

## **Kant Goes Fishing.**

### **Kant and the Right to Property in Environmental Resources**

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#### Abstract:

We can observe a connection between some serious environmental problems caused by the overexploitation of environmental resources and the particular conceptions of property rights that are claimed to hold with regard to these resources. In this paper, I investigate whether Kant's conception of property rights might constitute a basis for justifying property regimes that would overcome some of these environmental problems. Kant's argument for the right to property, put forward in his *Doctrine of Right*, is complex. In Section I, I attempt an interpretation. Section II works out the defining characteristics of the conception of property rights that Kant's argument establishes and investigates their implications for determining property regimes in environmental resources. Kant proposes a minimalist notion of the right to property as a triadic relation between persons with regard to an object, justified only on the condition that it is universalizable in the given circumstances. I argue that this notion offers a promising account for determining property relations with regard to environmental resources. By way of illustration, in Section III, I focus on an example of Kantian property rights in one type of environmental resource: the marine fisheries.

The 'stock-fishery' off the great bank *Terre Neuve*

The green and white stockfish, called *Cod*, is dried and salted. The dried fish are called 'stockfish'... Up to 300 fishermen fish on the great bank yearly, of whom each catches 25,000 stockfish. Everything is done with fishing rods. The lure is a piece of a herring and hereafter the undigested food in the stomach of the stockfish. This fishing goes very quickly.

I. Kant, *Physische Geographie*<sup>1</sup>

The fishery off Newfoundland, Canada, that Kant describes is closed today. Extensive fishing has depleted the fish stock. The first moratorium on fishing the Newfoundland cod was announced in 1992<sup>2</sup>, yet, apparently too late for the survival of the stock. Would things have turned out differently if fishery regimes had been based on a Kantian conception of property rights? More importantly, could the introduction of alternative property regimes grounded on a Kantian conception of property rights prevent similar destruction of environmental resources?

My aim in this paper is to investigate whether Kant's conception of the right to property, put forward in his *Doctrine of Right*, constitutes a basis for justifying property regimes in environmental resources that would overcome some of the environmental problems we face today. This question arises from the observation that there is a connection between some serious environmental problems caused by the overexploitation of environmental resources and the particular conceptions of property rights that are claimed to hold with regard to these resources. My approach thus focuses on the role played by the conception of property rights in the attempt to

overcome certain environmental problems. It is not concerned with the more general justification of claims for the protection of the environment.

Kant is not well known as a theorist for the nature and justification of property rights. In particular, Kant's conception of property rights has not received much attention as a conception for dealing with the question of ownership in environmental resources.<sup>3</sup> I argue that this neglect is unjustified. Kant's argument for the right to property is complex. In Section I, I shall therefore attempt a detailed interpretation. Section II will work out the defining characteristics of the conception of property rights that Kant's argument establishes. I shall investigate the implications of these essential aspects of Kant's conception for determining property regimes in environmental resources. As an illustration, I shall, in Section III, focus on an example of Kantian property rights in an environmental resource: the marine fisheries.

### **I. Kant's argument for the right to property**

Kant argues for the right to property in his *Doctrine of Right*, the first part of his *Metaphysics of Morals*. Reading the *Doctrine of Right* is made difficult by the brevity and obscurity of Kant's argument. In this section, I shall nevertheless attempt an interpretation. Indeed, I claim, we can find in the *Doctrine of Right* an important and highly original argument for the right to property. A difficulty, however, concerns translation. There is considerable disagreement about how to render Kant's use of the terms 'recht' and 'Recht' in English. It is not always clear whether these should be translated as 'right', or 'just' and 'justice', respectively. The difference between the

translations is not unimportant and I shall try to distinguish between these concepts where possible.<sup>4</sup>

My interpretation of Kant's argument is based on Bernd Ludwig's revised edition of the *Doctrine of Right*.<sup>5</sup> Ludwig's most significant revision is the relocation of §2 of Chapter 1 into §6. I am not in a position to judge the exegetical accuracy of Ludwig's reconstruction. The revisions are helpful, however, in giving a coherent interpretation of the text. My reading of Kant's argument is further influenced by the work of Reinhard Brandt, Katrin Flikschuh and Kenneth Westphal. My own reading places particular emphasis on the question of how the right to property follows from Kant's conception of justice (and thus, as I clarify in Section II, from practical reason). Kant's conception of justice is also the point where I shall start my analysis.

### *1. Kant's conception of justice*

In the introduction to the *Doctrine of Right*, Kant distinguishes between that which is innately, or internally, just from that which is derivatively, or externally, just (6:237). There is only one principle concerning that which is innately just. This is the principle of freedom. More specifically, it is the principle of external freedom: a just situation is that in which every human being is externally free, that is, independent from being constrained by other people's actions. The actual nature of the human condition, however, is such that the pursuit of external freedom by one inevitably restricts the pursuit of external freedom by another. As a matter of fact, we do not inhabit 'an unbounded plane' on which 'people could be so dispersed... that they would not come into community with one another' (6:262). One person cannot be unrestrictedly free without undermining the unrestricted freedom of another. Under these conditions, the principle of unrestricted external freedom contradicts itself: if

everyone had unrestricted external freedom, then no one could have such freedom. The very concept of external freedom for each therefore entails that this freedom must be restricted. And since the principle holds universally for all human beings, external freedom must be restricted in a way that leaves the same freedom for everyone. Thus, Kant claims, '[t]his principle of innate freedom already involves the following authorisation...: innate *equality*, that is, independence from being bound by others to more than one can in turn bind them...' (6:237-38). The external freedom of each is guaranteed only by a restriction of freedom that can hold for everyone. This is precisely the idea of Kant's 'Universal Principle of Justice' (hereafter UPJ): '[a]ny action is *just* if it can coexist with everyone's freedom in accordance with a universal law' (6:230)<sup>6</sup>. Kant's conception of justice thus follows analytically from the 'principle of innate freedom'.

The UPJ thus specifies how the external freedom of one person can be reconciled with that of another: the restriction of one person's freedom is just only if it is universalizable. More generally, an action is just if it leaves all those affected by it free to pursue just actions themselves. It is unjust if those who are affected by it are hindered from performing just actions. The concept of a right can now be derived from that of just and unjust action. Consider Kant's example of a debtor and his creditor (6:232). The former acts unjustly if he does not pay his debt. The latter can therefore be said to have the *right* to be paid while the debtor has the corresponding *duty* to pay. More generally, we have the right that others restrict our external freedom only to an extent which is universalizable. And we have the duty to refrain from non-universalizable restrictions of the external freedom of others. Rights, and duties, are therefore universal. What is described as a situation in which the innate freedom of one is reconciled with that of others by a universalizable system of

limited restrictions of freedom can also be described as a possible, or consistent, *system of rights*.

The example of the debtor and his creditor shows a further point: the creditor acts justly if he uses coercion to constrain his debtor to pay the debt. For, Kant argues, any action which 'counteracts the hindering of an effect' promotes this effect (6:231). Since resistance to unjust action is resistance to the non-universalizable restriction of external freedom, it promotes external freedom. It is therefore just. Kant concludes that the concept of a right includes the authorisation to use coercion which would counteract coercion preventing exercise of the right (6:232).

Given this account of justice, how does Kant justify rights to property? The right to property in a thing seems to entail the right to exclude others from using the thing. Yet, how could there be a universal right to exclude? A Kantian argument for the right to property would have to show that the reconciliation of the external freedom of one with that of others requires the right to property in external objects. Kant's argument is extremely complex. A brief outline may help with the detailed investigation that follows.

Kant begins with an analysis of the notion of property. Property, or 'rightful possession', constitutes a non-physical, purely normative relation. To prove that we have indeed a right to property, it will have to be shown that the lack of a system of property rights is incompatible with the UPJ. Here we encounter a problem. On the one hand, the right to property seems to be a necessary condition for the pursuit of external freedom. As finite and embodied beings we need to have external objects reliably at our disposal in order to attain our aims. On the other hand, we are, as a matter of fact, under empirical constraint by living on a finite earth. Any claim to property by one compromises the freedom of everyone else by making possible

objects of their choice unavailable to them. Both a system including property rights and a system without property rights seems incompatible with the UPJ. However, without a solution to this dilemma, just action is impossible. Kant therefore introduces a 'permissive law': we obtain the permission to constrain others by excluding them from our possessions. Yet, how does Kant justify this patent violation of the UPJ? Kant rejects the premise, underlying both horns of the dilemma, according to which a property right can be established by a unilateral act. Under actual human conditions property rights are necessary for external freedom. But the UPJ requires that everyone's freedom be equally secured. If, therefore, there are to be property rights they must be equally valid for all. Consequently, the *right* to property can be established solely by a universal *duty* to respect each other's rights to property. Only a system of property rights thus based on a universal duty is compatible with the UPJ. Finally, the duty to respect others' property rights entails the duty to secure property rights by means of positive laws. The (provisional) violation of the principle of justice authorised by the permissive law is legitimate because it makes possible the full realisation and securing of a just condition in society. With this general outline in mind, we may venture into the details of Kant's argument.

## 2. *A deduction of the right to property*

In §1 of the first chapter of the *Doctrine of Right*, Kant analyses the notion of property, or rightful possession, of external objects. He states that '[t]hat is *rightfully* mine... with which I am so connected that another's use of it without my consent would wrong me' (6:245). In what, then, does this connection between me and the object consist? The connection might be thought to be merely physical. As long as I

was physically connected with the object it would be rightfully mine. It would follow analytically that using the object in my possession without my consent would directly interfere with my external freedom. The interference would thus wrong me. I could, for example, be holding an apple or standing on a piece of land. If someone wanted to use the apple or the land without my consent, she would have to employ physical force. She would have to snatch the apple from my hand or push me off the land. Her use of physical force would constrain my freedom to act.

This merely physical connection between me and the object, however, does not do the job required for the general definition of rightful possession. Once another person takes physical possession of the object I have claimed to be mine, the connection between me and the object is severed. According to the actual possession criterion of property, I can then no longer claim the object to be rightfully mine. But the objects I want to call my own are not necessarily in physical connection with me. I want to claim the apple mine, even if I left it on the table in the kitchen. Kant infers that 'it would be self-contradictory to say that I have something external as my own if the concept of possession could not have different meanings' (6:245). He thus distinguishes the physical possession of external objects from intelligible, or merely rightful possession. And he concludes that '[s]omething *external* would be mine only if I may assume that I could be wronged by another's use of a thing even *though I am not in [physical] possession of it*' (6:245). The notion of property, according to Kant, goes beyond the concept of physical possession. It is the notion of intelligible possession, that is, 'possession of an object *without holding it*' (6:246).<sup>7</sup>

As Kant points out in §5, the foregoing is only a 'nominal definition' of the concept of property. In order to prove that there can be a universal right to property, a 'real definition' is required (6:248-49).<sup>8</sup> As I have shown, only the right to physical

possession follows analytically from the UPJ. The right to a merely intelligible possession, however, is a synthetic proposition: the proscription of interfering with this latter kind of possession does not follow analytically from innate freedom. The question of how to prove the right to property resolves itself, therefore, into the question: 'how is a *synthetic* a priori proposition about right possible?' (6:249).<sup>9</sup> A real definition of the notion of property needs to give an argument for the synthetic justification of intelligible possession. It needs to provide a 'deduction' of the concept of intelligible possession (6:249).

'The possibility of this kind of possession, and so the deduction of the concept of non-empirical [i.e., intelligible] possession', Kant says, 'is based on the postulate of practical reason with regard to rights' (6:252). The postulate says:

[i]t is possible to have an external object of my choice as mine; that is, a maxim according to which, if it were to become a law, an object of choice would *in itself* (objectively) have to *become ownerless (res nullius)* is contrary to right. (6:246)<sup>10</sup>

In what way does the postulate help to show the possibility of intelligible possession? Does it not simply reassert this possibility?

After having introduced the postulate, Kant says of it that it can be called a permissive law (*lex permissiva*) of practical reason, which gives us an authorisation that could not be got from mere concepts of right as such... (6:247)

Kant's characterisation of the postulate as a *lex permissiva*, is a clue to understanding its role in the deduction of intelligible possession. Reinhard Brandt gives a helpful

analysis of the notion of a *lex permissiva* in Kant's philosophy.<sup>11</sup> He characterises permissive laws as applying to actions which are neither obligatory nor prohibited, but which are nevertheless justified as a permission to coerce. On the grounds that the given circumstances leave open no other option, permissive laws authorise the law-like restriction of other people's external freedom. Under the given conditions, they justify such a restriction as a necessary exception to the UPJ. The exception is regarded as provisionally just because it points towards a permanent solution which makes law-like action, and hence the full realisation of the UPJ, possible. The commission of an act of injustice is regarded as necessary in order to establish relations of justice between persons.

Why, then, is a permissive law required for the justification of property rights? Why is action on a principle of intelligible possession neither obligatory nor prohibited? And in how far would a provisional exception from the UPJ by a principle of intelligible possession lead to the establishment of relations of justice? I shall answer the first question by taking the latter two questions in turn.

### 3. *The Antinomy of Right*

It seems that both the prescription and the prohibition of actions that assume intelligible possession are contrary to the UPJ. In fact, Katrin Flikschuh interprets Kant's brief and rather obscure description of the antinomy of right in §7 as expressing exactly this dilemma:<sup>12</sup>

The *thesis* says: *It is possible* to have something external as mine even though I am not in possession of it.

The *antithesis* says: *It is not possible* to have something external as mine unless I am in possession of it. (6:255)

What are the arguments behind these two claims? The thesis claims the possibility, or intelligibility, of a property relation that is rightful though merely intelligible. This thesis can now be established on the grounds that a denial of the right to intelligible possession would be incompatible with the UPJ. The crucial premise is that intelligible possession of external objects has to be thought of as a necessary condition for the exercise of external freedom. Kenneth Westphal shows how this claim can be justified.<sup>13</sup> Three basic facts about the human condition are of importance. First, as finite and embodied beings, we cannot produce things *ex nihilo* by willing them into existence. The arrival at an intended result always involves a certain physical interaction with the world. Secondly, as human beings, we have complex, temporally extended and integrated ends. Such ends may include earning our living by doing a job, staying warm by occupying a shelter, and obtaining food to eat. Thirdly, living on a finite earth faced with relative scarcity, we are too populous to avoid one another's things and projects. These facts taken together, Westphal shows, entail the necessity of intelligible possession of certain external objects. First, physical possession and use of some external things are required to produce any intended results. Secondly, it is impossible physically to hold at every moment in time all those things we need in order to attain our ends. We cannot, for example, simultaneously occupy a shelter and obtain food. But it is possible, thirdly, that others might take physical possession of the things we need when we are not in physical connection with them. Someone might occupy the house I live in when I go out to buy food or eat the food I left in the fridge when I go to work. This would

present no problem in conditions of superabundance, where a substitute is available for anything someone happens to take. But, as a matter of fact, we face conditions of scarcity. Without rights to intelligible possession, I would be unable to use the things necessary to obtain my goals. The rejection of rights to intelligible possession would therefore be a rejection of the conditions necessary for one's rational agency and, thus, for the exercise of one's external freedom. Hence, the denial of the thesis is incompatible with the UPJ.

It seems, however, that the antithetical claim, too, can be established by showing that its denial would amount to a non-universalizable restriction of external freedom. The antithesis claims the impossibility, or unintelligibility, of a right to a non-physical property relation. As we have seen, physical possession and use of external objects is a necessary condition for the exercise of external freedom. Given the relative scarcity of external objects necessary for our rational agency, any claim to property by one would compromise the freedom of others by making some external objects of their possible choice unavailable. Under conditions of relative scarcity it is thus likely that others would be left incapable of using the things necessary for the exercise of their external freedom. A principle of intelligible possession would not be universalizable and is therefore incompatible with the UPJ.

Thesis and antithesis present a genuine dilemma. On the one hand, intelligible possession is a necessary presupposition of the external freedom of each. On the other hand, any claim to intelligible possession by one violates the equally valid claim to freedom by others. Neither the claim that *no* object may be intelligibly possessed nor the claim that *any* object may be intelligibly possessed seems compatible with the UPJ. Can we escape this dilemma? Kant's solution to the antinomy does not appear promising:

[b]oth propositions are true, the first if I understand, by the word 'possession', empirical possession (*possessio phaenomenon*), the second if I understand by it purely intelligible possession (*possessio noumenon*). (6:255)

Both thesis and antithesis are thus reinterpreted as allowing the possibility of merely intelligible possession. Does this simply resolve the antinomy in favour of the thesis?<sup>14</sup> Kant adds that 'we cannot see how intelligible possession is possible... but must infer it from the postulate of practical reason' (6:255). The postulate is thus presented as offering the grounds for a solution to the antinomy. Yet, as I shall show, it differs from the thesis in a significant respect.

We can now answer the first of our two questions concerning the postulate as a *lex permissiva*. Actions on the maxim according to which an external object can be intelligibly possessed are neither obligatory nor prohibited. Both their prescription and their prohibition would be contrary to right. Without a solution to the antinomy, just action would be impossible. Yet, as a matter of fact, we cannot choose not to act. This is where the postulate as *lex permissiva* comes into play. It does not demonstrate that external possession is rightful per se. It only says that in so far as its general prohibition would be contrary to right, intelligible possession must be possible. The postulate, as a permissive law, thus authorises a provisional violation of the UPJ.

#### 4. A duty of right

Let me turn to the second question. In what way is this violation of the UPJ justified? Does the postulate point towards a situation in which just action is permanently possible? The postulate solves the antinomy by rejecting an important

assumption underlying both thesis and antithesis: the premise that intelligible possession could be grounded on a unilateral act (6:256). Instead, Kant argues, intelligible possession of an object is constituted by the right to exclude others from using the object, and by the corresponding obligation of others not to interfere with this right. As Kant says in §8,

[w]hen I declare..., I will that something external is to be mine, I thereby declare that everyone else is under obligation to refrain from using that object of my choice, an obligation no one would have were it not for this act of mine to establish a right. (6:255)

But rights and obligations can hold only between rational beings. If intelligible possession is to be regarded as a relation between persons, however, it cannot be grounded by one person alone. Kant's thought continues:

[t]his claim [that something external be mine] involves, however, acknowledging that I in turn am under obligation to every other to refrain from using what is externally his; for *the obligation here arises from a universal rule...* (6:255, emphasis added)

The right to property may be suggested by my unilateral act of declaring something to be mine. But it cannot be justified by this act. It is justified by a 'universal rule'.

As the argument so far has shown, the rejection of the right to intelligible possession cannot be universalized. This entails, Westphal lays out, that a maxim for action according to which an agent regards others' intelligible possessions as available resources cannot be universalized either.<sup>15</sup> The point of having rights to

intelligible possession is to be able to rely on the availability of certain items of use. Undermining such use would undermine a person's rational agency. The interference of one with the intelligible possession of another would therefore undermine the external freedom of the latter. Thus, the act of interference with another's possessions cannot be universalized. A commitment to rights to intelligible possession would also commit one to respecting others' equivalent rights. Kant's second formulation of the postulate therefore contains the concept of duty: 'that is a duty of right to act toward others so that what is external (usable) could also become someone's' (6:252). It is this duty that is the 'universal rule' grounding the obligation that arises out of property claims.

In this way, the Postulate of Practical Reason makes possible the provisional justification of property rights. Kant's claim that intelligible possession can be established only by the 'collective, general' will (6:256) can be understood as the claim that a system of property rights is just only if it can be willed by all. A system of property rights must be universalizable. We can now answer our second question. The justification of property rights by means of the postulate is provisional as long as there are no positive laws that determine a specific configuration of property rights and their corresponding obligations. The duty to respect other persons' possessions entails the duty to secure property rights by positive laws by entering into society with all others. By authorising the provisional violation of the UPJ, the postulate as a *lex permissiva* presents a solution to the antinomy and points to a full realisation of the UPJ in society. By means of the postulate, Kant has shown how intelligible possession can be reconciled with everyone's external freedom. This solves the antinomy and concludes the deduction of intelligible possession.<sup>16</sup>

## II. Kant's conception of property rights

In the introduction to the *Metaphysics of Morals*, Kant emphasizes two important aspects of any moral law: its foundation in general considerations of reason and its applicability to the concrete character of human nature.<sup>17</sup> Moral laws

hold as laws in so far as they can be *seen* to have an a priori basis and to be necessary. (6:215)

At the same time, however, we

cannot dispense with principles of application, and we shall often have to take as our object the particular *nature* of human beings, which is cognised only by experience, in order to show in it what can be inferred from universal moral principles. (6:217)

Foundation on reason and applicability to human nature are significant, in particular, for the Postulate of Practical Reason. This dual aspect can be brought to light by investigating Kant's characterisation of the postulate as a principle of practical reason (6:247).

### 1. The postulate as a principle of practical reason

A principle of practical reason, according to Kant, is a general law which shapes an agent's action and is purely grounded in reason. In order to clarify Kant's claim that the postulate is such a principle, it will be helpful to consider Otfried

Höffe's<sup>18</sup> distinction between three levels of the CI, Kant's 'supreme principle of practical reason'. Höffe lists (i) a general CI that is indifferent to any distinction between the sphere of justice and that of ethics<sup>19</sup>; (ii) the application of this CI to these two spheres, leading to a CI of justice and one of virtue; and (iii) the substantive principles of categorical obligations that fall under the latter imperatives. Höffe identifies the CI of justice with the UPJ. The Postulate of Practical Reason can then be classed as a principle of the third level of generality. A justification of the postulate as a principle of practical reason would thus rely on three linked claims. First, the general CI is grounded in practical reason. Second, the UPJ states a version of the CI, restricted to the sphere of justice. Third, the postulate presents a special case of a principle adjusted to specific external conditions that falls under the UPJ. I shall here attempt a rough outline of this three-step argument.<sup>20</sup>

Onora O'Neill gives a convincing summary of Kant's argument for the first claim.<sup>21</sup> If there are any principles of reason that have unrestricted authority in guiding our actions, they must be independent of any specific faiths, beliefs, traditions and norms that particular persons might adhere to and, more importantly, others might not adhere to. Principles that are unconditioned in this way are principles that can be followed by all. The CI incorporates precisely this doubly modal requirement of reason: principles of action *must* be such that they *can* be adopted by all for whom they are to provide reasons. Thus, the version of the CI as Formula of Universal Law says: 'act only in accordance with that maxim through which you can at the same time will that it become a universal law'<sup>22</sup>.

Second, the UPJ is a restricted version of the CI because it is concerned solely with laws for structuring the external freedom of agents. It can apply only to actions in so far as they have external effects on people. Whether the action is motivated by

the thought of duty is irrelevant. The UPJ as the CI of justice thus restricts the doubly modal requirement of reason to the sphere of external action: any maxim for action in the public domain *must* be such that it *can* be adopted by all.

Third, a restriction of external freedom is necessary only where the freedom of one comes into conflict with that of another. This is the case in the present human situation. External freedom needs to be restricted in order to ensure that every agent can be equally free. My interpretation of Kant's argument has shown that the possibility of rightful possession is a condition for such reciprocal restriction of external freedom. The possibility of intelligible possession *must* therefore be *capable* of being consented to by all rational agents.

The postulate can thus be considered a principle of reason, falling under the CI and the UPJ. The postulate presents an example of how reason is applied to concrete conditions of human nature and thereby determines a more specific principle of justice. As my interpretation in Section I has shown, however, Kant cannot simply derive the possibility of rightful possession from the UPJ as such. Instead, he needs to *postulate* its possibility and hence justify the possibility of rightful possession via an indirect route. In consequence, the postulate is a *particular* principle of reason in the sense that it 'extends' practical reason to a principle 'which could not be got from mere concepts of right as such' (6:247).<sup>23</sup> The characterisation of the postulate as based on reason and restricted to fit the specific nature of human existence now has important implications for the conception of property rights that follows from Kant's argument.

## 2. *The Essential characteristics of Kantian property rights*

First, from Kant's justification of property as ultimately grounded on reason, it follows that a system of property rights is defined by its *necessary and universal validity*. Thus, the justification of property rights is based on universalizability, a direct and necessary requirement of reason. It is independent of any contingent claims. In this respect, Kant's justification of property rights contrasts sharply with consequentialist justifications. For Hume, for instance, the justification of property rights is based on the claim that a system of property rights makes everyone better off.<sup>24</sup> Hume's account is concerned with the benefit or harm that would result as a consequence of the introduction of property rights. Whether such consequences are beneficial, however, is dependent on the contingent needs and desires of human beings. For Kant, by contrast, non-compliance with a system of property rights is illegitimate not because it would produce disutility. It is illegitimate because it would be impossible for at least some others to act on the same maxim of non-compliance.

This entails, furthermore, that a property system on Kant's account is universally valid for all rational beings. It can be justified only by a 'general will'. The concept of the general will may be associated with contractualist conceptions of rights.<sup>25</sup> Kant's interpretation of the general will, however, differs significantly from such interpretations. The latter appeals to actual or hypothetical agreements between different individual wills. This agreement is not necessarily justified by practical reason but may be based on certain assumptions that are accepted as reasonable among the agreeing individuals.<sup>26</sup> For Kant, by contrast, the endorsement of a system of property rights by the general will means that the system can be universalized without generating a contradiction. As O'Neill<sup>27</sup> points out, this difference between the Kantian and the contractualist positions entails a difference in their scope. While

the contractualist justification is restricted to human beings within a specific bounded society, Kant justifies principles for a system of property that can universally hold for all rational beings.

Second, a right on Kant's account can only ever concern a relation between rational beings. A Kantian property right is therefore a *triadic relation* between persons with regard to a thing. It is the relation between (i) a person with the right to the exclusive use of an object, (ii) other subjects with the correlating duty not to interfere with that right and (iii) the object over which the right ranges. The right to property is thus the right to use, and exclude others from using, a thing. This understanding of the right to property contrasts with conceptions of property rights as *dyadic relations* between a subject and an object. Locke, for example, regards the entitlement to an object as established by a primitive, unilateral act on the part of the original owner (or by just transfer of justly appropriated items).<sup>28</sup> One person's labour on an object can directly create a right to that object. For Kant, however, '[I]t is [...] absurd to think of an obligation of a person to things or the reverse' (6:260). Property rights on a Kantian account cannot be grounded in an empirical relation between the owner and the object, such as the imposition of labour.<sup>29</sup>

When first acquisition is in question, developing land is nothing more than an external sign of taking possession, for which many other signs that cost less effort can be substituted. (6:265)

An empirical relation thus could never justify intelligible, but merely physical possession.

A further striking fact about Kant's justification for the right to property is that Kant is solely concerned with the fundamental question of whether, and if so how, we can have property in external objects *at all*. He is not concerned with the problem of what distribution of goods would be fair. His approach therefore differs from that of many other property theorists who take a positive answer to Kant's question for granted and are concerned with justifying just appropriation or transfer of property rights.<sup>30</sup> Since property rights on the Kantian account are thus characterised by their *generality*, they are also *limited* in important respects. Property rights have been justified partly on the grounds that a rejection of them would undermine external freedom. The three facts about our actual existence, pointed out by Westphal, entail that property rights are a necessary condition for the exercise of external freedom. As finite rational beings with complex and temporally extended ends living on a finite earth, we need property rights in certain external objects in order to attain our ends. The requirement for property rights is thus directly dependent on the characteristics of the human condition. Yet, what does this requirement amount to? What is the content of the needed property rights? From Westphal's argument follows merely the requirement that there be *some* objects of certain types that are available for my use when I need them. It seems unnecessary that I should use the same *token* objects. I need not, for example, sleep in the same bed every night, eat the food I left in the fridge or ride the same bike every day. I can attain my aims as long as I have *some* place to stay, *some* food to eat and *some* means of transport. Kant's conception of the right to property as following from specific empirical facts about human life entails only that there be some kind of 'system whereby things are regularly and reliably made available for individual use'<sup>31</sup>. A third characteristic of the right to property

established by Kant's argument is therefore that it presents the *minimal* right to exclusive use of external objects necessary for attaining one's rightful aims.

### *3. Limitations of Kantian property rights*

Kant's minimalist notion of the right to property as the right to exclusive use of some objects leaves undetermined which *particular* system of property rights should hold among rational beings. Yet, there can be many different realisations of the structure of rights and duties that characterises the property relationship. Thus, we may roughly distinguish between three types of property institutions: those of private, common and public property. First, an object is owned privately if one person has the right to the exclusive use of that object. This person can be an individual or a corporation. All others have the duty to respect this right and to refrain from using the object without the right-holder's consent. Second, a common property regime is one in which the right to the exclusive use of an object is held by a group of co-owners. Each co-owner has rights and duties with respect to the use as well as maintenance of the object owned. These rights and duties are usually defined by accepted practices and rules within the group. Non-owners have the duty to abstain from using, damaging or destroying the object. Third, public property regimes differ from common property regimes in that the right to use the owned object is allocated to the members of a specified collective by a public agency. The latter may be a city council, the state or an international body. It has the right to control the access to, but delegate the management of, the use of the object owned. Individuals, or groups of individuals, of the collective may use the object only at the forbearance of this agency.

The three types of property regimes described contrast with systems that lack any property rights. These may be called 'open access' regimes. Objects under open access regimes are open to be used by anyone. No one has the right to exclude others from such use. Following the motto 'finders keepers', the first person to take the object into possession will be the one to use it. No management of the use of the object as a whole is undertaken.

Even cases of the same type of property regime, however, entail varied rights and duties. Not all cases of ownership fall under what Honoré has defined as the liberal concept of full ownership.<sup>32</sup> Full ownership, according to Honoré, entails not only the right to physically possess and the right to exclusive use of the thing owned. It implies further rights. These include the right to manage, that is, the right to control how objects owned are to be used and by whom, the right to receive income from the objects owned, the right to the capital, that is, the right to transfer, consume or destroy objects owned and the right to immunity from expropriation. None of these 'incidents' are necessary ingredients of the minimalist right to property established by Kant.

To my analysis of what Kant's argument for the right to property establishes, I can now add what it does *not* establish. Kant remains silent about the question of whether ownership should be private, communal or public. And he says nothing about the rights entailed in a property regime over and above the right to physical possession and exclusive use of an object. Does this entail that choosing one specific institution of property rights in preference to another is simply a matter of convention? Is one particular property regime as good as any other? This cannot be correct. Kant's argument does not specify what specific property regime is just. But, as the foregoing investigation has shown, it defines a necessary condition that must

be fulfilled by a just property institution: it must be universalizable. Furthermore, Kant's characterisation of the right to property as a triadic relation indicates the determining factors in deciding whether something could be universalized. Besides considerations concerning the putative owner, two further kinds of consideration are decisive: those concerning the types of object over which property rights are claimed and those concerning the subjects obligated to respect this right. According to Kant, we can determine whether a property system is just by investigating whether, given the three types of consideration, it is universalizable. The pieces that define Kant's conception of property rights are now in place. This puts us in the position to investigate the implications for Kantian property rights in environmental resources.

#### *4. Implications for Kantian property rights in environmental resources*

The defining characteristics of Kant's conception of property rights make it, so it seems, particularly relevant for determining property rights in environmental resources at a time when the exploitation of such resources presents a serious environmental threat. First of all, Kant asks the fundamental but general question of how it is that we can have property rights in external objects at all. His answer does not specify which particular property systems are justified. Kant merely defines the *conditions* necessary for a just system of property rights. The question of whether a property system is just is therefore always tied to a description of the circumstances in which the system is to hold: a property system is justified only if it is universalizable *in the given circumstances*. But circumstances change. It follows that, on Kant's account, a property system may be just in one set of circumstances, but unjust in another. Property rights are not immutable entitlements. One property regime may not be good for all times and occasions.

As Kant, secondly, characterises the right to property as a triadic relation between persons with regard to a thing, the relevant circumstances are defined by three types of consideration: those related to the right-holder, the duty-bearer and the object owned. Considerations merely concerning just acquisition, for example, are insufficient for the determination of just ownership. On Kant's account, whether a property regime is just depends on more than considerations relating to the owner. The effect a particular use may have on non-owners as well as on the object used is relevant, too. This characterisation of property rights has major implications when dealing with environmental resources. When technology develops, resources may be exploited in a different way and to a different degree. When population becomes denser and resources scarcer, the use of a resource that previously had no significant effect on others may now prevent them from using the resource themselves. Property regimes in environmental resources on the Kantian account will thus have to be adjusted when resources face overexploitation.

Thirdly, many environmental problems can only be solved on a global level. Property regimes for environmental resources are inadequate if they are respected by members of some but not of other societies. The legitimacy of property rights on a Kantian account, however, is not grounded on what a given society may conventionally consider just, or on what counts as reasonable for people in a given society. Kant's account does not justify property rights for some people on considerations which are not acceptable by others. Kantian property rights are universally and necessarily valid for all people on the planet.

It seems, then, that Kant's conception of the right to property proves especially relevant for property rights in environmental resources which are threatened by overexploitation. In the following section, I illustrate this result by means of a

concrete example: that of the marine fisheries. As the oceans are very hard to control, the case of the marine fisheries seems particularly difficult for the purpose of our discussion. In order to be realistic about the development of Kantian property rights, however, it seems important to concentrate on such a demanding example. I shall first give a rough description of the fisheries case in order then to work out the distinctive empirical premises that underlie it. These premises will constitute the defining circumstances for which a property system is to be justified on Kant's account.

### **III. Kantian property rights in the marine fisheries**

#### *1. The tragedy of the oceans*<sup>33</sup>

Before 1976 most of the world fishing grounds, apart from coastal waters, were open to all. For a long time this presented few problems for the ecological state of the oceans. Fishing was a dangerous and strenuous activity and the total catch stayed relatively low. The nineteenth and twentieth centuries, however, brought wide-reaching technological innovations: more efficient fishing gear, the invention of engine power, frozen food technology, as well as directional sonar, satellites and spotter aircraft, helping to locate fish. These innovations changed ocean fishing into an activity no longer dependent on luck or limited by the fishermen's strength and skills. Over the years, most of the conventional sail-powered fleet was replaced by what can be described as whole fishing factories. Fleets can now catch, freeze and process more than a hundred tonnes of fish before returning to port.

Initially, the new monster ships brought about hitherto unseen profits. But soon overfishing was recognised as a possibility. In 1902, for instance, the British discovered that the cod stock in the North Sea had been depleted. They reacted by moving their ships towards Iceland where cod was still abundant. Due to a decline in the fish stock, fishermen from different parts of the world thus found themselves moving to farther waters. Iceland was the first country to take action against uncontrolled exploitation of the waters near its shores. Between 1950 and 1975 the country gradually extended its territorial limit from three miles to 200 miles off its shoreline. Although Iceland first encountered resistance, mainly by the British and the West Germans in what have been called the three 'cod wars'<sup>34</sup>, its 200-mile zone gained international acceptance in 1976. Most nations and international authorities followed Iceland in declaring their own 200-mile zones. The EU, for example, controls a 200-mile zone of the North Sea and the north Atlantic beyond its shoreline. Today, almost ninety per cent of the world's known fishing grounds fall within 200 miles of the coast of at least one nation.

The establishment of the 200-mile zone, mainly seen as a protectionist measure for national fisheries rather than a conservation measure, did not necessarily mean a solution to overfishing. Where international fleets had posed a threat to the fish stock they were often replaced by a growing national fleet. But exclusive zones made it – at least in theory – possible to impose regulations by national law or international agreement. Possible regulations include restriction of fishing times, licensing of boats in order to limit the number of boats and fishermen per area, and regulation of fishing gear, such as the size of boats and of the net's mesh. Fishing quotas on species per vessel per season can be introduced, based on the maximum catch that would leave enough fish to spawn in the next year.

Regulations have shown little success, however. In most countries measures were introduced only half-heartedly. In Kant's own example of Newfoundland, the Canadian government had invested into its offshore fleet and was therefore interested in making full use of it. The fish stock has continued to decline and, in the case of cod, seems to have been killed off completely. Moreover, even where measures were introduced they were often insufficiently enforced, lacking effective surveillance or sufficiently heavy penalties. Some estimates suggest that the illegal catch is 30-50% of the reported catch. Where effort is put into the enforcement of regulations, a further problem has arisen. If a boat is licensed to catch only a limited amount of particular species, then most profit is made if quotas are filled by the highest quality fish that can be found of the particular species. This means that any unwanted and lower-quality fish are thrown back, although, in most cases, they are already dead. Even if, therefore, quotas are based on the maximum catch that would keep the size of a fish stock stable, they do not seem to determine the number of fish actually killed. This seems to be the problem in the case of the North Sea. For years, the EU has not succeeded in agreeing on and enforcing regulations that would cut down the catch to a sufficiently moderate level. Competing national fleets have furthered the decline in the fish stock. The state of the North Sea cod stock today seems as worrying as that of Newfoundland.<sup>35</sup>

More regulations have been introduced and more difficulties encountered.<sup>36</sup> The above description is supposed to give only a rough idea of the kind of problems involved in the 'tragedy of the oceans'. What can be said with certainty is that we are faced with a serious environmental problem. Recent estimates say that large predatory fish biomass today is only about 10% of pre-industrial levels.<sup>37</sup> This presents an ecological problem as much as a social one. Consequences of the

depletion of fish stocks include mass unemployment in the fishery sector and food shortage, with most severe effects on poorer countries that are dependent on fish for nourishment but unable to meet rising prices. The conclusion is obvious. The catch has to be restricted to allow the fish population to grow back to a size large enough to yield a moderate catch year after year. How this conclusion could be realised is less obvious. An approach to this problem from the perspective of the Kantian theory of property rights, I suggest, may prove fruitful.

## *2. The premises*

What are the distinctive empirical premises that define the example of the marine fisheries? I identify seven premises which will form the basis for a Kantian argument justifying property regimes concerning fisheries. First, (1) fisheries are a renewable resource. Humans have always used them as a resource for food. Yet, (2) fisheries are also depletable. They are renewable only to a certain extent and cannot serve unlimited exploitation. This causes problems when the number of users increases. (3) Too many users and too extensive use result in overfishing. The solution to overfishing is simple: the total catch has to be restricted to the reproductive capacity of the fishery. Why, then, is it so difficult to realise this solution? Fisheries stretch over vast areas. This means that (4) it is impossible for single fishermen to assess the overall state of a fishery or the extent to which it is being used. It also implies that (5) it is very difficult for anyone to control the total catch of fish. Especially in the case of offshore fisheries, effective control of the number of fishermen and of the fish they catch may not be achieved. This has certain consequences for the way in which possible fishery regimes may deal with the

problem of overfishing. Let me consider, in turn, the consequences that follow for the four regimes I have distinguished.

Before the introduction of the 200-mile zone, everyone had access to fishing the oceans. Under conditions of open access, however, communication between fishermen is extremely difficult. Fisheries are vast and their users hard to determine. Furthermore, there are reasons for secrecy. A fisherman who has found rich fishing grounds will do good not to tell others about it. Under these conditions it is difficult for fishermen to reach a collective decision concerning the conservation measures to be adopted. Even if a decision could be reached, however, it is not clear how it would be enforced. Since fishermen seem incapable of taking collective action to conserve the resource, no management of the fishery seems possible. Each fisherman acts as an isolated individual. Lacking secure knowledge about the actions of others, he will be likely to assume that others act according to their own interests rather than to the interests of the group. It will thus be beneficial for him, too, to act according to his own interests. Each fisherman has an incentive to catch as much as he can. This situation is one which, under the influence of an old but still well known article by Garret Hardin, has become known as 'the tragedy of the commons'. It is, however, correctly termed a 'tragedy of open access'.<sup>38</sup> The problem of overfishing, we must conclude, cannot be dealt with in open access regimes.

The introduction of the 200-mile zone has brought most of the oceans under the control and administration of nation states or international agencies. Within the 200-mile zone, the open access regime has been converted into public property regimes. It may be hoped that public agencies are in a position to introduce regulations that co-ordinate the actions of fishermen to avoid overfishing. Because fisheries are not easily controlled, however, public property regimes, too, face

difficulties in solving the problem of overfishing. Even if a public agency adopts adequate regulations for reducing the catch, enforcing these regulations will be difficult. How is one to stop misbehaviour of people far away at sea?

Such difficulties, furthermore, prevent fishermen from putting their trust in governments' regulations. Yet, if fishermen believe that regulations are inefficient and not observed by others, they have an incentive to breach them, too.<sup>39</sup> In such a situation, the tragedy reappears. It would now be foolish for each fisherman to catch less in order to conserve the fish stock. The fish he would save would simply be taken by others. The conversion of an open access regime into one of public property has not been successful in establishing an opportunity for fishermen to take collective action. Rules have merely been imposed on the fishermen from above and no collective strategy on how to act has been adopted. The public property regime is likely to degenerate into an open access regime in which fishermen act as independent individuals, trying to make as much profit as they can as long as this is still possible. Public property regimes, therefore, cannot solve the problem of overfishing if they fail to provide a framework for fishermen to act collectively for the conservation of the fishery.

What consequences may be expected to follow from the premises laid out above for private and common property systems? In the case of private property institutions, management decisions are made by one person and for one person alone – whether this is an individual or a corporation. Decisions concerning the management of a fishery need to take into account merely the interests of the private owner. No consensus need be reached among different persons with varying interests. Conservation measures can thus be introduced relatively easily and quickly. The owner can make decisions, furthermore, in the knowledge that good

stewardship of the owned resource will return private rewards. Misuse, by contrast, will directly punish the owner. The owner thus has an incentive to use the fishery in a way that ensures its conservation. But while it is possible that the owner may act according to this incentive, her interests may also be completely at odds with the long-term conservation of the fishery. She may simply be interested in making quick money, for example. She might exploit the fishery to the extent of depletion. Whether conservation measures are introduced in private property regimes is therefore dependent on the discretion of the private owner.

Common property regimes exclude fewer people from the decisions concerning the management of the fishery. Less exclusion, however, can also present a problem.<sup>40</sup> In small groups, the consequences of an action can be perceived relatively easily. A violation of accepted rules and conventions which regulate legitimate use of the resource will be relatively obvious. This is not the case in large groups. Here it is often difficult to perceive that one's action makes any difference to the situation at all. Rules and conventions that regulate legitimate use of the resource are more difficult to maintain. Moreover, as group size increases, the possibility of communication between group members and, thereby, the possibility of taking collective action decreases. As a result, common property regimes for fisheries that include too large a group of users are liable to degenerate into open access.

As long as the community included in a common property regime is relatively small it can benefit from advantages like those of private property regimes. Management decisions can still be obtained without much logistical effort. And co-owners know that their care or misuse of the owned resource will directly benefit or harm them. At the same time, common property regimes for small groups may present the same problems as private property regimes: the group's interests may be

incompatible with the conservation of the fishery. While large common property regimes are liable to degenerate into open access, the introduction of conservation measures in small common property regimes is dependent on the interests of the group owners.

Two further premises that define the fisheries example can now be abstracted from this discussion. First, as a consequence of (4), (6) some regulation is necessary in order to restrict the catch of all fishermen. Second, as a consequence of (5), (7) regulations will only be successful if it is advantageous for fishermen to act on conservation measures as one coherent collectivity. Neither of these two conditions expressed by premises (6) and (7) can be fulfilled by open access regimes. The latter cannot achieve management of the fishery to restrict the total catch. Public property regimes and large common property regimes, which might fulfil the first condition, will overcome the problem of overfishing only if they provide a framework for fishermen to restrict the catch collectively. As long as fishermen do not achieve collective action, they will not be in a position to manage the fishery in a way that would cut down the total catch. Of course, there may be free riders even in a situation of collective action. Even if all agree on an upper limit to the amount that may be caught, some might still take advantage of others' compliance with the rules by taking more than was agreed on. There is, however, a difference between this type of free-riding, and the independently egoistic action performed by a fisherman in a situation where collective action is lacking. In the former but not the latter case, an alternatively acceptable course of action is available to the fisherman. By taking only as much as the group of fishermen agreed on, he can still expect to produce an outcome that will be beneficial for himself. Finally, private property regimes and small common property regimes are in a much better position to fulfil the second

condition. But only independent regulation can ensure that the total catch is restricted to prevent overfishing. With the empirical premises of our example clarified, I turn to investigate the specific property rights in fisheries that would follow from Kant's conception of property rights.

### *3. Kantian property rights in fisheries*

My analysis of Kant's conception has shown that any system of rights must, according to Kant, be universalizable. This requirement, it seems, entails that a system of property rights in fisheries must not lead to the destruction of the fishery. Fisheries are renewable, yet depletable, resources (1 and 2). An institution of property rights in a renewable resource that leads to the destruction of the resource cannot be universalized. Consider a maxim according to which a renewable resource is to be under a system of property rights which leads to the destruction of the resource. Consider now the universalization of this maxim. If everyone acted on the maxim, then all property regimes in renewable resources would lead to the destruction of the resource. But without renewable resources, there could be no property rights in renewable resources. Hence, no one could act on the maxim according to which a renewable resource is to be under a system of property rights which leads to the destruction of the resource. The maxim is not universalizable. A possible system of property rights in fisheries, according to Kant, must not lead to the destruction of the fishery.

This claim may seem puzzling. It seems that an equivalent argument could be construed for systems of property rights in fish, rather than whole fisheries. Consider the maxim on which a fish is to be under a system of property rights which leads to the consumption, and hence destruction, of the fish. If everyone acted on this maxim,

then all systems of property rights in fish would lead to the destruction of the fish. There would be no fish and therefore no system of property rights in fish. Hence, no one could act on the maxim according to which a fish is under a system of property rights that would lead to the destruction of the fish. This maxim, too, is not universalizable. Consequently, a system of property rights which would lead to the consumption of fish is unjust on Kant's account. But this is absurd. Surely, Kant cannot deny that I may consume a fish I own. The justification for property rights was precisely that they are necessary for the exercise of external freedom. Yet, if I could not even secure my survival by eating my own food, what would be the point of property rights at all?

The second argument contains a mistake. Kant classifies as maxims only general principles that agents adopt. The maxim to be tested in the second case would be the principle according to which an item of food is to be under a system of property rights that leads to the consumption of the food. This maxim can be universalized. Even if everyone acted on it, and consumed the items of food they owned, there would be more items to replace the ones consumed. This second case is, however, dependent on the first. A necessary condition for there being replacements for the consumed items of food is that there are renewable resources for such items. As long as systems of property rights in renewable resources do not lead to the destruction of the resource, systems of property rights in items of food may well lead to the consumption of the food. In particular, as long as fisheries are not exploited in a way that leads to their destruction, all justly owned fish may also be consumed.

Kant's account entails, we can conclude, that a possible system of property rights in fisheries must not lead to the destruction of the fishery.<sup>41</sup> To express the same idea in positive terms, a system of property rights in fisheries has to be a

regime that can last. In order for its principles to be law-like, it has to hold not merely across persons – as expressed by the claim that it has to be willable by all. It has to hold also across time. Kant’s universalizability claim thus extends not only to persons living at present, but also to those that will live in the future.

Whether a property regime can last, however, depends on its concrete circumstances. The same is true for no-property regimes. When fishermen are scarce, their fishing technology relatively inefficient and fish still abundant, open access regimes remain stable. Each fisherman can use the fishery without depleting it. Under these conditions, open access regimes can be universalized and are justified on Kant’s account. When the population of fishermen becomes denser, their fishing gear more efficient and fish a scarce resource open access regimes lead to the destruction of the fish stock. In these circumstances, they are not universalizable. They are not justified on Kant’s account. Some property rights become necessary. But which ones?

The minimalist conception of the right to property justified by Kant is the right to exclusive use of an object. Given premise (3), a property institution for fisheries can be stable over time only if the right to use the fishery is limited. It follows that just use must be restricted to a moderate level which leaves the fishery to yield a stable catch every year. The limit to just use of the fishery by one fisherman, however, depends on the total number of fishermen using the fishery. If more fish, each must fish less. Yet, given premise (4), it is difficult for fishermen to restrict the catch. Some measures regulating the use of the fishery are needed (6). If these measures are to have any authority, it seems to follow that fishermen have no right to continued use of the fishery in cases in which they do not act according to the regulations. They have no right against expropriation. Furthermore, following from

premise (5), it is difficult to determine whether regulations have been violated. Violation is less likely, however, if fishermen take collective action to restrict the catch (7). Within the framework of certain basic regulations, fishermen need to decide collectively on, and enforce, a course of action designed to limit the total catch. They need to have an incentive for establishing a self-policing system. It follows that property rights in fisheries need to combine in the same right-holders the right to limited use of the fishery and the right to manage the fishery, again limited to management which maintains the fishery as a renewable resource.

What about the other rights mentioned by Honoré that may be included in a property regime? It is obvious that no right to destroy, waste or completely consume the fish stock can be justified. The right to capital therefore cannot be implied in property regimes for fisheries. Nothing speaks, however, against including in the property regime the right to income from the resource, as long as this right is again restricted to cohere with the limited rights to use the fishery.

I conclude that property rights in marine fisheries on Kant's account cannot include full ownership rights. Fishermen would merely have use and management rights, limited by the requirement to keep the fishery stable. They would have no right to capital or against expropriation in cases of misuse. Only a property regime including these rights, and only these rights, seems to be universalizable in the specified circumstances. Of course, there are different property regimes which realise these rights. It seems that the right to limited use and management, the duty not to destroy the resource and the liability to expropriation in cases of misuse of the resource, could be realised by a public agency maintaining the right to control access to the resource, while delegating the right to manage the resource, by means of licenses, to an individual or a group of individuals. Different versions of

combinations of public with common or private property regimes could thus be imagined as realising the property rights justified by Kant's account.

#### *4. Conclusion*

The fisheries example illustrates how Kant's conception of property rights can be applied to determine property regimes which address the problem of overexploitation of environmental resources. There is an obvious limitation to this result. The fisheries example is that of a renewable and depletable environmental resource. In fact, as ocean fisheries are very difficult to control, it is a rather special case of a renewable and depletable resource. Different property regimes may be suitable to realise the justified property rights for more controllable environmental resources, such as land. Moreover, not all environmental resources can be classified as renewable resources. My argument does not cover these cases. Yet, it is not obvious that it could not be extended to do so.

With this limitation in mind, the foregoing discussion seems to suggest that Kant's conception of property rights offers an account for determining property regimes for environmental resources. If it was used today, it might help us overcome some of the problems posed by the overexploitation of environmental resources.

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<sup>1</sup> Kant (1900ff.), Vol. 9, p. 345. My translation. References to the *Critique of Pure Reason* cite the pagination of the original A and B editions, included in Kant (1929). All following references to other works of Kant cite the volume and page number of the Akademie edition, included in Kant (1996).

<sup>2</sup> Kurlanski (1998), p.186.

<sup>3</sup> Bromley (1991) *claims* to use a Kantian conception of property rights as a framework for discussing property rights in environmental resources. What he calls a Kantian conception, however, does not seem to be Kant's conception: Bromley relies on Williams' (1983) mistaken characterisation of Kant as a social contract theorist (cf. Section II.2 below).

<sup>4</sup> I rely mainly on Mary Gregor's translation of the *Metaphysics of Morals*, in Kant (1996), and indicate where translations are my own.

<sup>5</sup> Ludwig (1988); Ludwig's revisions are included in Kant (1996).

<sup>6</sup> My translation.

<sup>7</sup> In §4, Kant recognises three types of things over which one may have exclusive rights: physical objects, another person's actions (through contracts or promises), and another person's status in relation to oneself (in marriage, in a parent-child relationship or in a work-contract). As I am concerned with property rights in environmental resources I shall focus merely on property rights in objects.

<sup>8</sup> Cf. Kant's introduction of the term 'real definition' in the *Critique of Pure Reason*, A240/B300.

<sup>9</sup> My translation.

<sup>10</sup> My translation.

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<sup>11</sup> Brandt (1981); cf. *Toward Perpetual Peace*, 8:348 and 8:374, footnotes; also *Metaphysics of Morals*, 6:223.

<sup>12</sup> Flikschuh (2000), pp. 134ff.

<sup>13</sup> Westphal (2002), pp. 98-99.

<sup>14</sup> Brandt (1974) seems to suggest this.

<sup>15</sup> Westphal (2002), pp. 99-101.

<sup>16</sup> This explains why Kant calls the permissive law a 'postulate'. In the *Critique of Practical Reason*, Kant defines postulates of practical reason as 'presuppositions having a necessarily practical reference and thus, although they do not indeed extend speculative cognition, they give objective reality to the ideas of speculative reason in general' (5:132). As we have seen, the postulate does not provide a solution to the dilemma by giving a *proof* or *disproof* for either of the two horns of the dilemma. It does not 'extend speculative reason'. It presents a practical solution: it says that we *need to think* of external objects as possible objects of rightful possession. Since, in this way it exposes the practical necessity of the concept of rightful possession, it shows the 'objective reality' of the idea of merely intelligible possession. It thus constitutes a 'presupposition' for the full realisation of the UPJ.

<sup>17</sup> Cf. the characterisation of moral laws in contrast with 'anthropology' in the *Groundwork to the Metaphysics of Morals*, 4:389 and 4:412-3.

<sup>18</sup> Höffe (1989), pp. 156-158.

<sup>19</sup> Cf. Kant's characterisation of morality as falling into the sphere of right and that of ethics in his introduction to the *Metaphysics of Morals*, 6:214.

<sup>20</sup> Cf. O'Neill's (2000a) three-step justification of Kant's conception of the social contract as an idea of reason.

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<sup>21</sup> Ibid.

<sup>22</sup> *Groundwork to the Metaphysics of Morals*, 4:421.

<sup>23</sup> I thank Katrin Flikschuh for pointing this out to me.

<sup>24</sup> Hume (1978).

<sup>25</sup> Cf. the contractualist position advanced in Rawls (1971). The difference between Kant's and the contractualist interpretation of the general will raises doubts about contractualist interpretations of Kant, such as Baynes (1989), p. 439, and Williams (1983) pp. 86ff.

<sup>26</sup> Rawls, for example, speaks of 'a more or less self-sufficient association of persons who in their relations to one another recognize certain rules of conduct as binding...' in Rawls (1971), p. 4.

<sup>27</sup> O'Neill (2000b and 2003).

<sup>28</sup> Locke (1984).

<sup>29</sup> Kersting (1984) thus describes Kant as 'de-mystifying' the notion of labour that plays the crucial role in Locke's theory.

<sup>30</sup> Cf. for example Locke's approach to property (1984).

<sup>31</sup> Westphal (1997), p. 174.

<sup>32</sup> Honoré (1970).

<sup>33</sup> Cf. *The Economist* (March 19th 1994) and Kurlanski (1998).

<sup>34</sup> Kurlanski (1998), ch. 10.

<sup>35</sup> Cf. Schiermeier (2003).

<sup>36</sup> Cf. O'Connor's (1994) description of measures adopted in New Zealand.

<sup>37</sup> Cf. Myers & Worm (2003).

<sup>38</sup> Hardin (1968).

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<sup>39</sup> Cf. Ernst (1998) for a discussion of psychological factors that play a role in situations of 'tragedy'.

<sup>40</sup> Schmid (1987) points out the importance of the size of a group that has access to a resource.

<sup>41</sup> One might object that fish as a food resource is substitutable by other types of food. There can be a system in which property regimes would lead to the destruction of fisheries, as long as other food resources were still available. I here leave aside the question of substitutability. It should be pointed out, however, that while one resource may be substitutable by another, all resources taken together are not substitutable. The gesture at substitutability will present no problem for my general argument that property regimes in renewable resources are unjust if they lead to the destruction of the resource.