, Berlin/Ost 1976, p. 162 pp. (172); R. Saage, *Eigentum, Staat und Gesellschaft bei Immanuel Kant*, Stuttgart 1973, p. 120-123; J.B. Müller, *Liberalismus und Demokratie*, Stuttgart 1978, p. 44 pp.; Riedel, *Herrschaft und Gesellschaft. Zum Legitimationsproblem des Politischen in der Philosophie*, in: Z. Batscha (Ed.), *Materialien zu Kants Rechtsphilosophie*, p. 125-151, (p. 140-144). F. Zotta, *Kant und der Besitz-individualismus*, Vorwort zur zweiten Auflage von: Saage, *Eigentum, Staat und Gesellschaft bei Immanuel Kant*, Baden-Baden 1994, p. 22-25.

law just because of the interests of the possessing few.<sup>11</sup> No, we had better take into account what Kant himself named as the reason for this crucial differentiation. He suggests that the '*volenti non fit inuria*'-formula would account for it since he who 'makes arrangements for *another*' can 'do the other wrong; but he can never do wrong in what he decides upon within regard to himself' (AA 6, 313). Kant's further argument for dividing political citizenship into two classes (depending on differences in property) then derives from his repeated claim that there was an important link between the economic situation of a man and his political abilities. A man who is used to managing his own affairs independently and by his own judgement will be able to do so in political affairs, too, and thus, if these persons make rules for the whole of the society they truly represent the 'united will of the people' (AA 6, 313). Hence for Kant making the political 'Selbständigkeit' dependent on economic 'Selbständigkeit' was a consequence of experienced reasoning.<sup>12</sup>

We do not think this way today.<sup>13</sup> But this much seems true: there *is* some link between our economic and our political situation.<sup>14</sup> So, before leaving Kant's respective thoughts behind without further regard, we should look for the *systematical*<sup>15</sup> reasons Kant might have had for his opinion in order to see if and what there is contained in these systematical arguments that might still be of use today.<sup>16</sup>

2 *Freedom* is the source of the entire practical philosophy of Kant. Freedom founds his *Metaphysics of Morals*, that is: his theory of right and applied ethics.<sup>17</sup> Freedom is the *ratio essendi* of Kant's moral law. And establishing *states of freedom* is what Kant's practical philosophy altogether – including

11 Cf. G. Luf, *Freiheit und Gleichheit. Die Aktualität im politischen Denken Kants*, Wien 1978, p. 77 pp.

12 The interpretation of W. Bartuschat goes beyond that. He suggests that Kant had wanted a certain form of liberal policy installed. Since Kant knew that a slavish mind would not live up to the ideals of freedom and hence would not politically promote their application, Bartuschat argues, Kant saw it as an important condition of self-stabilization and self-improvement of each republican government to integrate only those into 'colegislation' who could be expected to work for freedom. Cf. *Zur kantischen Begründung der Trias 'Freiheit, Gleichheit, Selbständigkeit'*, l.c., p. 20 pp.

13 Cf. Bartuschat, as quoted, p. 24; Kersting, *Wohlgeordnete Freiheit*, l.c., p. 383.

14 Cf. J. Rawls, *Kantischer Konstruktivismus in der Moraltheorie*, in: *Die Idee des politischen Liberalismus, Aufsätze 1978-1989*, herausgegeben von W. Hirsch, Frankfurt am Main 1992, p. 80-83.

15 Cf. Schild, *Freiheit – Gleichheit – 'Selbständigkeit' (Kant): Strukturmomente der Freiheit*, l.c., p. 143 pp.

16 For the historical reasons see: H. Krüger, *Kant und die Staatslehre des 19. Jahrhunderts. Ein Arbeitsprogramm*, in: Blühdorn & Ritter (Ed.), *Philosophie und Rechtswissenschaft*, Frankfurt am Main 1969, p. 55.

17 Cf. F. Kaulbach, *Die Kopernikanische Denkfigur bei Kant*, in: *Kant-Studien* 64, p. 30 pp.; and H. Oberer, *Ist Kants Rechtslehre kritische Philosophie?*, in: *Kant-Studien* 74 (1983), p. 218-224.

the *triade* of freedom, equality and 'Selbständigkeit' here at stake – is aiming at.<sup>18</sup> Consequently Kant makes freedom the first and highest principle of all practise. Two different notions of freedom have to be distinguished: First the concept of freedom as used for the *foundation* of practical metaphysics in the *Groundworks of the Metaphysics of Morals* and the *Critique of Practical Reason*, second the concept of freedom *within* moral, legal and political philosophy. Both are linked with each other by Kant's theory of the categories of practical reason: the so-called *categories of freedom* (AA 5, 66).

Due to Kant's terminology we differentiate freedom in general from *transcendental freedom*. Transcendental freedom then means the ability of human beings to act on rational principles and not only forced by motives, inclinations and affections. It names our ability to spontaneously start an action out of rational deliberation (AA 5, 32). According to Kant this freedom cannot be fathomed at all if we do not suggest that this freedom *is* always bound to a certain inner law and a higher necessity than the one deriving from existing as a finite sensual being. Were our will merely 'free' in that sense, that is was rid of any binding ties, it could not be conceptualised except as chaos and would therefore contradict the theoretical philosophy of Kant. In order to harmonize with the lawfulness of natural sciences proposed there, transcendental freedom can only be conceptualised as a higher determinative order than that of ordinary sense phenomena.

So, transcendental freedom can exist only in the form of a certain 'law' of itself that determines its inner structure and at the same time prescribes its phenomenal appearance. This is for Kant why man is free and yet obliged to make a certain use of this freedom (AA 5, 36). We have the so-called *freedom from* something only because we have the *freedom to* follow the inner moral law of transcendental freedom. This law is, as everybody knows, expressed in Kant's categorical imperative to 'act only in accordance with that maxim through which you can at the same time will that it becomes a universal law' (AA 5, 31). The moral law expressed in this imperative systematically unites all the fields of practise under a single and common concept that Kant holds to be of unconditional value.<sup>19</sup>

Moral, legal and political freedom as specific forms of moral practise therefore shall articulate themselves as appropriate expressions of the transcendental freedom, that means: our practical freedom should try to realize the

18 Cf. Bartuschat, Zur kantischen Begründung der Trias 'Freiheit, Gleichheit, Selbständigkeit', l.c., p. 15.

19 Cf. W. Naucke, Kants Kritik der empirischen Rechtslehre, in: Sitzungsberichte der Wissenschaftlichen Gesellschaft an der Johann Wolfgang Goethe-Universität Frankfurt am Main, Stuttgart 1996, p. 191, and P. Unruh, Die Herrschaft des Rechts. Zur Staatsphilosophie Kants, Baden-Baden 1993, p. 44.

moral law of transcendental freedom in the outer appearance of all our free actions. It's obvious that we are operating with a concept of freedom in this latter sense when speaking of freedom and equality in the context that was induced by introducing Kant's transformation of the French 'liberté, égalité et fraternité'-postulations.<sup>20</sup>

Since for Kant these forms of freedom *are* always bound to realize the final end of transcendental freedom in general: the moral law,<sup>21</sup> the question arises, how then can our phenomenal freedom do this? How is it possible that pure reason gives our phenomenal freedom a certain shape that expresses the moral law appropriately? First of all the moral law in Kant's practical philosophy differs due to the relevant context we are looking at. In his moral philosophy Kant of course thinks of how to build up a good conviction and to pursue morally good ends. But in his philosophy of law, pursuing the moral law no longer expresses seeking a universally shared motive or a universally shared end for public actions. Instead, the law of the legal philosophy of Kant is that each and everyone can pursue his own individual concept of the good and of his or her happiness. Therefore, the outer freedom of acting in Kant's legal philosophy is not influenced by the categorical imperative in that sense that everyone has to act on a moral impetus. The ethical grounding of legal freedom is expressed only in that sense that this freedom finds its boundaries in the freedom of all the others a priori.

Hence for Kant

'Right is the sum of the conditions under which the choice of one can be united with the choice of another in accordance with a universal law of freedom.' (AA 6, 231)

'Thus the universal law of Right, so act externally that the free use of your choice can coexist with the freedom of everyone in accordance with a universal law, is indeed a law, which lays an obligation on me, but it does not expect, far less demand, that I *myself should* limit my freedom to those conditions just for the sake of this obligation; instead, reason says only that freedom *is* limited to those conditions in conformity with the idea of it and that it may also be actively limited by others' (AA 6, 231/232)

'Therefore, if a certain use of freedom is itself a hindrance to freedom in accordance with universal laws (i.e. illegal), coercion that is opposed to this (as a hindrance of a hindrance of freedom) is consistent with free-

20 Cf. W. Dörpinghaus, *Der Begriff der Gesellschaft bei Kant* (Diss. Köln) 1959, p. 91.

21 On the importance of the concept of transcendental freedom for Kant's philosophy of law see: W. Busch, *Die Entstehung der kritischen Rechtsphilosophie Kants*, Berlin/New York 1979, p. 70 pp.

dom in accordance with universal laws, that is, it is right. Hence the authorization to coerce someone who infringes upon it, is connected with the idea of right by the principle of contradiction.’ (AA 6, 232, with changes in translation)

This important extensional differentiation between law and ethics does not mean that they are derived from intensional differing principles. Both of them are linked with the concept of transcendental freedom in the very same way: by the *categories of freedom*.<sup>22</sup> Those categories articulate the *a priori structure* of practical reason, says Kant (AA 5, 65) or, in other words, they help us as ‘practical elementary concepts, [that] have as their basis the form of a pure will’ (AA 5, 66), that is: they let us find the way how to *synthesize a priori* a certain field of practise with the moral law itself.<sup>23</sup> Thus these categories apply themselves on different areas – on the area of inner actions in morals and of the area of outer actions in law. Hence Kant insists that the matter of the philosophy of law is restricted to the ‘external and indeed practical relation of one person to another, insofar as their actions, as facts, can have (direct or indirect influence) on each other.’ (AA 6, 231)

The practical categories of *quantity, quality and modality* are of no special interest for our focus because what is defined by them – the integration of subjective and objective strivings in universal laws, the synthesis of rules of commission, omission and exceptions and the modality of the permitted and the forbidden – remains similar in both ethics and natural law. The crucial content of the ethical and the legal legislation of practical reason shows itself primarily within the three categories of *practical relation* which refer first ‘to personality’, second ‘to the condition of the person’ and third ‘reciprocally, of one person to the condition of others’ (AA 5, 66/67). If we are looking for the meaning of these categorical structures we have to examine which particular rights could be shaped by such conceptual forms.

Before starting with certain topics and themes of legal philosophy, Kant had already split the whole of it in two major parts, due to the fact that he held the opinion that one of these parts could not adequately be explicated by philosophy and thus was to be ‘put in the prolegomena’ (AA 6, 239). What we are having in mind is Kant’s differentiation between *inner and outer* innate rights. Kant thought since there was only *one* innate inner right – freedom – including its logical implications, but *a multitude* of outer innate rights, only the latter should be thematized within the metaphysics of law.<sup>24</sup> Kant

22 Cf. C. Dierksmeier, *Der politische Imperativ. Zum systematischen Ort der Politischen Philosophie in Kants praktischer Philosophie*, Marburg 1996 (Microfiche, p. 41 pp.).

23 On the topic of practical synthesis a priori within Kant’s legal philosophy see: W. Bartuschat, *Apriorität und Empirie in Kants Rechtsphilosophie*, *Philosophische Rundschau* (34) 1987, p. 31-49.

24 Cf. R. Gröschner, C. Dierksmeier, M. Henkel & A. Wiehart, *Rechts- und Staatsphilosophie. Ein dogmenphilosophischer Dialog*, Berlin 2000, p. 220 pp.

thought so, because the inner state of man was evidently no field of outer practise where actions 'as facts' can collide. Let us first see what *are* these 'logical implications' of the principle of freedom – that is the impact of the *categories of freedom* on the field of *inner* innate rights – before discussing the *outer* innate rights.

*Freedom*, as a person's categorical relation to each *personality*, comes first. The right to act freely as long as one does not hinder the freedom of the others' *and* the right to force anyone who does not respect my legal freedom can't be taken or given away, argues Kant; it is my original innate natural right. The state has to secure and protect this right but it does not create it. All the following deductions only explicate what already is implicated in this birthright.<sup>25</sup>

Since respecting the other's right like mine cannot depend on whether the other is male or female, Christian or not, because it only depends on his or her being human, all differentiations in the right-system that do not go well with this fundamental equality must be abolished. So, concentrating on the inner meaning of legal freedom we have come to the second element of the *triade* at stake: *equality*. Its inner principle is, as Kant says, not to be bound by others 'to more than one can in turn bind them' (AA 6, 238) and it thereby articulates the categorial relation everyone has to the '*condition*' of everyone else's personality.

Coming then to the relation that everyone's '*condition*' has to the *condition of everyone else 'reciprocally'* Kant names every 'human being's quality of being *his own master (sui iuris)*' (AA 6, 238) as the adequate manifestation of our birthright, without exactly clarifying what he suggests us to understand under the latter. Altogether, to live according to these three principles – that is in sum: not to 'make yourself a mere means for others but be at the same time an end for them' (AA 6, 237) – is for Kant the appropriate explication of the old Ulpian formula '*honeste vive*' and manifests our innate inner right the way it should be.<sup>26</sup>

Since, in fact, other persons can infringe upon these three forms of our *inner* innate right only by means of *outer* actions we can thematize possible conflicts and conflict-hindering measurements only in the realm of those outer actions and we therefore have to enter the area of outer rights in order to discuss how our inner right becomes real in the phaenomenal world at all. We thus have to concentrate also on our possibility to harm others and have

25 Cf. M. Köhler, 'Das angeborene Recht ist nur ein einziges ...'. Menschenrecht, Grundrechtsverhältnis und Rechtssystem, in: Vielfalt des Rechts. Einheit der Rechtsordnung, Hamburger Ringvorlesungen, Vol. 85 (1994), p. 61 pp.

26 Cf. D. Pasini, 'Das "Reich der Zwecke" und der politisch-rechtliche Gedanke', in: Akten des vierten Internationalen Kant-Kongresses (1975), Vol. II/2, Berlin/New York 1974, p. 675-691, and J. Hruschka, 'Die Person als Zweck an sich selbst. Zur Grundlegung von Recht und Ethik bei August Friedrich Müller (1733) und Immanuel Kant (1785)', Juristenzeitung (JZ) 1990, p. 1-15.

to focus on the respective demand: *'neminem laede'*. And since avoiding the possibility of reciprocal infringing upon another's rights *would* mean to 'stop associating with others and shun all society' but *shall not* imply this, Kant suggests that we are a priori bound to 'enter into a society' or, if necessary build it up, 'in which what belongs to each can be secured to him against everyone else' (AA 6, 237): *'suum cuique tribue'*. The latter is then expressed in Kant's dictum: *exeundum est e statu naturali* – we do not only have to arrange our social affairs somehow, but we are obliged to construct a state of 'public justice' (AA 6, 306). Thus Kant postulates the republican state of right in which each and everyone can live under a publically known and guaranteed law ('Rechtsstaat').

In his deductions of the Public Right (AA 6, 308 pp.) Kant again states that the fundamental right referring to each 'personality' is 'freedom' and that the main right referring 'to the condition of the person' is 'equality'. But the third relation 'reciprocally, of one person to the condition of others' (AA 5, 66/67) transforms itself now into 'Selbständigkeit' (AA 6, 314/315). Although we do not immediately see clearly what we have to understand under that concept of 'Selbständigkeit' in this context we already know, surprisingly enough, that it shall become real not only by each and every single person itself but 'reciprocally', that is, by each person acting upon other persons' conditions.

Although being a subject of free and equal rights by birth, using them adequately indicates a specific *state* a person must be in and that state isn't reached out of nothing.<sup>27</sup> We all know that a certain amount of education, experience and, of course, age is needed to make proper use of our rights. Therefore, most of us think, it is society's obligation to make us apt for using our rights. We are thus speaking of a right to education, a right to information and so on. In German Idealism, these notions were later subsumed under the useful concept 'Rechtsbefähigungsrecht',<sup>28</sup> which means: the (secondary) right to be enabled to recognize and use your (primary) rights properly. Kant agrees with this and that leads us directly to the systematical function of Kant's concept of 'Selbständigkeit' within his legal philosophy.

3 *Freiheit, Gleichheit and Selbständigkeit* have a double character: on the one hand they are presuppositions, on the other hand they result from cer-

27 Cf. Luf, *Freiheit und Gleichheit. Die Aktualität im politischen Denken Kants*, l.c., p. 150 pp.

28 The term was coined by K.C.F. Krause (1781-1832) but the notion is found in Fichte and Hegel as well. On Krause and Kant see C. Dierksmeier, *Karl Christian Friedrich Krause und das 'gute' Recht*, *Archiv für Rechts- und Sozialphilosophie (ARSP)*, Sonderheft: *Deutscher Idealismus*, Vol. 85 (1/1999), p. 75-94, *Kant versus Krause – sobre o Comum e as Diferencas no fundamento da Moral e do Direito*, in: *Estudios em Homagem a Joachim M. da Silva Cunha*, Portucalense 1999, p. 87-100, *Kant versus Krause – Über Gemeinsamkeiten und Differenzen in der Begründung von Moral und Recht*, *Studia Iuridica* 45, Coimbra 1999, p. 71-82

tain conditions. Just as freedom in its transcendental mode is the presupposition for practical freedom and just as the abstract concept of equality is the conceptual condition for shaping certain rights of anti-discrimination so the transcendental notion of 'Selbständigkeit' founds the practical demands for civil 'Selbständigkeit'. This is the noumenal character of those terms.

The phaenomenal character is just the other way round: Only specific modes of practical freedom realize transcendental freedom, only certain rules of equality give expression to the principle of the fundamental equality of all human beings and only concrete forms of civil 'Selbständigkeit' may realize what the ideal concept of 'Selbständigkeit' intends. So, if there are certain rights of certain freedoms and certain rights necessary for realizing civic equality, there have to be respective rights of 'Selbständigkeit' as well. Under the hypothesis that we all knew what kind of living was the appropriate realization of 'Selbständigkeit' we could deduce, that this specific way of living should be guaranteed to anyone. Just as every citizen is given the rights of equality and freedom he should then be given the right to live in a certain mode of 'Selbständigkeit'.<sup>29</sup>

But can we conclude therefrom that the state should become a social and welfare state and give anyone what the state thinks that he or she needs?<sup>30</sup> If, some argue, one can only properly use his rights as a citizen when one has a certain amount of property and security, why not simply take the money from the rich and give it to the poor in order to enable everyone to enjoy his full political rights?<sup>31</sup> Even notwithstanding the practical problems that arise by that proposal one should be careful to take this as an adequate Kant-interpretation. Kant held the paternalistic regime to be 'the most despotic of all (since it treats citizens as children)' (AA 6, 317).<sup>32</sup> Thus he never argued in favour of expropriative levelling,<sup>33</sup> and his reasons were certainly not to flatter the upper class or to fight social equality.

We see, the genuine problem starts right there: We do *not* know and we cannot define by government what exactly fits the concept of the 'Selbständigkeit' of this or that person. And that's due to the notion 'Selbst-' in 'Selbständigkeit'. Principally, it is up to oneself alone if and how one rea-

29 Cf. Schild, *Freiheit – Gleichheit – 'Selbständigkeit'* (Kant), l.c., p. 149; K. Kühl, *Eigentumsordnung als Freiheitsordnung*, Freiburg/München 1984.

30 Cf. W. Brugger, *Menschrechtsethos und Verantwortungspolitik*, Freiburg/München 1980, p. 296f.

31 Cf. C. Langer, *Reform nach Prinzipien*, 1986, p. 157 pp. For critical reflections on this argument see: S. Koslowski, *Die Geburt des Sozialstaats aus dem Geist des Deutschen Idealismus*, Weinheim 1989, p. 130-131.

32 Cf. W. v. Humboldt, *Ideen über Staatsverfassung* (1791), in: *Gesammelte Schriften*, Vol. 1, Berlin 1968, p. 83.

33 Cf. Kersting, *Wohlgeordnete Freiheit*, l.c., p. 56 pp.

lizes his or her 'Selbständigkeit' because it is the outer expression of autonomy ('Selbstbestimmung').<sup>34</sup> There cannot and there shall not be a centralized version of how to live your autonomy.<sup>35</sup> Thus there can't be a master-plan to realize 'Selbständigkeit'. Does this mean to leave it all to chance? I don't think so.<sup>36</sup> Since certain conditions of bourgeois existence remain the same for everyone, and since certain forms of rational deliberation occur in any situation of real freedom and social existence, we could say that at least these conditions should, if possible, be granted to anyone. But let us first have a closer look at Kant's argumentation.

In § 46 of his 'Rechtslehre' Kant tries to define the concept of the 'Staatsbürger' (citizen of the state) by the following three aspects:

'lawful freedom, the attribute of obeying no other law than that to which he has given his consent; civil equality, the attribute of not recognizing among the people any superior with the moral capacity to bind him as a matter of right in a way that he could not in turn bind the other; and third, the attribute of civil 'Selbständigkeit', of owing his existence and preservation to his own rights and powers as a member of the commonwealth, not to the choice of another among the people and, based on this, his legal identity not to be mastered or represented by another where his rights are concerned.' (AA 6, 314, with changes in translation)

When Kant argues that the ability to earn one's living and to hold up one's existence by one's own means and power defines 'Selbständigkeit', we can distinguish an active and a passive moment in this. First of all, we look at the activity a subject performs (or does not perform) in order to manifest his independent existence. But secondly, we also need to take into consideration the conditions that make this activity possible. Now, in all of Kant's practical philosophy, establishing and stabilizing the so-called '*conditions of possibility of*' something that itself is strictly demanded by the moral law, has a high argumentative rank. It would be a performative contradiction to demand something from someone and to neglect at the same time '*the conditions of possibility of*' what is demanded. Thus, making sure that the subject of duties is given the conditions to fulfill these, becomes a consequent secondary demand.

So, Kant does not say that the distinction between the politically passive and the active citizen always has to remain the same. Since 'having some

34 Cf. G. Geismann, *Politische Philosophie – hinter Kant zurück? Zur Kritik der 'klassischen' Politischen Philosophie*, Jahrbuch für Philosophie 2/1992, p. 319 pp.

35 Cf. O. Höffe, *Politische Gerechtigkeit. Grundlegung einer kritischen Philosophie von Recht und Staat*, Frankfurt 1989, p. 469-474.

36 Cf. I. Fetscher's critique of W. Kersting's arguments, in: M. P. Thompson (Ed.), *John Locke und Immanuel Kant. Kritische Rezeption und gegenwärtige Relevanz*, Berlin 1991, p. 137 pp.

property (and any art, craft, fine art, or science can be counted as property)' (AA 8, 296) will suffice to fulfill the criterium of the politically requested 'Selbständigkeit', no-one is principally excluded from the class of the 'Selbständigen'.<sup>37</sup> But if nobody is principally excluded why then not postulate everybody should principally be included in it? In other words: abolishing the paternalistic state model, via the argument for individual freedom, obliges us to guarantee *anyone* the 'conditions of possibility of' his or her civil and civic 'Selbständigkeit' instead.

Against all those interpreters who would like to make Kant an ancestor of the minimal state model<sup>38</sup> let us re-read the important sentence that the state's laws should always be such that anyone may, by the use of his own abilities, be able to 'work his way up from this passive condition to an active one.' (AA 6, 315) Taking this seriously makes us read: the proper use of one's own abilities must be enough for everyone to achieve the state of political and economic 'Selbständigkeit'. This would explain Kant's reasoning that the third category of practical relation would take its way 'reciprocally, of one person to the condition of others' (AA 5, 66/67) for then all those conditions that might hinder someone from becoming 'selbständig' by the use of his own abilities must be abolished by the help of others and – vice versa – all those conditions which enable people to be their own masters must be promoted likewise.<sup>39</sup>

Thus we can interpret that with Kant one can vote for a three-level-model of state activity in order to arrange the subject's way of living. First, of course, there is the state's obligation to grant subsistence to everyone who lives in the realm of the state. This obligation is due to the individual's delegation of his entire force to the state. Since Hobbes, it is clear that any individual who does not find his subsistence in a state will be given back his natural right to use force in order to hold up his existence. In a way this reflects the original *freedom* of man in its negative mode. Second, there is the state's obligation to finance those institutions that belong to its essence: the law system, police, punitive right and so on. For these exercises the state may distribute the burden equally on its citizens, which is just a logical implication of the right of *equality*. And third, the state has to enable its citizens to live a life in 'Selbständigkeit' if the state does not want to mother them all day. Hence the state has to guarantee the *conditions of possibility of 'Selbständigkeit'* such as education, schooling, infra-structure, as well material and logistical support for those who are, by no fault of their own, out of work. This burden

37 For example, Kant does not at all restrict the category of 'Selbständigkeit' on landowners as does his contemporary: Th. Schmalz, *Das natürliche Staatsrecht*, Königsberg 1804, p. 33.

38 Cf. P. Koslowski, *Gesellschaft und Staat. Ein unvermeidlicher Dualismus*, Stuttgart 1982, p. 225.

39 Cf. V. Gerhardt, *Immanuel Kants Entwurf 'Zum Ewigen Frieden'. Eine Theorie der Politik*, Darmstadt 1995, p. 79 pp.

then has to be paid by those who profit from the system of 'Selbständigkeit', in other words, those who have work and get their share of the merits of a free-market-economy. Thus we could call this reasoning a fundamental demand of 'Teilhabegerechtigkeit' (participatory justice).<sup>40</sup>

One can understand the legitimacy of this last point by a simple thought experiment. Taking for granted that a free-market-society exists with a certain amount of structural unemployment and that it, notwithstanding, has a prosperity that is about 100 units higher than that of a comparable socialistic economy of artificially achieved full employment, we can see that this capitalistic surplus is profitable only for those who are integrated in the big system of working and earning. Thus it is just fair to insist on taking what is needed to support those who are in structural unemployment from these 100 units. Otherwise, those who, by no fault of their own, are not integrated in this system were put at disadvantage without any ethical legitimation. They would merely serve as means for the utility and prosperity of those who had the luck to be employed. And this would strictly contradict the categorical imperative that demands that everyone does not merely exist as a mere means but always also as an end in himself.

The doctrine of progressive taxes also finds its legitimation right here, because those who prosper more from the free market do not only earn the fruits of their own ambition but additionally also a bigger share of what we can call the structural surplus of the capitalist system. Therefore, that they would have to give a bigger share, could then be understood as an implication of the right of 'Selbständigkeit' as well. (And let us really not forget, this share may not escalate to absurd heights but serves only to support those who really want to reach a state of 'Selbständigkeit'!) Consequently, all three forms of the state's fundraising may correspond to the positive notions of the three basic individual rights and may serve as their logical implications. Thus, a state of *Freiheit, Gleichheit and Selbständigkeit* would – at least philosophically – be able to exist out of its own principles and stabilize itself by laws that go well with the autonomy of each and every subject.<sup>41</sup>

40 Cf. M. Köhler, *Freiheitliches Rechtsprinzip und Teilhabegerechtigkeit in der modernen Gesellschaft*, in: G. Landwehr (Ed.), *Freiheit, Gleichheit, Selbständigkeit. Zur Aktualität der Rechtsphilosophie Kants für die Gerechtigkeit in der modernen Gesellschaft*, Hamburg 1999, p. 103 pp.; *Ursprünglicher Gesamtbesitz, ursprünglicher Erwerb und Teilhabegerechtigkeit*, in: R. Zazyck, M. Köhler & M. Kahlo (Ed.), *Festschrift für E.A. Wolff zum 70. Geburtstag*, Heidelberg 1998, p. 247 pp.; *Iustitia Distributiva. Zum Begriff und zu den Formen der Gerechtigkeit*, *Archiv für Rechts- und Sozialphilosophie (ARSP)*, Vol. 79 (1993), p. 457 pp.

41 Cf. G. Söchting, *Eigentum und Sozialhilfe. Die eigentumstheoretischen Grundlagen des Anspruchs auf Hilfe zum Lebensunterhalt gem. § 11 Abs. 1 BSHG nach der Privatrechtslehre Immanuel Kants*, Berlin 1995, p. 215 pp.

4 Let us now reflect on the systematic conclusions we can deduce from the foregoing discussion. When regarding the specific character of right, in comparison with ethics, we saw that right correlates with the legitimation of forcing people to act according to its laws whilst moral and ethical obligations only appeal to free will. This helps us understand the question why Kant transformed the concept of 'fraternité' into 'Selbständigkeit' thoroughly. The solidarist slogan of 'fraternité' and also the Christian concept of charity could not solve the problem at stake here because one cannot clearly distinguish which of their specific demands are to be realized only by free moral motivation, and which could also be imposed by legal coercion. Therefore Kant decided to thematize 'Selbständigkeit' in his *legal* philosophy.

This decision also opened the way for a new understanding of participation ('Teilhabe'<sup>42</sup>) in the realm of a genuine philosophy of *freedom*. Kant's peculiar concept of 'Selbständigkeit' first made it possible to develop a concept of 'Teilhabegerechtigkeit' (participatory justice) next to the older model of 'Verteilungsgerechtigkeit' (distributive justice). Whilst the concept of distributive or social justice had mostly focused on a non-growing amount of goods that had to be distributed by a perfectly informed statesman, the new concept of participatory justice stresses not so much the distribution of goods but the foregoing economic-social and political participation<sup>43</sup> of individuals which in the end would lead to an even bigger amount of prosperity and welfare for all.

This form of justice insists on the fact that because everyone is born with the right to realize himself in the outer world and therefore needs a certain material sphere of his or her own, he or she has a priori the right to participate in the nation's powers and possessions.<sup>44</sup> Realizing this participation within social surroundings can and will have different forms. One of these is still and, of course, will always be distribution, but distribution is not its central aspect. In the foreground stands the individual creativity and the *subsidiarian* initiative for subsistence and welfare. Thus the strict alternative between either acknowledging the value of *iustitia distributiva* (and then coming close to socialistic options) or more or less reduce politics to the minimal state model plus merely contingent and non-systematic acts of benevolence, charity and solidarity can and, I think, should be left in favour of an integrative model that transforms the *principle of freedom* into a plausible policy for the promotion of individual and social 'Selbständigkeit'.<sup>45</sup>

42 Cf. W. Huber & H.E. Tödt, *Menschenrechte. Perspektiven einer menschlichen Welt*, Stuttgart/Berlin 1977, p. 93 pp.

43 Cf. H.-J. Menzel, *Legitimation staatlicher Herrschaft durch Partizipation Privater?*, Berlin 1980.

44 Cf. Süchting, *Eigentum und Sozialhilfe*, l.c., p. 193-211.

45 Cf. Heinrich v. Treitschke, *Politik*, Leipzig 1897, Vol. I, p. 83f.; E. Rosenthal, *Der Wandel der Staatsaufgaben in der letzten Geschichteperode (Rektoratsrede)*, Jena 1913, p. 11.

## Summary

With the term 'Selbständigkeit' Kant completes his notion of freedom and equality. The formula 'Freiheit, Gleichheit, Selbständigkeit' should replace the term 'brotherhood' brought up by the French Revolution.

The article examines what would be the systematically adequate interpretation of 'Selbständigkeit' within Kant's philosophy of law. The objective of this investigation is to find out whether and how the concept of civil and civic 'Selbständigkeit' includes certain obligations of society as a whole to enable each and every individual to reach a state of 'Selbständigkeit'.

If so, it could be shown that some aspects of nowadays' notion of 'social justice', far from being contrary to an autocritical concept of freedom, derive their legitimation directly from the principles of liberal thinking themselves. 'Selbständigkeit' could thence define the basis and limits of a state's concern in respect to the personal wellbeing of his citizens and thus offer a critical and normative concept for today's social politics.