

'PROPERTY' AS A HUMAN RIGHT?

**A Critical Interpretation of John Locke's Political Theory of Property And its Contemporary
Significance**

by

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Declaration

This work has not been previously submitted in whole, or in part, for the award of any degree. It is my own work. Each significant contribution to, and quotation in, this dissertation from the work, or works, of other people has been attributed, and has been cited and referenced.

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Abstract

John Locke's political theory of property is influential, profound, but problematic. The crux of his argument is that all natural resources are God's gift to all mankind in common. While the theory succeeds in demonstrating the manner in which individuals are able to own privately some parts of this common weal without the necessity of the common consent of all mankind, it fails in its attempt to justify unlimited accumulation and rivalrous capitalism. This, Locke accomplished by arguing that whatever part of the common property an individual mixes his labour with becomes his preserve in exclusion of the right of any other individual to that resource.

Locke further states (i) that no individual is permitted to take more than he can make use of before it spoils; and (ii) that every individual is also commanded by natural law to leave behind 'enough and as good' of whatever he takes from the common resources for the others who are yet to take. These two Lockean provisos are, however, upset by the invention of money, which enables individuals to store up more than they can possibly make use of. Money gave rise to hoarding, artificial scarcity, unlimited accumulation, and hence increased the state of inequality, which had begun with the individual's cultivation of land in the state of nature. For Locke, property in the state of nature as well as in civil society is only meaningful, if it is the exclusive preserve of the individual. And this is the logic of liberal capitalism as well as one of the major flaws of his theory.

This thesis thus seeks to address some of the inherent flaws of Locke property theory and it does this by proffering the ideal of personal ownership of property. While acknowledging the right of every individual to property, the ideal of personal ownership deconstructs the exclusiveness of private ownership by debunking the theory of self-ownership, and it posits the inclusiveness of every individual act of appropriation by affirming responsible appropriation as a human imperative and a duty towards God.

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Introduction

The first man who, having enclosed a piece of land, took it into his head to say, 'This is mine,' and found people simple enough to believe him, was the true founder of civil society. The human race would have been spared endless crimes, wars, murders, and horrors if someone had pulled up the stakes or filled in the ditch and cried out to his fellow men, 'Do not listen to this impostor! You are lost if you forget that the fruits of the earth belong to everyone, and the earth to no one!' – Jean-Jacques Rousseau¹

Many thinkers through the ages have thought long and hard on the 'problems of property'. From Plato in antiquity to Robert Nozick in our times, a central concern has been the moral problem of the justification of private ownership of property. Why should anyone exclusively own anything? Why should some individuals own most of the scarce economic resources while others own hardly anything or nothing? Why should the particular people who own land, estates, livestock, factories, stocks and shares go on doing so in the face of stark inequality and injustice? What, if anything, would be wrong if the state expropriated all the current private owners of their 'holdings' and took these into public ownership for the common good of all? What would be wrong if no individual is allowed to own so much wealth as to 'buy' another individual and none so poor as to be forced to sell him/her self to another individual? Do individuals in fact have right to private ownership of anything in the first place? Entangled in these and other like questions are numerous conceptual questions about the nature of ownership and its relation to the right of 'private property'.

Had Jean-Jacques Rousseau's insight above been heeded, perhaps these problems of ownership would not have arisen and this thesis, of course, would not have been written. Rousseau is one of two seminal modern political philosophers, the other being John Locke, who believe in the theory that the human race began from an original state of nature, where

¹Jean-Jacques Rousseau, *The First And Second Discourses*, pp. 141-2; See also G. A. Cohen, "Self-Ownership, World-Ownership, and Equality" In Frank S. Lucash (ed.), *Justice and Equality Here and Now*, p. 108.

there was relative peace and plenty of resources.² In this state of nature, they argue that everything (including the earth and all its natural provisions) was owned by all humanity in common. Thus, guided by the fundamental law of nature, everyone had a natural right to every thing that he needed. But whereas for Locke, private ownership was the only logical means of utilising these abundant resources for the benefit of one's life, Rousseau reasons that private ownership was a corrupting influence and a factious rule imposed by the civil society.

In contrast to Rousseau, Locke makes the case that although the earth and its fruits belong to all humanity by virtue of God's free donation to mankind in common, strictly speaking, the earth and its fruits belong to only those who are able to cultivate it or to appropriate its fruits by means of their own labour. In fact, Locke dedicates the entire fifth chapter³ of his *Second Treatises* to rigorously establish "how Men might come to have a '(private) property' in several parts of that which God gave to Mankind in common, and that without any express Compact of all the Commoners."⁴ Locke assumes that although God owns the world as His 'property' and His workmanship⁵, God had donated the earth and all its natural resources to all mankind in common on the one condition that each person only benefits from this gift by the means of his individual labour.⁶ Whatever therefore a person acquires by means of his/her labour, becomes the 'private property' of the appropriator as long as he/she leaves enough and as good for others and does not allow what is appropriated

² We must note that Thomas Hobbes also speculated about the state of nature, but his theory is radically different from that of Locke and Rousseau in that Hobbes's state of nature was rather a state of endless war and lawlessness. See Thomas Hobbes, *Leviathan*, Part 1, Chapter XIII.

³ Although Locke specifies this task in the Fifth chapter of his *Second Treatise*, he already begins to approach the task from the first chapter of his *First Treatise* and brings it to its culmination point in the famous Fifth chapter. The rest of the *Second Treatise* is more or less like a footnote to this all-important chapter on property. Locke, however, tackled similar problems relating to the question of property in some of his economic writings including for example Some Considerations of the Consequences of the Lowering of interest, and Raising the Value of Money.

⁴ Locke, *Two Treatises*, 2.25.

⁵ Ibid. 2. 6

⁶ Ibid., 2.32. This argument is an express reaction to Robert Filmer's book, *Patriarcha*, where the latter had maintained that God had donated the world not to all mankind in common but only to Adam and his successors, which included kings, princes, rulers, and the *pater familias*.

to waste. She has rights over these resources, that no other individual or group may interfere with without causing offence.⁷

I chose to center my thesis on Locke's theory rather than Rousseau's not because the latter is any less important or any less coherent, but for two reasons. The first is the fact that Locke's political theory of property has had far more extensive influence in both modern and contemporary political discourses and also in shaping certain crucial historical moments since the publication of his *Two Treatises of Government*. Locke's theory of property is found in the *Second Treatise* of this book. Composed about the early 1680s but published in 1689, the *Two Treatises* provided the Whig Party with a formidable justification for the Glorious Revolution of 1688 and marked Locke out as a major political thinker of his time.⁸ The crux of this work lies in the critical distinction, which Locke makes between legitimate and illegitimate civil governments and his justification for the legitimacy of revolution against tyrannical governments. According to Locke the reason governments are established is to protect the life, liberty, and property of the citizens, but where these goals are not respected, then rebellion is entirely permissible by the people who originally consented to the governments' power.⁹ Locke's *Two Treatises* is also said to have significantly influenced the maturity of English liberalism, as well as the developments that led to "the American Revolution, the French Revolution, and their parallels in southern America, in Ireland, in India – everywhere government by consent of the governed has made its impact felt."¹⁰

The second motivation for this thesis is the perennial problem of the moral justification for private ownership. Private ownership of property is the economic face of liberal capitalism. And John Locke's political theory of property is said to have provided a solid theoretical justification for unlimited accumulation and a moral foundation for liberal

⁷ Robert Nozick, *Anarchy*, p. ix.

⁸ See Peter Laslett, "Introduction" in Locke, op. cit. p. 46. See also Mark A. Plozay, "The Early Reception of John Locke's *Two Treatises of Government*: 1688-1702". Available at: http://history.hanover.edu/hhr/99/hhr99_1.html. Date accessed: 22nd May, 2005.

⁹ Locke, *ibid.* 2.222.

¹⁰ Peter Laslett, op.cit. In Locke, *ibid.* pp. 3-4.

capitalism.¹¹ The sticky point in Locke's theory of private ownership pertains principally to his justification of the individual's 'exclusive' right to unlimited accumulation. Locke grounds his argument on the individual's right to property in her person (or what some have called self-ownership).¹² Although Locke subscribes to the argument that the resources of the earth belong to all mankind in common, he does not consider either the option of socialism or communalism as a viable means of ensuring an effective utilisation of these resources. Instead Locke posits unhindered private ownership as the only legitimate and logical strategy of enjoying these resources.¹³

Accordingly, in this work, I have arranged the body of Locke's property theory systematically beginning from God as the sovereign owner to mankind as the joint owners and down to individual persons as private owners. At each stage in this hierarchical order I have critically analysed Locke's arguments noting essentially the logical inconsistencies, the ambiguities, and self-defeating logic. I have notably rejected as myth the theory of self-ownership, which is the fulcrum of Locke's private ownership thesis. Having sawed off the trunk of his propositions, it should not, however, be expected that the mass of his property theory would collapse like a dead piece of wood. My aim has not been to discredit Locke's brilliant propositions, but by studying him to improve his rigorous search for truth in today's context. Thus whereas Locke had advocated the exclusive right of the individual to private ownership, I rather propose the possibility of an inclusive right of all individuals to a 'universal personal ownership'. The thesis of personal ownership is somewhat an alternative version of private ownership with the exception that the latter is positively exclusive while the former is naturally inclusive.

As a guiding matrix to our postulations, this alternative vision has been set up as part of a framework in this thesis within the context of four possible worlds of ownership to wit: a 'no private ownership world', a 'common ownership world', a 'no common ownership

¹¹ MacPherson, *Possessive Individualism*, pp. 205 & 221.

¹² See Locke, op. cit. 2.44. See also Will Kymlicka, *Contemporary Political Philosophy*, p. 107-111.

¹³ Ibid. 2.27

world', and a 'personal ownership world'. These possible worlds not only prefigure our analysis of Locke's argument, they also help essentially to clarify the distinction between the concept of property and the notion of ownership. This thesis thus has been divided up into two broad parts. The first part is basically a framework dealing with the puzzling task of unmasking the relation and difference between property and ownership. It also raises the question of what it means to have a right to ownership of property and concludes by positing the human right to property as basic and inalienable from the perspective of a possible universal 'personal ownership'. The second part comprises a critical exposition and analytic interpretation of Locke's property theory within the context of our today's world.

In the main, I have used many illustrations from Southern Africa especially South Africa and Zimbabwe to clarify Locke's arguments as well as to critique him. I do not, however, pretend that these cases are typical to Locke since in all of Locke's works that I consulted, there were no specific instances from the African continent. I therefore take full responsibility for this 'African misrepresentation' of Locke. I have also largely preferred contemporary examples although I maintained some traditional Lockean illustrations. I must, thus, warn the reader that this work is not essentially a historical account of Locke's political theory of property (already done by MacPherson¹⁴) nor an extensive discourse on Locke's property theory (thanks to James Tully¹⁵) nor was it intended to be a mine of inspiration for fresh insights on political theories (as in the case of Robert Nozick¹⁶). This thesis is set out as a critical response to the moral problem of property using the seminal framework already developed by John Locke. So our analysis of Locke in most instances has been aimed at the best interpretation possible. We hope our interpretation has been fair enough to him and that our analysis helps to shed further light on the problem in question. Since it is impossible to expect to solve the enigma of property in this piece of work alone, we hope that at least our research stimulates others to carry on the search for more light.

¹⁴ See MacPherson, op.cit.

¹⁵ See James Tully, A Discourse on Property.

¹⁶ See Robert Nozick, op. cit.

Chapter One

1. Why Property?

The contention about rights to property has given birth to two radically opposed ideological schools to wit: liberal capitalism and modern socialism. Whereas the liberals advocate for the protection of the individual's right to private property as well as for the regime of free trade and minimal state control of markets, the socialists, in turn, defend the protection of a collective right to property as well as for a strong state control of the markets and the means of production that ensures a redistributive property system that is motivated by the idealised sense of the universal equality and social justice for all. The central issue in this contention, thus, is the question of the sovereignty and the welfare of the human person.

For the liberals, a private property system provides the best and the safest guarantee for the development of the individual as an autonomous moral agent. It safeguards the individual's capacity for unhindered self-expression, and free enterprise in a free market system. Liberal capitalism, according to this argument, rewards personal enterprise, initiative and competence with profit while it also punishes or threatens incompetence and lack of competitive advantage with bankruptcy. For the laissez faire capitalists, a private ownership of the means of production helps to mitigate or to check the possibility of centralised domination, and excessive control of free and autonomous individuals by the state or a nomenklatura claiming to act for the community as a whole in a collective property system as was the case in erstwhile Communist states like the Soviet Union and East Germany.

Au contraire, the socialists favour the argument that the human person will best realise her genuine options and achieve an ethical development in a collective property system in which the ideals of equality, security and social justice for all persons are respected. To attain these high ideals, as Hayek – a prominent opponent of socialism – articulates, the socialists strongly canvass for the “abolition of private enterprise, of private

ownership of the means of production, and the creation of a system of 'planned economy' in which the entrepreneur working for profit is replaced by a central planning body."¹⁷ Simply put, the socialists advocate an economic system in which, according to Albert Einstein, "the means of production are owned by society itself and are utilized in a planned fashion."¹⁸ "A planned economy," the socialists argue, "would distribute the work to be done among all those able to work and would guarantee a livelihood to every man, woman, and child. The education of the individual, in addition to promoting his own innate abilities, would attempt to develop in him a sense of responsibility for his fellow men in place of the glorification of power and success in our present society."¹⁹

In sum, the liberal capitalists and the modern socialists or central planners essentially disagree on what property regime can afford the best welfare and provide the fullest development to every member of the society. As F. A. Hayek puts it:

The question is whether for this purpose it is better that the holder of coercive power should confine himself in general to creating conditions under which the knowledge and initiative of individuals is given the best scope so that they can plan most successfully; or whether a rational utilisation of our resources requires central direction and organisation of all our activities according to some consciously constructed 'blueprint'. The socialists of all parties have appropriated the term planning for planning of the latter type and it is now generally accepted in this sense. But though this is meant to suggest that this is the only rational way of handling our affairs, it does not of course prove this. It remains the point on which the planners and the liberals disagree²⁰.

Casting aside all fabulous rhetoric vis-à-vis the real world of scarcity of useful resources, gross population density and expensive economic necessities, property is a subject that tugs at the heart and soul of everyone: the rich and the poor, the pope and peasant, the man and the woman alike. The social institution of property for most people determines the radical difference between life and death, prosperity and poverty, the highway to freedom or the pathway to serfdom. It is for this reason we often find that an adverse dispossession,

¹⁷ F. A. Hayek, *The Road to Serfdom*, pp. 33-4.

¹⁸ Albert Einstein, "Why Socialism?" *Monthly Review*, May 1998, vol. 50, no. 1, p.5. Available at: <http://www.monthlyreview.org/598einst.htm> . Accessed: May 20, 2004.

¹⁹ Ibid.

²⁰ Hayek, *ibid.*, p. 37.

expropriation, or coerced alienation of people from their property sometimes leads to fatal catastrophes. It is little wonder why nation-states and countries have waged mortal battles to defend the sovereignty of their lands, natural resources and the security of their citizens' lives and property.

It is further not surprising, therefore, that the notion of property appears both conceptually elusive and concretely evident at the same time. Property in its familiarity and concreteness has a manifest ubiquity in our modern world. In this popular sense, people tend to refer to things as property yet many are conceptually unable to define or explain the relation between people and the things called property. Isn't it common in ordinary life to hear people on the streets, in the market place, and even in their homes, argue and haggle about their 'properties'? We appear to have unconsciously imbibed the use of such possessive and exclusive expressions like 'my cars', 'my estate', 'my dog', 'his house' and so on? When we use these expressions, we are explicitly or tacitly making a claim of entitlement to some 'thing' as our possession or property. Let us call this the popular conception of property.

Conversely, there is a school of thought that simply dismisses this popular conception of property as mere sham and gibberish. One of the most radical proponents of this school of thought in recent times is Thomas Grey. Espousing the controversial notion of the disintegration of property, Grey strongly argues that, "'Property' means nothing in particular and those who seek to justify or condemn it, or to decry or applaud any particular distribution of it, engage in sound and fury signifying nothing."²¹ And similarly, Bruce Ackerman contends that since the notion of ownership can never be absolute it is an incoherent notion. According to Ackerman, the law itself knows that no one ever owns anything absolutely. Therefore, insofar as the law never assigns any single person "the right to use anything in

²¹ Thomas C. Grey, "The Disintegration of Property." In J. Roland Pennock and John W. Chapman, (eds.), *NOMOS XXII: Property*, pp. 69-85; see also Harris, J. W. op. cit., p. 8.

absolutely any way he pleases”²² it risks serious confusion “to identify any single individual as the owner of any particular thing.”²³ Since nobody thus can ever own any thing unconditionally, Ackerman concludes that talks about ownership should be dismissed as empty rhetoric.

The problem with this type of theoretical scepticism about property is that the authors often conflate the notion of property with that of ownership, and thus treat these two concepts as though they were identical and interchangeable. This ambiguity complicates the distinction between property as a legal and social institution and ownership as a particular and concrete relation to one’s possessions. On this note Harris observes:

When commentators make conceptual claims about ‘the nature of property’, they are sometimes referring to the institution as a whole and sometimes specifically to ‘ownership’ – an ambivalence which can lead to misplaced conceptual cavilling.²⁴

To forestall this conceptual confusion in the development of our thesis, I will begin this essay by clarifying the distinction between the general concept of property and the notion of ownership. Since the key aim of this thesis is the systematic analysis of a rights-based argument that justifies an individual’s exclusive right to private ownership of property and to contrast the latter with a rights-based alternative ideal that justifies an inclusive and universal human right to personal ownership of property, I will also in the course of this chapter shed some light on what it means to have a right to ownership of property. I make these distinctions with the view to providing a conceptual framework that would assist us in digesting some of the underpinning theoretical assumptions regarding ownership of property. These distinctions, I hope, will serve also as the formal basis for grappling with our author’s (that is Locke’s) theoretical justification of the individual’s exclusive right to private ownership of property, which is the central thesis of our next chapter. Suffice it hence to begin by clarifying the concept of property and that of ownership.

²² Bruce Ackerman, *Private Property and the Constitution*, pp. 172-4

²³ *Ibid.*, pp. 26-7.

²⁴ Harris, J. W. *ibid.*, p. 13.

1.1 Property And Ownership: Towards A Conceptual Framework

As human beings we live in a vast world of scarce economic resources and so human life inevitably involves rules and regulations governing the use of these resources. We commonly regard something as a resource, says Jeremy Waldron, if it is an object capable of satisfying some human needs and wants.²⁵ Such resources will include tangible things like water, land, plants, trees, and mineral resources, as well as manufactured products like cars, electronics, and textiles. Economic resources also include intangible things like stocks and shares, patents and copyrights.

The concept of property thus, in Waldron's words, pertains to a particular system of rules governing access to, and the control of resources.²⁶ Put differently, property refers to the system of social rules determining who has access, rights, or entitlements to which resources. Logically, therefore, a *system or regime of property* encompasses the institutions, practices and general socio-political and economic norms governing different forms of ownership. What about ownership?

The notion of ownership is a subset of a regime of property and it pertains to the relation between a person and his/her possessions. As Waldron succinctly enunciates:

Ownership... expresses the abstract idea of an object being correlated with the name of some individual, in relation to a rule which says that society will uphold that individual's decision as final when there is any dispute about how the object should be used. The owner of the object is the person who has been put in that privileged position.²⁷

Thus whereas property falls within the domain of the rules that determine whose decision is final in a dispute about a resource, ownership on the other hand refers to the correlation between the individual person and the resource in question. Depending on the operational regime of property within a social institution, once a resource has been correlated to a particular person as its owner, the person has rights over the resource or item, which other

²⁵ Jeremy Waldron, *The Right to Private Property*, p.31.

²⁶ *ibid.*

²⁷ *ibid.* p. 47.

individuals have to respect. These rights transcend the material presence of the individual or the resource in the sense that the owner of an item continues to be the owner irrespective of the spatial distance between the person and the object. For instance, if I own a piece of land in Howick in the Province of Kwazulu-Natal, that land remains mine whether I reside in Howick or I live in Holland. And similarly, if Mr Tinashe owns a blue Mercedes Benz, that blue Benz remains his even when an armed robber snatches it from him at gunpoint.

However, to avoid the common confusion of the popular conception of *property* and the concept of *ownership*, we need to develop a conceptual framework to clarify the relation not only between ownership and property, but also between private, collective, common and public forms of ownership within different property systems. For the purpose of developing this conceptual framework it may be helpful to conduct a brief thought experiment considering a range of possible notions of private and/or common or collective ownership within different property systems. A starting point is provided by the familiar contrast between liberal or capitalist property systems (popularly conceived as based on private ownership) as against socialist property systems (conceived as based on common ownership at least of the means of production – a sort of an alternative to private ownership).

To begin with, it should be noted that a liberal or capitalist property system does not necessarily mean that all persons also effectively exercise private ownership (capitalism notoriously leaves large numbers of individuals unpropertied and indigent) or that all properties are privately owned (a liberal property system is consistent with various forms of public and collective ownership). Likewise it should be noted that a socialist property system does *not* necessarily mean that there can be no forms of private ownership (socialism requires common ownership of the means of production but does not necessarily rule out private ownership at other levels). In other words, in terms of *ownership* both liberal and socialist property systems amount to hybrid or mixed cases.

Conceptually, it may be helpful to contrast these two property systems with possible “pure” or “ideal-type” cases ranging from that of “no private ownership” to that of “no common ownership”. Arguably, these hypothetical options may well appear to be utopian and to require a world inhabited by saints and aliens. In a sense they presuppose and presume a world of abundance of resources. Nevertheless, for the purpose of developing a conceptual framework differentiating more clearly between different forms of ownership, on the one hand, and property systems, on the other hand, our thought experiment will take these various utopian options seriously enough.

Firstly, let us consider (i) a possible world where there is “no private ownership”.²⁸ Private ownership, we must recall, deals with the abstract idea of an object being correlated with an individual, in terms of a property rule which says that society will uphold that individual’s decision as final when there is any dispute about how the object should be utilised, the owner of the object being the person or group that enjoys this privileged position.²⁹ Now our “no private ownership” world will be a world where nothing can be correlated with specified individuals in this way. It will be a world, in which there are lands, houses, factories, automobiles, companies and tools but no one exclusively owns any thing as his or her private property. Our “no private ownership” world would mean that if for instance I live in a house, I have no right to exclude Mr Brown, who might well be a total stranger to me from sleeping in the same house. And likewise, Mr. Brown cannot exclude me, nor can he deny any one else the right to reside in any house, which he may be occupying at any point in time. Persons are free to cultivate any parcel of land they so desire, but they are not permitted to exclude any one from harvesting the products of their labour nor from cultivating the same land during the next planting season. Households may transfer things to other households but they lack the right to deny another household or family access to any available resources they

²⁸ The reader may contrast this thought experiment with that given by Stephen R. Munzer, *A Theory of Property*, p. 15, but whereas Munzer speaks of a ‘no property world’, I am more inclined to conceive of a ‘no ownership (specifically no private ownership) world’.

²⁹ Jeremy Waldron, *op.cit.*, p. 47.

might want from them. This does not mean that there could not be defined rules of access to, and control of, resources in this world, but only that such rules nullify all *exclusive* control of resources. In such a possible world all resources would be regarded as common resources, and thus as objects of common ownership.

At this point we may consider (ii) the possibility of a “common ownership only” world. This would amount to the inverse extension of a “no private ownership” world: while the latter involves a property system that negatively rules out any form of exclusive ownership, the former involves a property system that positively requires all ownership to take the form of common ownership. In other words, in this “common ownership only” world, everyone is entitled to share in the common ownership of everything. Common ownership of this kind may involve certain rules of access and specified limitations on usage. Thus individuals may be free to pluck and consume the apples and the plums they need for their own subsistence, but they may not be at liberty to amass or hoard baskets of apples and plums for themselves at the expense of others. It will mean that though various families and races of peoples may reside in certain distinct geographical locations, there may not be any human invented barriers and controlled access or border posts separating one group from the other. Every one is free to go wherever her interests, needs and desires lead her and will retain equal access and rights of usage to available resources. In such a “common ownership only” world every one’s interests, ambitions, desires and goals are to be respected, encouraged and accommodated within the circumference of her initiatives, opportunities, natural talents and the limits of available natural resources. Something like this vision of a “common ownership only” world has been the inspiration for the many and persistent experiments in communal living and sharing from the early Christian communities known to us in the Acts of the Apostles³⁰ through the 19th century theories of Robert Owen³¹ and Saint-Simon to the more recent examples of the Israeli *kibbutz* or “counter-culture” communes.

³⁰ Acts. 2:42-7.

This utopian vision with its elimination of all elements of the regime of private ownership of anything ultimately translating to the adoption of a regime of common ownership of everything, nevertheless, can in reality result in a classic example of Garrett Hardin's famous 'tragedy of the commons'³². As Hardin demonstrates in that masterly essay, free communal holdings more often than not suffer the remorseless tragedy of overuse, abandonment and ruin owing to the individual's unhindered pursuit of his best interests with little concern for the advancement of the common interests. And if we assume, as Adam Smith proposes, that individuals are ultimately driven by an 'invisible hand' to pursue their self-interests and personal gains in all their economic relations³³, there appears to be no guarantee that with unhindered common right to every thing individuals would by chasing their own individual interests promote the general welfare and the good of everyone or of the larger society, nor can it be guaranteed that every individual would manage her takings wisely and responsibly and not squander them on the hope of replenishing from the common pool.³⁴

Even so, the possibilities of a "no private ownership" world and of a "common ownership only" world may be differentiated from two further possibilities, that of (iii) a "no common ownership" world as well as that of (iv) a "universal personal ownership" world. The former possibility may be conceived as a radicalisation of more familiar private property systems in which the privatisation of all resources has been consistently applied across the board. In such a world not only ordinary possessions and the economic means of production as well as welfare and security services would be privately owned but all resources and

³¹ See Robert Owen, A New View of Society and Other Writings; and also A Development of the Principles and Plans on Which to Establish Self-Supporting Home Colonies.

³² Garrett Hardin, "The Tragedy of the Commons", *Science Journal*, vol. 162, 13 December 1968, pp. 1243-8.

³³ Adam Smith, The Wealth of Nations, 569-72.

³⁴ Again, our utopian world does not appear to leave any room for personal efforts, rewards, and punishment. Will individuals stoop to labour if they were certain that with or without labouring their daily bread is assured? And what would be the just proportion for work and recompense? Perhaps we might have a situation like Aristotle foresees where: "[t]hose who do more work and get less recompense will be bound to raise complaints against those who get a large recompense and do little work." See Aristotle, *Politics*, 1263^a, Barker (trans.) p.49.

services without exception, even those traditionally assigned to the liberal or minimalist state, would be fully privatised. Moreover a fully privatised or “no common ownership” world would not be ready to recognise some resources as public goods. However, it would by no means follow that in such a “no common ownership” world everyone would also be personally ensured of private ownership. On the contrary, it is to be expected that in such a fully privatised world the old, the weak, the sick or disabled etc. would lose out and effectively be denied access to, and use of, the resources they need.

At this point then we may conceive of the converse possibility, that of the radical possibility of (iv) a “universal personal ownership” world. We may visualise this as a world in which everyone without exception, including the old, the weak, the sick or disabled, are ensured access to, and use of, the resources they need, not as a matter of charity or as welfare services to be provided by the state, but in terms of a natural right of personal ownership. Put simply, this is a world in which individuals come into the world as owners of resources. Every person is legitimately entitled to a certain amount of basic resources as a start-off and no one irrespective of the circumstances of her birth, sexual orientation, ideological sensibilities, or moral disabilities, is denied this right to personal ownership. In this world, to be a person is to be an owner of things or possessions. As Thomas Paine aptly puts it, it is a world in which every one is a proprietor and each one draws on the capital as a matter of right.³⁵ Unlike in Hardin’s tragedy of the commons, individuals in this “universal personal ownership” world would have an interest in improving their personal holdings in order to advance the common interests. And by so doing they ensure that something is provided for the yet-to-be-born owners. Only non-persons, that is to say, entities lacking human identity, such as beasts and birds can be non-owners in our possible “universal personal ownership” world.

³⁵ Thomas Paine, Rights of Man, p. 34.

Suffice it at this stage, though, to say that we do not wish to concern ourselves with the realism or the feasibility of these various utopian options. Rather the thought experiment positing these different ideal types of possible worlds, each with a distinct form of ownership, has been introduced in order to clarify some of the underlying issues that are critical to the notion of property and ownership in our global regime of property. Two main conclusions, however, may be drawn from our thought experiment and serve as contributions to a conceptual framework.

Firstly, a closer and systematic consideration of the different forms of ownership undercuts many of the prevailing popular assumptions regarding the supposed antitheses of capitalist private property versus socialist collective property systems. At the level of *ownership* consideration of the full spectrum of “pure” options – (i) a possible “no private ownership world”, (ii) a possible “common ownership only world”, (iii) a possible “no common ownership world” and (iv) a possible “universal personal ownership” world – reveal other and cross-cutting possibilities. As long as we consider (i) the “no private ownership” and (ii) the “common ownership only” worlds, private ownership appears as the antithesis of common ownership. While the concept of private ownership embodies individual self-interest at the expense of social justice and the public good, the concept of common ownership, in contrast, is premised precisely on social solidarity and sharing.

But if we extend the spectrum to include (iv) the possibility of a “universal personal ownership” world then this tidy antithesis is upset. Instead, the radical option of (iv) a “universal personal ownership” world shares much with that of (ii) a “common ownership only” world. Indeed, it may be argued that it embodies a more radical view of social equality and welfare while avoiding precisely the consequences of social inequality and injustice commonly associated with private ownership, most evidently in the case of (iii) the fully privatised “no common ownership” world. Much will depend, of course, on the difference between *private* ownership, involved in (i), and *personal* ownership, as conceived in the case

of (iv). This difference does not lie in the individuated relation between individual owners and their possessions, but in the exclusionary character of private ownership, which is not necessarily conceived as part of personal ownership. That vital exclusionary character of private ownership is not inherent in the *ownership* relation as such but is conferred particularly by the existing *property* regimes.

We now come to the second main conclusion with regard to the proper distinction between *ownership* and *property*, that ownership specifically refers to the relation between an owner and his/her possessions while property refers to the holistic practice, including social relations, institutions and the norms or laws governing these. The relation between individual owner and his/her possessions may be “personal” or “private” depending on the wider property regime. For its part, a property regime or system is not simply a particular ownership relation multiplied and writ large. As we have seen, the various “pure” or ideal-typical notions of ownership such as that of “private” or “personal ownership” and of “common” or “collective” ownership, do *not* straightforwardly correspond to specific property regimes. Rather, these property regimes may involve different combinations of “pure” forms of ownership while any particular form of ownership may function as part of different property systems. In other words, property is not just about ownership as a relation to one’s possessions but more about the rules governing relations between the varieties of peoples and institutions in the society. Jeremy Bentham insightfully says, “Property and law are born together, and die together. Before laws were made there was no property; take away laws, and property ceases.”³⁶

At the level of *property* systems, therefore, the differences are largely about the normative and social rules which may, or may not, ensure a just and a fair playing field between equal and autonomous rights-bearing agents living together on the planet-earth, with equal access to the earth’s common material resources. How these rules are played out in real

³⁶ Jeremy Bentham, The Theory of Legislation, C K. Ogden (ed.), p.113

life and whether justice and fairness is plausibly achieved is yet another matter, which is beyond the scope of this thesis. Our own present purpose is to further explore a conceptual framework based on a clear recognition of the difference at the level of forms of *ownership* in relation to specific systems of *property*. To that end we will first critically review popular conceptions confusing property with ownership and then briefly consider the basic legal conception of property.

1.1.1 Popular Confusions of Property and Ownership

In common parlance, the term 'property' "is used popularly to designate an object which a person owns, as in 'this car / pen / table is my property'".³⁷ Property in this common understanding refers to that which gives us the sense of the connection between a thing and the person who possesses it³⁸. In casual speak, therefore, some one may say that the chair on which I am sitting, the house in which I am living, the bed on which I sleep, the car that I drive, the shirt that I am wearing, the books I read are all "my property" because I own them. In other words, I own these items as 'my property' because they belong to me. As the Romans say *res clamat domino* (a thing cries for its owner), I may well say that I know my 'property' and my 'property' knows me. Even though we can have a situation where I may have borrowed all or some of the items from some one else say Mr X (in that case the borrowed items would be Mr X's 'property'), but for our purposes here it is assumed that all the items are my own. Having all of these items as my 'property' does not necessarily imply private and exclusionary ownership. *De facto* ownership of this kind may be compatible with various kinds of customary or other arrangements for long-term or "permanent" loans, leasehold, usufruct, trust or rent without these things actually being my (private) *property*. That would depend on the system of property, which applies and not just on the substance of the ownership relation as such.

³⁷ Margaret Davies and Ngaire Naffine, *Are Persons Property?*, p.26

³⁸ Kenneth Minogue, 'The Concept of Property and its Contemporary Significance' in *Nomos XXII: Property*, R. Pennock and J. Chapman (eds.), 1980, p. 11.

Theoretically, the popular notion of property appears to marry the concept of property with its Latin etymological derivative, *proprius*, which means “that which one owns; the thing or things belonging to a person”.³⁹ Accordingly, some commentators claim that property is a thing, identical to the things that an individual owns.⁴⁰ In other words, they believe that property represents the thing that individuates and delimits a person, marking off real or imaginary borders between a person and the rest of the world out there.⁴¹ In this popular conception, therefore, property will include every class of acquisitions, which a man can own or have interests in for example all tangible things like tracts of land, houses, horses, automobiles, cutleries, tools, factories, or even body parts – the latter being the new kid on the block – and also intangible things like copyrights, patents, trademarks⁴², and other items which are today classified as “intellectual property”.

But a proper understanding of the concept of property must seek to separate this general etymological conception from its strictly technical meaning. It must also distinguish the relation between property and ownership so as not to confuse the latter with the former. To some extent the popular conception of property derives ostensibly from its confusion with the general notion of ownership and from a misconception of the right of ownership, which in legal terms is what entitles an individual to an object or resource.⁴³ But as the legal theorists and political philosophers argue, it is actually a mistake to view property as the ownership of anything at all.⁴⁴ Property, they contend, is about the bundle of rights and legal relations between individuals with respect to legal objects or things whereas ownership applies, as

³⁹ Shorter Oxford English Dictionary, Fifth Edition, Vol. 2, p. 2369. See also Kenneth Minogue, op.cit. p. 11.

⁴⁰ See John Christman, The Myth of Property, p. 16.

⁴¹ Gray, K. J and Symes, P. D. Real Property and Real People: Principles of Land Law, p.7.

⁴² Stephen Munzer, op. cit, p. 16.

⁴³ See the discussion on legal conception of property below.

⁴⁴ John Christman, op.cit. p. 16; See also Margaret Davies and Ngaire Naffine, op.cit. p. 26.

Honoré puts it, to “the person who has the greatest interest in a thing which a mature system of law recognises.”⁴⁵

Owing to this misconception, jurists and legal scholars consider the popular conception of property as a layman’s conception of property. When, as all too often happens in lay discussions, the concepts of property and ownership are used interchangeably this can only encourage the confusion involved in the popular conception of property. And this we must try to avoid at least within the course of this thesis in order to keep our analysis clear and precise. Once we realise that the popular confusion of property and ownership must be avoided, it becomes clear that a proper analysis of the concept of property must rather consider seriously its strictly legal definition and status.

1.1.2 Legal Conception of Property

In contrast to the popular understanding of property, jurists and legal philosophers speak about property as the system of legal relations, i.e. of rights and correlative duties, between individual persons and/or jural persons with respect to the use and control of things, rather than simply the relation between an owner as subject and the objects or things possessed by her. Technically speaking, ‘property’ is strictly about the legal relations between persons or other entities with respect to things within a particular legal or social institution.⁴⁶ Metaphorically, legal scholars sometimes describe this conception of property as a “bundle of sticks”.⁴⁷ In this bundle are contained many kinds of ‘sticks’ including the ‘normative power to exclude’, the ‘normative power to transfer’, ‘trespassory rules’, ‘expropriation rules’, and ‘appropriation rules’. Depending on at which end of the jural equation one sits, these ‘sticks’ translate ultimately to the question of rights of ownership and the duties of other parties. To be an owner of an item thus means that one has certain legally recognised and binding rights

⁴⁵ Honoré, “Ownership”, p. 107. For more general analysis of the concept of ownership see Andrew Reeve, Property; Lawrence Becker, Property Rights: Philosophic Foundations.

⁴⁶ See Stephen Munzer, *op.cit*, p.16.

⁴⁷ Stephen Munzer, *ibid*.

to that item while the non-owners in turn have certain corresponding legally binding duties to the owner with respect to the item in question.

Honoré's well-known analysis of ownership provides a helpful basis for our present discussion. He suggests, as we quoted earlier, that legally speaking the term "owner" refers to "the person who has the greatest interest in a thing which a mature system of law recognises."⁴⁸ Hence, Honoré argues that there are eleven 'standards incidents' within which we can speak of the right of ownership of property especially in the liberal sense of the term.⁴⁹ According to him, to say a person owns X involves the following incidents: (i) the right to possess X; (ii) the right to use X; (iii) the right to manage X (that is to determine the basis on which X can be used by others; (iv) the right to the income that accrues from X; (v) the right to the capital value of X; (vi) the power to transfer X by sale, or gift, or bequest; (vii) the liberties to consume or destroy X; (viii) the right to security (or immunity) against the expropriation of X; (ix) the duty not to use X harmfully; (x) the liability that a court judgement may be executed against him with respect to X; and (xi) the incident of residuary character (that is the expectation that when the rights that others may have in X, as in the case of leasehold, come to an end or lapse for any reason, those rights will naturally return to the owner).⁵⁰ Property, then, in a determinate object would consist of certain constituent elements, to wit: the unrestricted right to use, enjoyment, and disposal of that object.⁵¹

These abstract elements of property claims come into play in specific circumstances. If for example, Squire Thompson is legally recognised as the owner or proprietor of the Virginia Tobacco farms, what it means before the law is that he holds a whole range of rights to his farm including the 'normative power to exclude' the general population from trespassing on his land. The general population in turn has the duty not to trespass on, or interfere with, Squire Thompson's tobacco farm, even if they had long resided on this farm or

⁴⁸ Honoré, A. M. op.cit. p. 107.

⁴⁹ Ibid. pp. 112-28.

⁵⁰ Ibid. pp.107-47. See also Stephen R. Munzer, op. cit, p. 22; Jeremy Waldron, op.cit, p. 49.

⁵¹ Hohfeld, N. W. Fundamental Legal Conceptions, p. 29.

worked for Squire Thompson. Failure on the part of anyone of the general population to comply with this positive regulation can be tantamount to a breach of Squire Thompson's property right, and is actionable by him. He can have them evicted as trespassers or illegal squatters, etc. So in this instance, property is not just about ownership of things -- the tobacco fields or crops and so on -- but about rights and rules of exclusion, transfer, expropriation, etc between individual members of the society or corporation. The exclusionary elements of property rights in this sense may well conflict with other established senses of customary usage and ownership relating to the commons as demonstrated in the "enclosures" of 17th century England. Even in contemporary urban contexts, squatters often succeed in establishing effective and even longer-term occupancy on what is not their property. It is in these contexts that the exclusionary rules governing property rights are invoked for legal enforcement.

A classic instance of the invocation of the 'trespassory rule'- one of the 'sticks' in the property bundle - is that between *Southwark London Borough Council v. William*⁵². In this case, two homeless families, with the help of a squatters' association, moved into and effectively took possession of houses owned by the city council, which the council had left empty with the view to redevelopment. When challenged and threatened with eviction, the homeless families invoked the common law doctrine of necessity and claimed the "right" to stay in the houses. But following a summary application by the Council, the trial judge ordered them to vacate the premises on the ground that they had no arguable case in law. The Appeal Court unanimously dismissed their appeal with the following judgement delivered by Lord Denning:

If homelessness were once admitted as a defence to trespass no-one's house could be safe. Necessity would open a door which no man could shut. It would not only be those in extreme need who would enter. There would be others who would imagine that they were in need or would invent a need so as to gain entry. Each man would say his need was greater than the next man's and the plea would be an excuse for all

⁵² Cited in Harris, J. W. op.cit. p. 89. The case cited here is similar to the plight of the homeless and dispossessed peoples squatting in shacks and common dormitories in the Joe Slovo squatter camps in South Africa.

sorts of wrongdoing. So the courts must, for the sake of law and order, take a firm stand. They must refuse to admit the plea of necessity to the hungry and the homeless and trust that their distress will be relieved by the charitable and the good.⁵³

If Lord Denning's judgement provides an authoritative statement of the implications of property in law, it is at some remove from our more everyday understanding of ownership. For the most part when we speak of ownership we know well enough what we are talking about: the things that we own. We do not constantly need the services of an expert in the law to determine or define for us what belongs to us. Most of the times, we can tell the boundaries of what we own. But the whole question of whether we have property rights to the things we effectively own or possess, or to the things we claim to own, is a different matter altogether. In reality, we do not need to invoke our rights to the things we have, the things we own or possess, until the boundaries of our property rights claims are invaded or the circumference of our ownership claims is threatened by opposing claimants. Hence, we still need to closely analyse and to unpack the relation between property and ownership.

1.1.3 Unpacking the Property and Ownership Nexus

Though conceptually related, the terms 'property' and 'ownership' are not identical. Ownership, as Harris puts it, is one of the twin foundations or pillars on which the property edifice is built.⁵⁴ Property is a much broader term without which the distinction between different forms of ownership does not arise. Stated differently, property can be said to be logically prior to ownership. In other words, if I have rights to a piece of land as my property, the land must first exist and be ownable before I can own it. This therefore implies that the notion of property is consistent with the practice of some form of ownership.

Naturally, there can be no property rights in a vacuum – outside the motley of ownable entities – nor can there be a plausible claim of ownership of what is effectively unownable. It

⁵³ *Southwark London Borough Council v. Williams*, 1971, 1, Ch. 734. Cited in Harris, J. W. *ibid.*

⁵⁴ Harris, J. W. *ibid.* p. 13. According to Harris, the other essential pillar of the edifice is what he calls 'trespassory rules'.

would be very strange, for example, for a person to claim that he “owns” the clouds and the galaxies, the oceans and the stratosphere. We shall not generally be inclined to heed this claim save to consider it as perhaps the ranting of a deranged mind because these entities are presently known to be un-ownable. Similarly, so long as natural resorts like Table Mountain, Mount Kilimanjaro, or the Kukuruku hill have not been subjected to the rules of private ownership, these resorts and resources remain unowned or better put commonly owned by especially those in whose immediate geographical domain they are found.⁵⁵ A property claim thus must essentially be about ‘things’, tangible or intangible, which are socio-politically and legally accepted as ownable.⁵⁶ *Mutatis mutandis*, a claim of ownership must also be related to things that are not already owned and the claim must be recognised and protected by the society for it to be meaningful.

In order to further explore the relation between property and ownership let’s imagine the following scenario. Consider that a massive global tsunami with devastating consequences occurs destroying all human life including scores of millions of flora and fauna. Somewhat miraculously, though, only a small island called Abyssinia Island, near the horn of Africa is left unscathed by this global holocaust. Trapped on this island, however, is a young couple, Zima and Zofin⁵⁷, who had been hiking alone on that little island just before the tsunami

⁵⁵ It is perhaps pertinent to observe that although a particular community or state might devise a system of maintaining these resorts as a form of tourism, this practise does not automatically turn the resorts into the property of those who maintain it. Ownership commences from the time that the state or community decide to place these resorts on the free market. But as we have said elsewhere the fact that something is owned by someone does not *ipso facto* make the thing owned or possessed by that person his ‘property’.

⁵⁶ I must, however, note that there are religious and cultural groups who may also have a different theory of property and ownership such that a person for instance a priest or soothsayer may be said to have or to ‘possess’, in other words, ‘to own’ some privileged spiritual powers, thereby making these powers the ‘property’ so to speak of the priest or soothsayer. But extrasensory possessions or mystical powers over things are not within the domain of our analysis here.

⁵⁷ We could also have had a scenario where there was only a single individual left on the island after the tsunami. But the problem with such a scenario is that with a solitary individual in the midst of resources, questions of ownership or property could not meaningfully arise. If Newt Gagarin on landing alone in space for instance decides to remain there, that is assuming space supports life, it might be absurd for him to consider seriously the question of ownership of space so long as he has no human rivalry. The only puzzle here is whether Gagarin can in the event of eventual rivalry meaningfully assert a claim of ownership of space by the fact of his being the first human to arrive there. Even though he may be the first to arrive and live in space but if a rival comes later and improves the condition of life in space, managing the environmental resources more efficiently, can the later settlers claim a superior right to ownership of space? Although the utilitarians like J.S. Mill and Jeremy Bentham would favour the rivals’ claim of

struck. Besides this couple there is no other known human form alive although some animals, birds, plants, and vegetations survived on the island along with them.

Now this scenario immediately provokes a number of intriguing questions with regard to possible ownership and/or property claims. Could Zima or Zofin separately or jointly lay claim to the Abyssinia Island, or indeed to the entire world around them, as their 'own', or consider all of this as in some relevant sense their 'property'?⁵⁸ Since they have faced no ownership contests from either men or beasts over the island, can we recognise any claim of ownership of the island or any part thereof beyond their immediate reach as meaningful? Is there a sense in which they could consider the whole island as their possession or 'property'? What would possibly be the boundary of their claim? Would ownership be restricted to the fruits they gather, the animals they hunt or would it generally be over the entire surface area of the island including undiscovered mineral resources in the ground? Again, in the event of a positive claim of ownership of the island, what would be the justification for their claim? Suppose the shock of the tsunami wears off and they start cultivating the land as productively as their strengths enable them, would there be a difference between any claims over the island *in toto* and claims to the products of their labour?

These are some of the questions that are critically central and confusing about the idea of ownership of 'property'. Clearly our difficulties in making sense of Zima and Zofin's possible claim of ownership of Abyssinia Island arise from their isolation. It appears utterly absurd for them to claim ownership in a social and moral vacuum – a universe unpopulated by human beings. Suppose they were to come into physical confrontation with some animals on the island over food and safety, and assuming they were able to tame or at least subdue

ownership on the logic of the efficient use of resources, my argument is that both Gagarin, his rival and even the yet-to-arrive space enthusiasts have right to a place in space by virtue of their human identity. None can claim absolute ownership of space since no human entity is the author of space although the size of a person's entitled enclosure might differ in consonant with the rule of ownership that they as a group are able to harmoniously agree upon.

⁵⁸ If they want to eat the fruit from the trees, or snare fish or fowl for food, no one else could interfere or stop them, and they would only be limited by their own abilities and skills. They could agree amongst themselves how they would divide the spoils, or decide to share that jointly.

these animals, their assertion of physical might over the beasts or other nonhuman creatures that live on the island would still not amount to a rightful claim of ownership.⁵⁹

Now let's add some further complications to the scenario. Suppose that Robinson Crusoe⁶⁰ and his Man Friday suddenly arrive on the island and likewise begin to cultivate and appropriate the fruits therein. With their arrival, it is clear that the previously prevailing 'social and moral vacuum' disappears and with it also the effective 'domination' of the island by Zima and Zofin. In this instance, one can think of at least three possible scenarios that might occur with respect to "ownership" of the island.

The first is that Robinson Crusoe and his partner might engage Zima and Zofin in a battle for power or control of Abyssinia Island. The couple might claim to be the first to arrive on the island and therefore deserve ownership of the island by "right of first occupancy".⁶¹ Crusoe and his partner might contest this claim by positing the international "right of conquest". In that case, the two parties would engage each other in a show of might and the party that conquers the other would claim a "sole and despotic dominion"⁶² – complete ownership of the island, which might entail controlling the vanquished and turning them into slaves or vassals. Now although the victorious party might achieve an effective control of Abyssinia Island by overpowering might, it would be completely farcical to consider the conquest and domination of one party as justifying ownership of the island. Conquest and domination might instead turn the island into a Hobbesian state of nature marked by sporadic

⁵⁹ I am reminded here of the struggle for ownership of the Manor Farm between the beasts of England and human beings in George Orwell's Animal Farm and how the animals successfully waged an independence revolution against human domination for the collective control of their 'property' and the fruits of their individual labours.

⁶⁰ Robinson Crusoe and Man Friday are two key characters around whose plight on a strange island after their miraculous escape from a shipwreck, Daniel Defoe developed the plot of his classic novel: Robinson Crusoe.

⁶¹ In his Social Contract, Jean-Jacques Rousseau argues that ownership is grounded in 'first occupancy.' He writes: "In general, to establish right of first occupier over a plot of ground, the following conditions are necessary: first, the land must not be inhabited; second, a man must occupy only the amount he needs for his subsistence; and in the third place, possession must be taken, not by an empty ceremony, but by labor and cultivation, the only sign of proprietorship that should be respected by others in default of a legal title." Confer, Jean-Jacques Rousseau, The Social Contract and Discourses, p. 17.

⁶² William Blackstone, Commentaries, Bk. 2, p. 2.

but perpetual war of all against all⁶³ leading ultimately to social alienation, intransigence and mutually assured destruction.

The second scenario is that Robinson Crusoe and his Man Friday may enter into a pact⁶⁴ with Zima and Zofin in which both parties agree to some form or a regime of property in which the “ownership” of the island and its resources is regulated between them. The parties might decide on a common ownership of all or some of the resources on the island or they may choose a private ownership system in which either part owns what they are able to get by dint of their personal labour or initiative from the island. The relevant question here is what would happen if any party does not observe the terms of the agreement or the pact somehow breaks down. Since there would be no regulating authority apart from the parties themselves they might presumably revert to open conflict as in the first scenario.

But there can also be a third scenario where both the ‘first occupiers’ of the island and the ‘later settlers’ live and cultivate freely on the island without anyone having to claim or assert any form of ownership or title to anything. In this scenario, although people might acquire things for themselves, they do not fix property rights on them since there are no defined rules of ownership. Objects are owned in the sense that people have personal possession of the thing and as a result are disposed to pass on whatever they acquire to another party in the circumstance of need. This scenario underscores the form of ownership scheme that was earlier envisioned in our ‘personal ownership world’. To a certain extent, this last scenario assumes a circumstance of relative abundance of resources and also a realistic recognition by the parties that they are all sojourners on the island – the island pre-existed them and would most probably also outlive them including their generations – and as such none of them truly has any ‘right’ to claim exclusive ownership of the island or of anything thereof. This scenario therefore in a way is a converse of the Hegelian intuition in

⁶³ Thomas Hobbes, *Leviathan*, Part. 1, Chapter XX, p. 160. [Hobbes paints a similar scenario in which the vanquished in order to avoid death in the hands of the victor enters into a pact of servitude to the victor. Confer, Hobbes, *ibid*, Part 2, Chapter XX, p. 155].

⁶⁴ The pact might come about peacefully without any conflict or it might be the outcome of a negotiated resolution arising from a stalemate in the conflict over the control of the island.

the sense that, all things being equal, we would have a situation where none of these parties struggles to recreate the island or the world in their own image on the pretext of racial, ideological or intellectual superiority, or to make other rational agents to be dependent on their will.⁶⁵

What these triple scenarios help to illustrate is the distinction as well as the relation between ownership as an outcome or subset of the social institution of property based on the social norms, customs, or rules of justice, and property as an abstract but macroscopic socio-legal principle of organisation of resources and things ownable by persons. In various social institutions, depending on the operational social norms of ownership and rules of justice, ownership can be private or communal albeit we can also have hybrid cases that combine private and communal form of ownership as well as some other amorphous or naïve forms of ownership. In other words, social institutions make rules on how particular resources, (of course not all resources), are utilised or assigned to individuals or groups. The same institutions as well create the mechanism that enforces the ownership rules made, or to protect the *status ante*. In sum, although ownership and property are conceptually related, ownership can be individuated and defeasible, ^{same of rules} whereas property can neither be individuated nor defeasible. A brief word is apt at this stage on some of the forms of ownership of property.

1.1.4 Private and Common Property Regimes

Our discussion thus far has dwelt firstly on the distinction between ownership and property, and then more specifically on the ownership and property nexus. In large part this was designed to counter the popular confusion between ownership and property. We are now in a position to consider different forms of ownership, and more especially that of *private*

⁶⁵ Hegel, *Phenomenology of Spirit*, A.V. Miller (trans.), pp.111-12 [Hegel speaks of a world where each man constantly struggles to recreate the world in his own image by conquest and wanting every thing and every other man to be dependent upon his will. This is chiefly what led to the Master-Slave relation where the master is the conqueror and the slave is the conquered.]

ownership and *common ownership*. These are to a large extent the two most common forms of ownership regimes. In a *private ownership property* system, the rules governing access to and control of economic resources are organised in such a way that objects are exclusively owned by or attached to individual persons.⁶⁶ In this case the individual owner has full rights over the objects or entities in his ownership even though this might only amount to the right of “mere ownership” and not the right of “total ownership” over his property.⁶⁷ If there is any dispute with regards to how entities are to be used in this *private ownership system*, the individual whose name has been correlated with the property holds the final word.

The regime of private ownership of property is often governed by a system, which stresses the role of individual autonomy, freedom of choice and initiative. This scheme of ownership tries to defend the right of the individual to choose a state of life, set independent goals and aspirations for herself by means of what she has, without the encumbrances of the state and/or local authorities. Thus in a private ownership system the individual person is so to speak enabled by her ‘property’ to take personal risks, to freely execute her personal initiatives in whatever endeavours she so desires and to benefit or loose from such risk taking. This is the familiar ownership regime found in most capitalist economies like the United States, Western Europe, Nigeria, and Japan.

In contrast to the system of *private ownership* of property, a *common ownership* regime upholds the rules that permit access to resources for every member of the society. Here access to resources is in principle available to all members of the society without any one being able to claim any special privileges or entitlements to any part of the common wealth. Many natural rights’ theorists have used the idea of common ownership of property by all

⁶⁶ Jeremy Waldron, *ibid.* p. 38.

⁶⁷ In his *Property and Justice*, Harris distinguishes between ‘total ownership’ (or otherwise full-blooded ownership) and what he calls ‘mere property’ (which I prefer to call ‘mere ownership’). The latter comprises the notion that what pertains to a person is hers to use and to transfer to others within some ‘drastic limits’. Ownership in this case, therefore entails “some open-ended set of use-privileges and some open-ended set of powers of control over uses made by others. The former, without the latter, amounts to half property.” (pp.28-9). In the case of ‘total ownership’ the person is *prima facie* entirely free to do what she wills with her own. She has unlimited privileges of use or abuse over the thing, as well as unlimited powers of control and transmission, so far as such use or exercise of power does not infringe some property-independent prohibition such as homicide, deliberate deceit or incitement (p. 30).

mankind to characterize the original state of all mankind in relation to material resources in what is called the state of nature.⁶⁸ An example of a common ownership scheme is that of the customary free access to the water in the ocean or the river. In other words, traditionally anybody can visit the beaches around the oceans and freely use the water in the river without hindrance either from the government or from private entrepreneurs. We must of course point out that free access to the beaches precludes the use of beach facilities that belong to private entrepreneurs or to public authority. In the latter case, one might require permission to use these facilities.

The key feature of a common ownership of property is its inclusiveness and non-exclusionism. In *actualité*, a common ownership of property means that no private ownership of property is permitted. In this sense, therefore, common ownership may be employed as a way of signifying that a particular resource has been debarred from, or has not been subjected to, the exclusionary and rivalrous private ownership regime. In the international sphere, for example, the open sea, the Antarctic continent, and the extraterrestrial universe may be viewed as 'common property'.⁶⁹ In a common property system, therefore, no one may deny another, by virtue of an ownership or quasi-ownership interest, the right to make use of a resource albeit uses may be limited by property-independent prohibitions.⁷⁰ There may also be positively relevant duties imposed on all, or imposed on those occupying special roles such as public authorities charged with the duty of repair and maintenance of the resource.⁷¹

Socialist countries like Julius Nyerere's Tanzania and some communist countries such as China have favoured the regime of common ownership, if only of the means of production.

⁶⁸ Jeremy Waldron, *ibid.* p. 41

⁶⁹ Harris, *ibid.* p. 110. ["In customary public international law, the expression *res communis omnium* has traditionally been applied to the high seas and more recently to outer space and celestial bodies.... Technically, Antarctica has, in the past, been treated as *terra nullius*, that is, land subject to appropriation by States, and claims to sovereignty over sectors of it have been asserted.... However, a regime of cooperation has been established by the Antarctic Treaty of 1959 under which, in effect, claims to sovereignty have been frozen and the area kept open for scientific investigation by all-comers.... In substance, trespassory rules are not enforced in respect of the Antarctic continent." *Ibid.* Footnote reference.]

⁷⁰ Property-independent prohibitions here refer to rules that are made to guide the common use of these resources or to preserve them for future uses.

⁷¹ Harris, *ibid.*

Besides the above two forms of ownership, there are also other forms of ownership of property that are recognised and practiced in some modern ownership regimes. There are what is known as the *public ownership of property* and the *collective ownership of property*.⁷² On the one hand, public ownership usually refers to ownership by the civil government or public authorities not in their personal capacities as private citizens but rather in their official position as public servants of the common resources of the state. In this case, thus, access to the state resources may be prohibited to all private citizens except to the agents of the State or those whom they authorise. As Harris aptly puts it, even though state officials may have open-ended powers of control over access to the state assets, no law or social convention permits them to do what they like with the state resources. "Appropriation of State money or chattels", for instance, "will be criminal unless it was done in performance of an official function."⁷³ In other words, the state officials have the duty of accountability to the public for the use and management of these common resources entrusted to their care. When a public official is found wanting in this duty, the public may deny this agent the right of access to the state assets or might in grave circumstances punish the official for a breach of contract.

Likewise, in a *collective ownership* of property regime, the joint interest of a group or corporation is paramount in the allocation of resources. Thus, as Waldron puts it, if there is any question regarding how or by whom resources such as land, industrial plant and so on are to be used, those questions are to be resolved by favouring the option that conduces to the general collective good and interests.⁷⁴ In most cases, *collective ownership* can be a variation of *private ownership* with its exclusionary character namely: external trespassory rules, use-privileges, control powers and powers of transmission vested in the agents of the corporation. A group of friends interested in animal husbandry, for instance, may acquire a herd of livestock including cattle, bulls, and goats, which they own collectively as a group but from

⁷² Some authors also talk about communitarian, group, or joint property. For more discussions on these forms of property see Harris, *ibid.* pp. 100-5.

⁷³ *Ibid.* pp. 104-5.

⁷⁴ Jeremy Waldron, *op.cit.* p. 40.

which they exclude non-members of their group. In this case the herd becomes, in common speak, the “*private property*” of the group who have collective access to it in contrast to non-members of the group who are debarred from access to the herd save with the permission of the members of the group. In like vein, a finance company like *Deloitte and Touche*, can be seen as the “*private property*” of its shareholders who have collective access to its resources, depending on the deeds of the company, while at the same time they reserve the right to exclude outsiders, to wit: the general population including their competitors and even the government from access to their resources.

These examples show, then, that the regime of collective ownership of property as well as public ownership though to some extent inclusive particularly of its members or representative agents, yet it does not completely transcend the exclusionary character of the regime of private ownership of property. Nevertheless, it is correct to say that in reality, there is no immaculate world of pure private ownership of property founded on the capitalist economic principle of rivalry, competitive advantage and exclusion, nor can we find a perfect world of common ownership of property regime built on the socialist norm of human solidarity and equality. What we usually find are hybrid regimes of private and common ownership regimes, as well as public and collective ownership systems, often operational within a particular socio-economic system. Whereas public and collective ownership systems are part of the broad scheme of the property institution, they are often not fully-fledged regimes themselves unlike the regime of common ownership and especially the private ownership regime.

A succinct expression of the contrast as well as the relation between the inclusive principle of a common ownership regime and the exclusionary imperative of a private ownership system is evident in Locke’s labour theory of property. There Locke shows how an individual’s exclusive right to private ownership of property derives from his inclusive right to the earth as the “common property” of all mankind. In fact for Locke without private

appropriation (alias “private property”) the “common property” would be of no benefit to the individual.⁷⁵ But once appropriated, this object from the common resource becomes the natural right of the individual appropriator that no one is permitted to take away from him.⁷⁶ We shall return to Locke’s subtle justification of the individual’s right to private ownership of property in the later part of this thesis. There we will by careful analysis attempt to show how Locke erred by absolutizing and prioritizing the exclusive character of the private ownership of property above the inclusive imperative of the common ownership of property. For the moment, however, let us concern ourselves with the question of what it means to say that ownership of property is a right.

1.2 The Right to Ownership of Property: Natural or Civil Right?

Through our consideration of the concept of property and its relation to that of ownership, we have seen that we cannot strictly speaking talk about any right to ownership of property or indeed a right to anything in a lawless society or in a community without rules. This therefore simply implies that rights are consistent with social rules or civil laws. Jeremy Bentham puts this point rather punchily thus:

Rights and law are correlative terms: as much so as child and father. Right is with me the child of the law: from different operations of the law result different sorts of rights.... Name me any right, name me what I mean by a right, the only sort that with me has either meaning or existence, name me a legal right either actual or possible, a right existing in this country or in any other, a right past, present, or future, I will shew by what it was made and how it was made. I will point out whatever laws have concurred in its formation.⁷⁷

Even though natural rights’ theorists like John Locke⁷⁸ would not totally agree with Bentham that rights, whether they are rights of ownership to property or right to freedom of expression, are solely the creation of the law, we first need to know what it means to say that someone has a right.

⁷⁵ Locke, *ibid*, 2.26

⁷⁶ *ibid* 2.27

⁷⁷ Jeremy Bentham, “Anarchical Fallacies” in Jeremy Waldron (ed.), *Nonsense upon Stilts*, p. 73.

⁷⁸ We shall return to this theory in a later paragraph.

Jurisprudents frequently distinguish the notion of rights as applied in judicial decisions from the concept of rights in a broad sense. Some philosophers and jurists equate a right with a claim and others view it as 'justified' valid claims.⁷⁹ Those who argue that right implies a claim make a distinction between making a claim to something, and having a right to that which is claimed. According to John Stuart Mill:

When we call anything a person's right, we mean that he has a valid claim upon society to protect him in the possession of it, either by the force of law or by that of education and opinion. If he has what we consider a sufficient claim, on whatever account, to have something guaranteed him by society, we say he has a right to it.⁸⁰

In modern legal philosophy, there are two senses in which legal thinkers speak of rights.⁸¹ The first conceives of right as the legal capacity to do something. This (also called positive right) is the power that an individual has to a legal object in relation to other individuals including juristic persons. It can also be said to be the power an individual has, backed by the force of the law, to compel other persons or the state to do something for him/her. If for example, A is a citizen of South Africa, A has the 'right' to compel the state (a jural person) to provide her with basic education (legal object) as stipulated in the South African Bill of Rights.⁸² In the law of contract, for another example, if Mr Kolade has paid Mr Adebayo for an item 'B', then Mr Kolade has the right to compel Mr Adebayo to have the item delivered to him. In other words, Mr Adebayo has a legal duty to deliver the item 'B' to Mr Kolade, failure of which would amount to a breach of contract. Put differently, this means that having a right also functions as an empowerment. It is an enablement for action without wrong. As Waldron puts it, liberal rights-holders do not say "Please let me have... but rather 'How dare you try...' and they do not ask "Please let me sleep on your land', but rather

⁷⁹ Adam Smith, *The Theory of Moral Sentiments* (1759).

⁸⁰ John Stuart Mill, *Utilitarianism*, Chapter V, par. 24.

⁸¹ See Jeremy Waldron, *Liberal Rights*.

⁸² *The Constitution of the Republic of South Africa*, (Act 108 of 1996), §. 29.

‘How dare you erect fences around land that people need to sleep on?’”⁸³ A liberal positive right, therefore, is neither apologetic nor supplicatory. It is rather proactively assertive.

But this is not to say that positive rights are absolute rights. They also have their limitations. The fact that I have a right to basic education does not mean that it must be necessarily provided at all costs. Sometimes, states or individuals may not have the means and resources to provide the citizens with all or some of the objects of their right. On this score, Nozick observes that though my right of ownership of my knife allows me to use it as I will, it does not mean that I also have right to stab it on someone’s chest.⁸⁴ To do so save in the judiciable case of self-defence, is to transgress the boundaries of my rights and can result in the stripping of my right to own the knife just as well as it might incur some more punitive sanctions. Rights, therefore, have their bounds (limitations) and concomitant responsibilities on the part of the rights-holders.

There is also the other sense of right, known as the negative right. In this case right is seen as a prohibition against interference. It is the power that a legal right-holder has to debar other persons from interfering with or encroaching on her legal object. If for instance, I have a right to X, it means that no one (including the government) should stop me from having X.⁸⁵ In fact (if I may again paraphrase Nozick) suppose I have rights to X there are things that no individuals or groups may do to X without violating my rights to X.⁸⁶ Thus my right to X prohibits others, whether individually or as a group, from interfering with X. To take another example, if I have a right to life, it implies that other persons are prohibited from interfering or denying me of my entitlement to this right. But as we have earlier pointed out, this right is of course constrained by the proviso that I do not harm others by the use of my right. If I

⁸³ Jeremy Waldron, op. cit. p. 20.

⁸⁴ Robert Nozick, op.cit, p. 171.

⁸⁵ I must also point out that just as in the earlier discussion, rights here do have their limitations. Rights are always limited by the rule against harmful use. That I have a right to own a cow does not mean I should allow it to graze on every available farmland and green pasture. My right to drive my car is also limited by the obligation to stop before a red robot. We revisit this point later.

⁸⁶ Robert Nozick, *ibid*, p. ix.

want others not to interfere with my right to life, it implies also that I have the constraint not to interfere with the others' right to life.

Hence, to have a right to ownership of property implies that one has a valid claim, supported by the force of law or a social norm or convention, to the resource in question. Without the backing of the law or the support of social norms, any claims of right to anything would be absolutely nonsensical and a breeding ground for conflicts. In a Hobbesian state of nature, for example, where each man has the liberty to preserve himself by the use of the aptest means possible without recourse to any social norm or rule of justice, each man must ultimately become his own law in order to achieve his goals.⁸⁷ In this circumstance the whole question of rights of ownership of property would not arise since each man out of fear, diffidence or distrust of his neighbour would consider himself at all times the owner of any resource which in his judgement conduced to his self-preservation. Thus, the stronger and the craftier a man is, the better his chances are of achieving his aims. But we can more easily imagine a state of chaos, of anarchy, and war arising from this than a veritable ground for issues of rights. In such a state, what right does a man have to anything that a stronger man can so easily snatch away from him without reproof? As Hobbes imagines, the general condition of life in this state would be miserably "solitary, poore [sic], nasty, brutish and short".⁸⁸

Accordingly, Hobbes famously argues that in the state of nature and without a common allegiance to a mutual Sovereign authority, there could be no moral right and wrong as well as no distinctions of property between persons.

Where there is no common Power, there is no Law: where no Law, no Injustice ... It is consequent also to the same condition, that there be no Propriety [sic], no Dominion, no Mine and Thine distinct; but onely [sic] that to be every man's, that he can get; and for so long, as that he can keep it.⁸⁹

⁸⁷ Hobbes, op. cit, Part 1, Chapter XIV, p. 100.

⁸⁸ Ibid. Part 1, Chapter XIII, p. 97.

⁸⁹ Hobbes, ibid, Part. 1, Chapter XIII, p. 98.

Hence, Hobbes considers the right of ownership of property and other rights as arising from the conventional laws of the civil society that is authorised by the common power of the Sovereign, the *Leviathan*, as a consequence of the social contract by which men mutually and voluntarily transferred their naturally unbounded rights to the rule of the Sovereign for their mutual benefits and security.⁹⁰

Similarly, David Hume believes that the right of ownership cannot be grounded upon natural rights, which existed in the state of nature independently of civil society but that ownership rules were the creation of civil society and drew their validity from their social usefulness. Hume thus classifies ownership rules as part of the rules of justice that emerged from a tacit convention among the members of society. Significantly, Hume devotes a great deal of his *Treatise* to explaining why justice, and by implication ownership, is an artificial (that is conventional) virtue and not a natural one.⁹¹ In contrast to Hobbes, however, Hume argues that the rules of ownership of property, though specific to civil society, did not arise out of a social contract but rather they are the consequence, in like manner as the rules of justice, of many separate understandings within society that eventually became engrained habits and custom.⁹² So whereas some theorists like Rawls explicitly accept Hume's descriptions of the conditions that gave rise to the need for ownership rules, Rawls differs from Hume by subscribing to the theory that ownership rules as well as the rules required by the circumstances of justice were the product of deliberations of individuals who in an original position of ignorance (a Rawlsian variant of the social contract) decided upon fair rules of ownership as well as principles of justice for the whole society.⁹³ Hume, however, further contends that the issue of rules of property ownership or rules of justice would be simply irrelevant and untenable in a natural state of abundance.⁹⁴ In his *Enquiries* he writes:

⁹⁰ Ibid. Part 1, Chapter XIV, pp. 100-3.

⁹¹ See James O. Grunebaum, op. cit., p. 93.

⁹² Ibid.

⁹³ John Rawls, *A Theory of Justice*, pp. 136-142. See also James O. Grunebaum, op. cit. p. 110.

⁹⁴ David Hume, *A Treatise of Human Nature*, p. 494.

For what purpose make a partition of goods, where everyone has more than enough? Why give rise to property, where there cannot possibly be any injury? Why call this object mine, when upon the seizing of it by another I need but stretch out my hand to possess myself to what is equally valuable?⁹⁵

In a radical defence of the theory of what I call '*sola jus positiva*' (strictly positive law) Jeremy Bentham argues that all substantive rights are solely the legal rights of the civil state, which of course are backed by the force of law. According to him, "[t]o any such word as 'right' no conception can be attached but through the medium of a law or something to which the force of law is given. Lay out of the question the idea of law and all that you have by the use of the word 'right' is a sound to dispute about".⁹⁶ And for him, since the right to property is conventionally assumed to be a natural and imprescriptible right, it therefore, cannot be backed by the force of law since it is not a real right.⁹⁷ For Bentham, real rights do not arise from nature. This is because "from real laws come real rights; but from imaginary laws, from laws of nature, fancied and invented by poets, rhetoricians, and dealers in moral and intellectual poisons come imaginary rights".⁹⁸ Accordingly, Bentham dismisses all appeals to natural rights as simply nonsensical. Natural and imprescriptible rights are rhetorical nonsense, - nonsense upon stilts.⁹⁹

Thus for Bentham, the right to property cannot be meaningful if it is not the creation of the law. A right to property without the force of the law will hardly be of any value since there would be no specific subject in relation to which my proprietary rights are established. In fact Bentham insists that 'rights are the fruits of the law and of the law alone; there are no

⁹⁵ David Hume, *Enquiries Concerning the Human Understanding*, p. 184. [And still further on the same page Hume reasoned, "We see, even in the present necessitous condition of mankind, that, whenever any benefit is bestowed by nature in an unlimited abundance, we leave it always in common among the whole human race, and make no subdivisions of right and property."]

⁹⁶ Jeremy Bentham, *Works*, III. 557. Cited in H. L. A. Hart, *Essays on Bentham*, p. 83.

⁹⁷ This assumption came out of the French Declaration of the Rights of Man and the Citizen of 1791 in which liberty, property, security, and resistance to oppression were listed as natural and imprescriptible rights. Bentham vehemently repudiated this document in his *Anarchical Fallacies*, which was published posthumously. See H. L. A. Hart, *ibid*, p. 79.

⁹⁸ Jeremy Bentham, "Anarchical Fallacies", in Waldron, J. *Nonsense upon Stilts*, p. 69.

⁹⁹ *Ibid*. p. 53.

rights without law – no rights contrary to law – no rights anterior to the law’.¹⁰⁰ In other words, there are no natural rights except those created by general utility but even in that sense the terms are anarchical fallacies and it would have been better that the words were never heard of.¹⁰¹ And lastly Bentham writes:

To me a right and a legal right are the same thing, for I know no other.... A natural right is a son that never had a father. By natural right is meant a sort of thing which is to have the effect of law, which is to have an effect paramount to that of law, but which subsists not only without law, but against law: and its characteristic property, as well as sole and constant use, is the being the everlasting and irreconcilable enemy of law. As scissors were invented to cut up cloth, so were natural rights invented to cut up law, and legal rights.... If natural rights came not from the law, from any sort of law – whence did it [sic] come? I will tell you – It is the spawn of despotism, begot upon incapacity. It is the effusion of a hard heart operating upon a cloudy mind. When a man is bent upon having things his own way and give no reason for it, he says: I have a right to have them so.... the language of natural rights requires nothing but a hard front, a hard heart and an unblushing countenance. It is from the beginning to the end so much flat assertion: it neither has any thing to do with reason nor will endure the mention of it. It lays down as a fundamental and inviolable principle whatever is in dispute: admit it, you are an honest fellow, a true patriot: question it, or so much as ask for a proof of it, you are whatever is most odious, sinning equally against truth and against conscience.¹⁰²

But the problem with Bentham and his ilk of legal positivists who repudiate every appeal to natural rights is that they tend to pigeonhole all of human nature to the narrow purview of the legislators. Legislations and positive laws, I suppose, spring from the common experiences of people within a particular polity or civil society as a reflection on human nature during the period the laws were made. If men were angels, of course, the laws would not be necessary. And if angels were to govern men, again the laws would be irrelevant. But since this is not the case, laws are made as a necessary evil to regulate the human affairs. Yet this cannot imply that these positive laws are supremely absolute. Definitely, positive laws grant legal rights. But because human nature is not static, and people’s experiences in the world are constantly dynamic, the issue of rights must go beyond the statute books or the dictates of the chief magistrate. Thus legal rights must be able to make room for “those rights

¹⁰⁰ Jeremy Bentham, Works, III. 221. Cited in H.L. A. Hart, *ibid.* p. 82.

¹⁰¹ Jeremy Bentham, Economic Writings I. 333. Cited in H. L. A. Hart, *op. cit.* p. 89.

¹⁰² Jeremy Bentham, “Anarchical Fallacies” in Jeremy Waldron, (ed.). *op. cit.*, pp. 73-4.

which we are entitled to by the eternal laws of right reason”, which exist independent of positive law, and stand as a the measure of its legitimacy.¹⁰³ “Ultimately”, as Bernard Bailyn enunciates, “...the entire legitimacy of positive law and legal rights must be understood to rest on the degree to which they conformed to the abstract universals of natural rights.”¹⁰⁴

This sublime truism, Alexander Hamilton, declares with such arresting brilliance:

the sacred rights of mankind are not to be rummaged for among old parchments or musty records. They are written, as with a sunbeam, in the whole volume of human nature, by the hand of divinity itself, and can never be erased or obscured by mortal power.”¹⁰⁵

In contrast, therefore, to the legal positivists who relegate all rights including the right of ownership of property to the legal rights of the civil society, some influential theorists have defended the view that property is indeed a right of nature.¹⁰⁶ As a natural right, these theorist argue, the right to property as well as other natural rights hold a historical and moral precedence over the positive rights of civil society because the former are derived from the law of God, Nature or Reason.¹⁰⁷ So civil governments are legitimate insofar as they bend their efforts to protect our natural rights, but they become illegitimate when they arbitrarily violate these rights. According to this school of thought, we are mutually obliged to obey the government so long as it upholds our natural rights, including our rights to ownership of property, but if the government abuses these rights for example by arbitrarily invading the private property of citizens, we are under no further obligation to obey.¹⁰⁸ As Alan Ryan puts it, natural rights set limits on what governments may do, as well as setting them the positive task of protecting each of us against violations of our rights.¹⁰⁹

¹⁰³ Alexander Hamilton, The Farmer Refuted, (1775). Quoted in Bernard Bailyn, The Ideological Origins of the American Revolution, p. 188.

¹⁰⁴ Bernard Bailyn, *ibid*.

¹⁰⁵ Alexander Hamilton, *op.cit*. Quoted in Bernard Bailyn, *ibid*.

¹⁰⁶ In saying this we have in mind thinkers like Locke, Rousseau, Kant, and Nozick.

¹⁰⁷ Alan Ryan, Property, p. 61.

¹⁰⁸ John Locke, *op. cit*, 2.221-2.

¹⁰⁹ See Alan Ryan, *op. cit.*, p. 62.

Unlike Hobbes, the natural rights' theorists starting with John Locke conceive of property as a natural right, which individuals already had in the state of nature before they made a social contract to form a civil society. For Locke, when people eventually decided to come together to form a civil society each person carried into this new political society the same rights, including the right to property, that he/she had previously enjoyed in the state of nature.¹¹⁰ The reason for the formation of the civil society, Locke postulates, is to end some of the inconveniences of life in the state of nature, which includes the protection and preservation of the life, liberty, and property of individuals.¹¹¹ Being now united through the social contract into a civil society, Locke further argues that it is the responsibility of the civil government, guided by the consent of the people, to make laws that would regulate as well as preserve the rights of property for the sake of the public good, which the conditions of the state of nature could not allow.¹¹²

Rousseau likewise defends the view that individuals originally started out in the state of nature where every thing was owned in common and each person had a natural right to his/her subsistence needs. But when by the social compact a civil society was formed, this compact turned the common possessions of all individuals into positive rights that excluded others. According to Rousseau, every man at the beginning, had a natural right to everything he needed in common with others in the state of nature, but later the positive act of civil society, which made each man the proprietor of one thing or the other excluded him from everything else.¹¹³ Hence Rousseau brilliantly argues, as the quote in our frontispiece indicates, that originally in the state of nature there was no division of property titles until the formation of the civil society created rules for ownership rights.

The first man who, having enclosed a piece of land, took it into his head to say, 'This is mine,' and found people simple enough to believe him, was the true founder of civil society. The human race would have been spared endless crimes, wars, murders, and horrors if someone had pulled up the stakes or filled in the ditch and

¹¹⁰ John Locke, op. cit., 2. 89.

¹¹¹ Ibid. 2.222.

¹¹² Ibid. 2.3.

¹¹³ Jean-Jacques Rousseau, The Social Contract and Discourses, p. 17.

cried out to his fellow men, 'Do not listen to this impostor! You are lost if you forget that the fruits of the earth belong to everyone, and the earth to no one!'¹¹⁴

Thus while Rousseau assumes that first appropriation, or what he calls first occupancy, grounds ownership through positive rights created by the social contract, he doubts that private ownership of resources, especially of land, can promote the well-being and freedom of everyone.

Following in a like Rousseauan tradition, Immanuel Kant subscribes to the view of first appropriation occurring in the state of nature prior to the formation of civil government. According to Kant, men needed private ownership of resources, especially of land, or else there would have been no reason for them to quit the state of nature. Hence for him, first appropriation, which was basically founded upon "an act of private will" of the appropriator, established a natural right to private ownership, which no government may interfere with. As Grunebaum puts it, Kant's "acts of private will" required neither labouring upon a material nor adding value. Although labouring upon land can, of course, serve as a deed expressing the intention to appropriate or a variety of different ways of declaring one's intention, all that really mattered for private appropriation is the declared intention to appropriate.¹¹⁵

When I declare (by word or deed), 'I will that an external thing be mine,' I thereby declare it obligatory for everyone else to refrain from [using] the object of my will.¹¹⁶

Whence private appropriation has been acquired, so Kant contends, the civil government has no right to meddle with it save to impose a positive law prohibiting bequests of land to succeeding generations for all time. Nonetheless, Kant allows that compensation be paid to the owners of land from whom this right of bequest is taken.¹¹⁷

Notwithstanding the apparent disagreement between the legal positivists and the natural rights theorists regarding the source of the right to property, both sides appear to agree on the

¹¹⁴ Jean-Jacques Rousseau, *The First And Second Discourses*, pp. 141-2.

¹¹⁵ Grunebaum, *op. cit.*, p. 71.

¹¹⁶ Immanuel Kant, *The Metaphysical Elements of Justice*, p. 63. See also Grunebaum, *ibid.*

¹¹⁷ *Ibid.* p. 91.

fundamental human need for property. Property, we must reiterate, refers to resources, tangible or intangible that are useful for the well being of the human person. The sticky point is what entitles a person to claim one or more resources, as his/her 'property', in lieu of another person. Whereas the positivists maintain that this entitlement is the creation of the law, so made and enforced in a civil government, the natural rights' theorists, on the other hand, argue that these entitlements are derived from nature, even before the foundation of civil society and therefore are beyond the interference of the civil government. In fact in the view of some theorists like Thomas Paine, natural rights and civil rights are fundamentally connected. According to Paine, natural rights are the foundation of all civil rights. In his *Rights of Man*, Paine writes:

Natural rights are those which appertain to man in right of his existence. Of this kind are all the intellectual rights, or rights of the mind, and also all those rights of acting as an individual for his own comfort and happiness, which are not injurious to the natural rights of others. Civil rights are those which appertain to man in right of his being a member of society. Every civil right has for its foundation some natural right pre-existing in the individual, but to the enjoyment of which his individual power is not, in all cases, sufficiently competent. Of this kind are all those which relate to security and protection.¹¹⁸

Ultimately, Paine argues that although in civil society every man is a proprietor, this right of property was not given to him by the society since the latter can grant him nothing.¹¹⁹ Rather the right to property actually pre-existed in the individual even before he became a member of civil society. What society does is to protect the sanctity of each individual's natural rights, which he brought with him into civil society.

Fundamentally, however, both the positivists and the natural rights' theorists must admit that a person's universe of rights' claims can only be relevant within the social context of rules of ownership. In our triple scenarios of ownership above, for example, it does not make sense for either Robinson Crusoe or his Man Friday to claim the ownership of Abyssinia Island in the void of a social institution of ownership within an unpeopled universe. The issue

¹¹⁸ Thomas Paine, op.cit. p. 33.

¹¹⁹ Ibid. p. 34.

of rules of ownership as well as rights to anything are bound to arise only within a human social context, for instance from the moment that Robinson Crusoe discovers Zima and Zofin who hold also potential rights' claims on the island. In order to avert the scenario of conquest and perpetual bickering, Robinson Crusoe and his Man Friday as well as Zima and Zofin must agree to respect some mutual ground rules of ownership. These rules of ownership, flowing from natural law or positive law, in essence become the rights upon which individuals and parties found their ownership claims. The violation of these rights becomes an occasion for conflict because of the implicit disrespect of another's rights' claim. In the modern context, a concatenation of some of these rights especially the strand that is preferred as 'natural rights' has given rise to what are today popularly called human rights. Significant among these human rights is the right to ownership of property. And to that we must now turn.

1.2.1 'Property' As A Human Right?

The natural rights theory has to a large extent been at the root of what are today known as human rights. Since the eighteenth century, following the *American Declaration of Independence* (1776) and the *French Declaration of the Rights of Man and Citizens* (1789), which proclaimed some rights as inalienable and imprescriptible to man, the issue of human rights has occupied a prominent place in political discourses, especially in Europe and America. Consequently, human rights are seen as the rights that are fundamental as well as inalienable to the human person and to the human dignity. They are rights that are so inextricably linked to the human person that they are taken to be independent of and prior to the recognition of the positive legal rights by any society, ethic or doctrine. As John Langan aptly puts it, human rights are the rights that every "human person has simply by virtue of being a human person, irrespective of his social status, cultural accomplishments, moral

merits, religious beliefs, class memberships, or cultural relationships”.¹²⁰ That these rights are independent of society means that they are indelibly inscribed in the hearts and souls of human persons by their creator such that the rights do not wither even if the society refuses to acknowledge them.

In fact the American *Declaration of Independence* of 4 July 1776 immortalised the notion of human rights in these famous words: “We hold these Truths to be self-evident, that all Men (persons) are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the Pursuit of Happiness”.¹²¹ And part of the logic of the pursuit of happiness is the human right to acquire property as was foreshadowed and better articulated in the Virginia *Declaration of Rights* on 12 June 1776 thus:

That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot by any compact deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.¹²²

Similarly, the French *Declaration of the Rights of Man and of Citizens* acknowledged that the goal of society is the pursuit of the common happiness of all and therefore that governments are established to guarantee to each citizen the enjoyment of his/her human and imprescriptible rights to equality, liberty, security, and property.¹²³

The intellectual precursor to these *Declarations*, but especially the *Declaration of Independence* and of the later *Bill of Rights* of 1791, is the English *Bill of Rights* of 1689 and importantly the philosophical treatises of natural rights particularly the strand developed by John Locke in his *Two Treatises of Government*. Therein, Locke enunciates that these rights, which have their origin in the law of nature, are discoverable by reason and pre-existed civil

¹²⁰ John Langan, “Defining Human Rights: A Revision of the Liberal Tradition”, in Alfred Hennessey and John Langan, *Human Rights in the Americas*, p. 70.

¹²¹ *The Declaration of Independence*, Action of Second Continental Congress, July 4, 1776. Available at: <http://www.law.emory.edu/FEDERAL/independ/declar.html> . Date Accessed: 12/04/05.

¹²² Eugene Kamenka, “The Anatomy of an Idea” in C. Arnold et al (eds.), *Human Rights*, pp. 1-2.

¹²³ *Ibid.* p. 4.

society. According to Locke, the fundamental rights to life, liberty and ownership of property pre-existed the civil laws of the state and as such respect for them is the first legitimate test of political authority. In fact Locke affirms that rebellion or revolution is legitimate and justified where these rights are wantonly abused by the state.¹²⁴ Louis Henkin explains that it is expedient for the state to recognise and respect these rights because they are human 'rights' and not mere aspirations, or assertions of the good. Says he:

To call them rights is not to assert, merely, that the benefits indicated are desirable or necessary; or, merely, that it is 'right' that the individual shall enjoy these goods; or even, merely, that it is the duty of society to respect the immunity or provide the benefits. To call them 'rights' implies that they are claims, 'as of right', not by appeal to grace, or charity, or brotherhood, or love; they need not be earned or deserved.¹²⁵

The most authoritative contemporary codification of these human rights is contained in the *Universal Declaration of Human Rights* (UDHR), adopted by the United Nations in 1948. As the name suggests, these are rights that are held to be supremely important to every human person and they apply universally to all peoples irrespective of their cultural affinities, national origins, racial and ethnic sentiments and religious sensibilities. They are the universal instruments to whose terms governments and states are held accountable. In the words of Lourens Ackermann, the UDHR "has become a standard by which to test state constitutions, a weapon in international diplomacy, and a set of principles to which the UN organs refer when confronted by human rights issues."¹²⁶ Some of these rights include the right to adequate food, clothing, housing and medical care (Article 25) and the right to work (Article 23). In its seventeenth Article, the UDHR specifically states thus: (1) "Everyone has the right to own property alone as well as in association with others. (2) No one shall be arbitrarily deprived of his property."¹²⁷ Article Fourteen of the *African Charter on Human*

¹²⁴ Locke, *ibid.*, 2.227.

¹²⁵ Louis Henkin, *The Age of Rights*, p. 3.

¹²⁶ Lourens Ackermann, "Introduction" to *Human Rights for South Africans*, pp. 3-5.

¹²⁷ *Universal Declaration of Human Rights*, available at <http://www.un.org/Overview/rights.html>. Accessed on: 13th June 2005.

*and Peoples' Rights*¹²⁸ re-echoes this provision in these words: "The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws."

Human rights are usually classified into three distinct categories or 'generations'.¹²⁹ Apart from the traditional civil and political rights, also known as the first generation rights or the blue rights, there are also the second generation (popularly known as the red rights) and the third generation of human rights. The socio-economic, and cultural rights including the right to social welfare, the right to education, as well as the right to economic development and prosperity fall under the red rights, while the solidarity and collective or group rights constitute the third generation of human rights. The latter comprises the solidarity rights of communities and whole peoples rather than individuals. They also embrace minority language rights, the right to natural self-determination, and the rights to peace, and healthy environment.¹³⁰

Traditionally, though, the right to ownership of property is deemed to belong to the classical rights, known as the first generation of human rights. As a civil and political right, it is said to be a natural and inalienable right of man, which transcends the civil encroachment of the state. Civil and political rights are also traditionally viewed as the core of human rights and they require few if any demands from the state to fulfil them unlike the red rights, which must be demanded from the state by the citizens. In other words, the blue rights are like shields safeguarding individuals against the state's intrusions and they also influence relations between states and their citizens and can accordingly be invoked against the state.

¹²⁸ See also Peter Jones, *Rights*, p. 3. [This Charter was adopted by the Organisation of African Unity, now renamed the African Union, on 27 June, 1981].

¹²⁹ The term 'generation' with respect to human rights' classification was used by Karel Vasak to substantiate the theory that in addition to the classical human rights associated with European civilisation, there are also the second and third generations of human rights. Although the term has become a popular classification for human rights in recent times, its connection with human rights has been very controversial. (see Vasak, Karel. "A 30-Year Struggle: The Sustained Efforts to Give Force of Law to the Universal Declaration of Human Rights", *Unesco Courier*, November 1977, pp. 29-30).

¹³⁰ Jeremy Waldron, *Liberal Rights*, p. 5.

In a way, the right to ownership of property can be said to spill over into the second generation rights in the sense that a person's right to work, housing, food, and clothing, which are part of the red rights implicitly entails the right to ownership of these resources. Consequently, therefore, the right to ownership of property is like a double-edged sword. It can be invoked against the government as a classical natural right (in the event of the state's encroachment on one's 'property'). It can also be demanded from the state under the canopy of the socio-economic rights. The right to ownership of property thus becomes a double bind for the state.

Owing to the interdependence and interrelatedness between the various kinds of human rights, it is curious why these so-called human rights are so classified according to generations or colours. On closer analysis these classifications are very fluid. The right to ownership of property as we have pointed out as well as the trade union rights are often seen to belong to both the first and the second generation rights. Some other rights like the right to education and the right to non-discrimination are often not easily categorised. The argument is often that classification makes it easier to separate the rights that are justiciable and enforceable by the state from the ones that are not so justiciable. For instance, Maurice Cranston sees the 'second generation' rights as merely objects of social policy and items in political programmes but cannot be legally enforceable rights unlike the 'first generation' rights, which deserve to be implemented.¹³¹ In fact, Cranston goes a step further to totally reject the 'second generation' rights as human rights since he considers them to be of an entirely different logical category.¹³² But the problem is: where do we draw the cut-off line between the 'first generation' rights that are legally enforceable and the 'second generation' rights that are not. In the Republic of South Africa for example, socio-economic, and cultural

¹³¹ Cranston, Maurice. What are Human Rights?, 1974.

¹³² Similarly, some have rejected the 'third generation' rights as human rights claiming that these rights if at all they deserve to be called rights cannot be classified as human rights but may better be called the environmental rights.

rights are not only guaranteed under the 1996 Constitution, they are also being enforced judicially in the same manner as the civil and political rights.¹³³

Apparently, the confusion regarding the legal justiciability of one right from the other relates to a basic misconception of the juristic content of these rights. A significant study carried out by a twentieth century American legal scholar, Wesley Newcomb Hohfeld, reveals that rights can actually be disaggregated into four different forms of entitlements namely: 'claim-rights', 'liberties', 'powers', and 'immunities'.¹³⁴ For Hohfeld, the entire judicial architecture is founded on these four pillars of rights. Understanding the subtle distinctions between these forms of rights enables one to accurately distinguish justiciable claim-rights for example from non-justiciable liberties. In order to better grapple with the justiciability or the non-justiciability of the right to ownership of property, we shall now undertake a brief but absorbing examination of Hohfeld's rights' analysis as applied to different forms of property regimes.

1.2.2 Hohfeldian Rights to Property

Having considered what it means to have a right to property in general and a human right to property in particular, we are now in a position to explain the legal conceptions of right as applied to property. Perhaps the most familiar sense of having a right is that of a "claim-right" in Hohfeldian terms¹³⁵, but as we shall discover shortly not all rights are claim-rights. We frequently speak about the right to form trade unions, the right to a fair trial in court, the right to freedom of expression, the right to own 'property', the right to make a will and to transfer our 'property' to whoever we want, the right not to have our 'property' taken away from us by the government, and so on. In these and several other instances, it turns out upon close examination that the same word 'right' is being used to denote first one concept, and

¹³³ See The Constitution of the Republic of South Africa Act No. 106 of 1996.

¹³⁴ See Hohfeld, W. N. op.cit, 1919.

¹³⁵ See the explanation of 'claim-rights' below.

then another, often with resulting confusion of thought.¹³⁶ When for instance Mrs Ncube asserts her right of servitude to pass through Mr Moyo's farmland, the right that Mrs Ncube is asserting might actually be a 'liberty' right, which differs from a claim-right that Mr Moyo holds to his farmland. And similarly when, Mr Moche as Chief Executive Officer of *Denel Limited* lodges a claim against the Management of *Armcor South Africa* for a breach of the right of performance by the latter's failure to deliver their arms deal to *Denel Limited*, the claim of right in this instance again differs from the claim of right of servitude in our previous example. Thus, we stand at risk of falling into error unless we are constantly able to carefully discriminate between these differing senses of right.

To clarify these differing senses of legal rights as well as to provide a concise terminology adequate to express the distinctions involved, Hohfeld reduced the many legal conceptions of 'right' to four distinct legal terms. These became the 'lowest common denominators' in terms of which all legal problems concerning rights can be stated.¹³⁷ And these four pillars of legal rights include: *Claim-rights*, *Liberty-rights*, *Powers*, and *Immunities*. Each of these rights has its corresponding *correlative* as well as its corresponding *opposite*¹³⁸ on the table of jural relations.¹³⁹ The following two diagrams below represent the jural correlatives and the jural opposites of these four pairs of rights respectively.

¹³⁶ Cook, W. W. "Introduction". In Hohfeld, W. N. *ibid.*, p. 6.

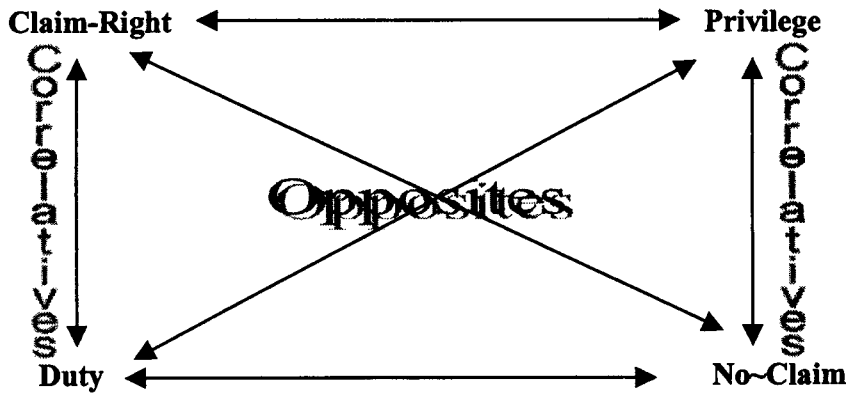
¹³⁷ *Ibid.*

¹³⁸ For our purposes in this thesis, we shall restrict our analysis to only the jural correlatives.

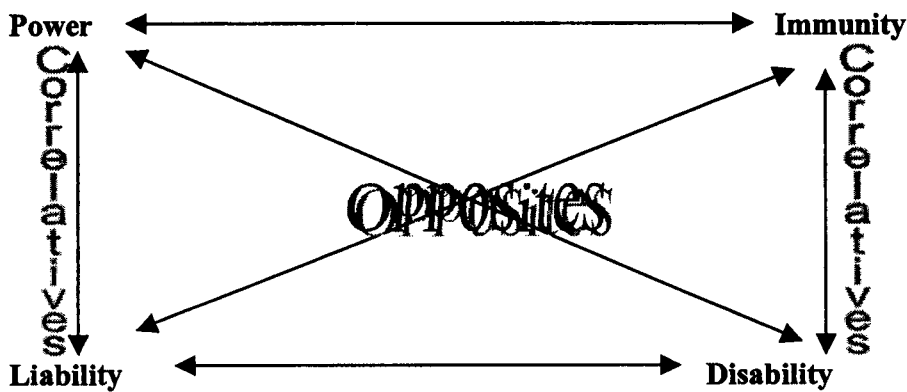
¹³⁹ Hohfeld, W. N. *ibid.* p.36

Diagrams of Jural Relations

1. *Jural Correlatives*



2. *Jural Opposites*



A jural *correlative relation* (connected with the vertical arrows in the diagram) exists for example if the presence of X in one person, A, in relation to something, K, invariably implies the presence of a Y in another person, B in relation to K where X denotes a right, Y its correlative and K the legal object in question. In other words, the presence of a claim-right in A invariably implies the presence of a duty in B with respect to K.¹⁴⁰ Similarly, a jural

¹⁴⁰ See Cook, W. W. In Hohfeld, *ibid.* p. 7.

*opposite relation*¹⁴¹ (connected by diagonal arrows in the diagram) exists if the presence of P in one person, A, in relation to K implies the absence of Q in the same individual, A, in relation to K, where P denotes a right, Q its opposite and K the legal object in question. Thus an immunity in X implies the absence of a liability in X with respect to K. According to Hohfeld's analysis, when people talk about their property rights, private or otherwise, this may best be understood with reference to one or another sense of the four pillars of rights. Let's look at each of these pillars on the diagrams representing Hohfeld's scheme of jural relations with particular attention to clarifying the relevant senses of different forms of property.

1.2.3 Hohfeld's Jural Correlatives

We will briefly consider the implications of each of these correlative relations in turn with a view to clarifying different forms of property rights. Note that the frame below represents the basic set of jural correlatives in Hohfeld's analysis.

Jural Correlatives

Claim-Right	Liberty	Power	Immunity
Duty	No~Right	Liability	Disability

Claim-Right – Duty Correlation

In terms of Hohfeld's scheme claim-rights by one party are jural correlatives of duties on other parties in respect to the legal object in question. Hohfeld defines a right in the strict legal sense as "one's affirmative claim against another"¹⁴², hence a "claim-right". This claim-right irrespective of its assertion or non-assertion imposes a correlative duty on another.

¹⁴¹ Salmond uses the term "jural contradictories" instead of "jural opposites". Note that before Hohfeld's analysis of rights, Salmond in his *Jurisprudence*, had made similar analysis of rights but his study was carried on further with better clarity and precision by the work of Professor Hohfeld.

¹⁴² Cook, W. W. *op.cit.* p. 7

When it is asserted against specific or determinate persons, the right-holder exercises what Hohfeld calls a “paucital” claim. On the contrary, when it is not asserted against any particular persons but potentially against the entire population, the right-holder exercises a “multital” right. The ‘paucital’ right and ‘multital’ right are traditionally also known as right *in personam* and right *in rem* respectively. In other words, to hold a claim-right to something as one’s (private) ‘property’ invariably implies a duty on the part of others to respect or not interfere with that ‘property’. If for example A owns a piece of land as his private ‘property’, it means that A has a claim-right over the land while B, C, D...^{nth} have correlative duties not to invade A’s land.¹⁴³ If A’s land is invaded by B, C, D...^{nth}, then a duty has been violated because A has a legitimate claim-right over the land, which is enforceable by law. Literally therefore, as Corbin explains, claim-right means control over another’s conduct whereas duty means societal compulsion for the benefit of another.¹⁴⁴

Now, how does this ‘right/duty’ correlation apply to the distinction between for example private and common or collective property? The difference between common property and private property is that in the former all concerned share the same claim-rights and none can thereby be excluded; at the same time even common properties are shared by some and exclude others. Of particular importance here are the implications of correlative duties: property rights as claim-rights imply duties on other parties with respect to the properties concerned but not on the proprietors themselves (except in relation to the properties of other property-holders). It follows then that a property regime imposes duties on those excluded from property in relation to property-holders, but not vice versa: proprietors do not have duties except to other proprietors. Especially in the case of private property, with its basic exclusionary features, this generates a systematically unsymmetrical set of relations: those excluded from private property have duties to the propertied, but not vice versa. The lack of symmetry may be somewhat mitigated in the cases of common property or collective

¹⁴³ Hohfeld, W. N. *ibid.*, p. 38.

¹⁴⁴ See Corbin, A. L. “Introduction” in Hohfeld, *ibid.*, p. ix

property in so far as these have inclusionary as well as exclusionary features. But both common and collective property regimes still have exclusionary features imposing duties on other parties. We must note that as far as this analysis goes there is not any question of duties on property-holders, either to others (except to other property-holders) or to their own property. In fact, on further analysis it will appear that X having a claim-right on something is compatible with X having a liberty in dealing with whatever is claimed. In other words, while property rights impose duties on others with regard to 'properties' it leaves the proprietors unencumbered with duties in respect of their own 'properties'. Presumably this will be more complicated in the cases of common and collective property than with private property. Questions could be raised regarding the possible duties of individuals sharing in common or collective property arrangements to their fellow-proprietors. But with regard to the unpropertied the exclusionary logic and unsymmetrical relations will remain the same.

Liberty And No~Right

In terms of Hohfeld's scheme a right in the sense of a liberty in one party is correlative to a no-claim in another party. To begin with, the notion of a "no-claim" might seem redundant: what could be the significance of one party having a no-claim on another party? However, if we bear in mind the correlative relation between claim-rights by one party with the duties generated on other parties, then the significance becomes clear: no-claims on the part of others correlatively mean that one is unencumbered by duties to them, amounting to a liberty. Right in the sense of liberty or privilege denotes one's freedom from the duties generated by the rights or claims of another. It pertains to the 'right', which a person has to do, or not to do, something without interference by others by virtue of the 'right' that the person enjoys. Thus if X has a right in the sense of a liberty to wear a tie, or not, that implies that Y has a no-claim with regard to X's dress code in this respect. In other words, Y cannot make X wear or not wear a tie since X has a legitimate liberty to wear what he likes. A legal liberty or

privilege in this sense is the advantage or benefit that a person enjoys, by virtue of possessing a claim-right to something, to which others have no claims, or in respect of which they are otherwise in a position of having no-rights. Thus if A has claim-rights to a piece of land, it means that A has the liberty to either develop the land, to lease it out, or to allow it to lie fallow. B, C, D...th, on the other hand, have correlative no-claims whatsoever with respect to what A does with his land.¹⁴⁵

But what are the implications of the jural correlation of liberties and no-claims with regard to different property regimes, for example private property as against common property? Consider the significance of a particular property regime not just in terms of claim-rights only but as a combination of claim-rights and liberties with regard to some P. Thus in the case of private property, X may have a claim-right on P and, if others have no-claims with regard to P, then X's claim-right on P will be unencumbered by duties to others, i.e. X will have a right to P in the sense of a liberty. In other words, while property rights impose duties on others with regard to properties it leaves the proprietors unencumbered with duties to others in respect of their own properties. Presumably this property regime will be more complicated, at least internally, in the cases of common and collective property than with private property. In the case of private property the regime is based on a set of exclusionary relations between individuals as proprietors in relation to all other individuals. But in the case of collective and common property both the proprietary claim-rights and the liberties bestowed by such property rights would be shared amongst individuals included in the collective (though not with other parties excluded and having correlative no-rights). Questions could be raised regarding the possible duties of individuals sharing in common or collective property arrangements to their fellow-proprietors. But with regard to the unpropertied the exclusionary logic and unsymmetrical relations of rights and liberties constituting these property regimes will remain the same.

¹⁴⁵ This is however so long as A does not violate property-prohibition rules for instance A is not allowed to use his land to grow cocaine or to train terrorists otherwise his right to the land may be revoked.

Power – Liability Relation

In terms of Hohfeld's scheme a right in the sense of a power in one party is correlative to the presence of a liability in another party. A right in the sense of a power is the affirmative control, which a person in a given legal relation holds as against another. It is the "ability conferred upon a person by the law to alter, by his own will directed to that end, the rights, duties, liabilities or other legal relations, either of himself or of other persons."¹⁴⁶ A liability on the contrary is the "condition in which an individual is placed after a breach of his contract, or a violation of any obligation resting upon him."¹⁴⁷

Suppose for an example John sells his estate to James for a fixed amount. In the event that James is unable to pay this amount after the contract has been signed, John reserves the right as legal power to sue James for breach of contract. James is then said to be liable to a court action by John. If on the other hand James having legally acquired the property discovers that the property was counterfeit he can also sue John for fraud. Thus John is as well placed under a liability to James for a breach of contract. In other words right as power 'empowers' the right-holder to seek legal redress or justice with respect to the actualisation of his right, while it also places the other party under a liability for interference or the violation of right.

With respect to different property regimes, the key issue here would be who is empowered in private property regimes as distinct from common property regimes, and who is made liable in each case? In the case of a private property regime property rights as powers evidently empower individual right-holders while placing other parties under liabilities for interference or violations of property rights. Once again this amounts to a systematically asymmetrical set of relations between empowered propertied individuals and unpropertied individuals. In the case of a common property regime all individuals included would be collectively empowered by their common property rights. Who, if anyone, would have

¹⁴⁶Hohfeld, *ibid.*, p. 60

¹⁴⁷*ibid.*

liabilities under such a common property regime? It may be tempting to conclude that if all are empowered then none would have liabilities. However, given the correlative relation between liabilities and rights as powers, this would also mean that in a common property regime the latter have no force. If common property rights as powers amount to the ability of those so collectively empowered to alter, by their own will, the rights, duties, liabilities or other legal relations, either of themselves or of others, in relation to their common property, then this is bound to create liabilities amongst themselves as much as in relation to other parties. In common property regimes, too, there must be “property crimes” of some kind, presumably related to the duties of individuals sharing in common or collective property arrangements to their fellow-proprietors. Individuals who fail in these duties would be liable to their enforcement. And any one falling outside these common property arrangements would only have liabilities and not share in the collective empowerment.

Immunity – Disability

Finally, in terms of Hohfeld’s scheme a right in the sense of immunity in one party is correlative to the presence of a disability in another party. A right in the sense of immunity is the exemption from law or the freedom (which an individual has) from the legal power or control of another regarding a specific legal relation. Immunity is the opposite of a liability; it means that one is not under any liability to another.¹⁴⁸ Thus, for example, as Peter Jones elucidates, in a society where there is no legal provision for divorce, a person has the right not to be divorced by his or her spouse. In that case, spouses hold the rights of immunity from divorce against each other, implying also that they are individually disabled from divorcing each other.¹⁴⁹

With respect to a private property regime, if for example I have ownership rights to something as my ‘private property’ then I have an immunity from this being put up for sale

¹⁴⁸ Hohfeld, *ibid.*, p. 60.

¹⁴⁹ Peter Jones, *Rights*, p. 24.

or rented out by others who are disabled from entering into such transactions involving my property. More generally, a private property regime functions to safeguard and to protect the rights of the propertied from possible actions by others while the unpropertied are characterised by their disability to affect such property rights. In a private property system, therefore, though an individual may own a hugely disproportionate amount of resources, he is under a legal immunity from other's interference with his property insofar as he has property rights to these resources. Similarly, though the masses may be disadvantaged by the bourgeois' disproportionate accumulation, the former will be legally disabled from affecting a legal redress so long as the bourgeois holds his legal property rights. But the legal implication of immunity and disability works rather differently in a collective or common property regime. In the latter regime, since things are collectively owned, individuals will share collective immunities especially with respect to non-members of the group and the latter would have collective disabilities with respect to the members of the community. In other words, while members of the group will be able to affect a legal redress in the event of disproportionate or averse appropriation by an individual, non-members are disabled from taking such a legal step.

Having thus considered the different senses of rights and their jural correlatives, as well as their particular applications to different property regimes, it would be logically expedient to also consider to what extent this Hohfeldian analysis can illuminate the significance of these different property regimes as well as how it could be applied in clarifying the significance of the four ideal types of ownership relations that we proposed in an earlier section of this work.

1.2.3.1 Implications of the Hohfeldian analysis for different property regimes

What light does the above account of the Hohfeldian analyses of the different senses of rights and their jural correlatives throw on our understanding of property rights, and more

specifically on the different kinds of property regimes associated with *private property* and *common property*? In the first part of this chapter we made a basic distinction between *ownership*, involving the relation of a proprietor to his or her possessions, and *property*, including the encompassing set of social relations and practices as well as the norms and laws governing these. It was suggested that the different forms of ownership represented by “private property” as distinct from “common property” may best be understood in terms of the different property regimes involved in each case. At the level of *ownership* relations we distinguished between four different ideal types or possible worlds:

- i) a possible “no private ownership world”;
- ii) a possible “common ownership only world”;
- iii) a possible “no common ownership world” and
- iv) a possible “universal personal possession world”.

At the level of *property rights* the different senses of Hohfeldian rights and their jural correlatives come into play and our questions are, first, to what extent this Hohfeldian analysis can illuminate the significance of these different property regimes and, secondly, how it could be applied in clarifying the significance of the four ideal types of ownership relations.

Firstly, the main outcomes of our brief discussion of different kinds of property rights and their jural correlatives in terms of the Hohfeldian analysis for different property regimes may be summarized as follows:

I. Private property regimes:

- In the case of a private property regime, with its basic exclusionary features, the correlative relation between *claim-rights* of proprietors and the *duties* imposed on others generates a systematically unsymmetrical set of relations: those excluded from private property have duties to the propertied, but not vice versa.

- This basic asymmetry is further skewed by the implications of the jural correlation of *liberties* and *no-claims*, leaving property-holders unencumbered with duties to others in respect of their own properties. Considering a private property regime not just in terms of claim-rights only, but as a combination of claim-rights and liberties with regard to some P, it appears that while property rights impose duties *on* others with regard to properties it leaves the proprietors unencumbered with duties *to* others in respect of their own properties.
- Likewise, with respect to the jural correlation between *powers* and *liabilities*, private property rights evidently empower individual right-holders while placing other parties under liabilities for interference or violations of property rights. Once again this amounts to a systematically asymmetrical set of relations between empowered propertied individuals and unpropertied individuals.
- Finally, with respect to the jural correlation between *immunities* and *disabilities*, a private property regime functions to safeguard and protect the rights of the propertied from possible actions by others while the unpropertied are characterized by their disability to affect such property rights.

II. Common property regimes:

- The marked difference between common property and private property regimes is the inclusionary nature of the former: all parties concerned share the same and equal *claim-rights* and ideally none can thereby be excluded. However, even though in common property regimes, some properties are shared by some while others are excluded, the systematically asymmetrical set of relations characteristic of private property regimes are somewhat mitigated in the case of a common property regime in so far as it is marked by inclusionary as well as exclusionary features. But common property regimes still have exclusionary features imposing *duties* on the unpropertied. A different question would concern the possible duties of individuals sharing in common or collective property arrangements *to their fellow-proprietors*.

- With respect to the jural correlation of *liberties* and *no-claims* the liberties bestowed by common property rights would be shared amongst individuals included in the collective (though not with other parties excluded and having correlative no-rights).
- With respect to the jural correlation between *powers* and *liabilities* all individuals included would be collectively empowered by their common property rights. Those so collectively empowered would be able to alter, by their own will, the rights, duties, liabilities or other legal relations, either of themselves or of others, in relation to their common property, thus creating liabilities amongst themselves as much as in relation to other parties. In common property regimes, too, there must be “property crimes” of some kind, presumably related to the duties of individuals sharing in common or collective property arrangements to their fellow-proprietors. Individuals who fail in these duties would be liable to their enforcement. And any one falling outside these common property arrangements would only have liabilities and not share in the collective empowerment.
- Finally, with respect to the jural correlation between *immunities* and *disabilities* all individuals concerned would share in the collective immunity of their common property rights being affected by other parties characterized by their fundamental disabilities in this regard. In this way a common property regime would function as a powerful safeguard and protection of all those included as a matter of common rights. However, by definition this could not extend to the unpropertied falling outside these common property arrangements.

The next question concerns the implications of this Hohfeldian analysis of different property regimes for our suggested distinction between different ideal types of possible worlds of ownership.

1.2.3.1.1 *A possible “no private ownership world”*

This ideal type of ownership was defined as a possible world where nothing can be correlated with specified individuals in terms of a property rule giving those individuals final

and exclusive powers of access and control. People may obtain rights to use or gain access to what they want or need but they have no power to exclude others from the use of any such resources. The rules of access to, and control of, resources in this world could not involve *exclusive* control and access. In Hohfeldian terms this ideal type of ownership would require that:

- the *claim-rights* involved in such ownership do not have *correlative duties* on others excluding them from access to, or control of, the resources concerned. However such non-exclusive claim-rights would still generate correlative duties on others to allow and respect non-exclusive access and use of resources to all proprietors.
- With regard to the jural correlation of *liberties* and *no-claims*, the ideal type of ownership in this possible world would not leave property-holders unencumbered with duties to others in respect of their own properties. Other parties could not in principle be conceived as having no claim-rights on the resources concerned, and accordingly such non-exclusive ownership would not provide proprietors with the same liberties in regard to the use and control of these resources.
- Concerning the jural correlation of *powers* and *liabilities*, the non-exclusive claim rights involved in this ideal type of ownership could not serve to empower individual right-holders by placing other parties under liabilities for interference or violations of their exclusive property rights. Non-exclusive ownership of this kind might still involve powers to alter the rights, duties, liabilities or other legal relations, either of themselves or of others, in relation to the resources concerned, thus creating liabilities amongst themselves as much as in relation to other parties, but not in exclusionary terms.
- Finally, with respect to the jural correlation of *immunities* and *disabilities* the question must arise to what extent there could be any safeguards to protect the rights of the propertied from possible actions by others when other parties can in principle not be

conceived as having no claim-rights on the resources concerned except in so far as these also may not have an exclusionary character.

1.2.3.1.2 *A possible “common ownership world”:*

This ideal type of ownership is evidently very closely related to that conceived in terms of a “no private ownership” world: while the latter involves a property system that negatively rules out any form of exclusive ownership, this positively requires all ownership to take the form of common ownership. The relationship between the “non-exclusive ownership” of i) and the “common ownership only” of ii) is so close that we might query whether this amounts to a distinction without a difference. On closer analysis, though, it appears that much will depend on the nature of the collectivity involved in such “common” ownership. This could be taken as a universal term extending to all individuals whatsoever, or could it be taken to refer to some less than universal collectivity, i.e. a particular community or society. In principle we can thus refer either to a *bounded common ownership*, limited to the members of some specified collectivity, or to a *universal common ownership*, which would include all individuals whatsoever.

Accordingly we might differentiate between a possible world of “common ownership only” in the sense of multiple bounded collectivities each having a common ownership system pertaining to its own members but excluding others, and a possible world of universal common ownership extending to all individuals whatsoever. It is the latter possibility, which most closely correspond to the non-exclusive ownership envisaged under i). However, in the case of bounded common ownerships the basic features of private property regimes will apply, though with respect to collectivities rather than individual as owners. Common ownership of this kind will necessarily have exclusionary features and likewise impose duties on the unpropertied. For present purposes we will be specifically concerned with the possible

world of *universal common ownership*. How does this ideal type of ownership appear in the light of our Hohfeldian analysis of the basic jural correlative relations involved?

- The *claim-rights* involved in universal common ownership, similar to those involved in a possible “no private ownership” world, would *not* impose *correlative duties* on others excluding them from access to, or control of, the resources concerned. A different question would concern the possible duties of individuals sharing in common ownership arrangements *to their fellow-proprietors*. These may well involve duties on others sharing in such universal common ownership to allow and respect non-exclusive access and use of resources by all proprietors.
- With regard to the jural correlation of *liberties* and *no-claims*, this ideal type of universal common ownership would, as in the case of a “no private ownership” world, also not leave property-holders unencumbered with duties to others in respect of their own properties. Since all individuals are in principle conceived as having equal and similar claim-rights on the resources concerned it follows that they would also have similar *duties* to respect the claim-rights on these common resources by others.
- Concerning the jural correlation of *powers* and *liabilities*, the claim rights involved in this ideal type of universal common ownership would serve to empower all individual right-holders equally by placing other parties under liabilities for interference or violations of their property rights. Universal common ownership of this kind might still involve powers to alter the rights, duties, liabilities or other legal relations amongst themselves in relation to the resources concerned, thus creating liabilities amongst themselves, but not in exclusionary terms.
- Finally, with respect to the jural correlation of *immunities* and *disabilities* all individuals sharing such universal common ownership would also have similar protection from possible actions by others.

1.2.3.1.3 *A possible “no common ownership world”*

This possible world was defined as one in which the privatization of all resources has been consistently applied across the board. In such a world all resources, both at the level of the economic means of production as well as that of ordinary possessions, would be privately owned. Similarly all services without exception would be fully privatized, including welfare and security services. Moreover such a fully privatized or “no common ownership” world would not be able to recognize some resources as public goods. In Hohfeldian terms this ideal type of ownership would mean that

- all *claim-rights* to property by individuals would necessarily be exclusive and that the *correlative duties* on other parties would also basically relate to these exclusionary rules.
- With regard to the jural correlation of *liberties* and *no-claims*, a no common ownership world would leave the propertied unencumbered with duties to others in respect of their own properties. The ideal type of exclusive ownership means precisely that other parties are in principle conceived as having no claim-rights on the resources concerned, thus providing the basis for the owners’ liberties in regard to the use and control of their properties.
- Concerning the jural correlation of *powers* and *liabilities*, the exclusive claim rights involved in this ideal type of ownership effectively serves to empower the propertied by placing other parties under liabilities for interferences or violations of their exclusive property rights. Exclusive ownership of this kind involves the powers to alter the rights, duties, liabilities or other legal relations with regard to the resources concerned.
- Lastly, with respect to the jural correlation of *immunities* and *disabilities* this type of exclusionary ownership cast other parties as having in principle no claim-rights on the resources concerned, thus ensuring that the propertied have immunity from any possible actions by those excluded.

On all these counts it will be evident that such a “no common ownership world” will be characterised by systematically asymmetrical relations between empowered propertied

individuals and unpropertied individuals. In short, it would amount to a radicalization of these features of a *private property regime* in their most unmitigated form. As we have already noted, in such a “no common ownership” world it would by no means be the case that everyone would also be personally ensured of private ownership. On the contrary, it is to be expected that in such a fully privatized world the unpropertied, including the old, the weak, the sick or disabled etc., would lose out and effectively be denied access to, and use of, the resources they need.

1.2.3.1.4 *A possible “universal personal ownership world”:*

In sum, this ideal type of ownership was defined in relation to a possible world in which everyone without exception is ensured access to, and use of, the resources they need, not as a matter of charity or as welfare services to be provided by the state, but in terms of personal ownership. As in the case of the fully privatised world of no common ownership, resources would be used and controlled by individuals but not in terms of exclusionary ownership; in this respect it would indeed be similar to a world of no private ownership. Likewise, it would be comparable to a “common ownership only” world, though in the sense of universal common property and not of a bounded common ownership, in that all concerned would share the same claim-rights to property and that none would be excluded, though in this case it would allow individuals to have (non-exclusionary) ownership of personal possessions. In Hohfeldian terms this ideal type of ownership would mean that

- the non-exclusionary claim-rights to property by individuals could not have correlative duties on others defined in terms of exclusionary rules. However, as in the case of the “no private ownership world”, such non-exclusive claim-rights could still generate correlative duties on others to allow and respect non-exclusive access and use of resources to all proprietors.

- Likewise with regard to the jural correlation of liberties and no-claims, this ideal type of ownership would not leave property-holders unencumbered with duties to others in respect of their own properties. Since other parties in principle have equal claim-rights on the resources concerned, such non-exclusive personal ownership would not provide proprietors with the same liberties in regard to the use and control of these resources as obtains in the case of private ownership.
- Concerning the jural correlation of powers and liabilities, the non-exclusive claim rights involved in this ideal type of personal ownership could not serve to empower individual right-holders by placing other parties under liabilities for interference or violations of their exclusive property rights. Again, as in the case of the “no private ownership world”, non-exclusive ownership of this kind might still involve powers to alter the rights, duties, liabilities or other legal relations, either of themselves or of others, in relation to the resources concerned, thus creating liabilities amongst themselves as much as in relation to other parties, but not in exclusionary terms.
- Finally, with respect to the jural correlation of *immunities* and *disabilities* there could not be any absolute safeguards to protect the rights of the propertied from possible actions by others since all are conceived to have equal and similar claim-rights on the resources concerned except in so far as these also may not have an exclusionary character.

1.2.3.2 The “Rights Equation” and the Ideal of Universal Personal Ownership

From our systematic analysis of these four ideal worlds (thanks to the analytical framework of Hohfeld) we have seen that property rights of a particular kind impose particular duties and obligations upon non-rights’ bearers, while property rights of another kind confer immunities on the rights’ bearers, they also impose correlative disabilities on non-rights’ bearers. We may thus depict this relation in a “Rights Equation” as a spectrum ranging from those benefiting from the systematically unsymmetric relations at the “right”

end of the spectrum to those excluded and burdened by the same systematic unsymmetric relations at the “left” end of the spectrum. Thus whereas the “Rights equation” appears to invest those on the “right” end of the spectrum with claims, liberties, powers, and immunities; on the contrary, it imposes duties, no-claims, liabilities, and disabilities on those at the “left” end of the equation. This then implies that to have a property right logically means to have claims, liberties, powers, and immunities but to have no property right would entail the correlative of duties, no-claims, liabilities, and disabilities. The natural rule of justice therefore would simply imply that everyone ought to be on the “right” end of the spectrum generated by the “Rights Equation” since that alone is consistent with freedom, independence, and the happiness of the individual. To be on the “left” side would be to lack property, which condition is consistent with oppression and slavery.

Whereas, therefore, a regime of private ownership of property would advocate the exclusive right of the individual to be on the “right” side of the “Rights Equation” and so be able to impose duties, and disabilities on non-rights’ bearers; the ideal of universal personal ownership upholds the inclusive right of all peoples to be on the “right” side of the equation so that no one would have the misfortune of deprivation of property. In other words, this ideal entails that where every one is a property owner but on an inclusive basis, no one would owe duties and obligations (save by contract) to any one but God alone. Each one in this universal personal ownership ideal would have specific and personal responsibility for the property that he/she owns not for the sake of another human being but as a duty towards God.

1.3 Recapitulation and Anticipation

In sum, we have rigorously waded through the labyrinthine Hohfeldian analysis in order to test the conceptual consistency of our primary propositions. In the main, we have considered at length within the course of this chapter the possibility of an ideal world of personal ownership. To arrive at this utopia, we began by articulating a clear distinction

between property and ownership. We maintained that whereas property pertains properly to a broad range of social norms, rules, customs, and abstract legal relations of entitlement within different socio-political institutions and communities, ownership on the other hand refers to the concrete social correlation between persons and their possessions or things. This distinction crucially helps to disentangle the concept of property from its popular confusion with ownership and/or with material possessions. We again essayed to illustrate the close interplay between property claims and ownership relations in reality by positing three imaginary scenarios that helped essentially to illuminate the complexity of the moral justification of private ownership of property. By way of a critical analysis of this problem, we advanced four possible worlds of ownership. And by systematically analysing these four ideal worlds using the Hohfeldian legal rights' framework, we arrived at a position that considers the ideal of a personal ownership as a tenable alternative to a regime of private ownership. This alternative standard justifies 'property' as a universal human right of every human person.

Preferring a world of personal ownership with its all-inclusiveness, albeit in its ideal typical form, would appear a radical move away from the conventional regime of private ownership with its all-exclusiveness. Several thinkers like Locke and Rousseau, Rawls and Nozick have at different times and in various ways grappled with the idea of the problem of the justification of private ownership of property. These thinkers all subscribe to the theory that private ownership arose at some definite time during the evolution of the human society. Of these theorists, however, Locke is most influential and no other theory of property seems more clearly and concisely explained than that contained in the *Two Treatises*.¹⁵⁰ The kernel of Locke's theory of property is that though individuals in the state of nature start off with equal and inclusive right to all the natural provisions, this inclusive right of all is ineffectual unless it leads to a logical extreme of exclusive private ownership whether in the state of

¹⁵⁰ This remark is said to have been made by Locke in 1703, just a few months before his death in 1704, to a young man desirous for insight from this elder sage. See Peter Laslett, op.cit. in Locke, op.cit. p. 3

nature or in the civil society. Locke's argument is that the equal and inclusive right of all persons emanate from their common right to God's free donation of the world to all humanity but the exclusive right of the individual to his private property arises purely from the individual's own labour.¹⁵¹ Locke's proposition here is supported by no less authority than Adam Smith who also proposes that "the property which every man has in his own labour... is the original foundation of all other property."¹⁵² In other words, for Smith as well as for Locke the logical ground for private ownership of property springs not from a possible inclusive right of all persons by virtue of God's donation but rather from the labour and actions of the individual. And Thomas Jefferson similarly defends the right that we have "to the acquisition of our own industry... resulting not from birth, but from our actions."¹⁵³

With no intent to suggest a paradigm shift from the argument about labour, we wonder why in the midst of many other variables (such as empathy, altruism, love, solidarity, contract, donation, or inheritance), labour should be exalted as the grounding prize to property. What is the yardstick for measuring labour? Is there a common normative standard for valuating labour and its outcome? If for instance I decide to spend half of my day contemplating the clouds and the meadows by the seaside and the other half cultivating vegetables in the garden, under what normative justification should one activity be exalted above the other as unproductive and productive respectively?¹⁵⁴ Naturally, labour usually consumes a great amount of energy and time. In fact some kinds of labour inflict great pains. But does the logic of private ownership follow that the more you labour the more you gain private property? Many a time those who labour the most for instance, farm workers, earn the

¹⁵¹ Locke, *ibid.* 2.26.

¹⁵² Quoted in Marjorie Kelly, *The Divine Right of Capital*, p.109

¹⁵³ Thomas Jefferson, *Writings*, p. 494.

¹⁵⁴ Contemplation for me could be a way of life without which it would be impossible for me to exist to plant vegetables. Of course, economists like Adam Smith would argue that contemplation is unproductive as compared to planting vegetables because with the latter activity I am able to exchange something for another (See Adam Smith, *op. cit.* p. 422). But these economists tend to forget that what is exchanged on the market or in the social discourses is not only tangible goods. There are also many people whose pre-eminent demands and needs are for intangibles like spiritual goods, radical prayers, psychotherapy, abstract poetry, music, and so. These intangibles are sometimes exchanged at even higher prizes than tangible goods.

least from the landowners. Does private ownership imply that the more painful, the more absorbing the labour, the more property you gain? Again this will be inconsistent vis-à-vis the fact that pain is a relative experience. Why then does labour have to justify private and exclusive ownership in the face of these inconsistencies? It appears labour is rather more consistent with a justification of a possible personal ownership world where the individual labours but remains unattached to the outcome of his/her labour. Presently, therefore we have reached the stage where we must critically unmask the detail of Locke's justification for private ownership. The persuasion of his argument perhaps might compel us to reconsider our propositions in this chapter.

Chapter Two

2. Locke's Liberal Discourse on Property

The sacred rights of mankind are not to be rummaged for among old parchments or musty records. They are written, as with a sunbeam, in the whole volume of human nature, by the hand of divinity itself, and can never be erased or obscured by mortal power – Alexander Hamilton, 1775¹

2.1 The Labour Theory of Property

John Locke sets up his theory of property in two parallel societies to wit: (i) the state of nature – the original state of all mankind; and (ii) civil society – a political society of autonomous individuals. Unlike civil society, Locke's state of nature has no formal or positive law but only the law of nature² to guide all individuals. The execution of this law of nature Locke puts into the hands of every individual especially for the purpose of restraining people from invading the rights of others.³ There is a natural progression from the state of nature to that of civil society. To overcome the several inconveniences of life in the state of nature, according to Locke, men mutually agreed to come together through a 'compact' to form a community or body politic.⁴ The chief end of this community (otherwise known as commonwealth) is the preservation and the protection of the life, liberty and estate (alias

¹ Quoted in Ian Harris "The Politics of Christianity" in Bernard Bailyn, (ed.), The Ideological Origins of the American Revolution, p.188.

² Locke, *ibid.*, 2.4

³ *Ibid.*, 2.7. [Putting the execution of the law of nature into the hands of all individuals is problematic. Since there are different conceptions and complexities of rationality amongst individuals, it follows that Locke's natural right will not mean the same thing to every one and will not apply equally to all or in like measure. This, therefore, introduces a certain level of instability in Locke's state of nature in the sense that the executive right of all to punish offences against the natural law can become arbitrary and can ultimately degenerate into a Hobbesian state of war of all against all. If every man has the right to punish what he considers an offence against him with such severity as he thinks fitting for the offence, how can we restrain the excesses of vengeance, envy and passion? Does not leaving punishment up to the discretion of each individual jeopardise the perfect liberty and equality, which Locke's state of nature is supposed to be? (*Ibid.* 2.4-6). Set up in this way, it appears that the inconveniences in Locke's state of nature do not differ much from the encumbrances of living in Hobbes' state of nature where life is "nasty, brutish and short"].

⁴ *Ibid.* 2.14

property) of the individual members. Locke brings out a significant difference between this civil society and the state of nature thus:

Those who are united into one Body, and have a common establish'd Law and Judicature to appeal to, with authority to decide Controversies between them, and punish Offenders, are in Civil Society one with another: but those who have no such common Appeal, I mean on Earth, are still in the state of nature, each being, where there is no other, Judge for himself, and Executioner; which is, as I have before shew'd it, the perfect state of Nature.⁵

In civil society, people resign the executive power of the law of nature that they had in the state of nature to the judgement of the magistrates or legislative of the commonwealth. By surrendering their power to the legislative, individuals *ipso facto* also empower this body with the authority and the executive power of civil society to settle all controversies between them and to redress all injuries that may happen to any member of their community.⁶

Further, and more importantly for our purposes, Locke argues that prior to the establishment of civil society every man in the state of nature had a natural right to an original common property, which was God's free bequest to mankind. As a common property, it implied also common ownership in the sense that no one's permission was needed before any part of the property could be taken.⁷ If such a common consent or permission was necessary, Locke reasons that people would have starved in spite of the abundant natural provisions. But for any individual to be able to make use of any of the resources at all, he needed to appropriate it and thus to remove it, that is, to alienate it out of the common domain. And by this alienation the object becomes, in Locke's opinion, the private property of its appropriator.⁸ ✓

Hence we may distinguish between two modes of appropriation in Locke namely: (i) the unmediated appropriation of the natural fruits of the earth, like apples and corns, for the

⁵ Ibid., 2.87.

⁶ Ibid., 2.89

⁷ Ibid., 2.28

⁸ Ibid.

purpose of the direct satisfaction of basic needs; and (ii) the mediated appropriations involved in cultivating the land for the regulated and improved quality of agricultural and other products.

In the first case of unmediated appropriation, the appropriator merely takes from, and lives off, the bare nutritious and unrefined resources of nature without investing much constructive thought and/or exerting much productive energy. For Locke all individuals in the state of nature have the natural right to appropriate all natural resources that conduce to the preservation of their lives. Says he: "Men, being once born, have a right to their Preservation, and consequently to Meat and Drink, and such other things, as Nature affords for their Subsistence."⁹ But in Locke's scheme, this natural right of self-preservation already implies a necessary measure of exclusivity (even if this does not yet amount to strictly private property). As Locke writes: "[t]he Fruit, or Venison, which nourishes the wild Indian...must be his, and so his, i.e. a part of him, that another can no longer have any right to it, before it can do him any good for the support of his life."¹⁰ The unmediated appropriation of the fruits of the earth is thus the first natural right that every individual has to make use of those things, that were necessary or useful to his being or serviceable for his subsistence and as means of his preservation. It is a right, which derives from the need or the strong desire that every individual has to preserve his life and being.¹¹ ✓

In the case of mediated appropriation, the goal is primarily the cultivation and/or improvement of the land and natural resources in order to increase the quality and value of these resources.¹² Appropriation in this case makes use of instruments, tools or capital goods to multiply or to add value to the original and unrefined stock of nature thereby making it

⁹ Ibid., 2.25.

¹⁰ Ibid. 2.26.

¹¹ C.B. Macpherson, "Natural Rights in Hobbes and Locke" in D. D. Raphael (ed.) Political Theory and the Rights of Man, p. 6.

¹² Ibid., 2.40

more productive, useful, profitable and durable. Although Locke considers unmediated appropriation as necessary for the preservation of life, it is the productive activity involved in mediated appropriation that he considers as labour *per se*. For him, mediated appropriation defines the essential meaning of labour and the chief matter of property. ✓

In considering the crux of property to consist not merely in fruit-gathering or animal hunting, but rather in the cultivation and development of the earth itself,¹³ Locke specifically aligns his theory of property with the perspectives of agricultural and industrial societies as against the practices of hunters and gatherers or nomadic societies who prefer to 'live off the land' than to cultivate it. In the context of the colonial encounters of his time between British settlements and the indigenous peoples of America and Africa this will have momentous political implications. On closer analysis, however, it appears that Locke's writing shows some ambivalence on this precise point. Earlier, Locke had stated that gathering the fruits of the earth, hunting deer, or catching the 'ambergriese' was equivalent to labour and amounted by right to private appropriation.¹⁴ But later he turns around to argue that the *raison d'être* of private appropriation excludes these latter activities and only includes the cultivation, and improvement of the resources of the earth.¹⁵ In other words, for Locke unmediated appropriation can only be counted as labour in a loose sense while labour strictly speaking refers to mediated appropriation. This twist appears necessitated to provide a theoretical justification for the colonialists' appropriation of land amongst the native peoples especially in North America, and this without their consent. No strange wonder Locke considers that the wild Indians of America¹⁶, who for him still lived the nomadic life of the state of nature, did not have as much convenience and hence proper entitlement to property as the English

¹³ Ibid. 2.32.

¹⁴ Ibid., 2.30

¹⁵ Ibid., 2.34

¹⁶ Ibid., 2.26

farmers who cultivated their lands and improved it by their labour.¹⁷ Only the latter qualified for entitlement to rights of private property in Locke's *stricto sensu* criterion of private ownership.

In this chapter therefore, I have organised Locke's theory of property in a systematically architectonic structure, beginning from God as Locke's original proprietor *par excellence*, to generic man as the joint proprietors with an all-inclusive right to God's bequests to mankind, down to the fundamentally exclusive right of each individual man and woman as the private proprietor (but in proper terms, private custodians) of God's property.¹⁸ It is our task thus to critically demonstrate how Locke makes this distinction between the common and inclusive right of all mankind to all natural resources and the uniquely exclusive right of private ownership of each individual to the product of his labour.

Through a critically expository and analytic approach, therefore, I would underscore the basic inalienable right of all humanity to property as well as the complexities and ambiguities involved in setting up an institution of private ownership of property that is only meaningful, in Locke terms, when it is exclusive and immune from interference.¹⁹ As much as possible, I would proceed by means of an *internal critique* of Locke, pointing out the logical implications and inconsistencies of his own premises and principles. At some points I will also use the logic of an *external critique* based on different premises and principles other than those of Locke himself to bring our analysis to a logical conclusion. For now, we begin with Locke on God's ownership of the world.

¹⁷ Ibid., 2.41

¹⁸ Ibid., 2.25

¹⁹ Ibid., 2.26

2.1.1 God as Sovereign Proprietor

Unlike many modern property theorists, Locke hinges the trunk of his labour theory of property on his “certain and indubitable assumption” that the world is God’s free gift to all humanity in common.²⁰ God makes this donation to mankind because He has “full Property as an Owner” of all things since he is “the Maker of Heaven and Earth” as well as the “sole Lord and Proprietor of the whole World”.²¹ Locke claims that we come to this knowledge of God as the proprietor of the universe through the account of the Scriptures, in which are inscribed the Grants that God had made to Adam and his posterity as well as through the intuitions of natural reason.²² In other words, from the scriptural explanation of the divine origin of beings in the world, Locke boldly concludes to God as the primordial “Maker of Heaven and Earth” and as the “sole Lord and Proprietor of the whole world”²³.

Locke’s characterisation of God as ‘Lord and Proprietor’ marks an interesting transition from the classical and scholastic attributes of God as the omnipotent and omniscient creator and maker of the world. Although the theological notions of God as creator and lord have an amply long history prior to Locke, it is doubtful that the character of God as proprietor had been in vogue prior to the writings of seventeenth century thinkers like Locke. Indeed, the use of the appellation “Proprietor” for God as the owner of the world, and thus the conception of the relation between God and the world in legal and economic rather than theological terms might well be one of Locke’s distinctive contributions in the field of

²⁰ Ibid. 2.25

²¹ Ibid. 1.39

²² Ibid. 2.25. See also John Locke, *An Essay Concerning Human Understanding*, 4.9.2, for Locke’s extensive argument on how we come to know God in general. Confer also the Yahwistic and the Elohist account of creation and the origin of the world in the book of Genesis where it is said that God made the moon, the stars, the fishes, the rivers, the beasts, the firmaments, and so forth with the creation of humanity, being the last act of God. (Gen.1-2). *All biblical citations in this thesis are taken from The Jerusalem Bible*, Standard Edition, 1985.

²³ Locke, *ibid.* 2.39.

intellectual history.²⁴ It, therefore, becomes curious why Locke prefers to conceive God as the owner or proprietor of the world, in lieu of the more traditional theological terms. For our purposes, however, the key question must be that of the significance and implications of viewing the world as an original “property” of God, or the “property” of some extraterrestrial being. Being God’s property, it is implied that the entire universe, which includes every living and nonliving entity, belongs by right to God. As such, and as God’s free donation, it may then be conceived as the common property of all mankind. In short, without the theological foundation it is not clear how the world could be conceived as mankind’s common property.²⁵

Now before we concur with Locke that the world is God’s property, we must first inquire the form of this divine proprietorship with respect to the world. Is the world, including all humanity God’s private property in which he has rights of full ownership in terms of the Hohfeldian jural relation of claim-rights?²⁶ In terms of the Hohfeldian jural correlatives, the question will arise who the other parties may be in relation to God’s ownership of the world, that is, if God has a claim-right to the world as his property, then what other parties have correlative duties in this respect? Based on our earlier analysis of the concept of property and its relation to the notion of ownership²⁷, it also appears pertinent to raise the question of what rules of justice, and social norms would apply with respect to God’s divine proprietorship of

²⁴ This is just a conjecture. I have yet to confirm or to falsify it. But it is remarkable that of the thirty-one attributes of God listed by Panteleon Iroegbu none refers to God as the proprietor of the world. See Panteleon Iroegbu, *Metaphysics: The Kpim of Philosophy*, pp. 109-123.

²⁵ If we were to assume any theory or explanation of the world that precludes the divine architect in the world, then what would be the grounds for conceiving the world as a common property at all? What would be the moral grounds for natural law or for any law at all? Would the explanation without God not justify unlimited accumulation of wealth and unwarranted grounds for altruism and charity? It seems to me that any explanation without God will ultimately consign the world to the Darwinian state of the survival of the fittest, and a Hobbesian war of all against all. To posit the world as a product of chance or as a free-willing entity without God as its maker and owner amounts to putting a sword into the heart of the thing that holds the world and beings together. Definitely and ultimately, all things must fall apart.

²⁶ See the discussion on Hohfeld’s jural correlative relations in Section 1.2.2 above.

²⁷ See the discussion on property and ownership in chapter one above.

the world. Since property in *stricto sensu* pertains to a broad range of rules, norms and legal relations between peoples within particular property regimes, how does God fit into this holistic picture? What natural or positive rules would God's right of ownership be dependent upon? Can we consider the world to be the private property of a monotheistic God or is it rather more logically suave to conceive it as the common property of a polytheistic deity? On the basis of Gen.1: 26, though, there is a hint that the latter may actually be the case. When during the account of the creation of man, God says, "Let us make man in our own image, in the likeness of ourselves"²⁸, in terms of Locke's scheme, this entails that God's right or title to the world as his property is tied up with creating, making or labouring on something (namely, the world).²⁹

But a consistent application of the Hohfeldian frame of analysis shows that the world cannot coherently be considered God's 'private property'. Assume that God has a claim-right to the world as his (private) property by virtue of his original creative act. It becomes curious who the parties are that have a correlative legal (or natural) duty not to interfere with God's property. Being a product of God's creative act – the workmanship of God – mankind can be said to be under a disability in relation to God's sovereign power of workmanship. Similarly, mankind can be assumed to have no-right in relation to God's liberty right with respect to his property. Yet by virtue of mankind's joint ownership of the world (thanks to God's free donation), it cannot persuasively be argued that mankind has a no-right or in fact a disability with respect to the control of the resources of the world. What this simply implies is that God's ownership of the world cannot be in terms of an exclusive private ownership but rather an inclusive personal ownership. This inclusiveness already pre-empted in Gen. 1:26 finds

²⁸ Genesis. 1:26.

²⁹ Locke, op.cit. Chapter five.

fulfilment in God's donation of the world to all mankind as well as in God's non-assertion of his full rights of private ownership of the world.³⁰

Nevertheless, it is not clear if and how Locke could have sustained his argument about mankind's joint right to property in the earth and its fruits without first making his basic assumption of God as the proto proprietor out of whose creative act and 'relinquished' proprietorship is derived mankind's joint proprietorship of the world's resources. But Locke's insightful proposition as well as his assumption is flawed by its lack of clarity and depth concerning the nature of this divine proprietorship of the world.

We may also consider the significance of Locke's notion of the world as the "property" of God as its creator in the light of the analogy with his own labour theory of property: just as man acquires a right of property in the product of his labour by mixing his labour with natural resources so God has a right of property in the world as the product of his creative labours. In a general sense we may grant that in both cases the right to property is founded in labour, yet it remains difficult to understand what "labour" means in relation to God. We have the idea from the cultural imperative that labour or 'the sweat of your brow' is mankind's accursed predicament consequent upon the Fall.³¹ Presumably it is a question whether Locke actually subscribed to this interpretation of Gen. 3:19 of the cultural imperative as conjoined with labour as a curse on mankind in consequence of the Fall. Maybe this is the difference between the Lockean and the Calvinist version of the cultural imperative.

Nonetheless, if God has right to ownership of the world because he laboured to create it then the cultural imperative loses its karmic consequences and labour also loses its negative implication as a divine curse upon man for his mortal act of disobedience. Labour then

³⁰ See Honoré, *op. cit.* p. 107-47.

³¹ Genesis, 3: 1-19.

becomes not a perennial curse upon original sin but a privileged participation in the divine creative act. Again if we grant that God “laboured” by his act of creating the world, then we may wonder with what material he mixed his labour in creating the world? If we assume, as the Scriptures say, that God made the world out of nothing³², it will thus be rather strangely inconsistent to ascribe ownership of the world to God based on the Lockean labour criterion since out of nothing proceeds nothing (*ex nihilo nihil fit*), except we speak of labour metaphorically, dogmatically, or with tongue in cheek with respect God.

Suppose we concede that the world is God’s property, the puzzle remains as to whether God still retains a certain amount of control rights and the manner in which He exercises these rights considering that He had already bequeathed His full rights of ownership of the world to mankind in common via Adam and his posterity.³³ In other words, does the world remain God’s property once He had made this pristine donation to mankind?³⁴ Locke’s barbed response to Robert Filmer’s concept of ownership in the *Patriarcha*, somewhat elucidates Locke’s view on God’s proprietorship of the world especially with respect to mankind.

The gist of Filmer’s argument in his *Patriarcha*, according to Locke’s interpretation, is that God after creating the world made his donation of the world by appointment to Adam and to his heirs, and this divine appointment *ipso facto* made Adam and his royal descendants the Monarch proprietors of the world.³⁵ Thus by a right of nature, Adam, in Filmer’s terms, took the place of God as ‘Governor of Mankind’³⁶, with a divine right over all humanity and over all the earth. This right Adam in turn handed over to Noah and his posterity and successively down to all his heirs, monarchs, princes, rulers, and fathers as the *pater familias*.

³² Ibid., 1:1-2.

³³ Locke, *ibid.* 2. 25; 1. 36.

³⁴ Locke, *ibid.* 2.25.

³⁵ Ibid., 1.16

³⁶ Ibid., 1.17

What this amounts to, according to Filmer, is that though the world is God's prerogative, God freely transferred this prerogative over the world to Adam and thus by right of inheritance to his first-born heirs, whose divine right it is to exercise private dominion, royal dominion, absolute lordship and governorship over the world.³⁷ This point is exactly what Locke finds disturbingly irrational and illogical about Filmer's logic of patriarchal ownership. For Locke all mankind has as much right as Adam and his heirs to God's free donation. According to Locke, God did not transfer his right of sovereign ownership of the world to Adam or to kings or to any individual person exclusively. Instead, Locke strongly argues that God transferred his divine right of ownership of the world to all mankind in common with Adam, monarchs, men, women, princes and peasants alike.³⁸ Locke's argument here, however, brings out the more inclusive sense of human dominion as against Filmer's patriarchal ownership, but not whether God also retains his ownership rights of the world as his creation, which is our present concern. Locke unfortunately does not provide us with an explicit and precise account of God's proprietorship of the world unlike he does so with mankind's joint proprietorship of natural and material resources in the world.

2.1.2 Mankind as Joint Proprietors

Locke informs us that in the beginning when the entire world was America³⁹ – when mankind still lived in the original state of nature like the Native Americans before their encounter with British colonialists – no individual person had private property in anything exclusive of the rest of mankind.⁴⁰ The earth and its fruits, including the beasts of the fields, were God's gifts to all humanity as joint owners without the designation of any of these

³⁷ Ibid., 1.11; 1.32

³⁸ Locke, *ibid.*, 1.126 & 2.25

³⁹ Ibid., 2.49

⁴⁰ Ibid., 2.26

natural resources as being the exclusive preserve of any particular individual or of a privileged class.⁴¹ The right that individuals had to enclose anything, as their private property was later acquired by means of labour, which was necessitated by the desire for self-preservation as much as with the imperative to improve the earth to make it more productive.⁴² By this logic, Locke thus fells Filmer's contrary proposition that restricted the right to ownership of the earth and its bounties as the exclusive preserve of Adam and his successors. In Locke's terms, Filmer's patriarchal argument is an absolute *non sequitor* argument. As he indicates in the preface to his *Two Treatises* it is chiefly for the purpose of a rigorous and considered refutation of Filmer's exclusionary patriarchal privilege that Locke embarked on the laborious enterprise of writing the *First Treatise*.⁴³

But soon we will discover that Locke eventually also heads himself into the same logical noose that he devised to strangle Filmer's patriarchal propositions. Locke converts Filmer's exclusive right of the patriarchs to the exclusive right of the individuals as the owners of private 'property'. Thus, for Locke, appropriation from the common ownership of all is not just a Hohfeldian privilege or a liberty, it is a strong claim-right that must of necessity be exclusive of everyone else before it can be considered useful to the appropriator.⁴⁴ In other words, while Filmer favoured 'sole and despotic dominion' for a class of people, namely Adam, monarchs, aristocrats and the *pater familias*, to the exclusion of the mass of commoners, Locke himself espouses the 'sole and despotic dominion' of each individual as private property owner to the exclusion of all other individuals.⁴⁵ Whereas in Filmer's

⁴¹ Ibid.

⁴² Ibid.

⁴³ See Locke, *Two Treatises*, p. 137. Here Locke writes: /B]y tracing Sir Robert ...through all the Windings and Obscurities which are to be met with in the several Branches of his wonderful System... to strip Sir Robert's Discourses of the Flourish of doubtful Expressions, and endeavour to reduce his Words to direct, positive, intelligible Propositions, and then compare them one with another (of his hoodwinking arguments in the Patriarcha).

⁴⁴ Ibid., 2.26

⁴⁵ Ibid.

‘patriarchamania’, only a few privileged people, the patriarchs, had the divine right to own things exclusively; in Locke’s ‘egomania’, each individual has the natural right to own things to the exclusion of the rest of mankind. Thus, while the downside of Filmer’s ‘patriarchamania’ ended up in absolute monarchy, the downside of Locke’s egomania thrusts up unregulated liberal capitalism. To date the effect of both enervating disorders still weigh heavily on the economic and social psyche of the human society.

The yawning chasm, however, between Filmer’s and Locke’s interpretation of God’s divine ownership of the world and his subsequent bequest to mankind is that whereas for Filmer God’s ownership made all creatures including man helpless slaves of God as well as slaves to human authorities, for Locke God’s ownership of the world and His beneficent bequest to humanity broke the chains of mankind’s enslavement to all forms of authority and thereby sets all persons free relative to one another⁴⁶ though not so free relative to God by whose order and for whose mission and business all mankind is sent into the world.⁴⁷ Being free from bondage to authority, individuals now have the right to establish the form of government or authority they want through the means of a social compact. Locke’s ire is that Filmer’s *Patriarcha* was so drafted to provide “Chains for all Mankind” that it had almost succeeded (especially from the pulpit and teachings of the current divinity of his time)⁴⁸ in persuading people, not only that they were slaves of God and slaves to authorities, but also that they were so destined by a divine fiat.⁴⁹

⁴⁶ Locke, however, will qualify this statement by delineating conditions under which slavery of man to man is permissible for example as a punishment for an unjust aggressor or a thief who may chose slavery to death (2.17).

⁴⁷ Ibid., 2.6

⁴⁸ Ibid., p. 138.

⁴⁹ Ibid., 1.1-5

For Filmer, according to Locke's account, God's investiture of an incontestable divine right of Sovereignty in Adam and consequently in his heirs and successors, implied that they were entitled to:

Absolute, Arbitrary, Unlimited, and Unlimitable Power, over the Lives, Liberties, and Estates of his Children and Subjects; so that he may take or alienate their Estates, sell, castrate, or use their Persons as he pleases, they being all his Slaves, and he Lord or Proprietor of every Thing, and his unbounded Will their Law.⁵⁰

In Lockean terms, therefore, what this important statement signifies is that for Filmer slavery is the natural condition of man, and that in the state of nature men are slaves (of God / Adam). This might appear an improbable statement but becomes eminently logical in its theologised version: as God's creatures, men evidently are the "property" of their Creator. There are two key steps involved here in the move from Filmer to Locke (and of Locke's version of Filmer): 1) the move from the theological notion of creation to the philosophical notion of the original state of nature, and 2) the move from the political relation of sovereignty to the economic relation of ownership.

Locke disputes Filmer's theological position here by forcefully making two counter-arguments. The first is that God's donation in Genesis Chapter One verse Twenty-eight was not made to Adam alone to the exclusion of the rest of mankind.⁵¹ In that case Adam, his posterity and contemporary monarchs have no power⁵² over men by any divine right since there is for Locke no certain account or proof of this in the Scriptures. Locke says:

Whatever God gave by the words of this Grant, I Gen.28 it was not to Adam in particular, exclusive of all other Men: whatever Dominion he had thereby, it was not a Private Dominion, but a Dominion in common with the rest of Mankind. That this Donation was not made in particular to Adam, appears evidently from the words of

⁵⁰ Ibid., 1.9.[Here Locke spells out the implications of sovereignty in terms of ownership, by clearly moving from the theological and political realm to the economic sphere].

⁵¹ Ibid., 1.25-32

⁵² Power in this case is not the same as Hohfeldian power as a right. The sense in which it is used here points to power as legitimate authority.

the Text, it being made to more than one, for it was spoken in the Plural Number, God blessed them, and said unto them, Have Dominion.⁵³

Locke's second counter-argument against Filmer's chains and "Rope of Sand"⁵⁴ is what I call the *Imago Dei* argument. Here Locke bases his argument on the textual analysis of God's creative word in the Twenty-sixth verse of Genesis Chapter One: "'And God said, Let us make Man in our Image, after our likeness, and let them have Dominion over the Fish, &c.'"⁵⁵ Locke contests the grounds upon which Filmer interpreted the 'them' as used in the text to signify one individual, namely Adam. For Locke, this interpretation is unsupported by any evidence, both in Scripture and to all Reason⁵⁶ because for him 'them' as used in the above quotation refers to the entire species of mankind created in the image and likeness of God and not only to Adam in particular.

For both Locke and Filmer the basic ground for the claim of God's grant to man is contained in Gen.1:28: "God blessed them, saying to them, 'Be fruitful, multiply, fill the earth and subdue it. Be masters of the fish of the sea, the birds of heaven and all the living creatures that move on earth". Much of the argument for both Filmer and Locke relates to the interpretation of the significance of this text, i.e. the "cultural imperative" as counterpoint of Adam's curse of being excluded from Paradise. In several places in the *Two Treatises*, Locke emphatically argues that God's liberal donation of the world was not to Adam, nor to his heirs alone (as Filmer avowed), but to Mankind in general⁵⁷. Whereas Filmer claimed that this text referred specifically and specially to Adam and his successors, Locke insists that the text refers to all humanity in common as God's children. Being created in the image and likeness of God, the entire human species shares in the intellectual nature of God. For Locke,

⁵³ Ibid., 1.29

⁵⁴ Ibid., 1.1

⁵⁵ Ibid., 1.30

⁵⁶ Ibid.

⁵⁷ Ibid. 1.24; 1.27; 1.28; 1.29; 1.30; 2.13; 2.25; 2.26; 2.28-30; 2.32; 2.34; 2.44.

it is mankind's participation in the intellectual nature of God that sets the margin between conscious human beings and the mass of other beings in nature. It is this rational aspect of mankind that enables it to have dominion over the inferior creatures and over the entire creation as King David says in Psalm 8:

Yet you have made him little less than a god, you have crowned him with glory and beauty, made him lord of the works of your hands, and put all things under his feet, sheep and cattle, all of them, and even the wild beasts, birds in the sky, fish in the sea.⁵⁸

In Filmer's opinion, Adam and his patriarchs have this right of dominion not only over the bare things of the world but also over the human race, but Locke insistently maintains that God gave neither Adam nor parents patriarchal dominion and sovereignty over the human race or over their children. Locke argues that fathers, by the fact of begetting, cannot claim an absolute right of sovereignty over their children. It is only God who has an absolute right of sovereignty and proprietorship over mankind by the fact that we are his workmanship. God, as the Scripture says, is the Lord our Maker, the Author and Giver of Life. And for this reason no earthly parents are able "to frame or make a living Creature, fashion the parts, and mould and suit them to their uses, and having proportion'd [*sic*] and fitted them together, to put into them a living Soul."⁵⁹ Thus since parents cannot arrogate to themselves the right of workmanship in their children, it follows that they cannot pretend to have absolute power and dominion over their children. They only have the duties of care and protection for their young ones.

Again, by insisting that we are God's property because we are the product of God's workmanship⁶⁰, Locke determinedly rules out the grounds for rights claims by parents over their children as a product of their labour. Not being the product of their labour, neither

⁵⁸ Psalm 8:5-8.

⁵⁹ Locke, *ibid.*, 1.53.

⁶⁰ *Ibid.*, 2.6

parents nor patriarchs, therefore, have any rights to dominate or enslave their children or subjects. What it means is that children have as much right and hence entitlements to the earth's wealth and resources as their parents. It also implies that citizens have as much right as their monarchs and rulers have to the commonwealth. No one is above and superior to the other since no one but God alone has the pre-eminent right of ownership (based on the principle of labour) over all humanity and all creation.

Strictly speaking, Locke also rules out the possible grounds for any man's claim to the natural provisions as his private property since no man is not the original proprietor or maker of any thing in being. Only God made all things in nature, although He later handed these over to all men for their use, comfort and preservation.⁶¹ We see, therefore, that for Locke labour is the supreme criterion of entitlement to property. God owns the world by the fact that it is the product of His creative labour. But Locke is able later to break through this apparent blind alley on the form of mankind's ownership by positing that all humanity by virtue of God's donation has a common right of ownership of the earth. From this major premise Locke proceeds to account how individuals can have private and exclusive access to this common property.

Before we proceed, it is pertinent to consider what are the logical implications of conceiving the world as the common property of all mankind. There are two ways in which joint ownership can be conceived. The first is that joint property can be considered as a collation of the private property of individuals who are freely engaged in a mutual or contractual partnership with one another. In this case, the contracting members set the rules of ownership that ensures that owners "are free to make such uses of their assets as they jointly or collectively decide, in accordance with the prevailing conception of the ownership

⁶¹ Ibid., 2.26

interest in question, within whatever property-limitation rules apply to all owners.”⁶² As a joint ownership corporation:

External trespassory rules vest use-privileges, control-powers, and powers of transmission in the corporation and hence via its constitution, in particular office-holders. Individual members retain the right to share in the wealth-potential of this protection but not, usually, the right not to be excluded from the corporate assets.⁶³

Mutatis mutandis, this form of ownership can be seen as the form of ownership that operates in Locke’s civil society but not so in his state of nature. The sense of joint ownership in Locke’s state of nature – which we may consider as the second form of joint ownership – is that in which individual members do not start off by putting together their individual assets to form a joint partnership or company. Rather, individuals acquire a common entitlement to all the assets by virtue of their sharing in the divine donation of the world to all mankind. Unlike in the former sense of joint ownership in civil society, where even individual members can be excluded from rights of access to the corporate assets in the case of the joint ownership of the state-of-nature, all individuals are permitted common access to all the natural assets and resources. In this later sense of ownership, the rules of joint ownership are set not by individual members but by the ordinance of reason or the command of natural law.

A number of questions appears warranted at this stage. If all humanity shares common or joint ownership of the earth and its resources as Locke claims, does this mean that every one born of a human has an equal right to all the earth’s resources irrespective of one’s geographical and historical circumstances? An expansive interpretation of Locke’s thesis of the earth as the common property of all mankind would mean that Christopher Columbus has a right not only to sail from Spain to North America, but also an equal natural right with the

⁶² Harris, J. W. *op.cit.* p. 101

⁶³ Ibid. [A naïve example of this form of ownership is the religious order of the Society of Jesus (popularly called the Jesuits) in which every member on joining the organisation declares and surrenders his assets to the organisation and in turn receives protection and whatever he needs for the conveniences of his life and work from the organisation although membership in the organisation does not guarantee non-exclusion from some of the organisation’s assets].

native Americans to the land and the resources therein. Again, if in the state of nature all humanity shares a joint ownership of all the resources of the world, how then do individuals come to acquire private ownership of any part of this joint property? Does acquiring private ownership from the common property terminate the individual's joint access to the commons and *ipso facto* their membership of the society of mankind? And what justifies private appropriation in the first place? Let's see how Locke attempts to tackle these questions in the next section.

2.1.3 From Joint Proprietorship to Private Proprietors

Locke is popularly celebrated for his philosophical justification of individual private property. However, as we have seen in the previous sections, individual private property is not in fact Locke's *point de depart*. Rather, his account and argument in an important sense sets out from the opposite end, that of the world as the *common property* of mankind in virtue of God's divine bequest. In other words, Locke does *not* posit individual private property as axiomatic or self-evidently justified; instead, how an individual person comes to appropriate 'sole and despotic dominion' over any part of that which belongs to all in common has to be *justified*. It is in response to this acknowledgement that the onus of justification rests with individual private property, not with common property, that Locke developed his famous labour-mixing argument. But before we turn to an account and analysis of his justification of the exclusive right of the individual to private property, some reflection on the historical and anthropological priority of common property is called for. ✓

First, we may recall that if individual private property had become the norm in England by the end of the 17th century, this occurred against the historical backdrop of the momentous social and economic disruptions brought about by the process of the "enclosures" of common land during the earlier Tudor period. The enclosure of open fields involved nothing less than

the breaking down of ancient law and custom of equal access to the commons, thus preparing the way for a market economy and private enterprise.⁶⁴ Accordingly, in Locke's capitalist England the need to make the basic case for individual private property, against the backdrop of the assumptions of customary access to common property, was still a live issue. Secondly, similar assumptions regarding the priority of common property still obtains in the case of some African cultures like the Igbos in South Eastern Nigeria. Hence the Igbos have a saying that no hand can exist on its own without the rest of the body. What this means is that no individual can exist as an island unto himself. Each individual must rather belong to a community outside of which his life can have little meaning and relevance. This idiom aptly depicts another common Igbo dictum: 'a thing is only able to stand when other things stand by it' (this is like saying 'I am because we are'). It also underscores the essence of the popular South African morality of *ubuntu*, that a person is a person because of other persons.⁶⁵ The Igbos believe that, no matter how wealthy and powerful an individual might be, he must of necessity belong to a community except he had been ostracised from the community as a result of wrongdoing. To belong is to have a claim on communal resources as common property; conversely, it also requires that one freely share what one has with other members of the household or community. For this reason, a hunter who kills a big animal like a cheetah, a kudu, or an elephant, does not eat it alone. He shares it with his household and his community. Even some smaller animals like goats or fowls are not commonly eaten alone. They are also shared with the people of the household. Thus an individual's personal possessions ultimately belong to his household and to his community. ✓

⁶⁴ See Karl Polanyi, *The Great Transformation*, (1944), pp. 34-6; Tawney, R. H., *The Agrarian Problem in the 16th Century*, (1912).

⁶⁵ This popular dictum is common among South Africans as an expression of reconciliation and a celebration of humanity in what they call '*ubuntu*'. Augustine Shutte explains the concept of *ubuntu* thus: "This is the insight that persons depend on persons to be persons, *umuntu ngumuntu ngabantu*. It is this insight that gives the African conception of community its distinctive character." See Augustine Shutte, *Ubuntu: An Ethic for a New South Africa*, p. 25.

This is why when a man dies, all his possessions are shared amongst his brethren. So individual appropriation in this culture does not exclude others but assumes common property; appropriation is primarily for subsistence and secondarily for the service of the community, depending on the size of an individual's wealth. People are not said to be rich or poor but rather hard working or lazy. If a man is hard working his barns will be full of yams and bumpy harvests. But a lazy man goes around begging or borrowing from others who may never refuse him save if he is a bad debtor as in the case of Unonka in Chinua Achebe's *Things Fall Apart*.⁶⁶

Unlike in the Igbo traditional society, Locke's primary concern in his seventeenth century English society is not whether an individual decides to share what he owns nor how what an individual owns belongs to his community. Locke is rather concerned with the crucial question of what gives an individual the right to take anything out as his exclusive private property from that which is owned by the community as a whole. It is Locke's chief concern that whatever it is that gives individuals the right to private appropriation, it must be such that ensures that what one has taken from the commons becomes exclusively his in such wise that no other person, as in the Hobbesian state of nature, can have any competing claims to it by right. And thus just as René Descartes finally established the connecting point between his extended self (the *res extensa*) and his thinking self (the *res cogitans*) in the pineal gland, Locke established property in oneself as the moral ground that entitles individuals a right to keep whatever they take from mankind's common property.⁶⁷ It is this property in one-self, according to Locke, that provides the model for how individuals can take from the commons to the exclusion of everyone else.

⁶⁶ Chinua Achebe, *Things Fall Apart*, p. 3. [An excerpt from this page reads: "Unoka, the grown-up, was a failure. He was poor and his wife and children had barely enough to eat. People laughed at him because he was a loafer, and they swore never to lend him any more because he never paid back. But Unoka was such a man that he always succeeded in borrowing more, and piling up his debts."]

⁶⁷ Locke, *Two Treatises*, 2.44

2.1.3.1 The Myth of Self Ownership

The claim to exclusivity of ownership of property is mainly founded upon the popular notion of self-ownership, which idea derives chiefly from the following words of Locke:

Though the Earth, and all inferior Creatures be common to all Men, yet every Man has a Property in his own Person. This no Body has any Right to but himself. The Labour of his Body, and the Work of his Hands, we may say, are properly his⁶⁸.

Over the years, a great deal of scholarship on the liberal theory of property has relied heavily on the above text as well as that found in the forty-fourth section of Locke's *Second Treatises* to justify private ownership of property. In the latter text Locke avers that though the things of nature are given in common to all men,

yet Man (by being Master of himself, and Proprietor of his own Person, and the Actions or Labour of it) had still in himself the great Foundation of Property; and that which made up the great part of what he applied to the Support or Comfort of his being, ... was perfectly his own, and did not belong in common to others.⁶⁹

The underlying idea behind these propositions as some scholars claim is that each individual is naturally and essentially the sole proprietor of his own person and of his own capacities.⁷⁰ This is the heart of Locke's individualism, implying that the individual by being the owner of himself is the absolute proprietor of his person in the sense that he owes nothing to society, just as he is also the absolute proprietor of his capacity to labour.⁷¹ Nonetheless, I find neither Locke's argument nor that of his commentators, that the individual is the owner of his person, or what is popularly today known as self-ownership, convincing. Hence I have chosen to analyse Locke's idea of property in oneself under what I call the 'myth of self-ownership'. While I am ready to concede that Locke's famous statement in Section twenty

⁶⁸Ibid., 2.27. [Hanna Arendt comments that this means that the body, hands and mouths, are the natural appropriators because they do not 'belong to mankind in common' but are given to each man for his private use. See Arendt, H., *The Human Condition*, p.111].

⁶⁹ Locke, *ibid.*, 2.44

⁷⁰ See Kaimipono David Wenger, "Slavery as a Takings Clause Violation", p. 203. Wenger includes as part of the self-ownership rights, the ownership of one's physical body, bodily integrity, and the ability to make choices – that is the right to own one's morality [*ibid.*].

⁷¹ MacPherson, *Possessive Individualism*, p. 231; Kaimipono David Wenger, *op.cit.* p. 199.

seven of his *Second Treatise*, implies the exclusion of an Other from what is mine, I am not persuaded by the argument that one has ownership of one's self or person. Moreso, the thesis of self-ownership appears logically inconsistent with Locke's previous arguments about mankind as the workmanship of God.

The first case of internal consistency is heightened by Locke's almost dogmatic assertions throughout the *First Treatise* and in several places in the *Second Treatise* that God is the owner and proprietor of the world including all humanity. In fact in section six of the latter *Treatise*, Locke clearly and distinctly imputes to God the maker and hence the proprietorship of all mankind. He says: "For Men being all the Workmanship of one Omnipotent, and infinitely wise Maker; All the Servants of one Sovereign Master, sent into the World by his order and about his business, they are his Property, whose Workmanship they are, made to last during his, not one another's Pleasure."⁷² Again, in his injunction to parents, Locke had written:

all Parents were, by the Law of Nature, under an obligation to preserve, nourish, and educate the Children, they had begotten, not as their own Workmanship, but the Workmanship of their own Maker, the Almighty, to whom they were to be accountable for them.⁷³

Thus, it appears logically contradictory and conceptually absurd for an individual to be both the property of God and the 'Proprietor of his own Person' at the same time.

Therefore, I think it is correct to argue that when Locke speaks of the individual as having the foundation of property in himself, he does not literally imply that the individual owns himself – which is what section forty four of the *Second Treatise* seems to suggest. Being the owner of oneself would mean that a person has the right to dispose of and to destroy oneself. But Locke does not grant this liberty to his individuals because the individual is God's workmanship and as God's creature, the latter is duty-bound to preserve

⁷²Locke, *ibid.* 2.6

⁷³ *Ibid.*, 2.56.

himself. He stresses that no person has the liberty to destroy himself, nor even any creature in his possession, save where some nobler use, than its bare preservation demands it.⁷⁴ It is for the like reason that the individual is not the owner of his own self but the property of God that Locke makes the case that no individual is free to simply quit his station wilfully.⁷⁵

The second problem has to do with the coherence, or not, of Locke's notion of self-ownership. When Locke claims that man has property in his own person, does this literally imply that we own ourselves, and that we could for example trade in that self as a commodity, or does it simply mean that we have an exclusive and inalienable claim to our own persons? The property that each individual has in himself might be said to be exclusive because it is not located in the commons. It is a part and parcel of each individual so much so that it cannot be removed or alienated from the individual (as easily as a cob of corn can be alienated from the corn tree or as a drumstick from the slaughtered fowl) without causing irreparable harm or damage to the individual.

Yet the trouble remains: does the fact that one has property in oneself make oneself the private and exclusive owner of that property? Property can be exclusive yet not be owned by a single individual only. For instance, a sex worker can claim to have ownership of her body yet she shares this body with all her clients. In that case though the property in her body can be said to be exclusive (or perhaps the better word is individuated since property can be individuated but nonexclusive), yet it is at the same time not exclusively owned by a single individual, namely the prostitute. Similarly, in what way can we plausibly ascribe self-ownership to a pregnant woman with respect to the foetus in her womb? Does she own herself as well as the unborn baby girl in her womb who may eventually someday also give birth to another baby girl, who may also produce another baby, and the latter in turn another

⁷⁴ Ibid.

⁷⁵ Ibid.

baby and the cycle goes on *ad infinitum*? Now, in the final analysis who owns whom: the first mother or the last mother; the first baby or the last baby?

On closer analysis it appears therefore that Locke's vaunted notion of self-ownership of one's person actually refers to the property of rationality that every human being has in him/her self. It is this property of rationality that distinguishes mankind from other species of creatures in the world. Also it is this quality that enables the individual to appropriate property as well as makes him/her worthy of being an owner of anything at all. Locke in fact takes this to be a principle of natural reason that tells every individual once he has being born, that he has a right to his preservation⁷⁶, and to subdue the earth by improving it for the benefit of his life.⁷⁷ The same property of natural reason or rationality informs the individual that the labour of his body and the work of his hands are properly his.⁷⁸

The property that each individual has in his own person, which is rationality, issues from God, who has furnished each individual with like faculties of reason. An individual's right of dominion over natural goods, Locke suggests, derives from the property of rationality that he shares with all humanity as an intelligent creature fashioned in God's likeness.

God makes him in his own Image after his own Likeness, makes him an intellectual Creature, and so capable of Dominion. For wherein soever else the Image of God consisted, the intellectual Nature was certainly a part of it, and belong'd to the whole Species, and enabled them to have Dominion over the inferior Creatures⁷⁹.

At this point there seems to be a shift in the argument. Previously, Locke had merely asserted that rationality provides the foundation for the notion of self-ownership. Now the argument seems to be concerned with the (theological) foundations of rationality itself, i.e. that man has been created in the image of God. Significantly, the implication appears to be that as

⁷⁶ Ibid., 2.25

⁷⁷ Ibid., 2.32

⁷⁸ Ibid., 2.27

⁷⁹ Ibid., 1.30

equally created in the image of God and in like intellectual faculties, the stress is on the principled equality of all mankind.

According to Locke, it is the sharing in this one commonality (otherwise universality) of natural reason that makes all humanity equal such that there cannot be supposed any subordination amongst us “that may Authorize us to destroy one another, as if we were made for one another’s uses, as the inferior ranks of Creatures are for ours.”⁸⁰ The same property of reason instructs every one that he is bound to preserve himself and also to preserve the rest of Mankind.⁸¹ From the universality of rationality, therefore, flows the principle of equality as well as the principle of inalienability, which precludes rational individuals from being turned into commodities or objects of property.⁸²

Further, Waldron argues that Locke’s assertion of property in the person of the individual is not merely a suggestion that one has property rights in one’s body as an entity⁸³. The foundation of property rather inheres in the identity of the individual as a unique conscious and intelligent being separate from other intelligent beings by virtue of his personal identity and separate also from the inferior creatures based on his human identity. According to Locke, it is the quality of “conscious thinking” that confers a distinct self-identity to the person. It is that, which “makes everyone to be what he calls self, and thereby distinguishes himself from all other thinking things.”⁸⁴ Hence without consciousness the person cannot be said to exist.⁸⁵ By virtue of self-consciousness, a person is aware of his actions as his own. And further Locke argues that it is the consciousness of his actions that makes a person the

⁸⁰ Ibid.

⁸¹ Ibid.

⁸² On this critical point Margaret Radin writes that commodification of the self “undermines personal identity by conceiving of personal attributes, relationships, and philosophical and moral commitments as monetizable and alienable from the self” and does “violence to our deepest understanding of what it is to be human.” See Market-Inalienability, quoted in Kaimipono David Wenger, *ibid.*, p. 205.

⁸³ Jeremy Waldron, The Right to Private Property, p. 178.

⁸⁴ Locke, Essay, 2.27.27.

⁸⁵ Ibid.

owner of what he has made. A person properly owns what he has produced, improved upon or fashioned by means of his actions or labour.⁸⁶ In other words, in Lockean terms, man is the proprietor of his actions because he is conscious of these self-performed actions.

But the crucial move from one being the proprietor of one's actions based on self-consciousness to one being the proprietor of one's own person based on one's labour upsets Locke's previously tidy propositions. Relying on this crucial thesis of property in oneself Locke goes on to defend a theory of exclusive private property that is derived from the inclusive common property of all humanity. Yet Locke's theory is by no means neat and tidy. On the one hand, he posits proprietorship of one's own person on a par with the proprietorship of one's actions. But on the other hand he appears to argue that consciously owning one's actions also amounts to exclusively owning the products of one's actions. And so this becomes a vehicle for turning what was the common property of all into the private property of the active individual.

But then the question must arise how proprietorship of one's own person or of one's own actions can be compatible with God's absolute proprietorship in man as his creature. If the person or rather the individual is the workmanship of God,⁸⁷ how then can the individual credibly claim propriety of one's own person without treading on the fringes of arrogance and arrant presumptuousness? If "Justice", as Locke affirms, "gives every Man a Title to the product of his honest Industry"⁸⁸ and if we are God's workmanship (in other words God's property), as Locke also maintains, what then justifies a claim of private ownership of oneself? Does an individual's claim of self-ownership not project the individual as the ultimate maker of himself and therefore God's equal? Conversely, the Scripture, which

⁸⁶ Locke, *Two Treatises*, 2.27; 2.32. Again, this is one of those uncanny absurdities in Locke with respect to slavery. If a person owns his actions, why then does the tuff my servant has cut belong to me and not to my servant who expended his labour doing the actual cutting [2.28]?

⁸⁷ Ibid., 2.6

⁸⁸ Ibid. 1.42.

Locke uses as his foundational authority is replete with accounts of God's creation of mankind.⁸⁹ St Paul says of men that they are earthenware vessels made by God; and in his letter to the Romans St Paul asks, "[s]omething that was made, can it say to its maker: why did you make me this shape?"⁹⁰ And even the writer of the book of Job decries such lofty claims by mankind when the mighty behemoth and the great leviathan, creatures like man, in spite of their power and grandeur cannot even arrogate to themselves power and equality with God.⁹¹ Strangely, Locke himself even chides at the futility of any attempts to arrogate to mankind or to parents the incomprehensible works of God.⁹²

[I]s there any one so bold, that dares thus far Arrogate to himself the Incomprehensible Works of the Almighty? ... If any one thinks himself an Artist at this, let him number up the parts of his Childs Body which he hath made, tell me their Uses and Operations, and when the living and rational Soul began to inhabit this curious Structure, when the Sense began, and how this Engine which has framed Thinks and Reasons: If he made it, let him, when it is out of order, mend it, at least tell wherein the defects lie.⁹³

Thus the critical question is: if Locke is convinced that God is our Maker and our Lord⁹⁴, and that we are His property, what does he mean when he says at the same time that man is the foundation of property and as such has property in himself and in his actions?⁹⁵ If a Master (who is not himself the creator/maker of his servant) can claim a right of ownership over the tuff that his servant has cut⁹⁶, why does man the creature of God retain ownership of himself as well as his labours?

Can we assume, for the sake of a Lockean consistency, that in bequeathing His entire creation in the form of a common wealth to all mankind as joint owners, God also donated or

⁸⁹ Genesis 1-2.

⁹⁰ Romans 9:20-1.

⁹¹ Job 40: 15- Chapter 41.

⁹² Locke, *ibid.* 1.53.

⁹³ *Ibid.*

⁹⁴ *Ibid.*

⁹⁵ *Ibid.*, 2.44

⁹⁶ *Ibid.* 2.28

strictly speaking 'relinquished' his own right of workmanship in each individual person/self exclusively to the possessing individual? Put differently, this would mean that when God breathed life into man⁹⁷ at the conclusion of his creative labour, he thereby surrendered his proprietary right of artificer in the person of each individual man to that individual artefact (person). In other words, should we assume that soon after man appeared on the stage as a self-conscious and intelligent being made in God's own image, God disappeared from the scene as the proprietor of man while the latter became the Nietzschean superman that is his own self-proprietor? This would entail that, on the one hand, God after his creation handed the world and all things to humankind in common, while on the other hand He also handed over to each person, even the yet-be-born, his exclusive right of self-proprietor. This in fairness is the most logical interpretation we can make of the conflict in Locke's propositions between man's self-ownership and God's ownership of man as the product of His workmanship.

It must, however, be reiterated that it is the divine right of all humankind to common property which the myth of self-ownership seeks to sidestep or even to overthrow in order to justify the individual's exclusive right to private property. More specifically, Locke's argument for justifying individual private property, given the priority of common property, is his famous labour-mixing argument.

2.1.3.2 The Labour-Mixing Theorem

For Locke it is individual labour that authenticates an individual's claims to exclusive appropriation of some part of the common wealth. To appropriate the rich provisions of nature, a man must join what is exclusively and intrinsically private to him (namely his

⁹⁷Genesis 2:7.

labour) with what is public or common to all (namely the earth and its resources). It is the act of mixing one's labour with the commons, thereby removing it from its natural state that makes it the exclusive preserve of its appropriator.⁹⁸ That is to say, although the individual has a rightful general claim to the water in the ocean, he has special and authentic claim only to the water that he has collected in his bucket.⁹⁹ On this note Locke declares:

Though the Water running in the Fountain be every ones, yet who can doubt, but that in the Pitcher is his only who drew it out? His labour hath taken it out of the hands of Nature, where it was common, and belong'd equally to all her Children, and hath thereby appropriated it to himself.¹⁰⁰

So, for Locke, it is not enough for a man merely to will that something becomes his own. He must of necessity strain to acquire it through the labour of his body and the work of his hands.¹⁰¹ Locke here echoes the Yahwistic account of creation and the Fall of man and God's consequent angry pronouncement on Adam and his descendants: "By the sweat of your brow you shall eat your bread until you return to the soil".¹⁰² It is, therefore, the "sweat of one's brow" – labour – that marks out the distinction between what is 'mine' and what is 'yours' taken from the commonwealth. It is his labour that gives an individual a special and valid entitlement to whatever he has taken out of the commons. These takings, barring that he did not worsen the condition of the yet-to-take commoners nor allow what he had taken to spoil,¹⁰³ are his exclusive property which no one has any right whatsoever to take away from him. With this revolutionary proposition, Locke literally 'abolished' the right that patriarchs and public authorities had to interfere with the property and holdings of private citizens and

⁹⁸ Locke, *ibid.* 2.27.

⁹⁹ *Ibid.* 2.29. The Christian version of this Lockean argument is that though Christ's salvation and redemption is being freely given to all mankind, each individual must through his labour appropriate the fruits of this grace, as St Paul puts it, "with fear and trembling". And for James, mere faith in the universal redemption of mankind by Christ without the accompanying good works is as good as dead (James 2:14-26). Differing interpretations of this text among other things led to the Lutheran and later Protestant reformations/revolutions in the sixteenth century.

¹⁰⁰ Locke, *ibid.* 2.29.

¹⁰¹ *Ibid.*, 2.27

¹⁰² Genesis 3:19

¹⁰³ Locke, *ibid.* 2.31

persons. Nozick, three hundred years later, would cement this revolutionary Lockean proposition with the caveat that all individuals have rights over their justly acquired holdings with which no person, group, or state whatsoever can interfere without violating those rights.¹⁰⁴

For Locke labour, “which is the taking any part of what is common and removing it out of the state Nature leaves it in”¹⁰⁵, thus marks the beginning of private property. Taking something out of the common stock makes it the property of the taker by the fact that he has “mixed his Labour with, and joyned to it something that is his own”¹⁰⁶. In effect, the fact that one has by her labour removed anything from the common state Nature placed it in, and annexed to it something of one’s own, thus excludes the common right of the rest of the claimants.¹⁰⁷ We can now arrange Locke’s argument for private property in the following sequence provided by Patrick Day thus:

1. Every man has a right to own his person, therefore
2. Every man has a right to own the labor of his person, therefore
3. Every man has a right to own that which he has mixed the labor of his person with.¹⁰⁸

In the state of nature, Locke literally holds that individual labour is the access card that unlocks to the exclusive ownership of the individual the riches of the natural provisions given by God to all humanity. However, there are some ambiguities in just what Locke understands labour to mean in this context. More specifically, God grants mankind and the individual two forms of entitlements namely: (i) that through unmediated appropriation of the natural Provisions: fruits of the earth and beasts of the field; and (ii) that through mediated

¹⁰⁴Nozick, op.cit, p.ix

¹⁰⁵Locke, ibid. 2.28.

¹⁰⁶Ibid., 2.27.

¹⁰⁷Ibid.

¹⁰⁸ J.P. Day, “Locke on Property,” in Gordon Schochet, (ed.), Life, Liberty and Property, p.109.

appropriation of the Earth itself, *the chief matter of Property*.¹⁰⁹ The latter applies specifically to agricultural cultivation and industrial exploitation of the earth whereas the former refers properly to hunting and fruit gathering – where men live off the land without any concern to cultivate and improve it agriculturally or industrially. However, on closer examination it appears that Locke himself did not always distinguish consistently between unmediated appropriation as distinct from mediated appropriation of natural resources, or strictly referred to the latter only as labour. In certain key contexts he did insist on labour as the productive use of the land. Above all this applies to his interpretation of Genesis 1:26, the cultural imperative: “in the sweat of thy Face, shalt thou eat thy Bread, till thou return unto the Ground, for out of it wast thou taken, for dust thou art, and unto dust shalt thou return.”¹¹⁰

What this means, according to Locke, is that:

God, when he gave the World in common to all Mankind, commanded Man also to labour, and the penury of his Condition required it of him. God and his Reason commanded him to subdue the Earth, i.e. improve it for the benefit of Life, and therein lay out something upon it that was his own, his labour. He that in Obedience to this Command of God, subdued, tilled and sowed any part of it, thereby annexed to it something of that was his Property, which another had no Title to, nor could without injury take from him¹¹¹

Locke’s interpretation here underscores the imperative of cultivating and improving the land while mere subsistence, or living off the fruits of the land by unmediated appropriation would not qualify as proper labour. In other contexts, though, Locke appears to include the unmediated appropriation of natural resources under his notion of labour. For Locke, the unmediated satisfaction of needs as in the case of one who drinks water from the river or one who picks an apple for food, also qualifies as labour so long as the individual gets the water or the apple by his own efforts.¹¹² Similarly, the hare that any one has hunted is assumed to

¹⁰⁹ Locke, *ibid.* 2.32

¹¹⁰ *Ibid.* 1.45; Confer also Genesis 3:19.

¹¹¹ Locke, *ibid.* 2.32.

¹¹² *Ibid.*, 2.28-30.

be his who has taken so much energy and labour to find and pursue her just as the acorns or the apples that any one gathered from the trees in the wood are said to his property who had laboured to gather them.¹¹³ These are intriguing formulations in that they seem to apply to the activities of hunters and gatherers who only live *off* the land and are *not* concerned with improving it. This obviously would imply that labour in Locke's understanding is not restricted to productive activities or agricultural / industrial societies. However, it needs to be noticed that the chief end of such unmediated appropriation at this stage pertains basically to self-preservation. Without labouring, man would starve, notwithstanding the plenty that God had provided for him.¹¹⁴

But, as we shall soon discover, when men began to cultivate the land and thereby acquiring property in it, the purpose of appropriation evolved from self-preservation to the increase of value to the original property. As people progressed from the state of nature to civil society, labour also gave title to money, which is in effect an instrument for the preservation and enlargement of the property that men held but crudely in the state of nature.¹¹⁵

With this we can return to the basic problem, which is: why does Locke uphold the individual's exclusive right to the products of his labour/action against his crucial insistence that the world was given to all men in common? If no man at birth had right to any part of the natural commons more than another, why then does mixing one's labour with a part of the commons make that into the exclusive property of the individual person?¹¹⁶ Nozick here posits the critically important question: why isn't mixing what I own with what I don't own a

¹¹³ Ibid., 2.28; 2.30.

¹¹⁴ Ibid., 2.28.

¹¹⁵ Ibid. 2.47

¹¹⁶ Ibid., 2.26.

way of losing what I own rather than a way of gaining what I don't?¹¹⁷ Again if God when He fashioned man invoked all the sacred dominions in that all-inclusive expression: "Let us make man in our own image, in the likeness of ourselves,"¹¹⁸ how then can liberal man in the Lockean fashion turn around to assert the exclusive right of each individual's ego over the inclusive right of "us", "ourselves" or everyone? Why does Locke's liberal ego have to assert the Hohfeldian strong claim-right over any part of the commons rather than the moderate sense of right as a privilege conferred by God to every one?

Grunebaum in his book, *Private Ownership*, argues that although Locke's justification of private ownership in the state of nature fulfils the requirements for the necessary logical structure of all forms of ownership, yet his labour criterion taken by itself is incomplete and inconsistent with the structure of rights of title taken as a whole which include: the right to use, the right to possess, the right to manage, the right to income, the right to security, the right to capital and the rights of alienation by gift, bequest and exchange.¹¹⁹ In like manner, Nozick points out that justifying acquisition of property rights using the labour mixing argument generates several difficulties. He likens mixing one's labour with the commons to pouring one's tin of tomato paste into the wild sea. And thus, Nozick reasons that just as the sea absorbs and dissipates all the particles of the tomato paste, so does the commons absorb and dissipate an individual's labour in such wise that mixing one's labour with the commons becomes a way of losing what I own in lieu of gaining what I don't?¹²⁰

¹¹⁷ Nozick, op.cit, pp. 174-5.

¹¹⁸ Genesis 1: 26.

¹¹⁹ Grunebaum, *Private Ownership*, p.55.

¹²⁰ Nozick., *ibid.* Nozick's metaphor of the tomato paste and the ocean is incongruent with Locke's labour-mixing argument. Firstly, Nozick's tin of tomato is something that is external to the individual whereas Locke's labour is something that is intrinsic to the individual. Nozick can afford to pour his tin of tomato into the wild sea, or he can cast it into the wild forest or the garbage bin without any personal injury to himself, but Locke's individual appropriator cannot afford to lose his labour without dissipating his own self in the act. Nozick's tin of tomato might be an extra baggage to him, which he must get rid of, but to Locke's appropriator, his labour is his life and cannot be toyed with without injury to his person. Secondly, Nozick's metaphor does not work because it runs contrary to Locke's no-waste principle, as we shall see in

One of the difficulties with Locke's labour-mixing argument is its apparently boundless perimeter and its ambiguous duration of ownership.¹²¹ Although Locke holds that nature has set the measure of a man's property by the extent of his labour,¹²² it is not easy to tell what are the geo-conceptual boundaries of what one can mix one's labour with. If I have a right to what I have mixed my labour with then suppose I climb a tree to pluck a fruit from it, what stops me from claiming both the tree and the fruit? By climbing the tree and plucking the fruit I have thereby (following Locke's proposition) mixed my labour with both the tree and its fruit. Pointedly, Alan Ryan also observes: can the man who shakes or climbs the tree to pick the fruit with the intention of owning the whole tree claim a natural right of ownership by labour?¹²³ If for instance, according to Nozick, a lone astronaut clears a place in Mars, has he mixed his labour with (and by right acquires) the whole uninhabited planet, or just the particular plot that he cleared?¹²⁴ Still on this point, does the fact of Jan van Riebeeck leaving his native homeland in the Netherlands to come to South Africa in the seventeenth century entitle him to all the lands, animals, and persons that he 'mixed' with on his arrival in South Africa? What specifically did he mix his labour with? Would his capturing an animal, conquering the native peoples or coercive occupation, dispossession and appropriation of the land and common resources amount to Locke's labour mixing justification? These questions

the next sub-section. Whereas for Locke, the aim of mixing one's labour with the commons is to gain something or to add value to the original thing, it does not seem that Nozick's aim of emptying his tin of tomato paste into the sea has any positive end in view save if his unexpressed intention was to feed some tadpoles in the sea.

¹²¹ In terms of his spoliation principle (see 2.2 below) Locke will argue that a thing appropriated may be kept so long as it does not spoil. This therefore confers indefinite time on ownership of property in the sense that as long as you can preserve whatever you own, it remains yours. And, of course, if you own a thing like land or diamond that does not spoil so easily it can remain yours almost perpetually even if you have no need of them. This obviously will have consequences on the rest of the commoners who do not have access to these assets but may also be in need of them.

¹²² Locke, *ibid.*, 2.36.

¹²³ Alan Ryan, *Property and Political Theory*, p.33.

¹²⁴ Nozick, *ibid.* p.174

and any attempts to provide definite answers to them will remain moot so long as Locke's works remain vague on the answers.

For our purposes it is more to the point to consider the implications of Locke's position if we would grant his starting point of the priority of common property, but discount his problematic justification for private property based on the labour-mixing argument. Accordingly let's assume with Locke that the earth and its resources are God's gift to mankind in common. What this therefore implies is that no human being or indeed any created entity can truly claim private ownership of anything. What individuals hold, possess or own belongs primarily to God and subsequently (by virtue of God's bequest), to mankind in common. In strict terms, this would imply that individual owners are only 'permitted by all' to own, hold or possess (that is to appropriate) things that are necessary and useful for the benefit of their lives. To many this would raise the spectre of some sort of "communistic" sense of ownership. No doubt there are problems with any prospect of making private property conditional on common ownership, both in principle and in practice. In practice it would certainly be unrealistic to obtain the express permission of all the commoners before one can appropriate anything. However, this need not lead to conflict as long as conditions of abundance where there are no competing claims to scarce goods obtains. Locke holds that in his state of nature there was neither scarcity nor greed until money was invented¹²⁵, yet he does not indicate whether God continues to replenish and multiply His generous donation to mankind, in direct proportion to mankind's population density and nutritional demands. But in conditions of relative scarcity and of high demand for some resources this would create conflicts between potential appropriators. Although conditions of relative scarcity would apply in Locke's civil society, Locke's state of nature is a state of relative plenty where every man has a natural right to keep what he takes from the common wealth by means of his

¹²⁵ Locke, *ibid.*, 2.45.

honest industry.¹²⁶ And this does not require the consent or permission of anyone.¹²⁷ Only two things are important for Locke to wit: that one takes only what one has mixed one's labour with; and that in so doing one does not violate the natural provisos.

2.2 The Natural Provisos

Although he firmly espouses the natural equality of all men¹²⁸, Locke is not unaware of the disparities and inequalities amongst all men with respect to natural abilities and talents. People do not have equal amounts of energy, or equal measures of ambitions and initiatives, motivation to work or the will to labour. The spirit may be willing, as the saying goes, but the body may well be weak. So even if all men might have the desire or the will to appropriate as much as they want from the common weal, not all men have an equal capacity to do so. Thus it appears that Locke is aware that if appropriation of the riches of the earth were to depend solely on the extent of man's labour¹²⁹, this would turn out to be unfair not only to children, the aged and the infirm but it might also favour the strongest and the most powerful.

Besides, justifying appropriation of the fruits of the earth solely on the extent of a man's labours seems to make two basic assumptions: the natural unlimitable right of all to appropriation¹³⁰ and the limitless abundance of the earth's resources. But we know that the earth's resources are not limitless and that this consequently constrains our rights to appropriation of the scarce resources of nature. We also recognise that under conditions of relative scarcity the rights others have to a fair share of the "common weal" constrains our own rights to an unlimited chunk of the cake. Therefore, if we must justify the entitlement to

¹²⁶ Ibid., 2.51.

¹²⁷ Ibid., 2.28 [By this proposition, Locke could be said to have signalled a liberal manifesto and probably also the first to sound the alarm bell against communism].

¹²⁸ Ibid., 2.4

¹²⁹ Ibid. 2.36.

¹³⁰ MacPherson, *ibid.*, p.203.

private property solely on individual labour, would this not generate individual and social conflict as well as greed, shrewdness, jealousy, fraudulence and theft? Likewise, if labour has to justify entitlement to property, does this not create a situation of injustice, which favours mostly the muscular, and the industrious who are willing to labour? If labour has to become the maxim of entitlement, is Locke not indirectly justifying, on the one hand a social Darwinism of the survival of the fittest or the strongest, and on the other hand a Machiavellian justice of 'might is right'?

Locke, however, pre-empts some of these criticisms by asserting that while every one has equal natural rights to property conferred on them by the 'Law of Nature', this same law of nature that vests the right to property on every man also limits the amount of property a man can have.¹³¹ According to Locke natural law has set two basic and obligatory principles that all appropriators must observe before and after the act of appropriation. The first principle is that everyone is entitled to appropriate from the common wealth only on the condition that there is "enough and as good" left in common for others.¹³² This has become known as the Sufficiency Principle. The second principle is that one can appropriate as "much as anyone can make use of to any advantage of life before it spoils".¹³³ This is known as Locke's Spoliation Principle. His arguments on these two principles of appropriation have been summarised by scholars¹³⁴ and we will deal with each in turn.

2.2.1 The Sufficiency Principle

In Locke's account, when God bestowed the natural resources of the world to all mankind, He also endowed each individual man with reason to enable him to utilise the

¹³¹ Locke, *ibid.*, 2.31.

¹³² *Ibid.*, 2.27.

¹³³ *Ibid.*, 2.31 [we shall discuss this further under the spoliation principle]

¹³⁴ Alan Ryan, "Locke and the Dictatorship of the Bourgeoisie" in Gordon Schochet, (ed.), Life, Liberty and Property, p.89; See also MacPherson, *ibid.*, pp. 204 -211; Vide Matthew H. Kramer., John Locke and the origins of private property, 1997.

earth's bounties for the best advantage and convenience of his life.¹³⁵ In his journal of 1677 Locke also wrote that though "[n]ature furnishes us with the material, for the most part rough and unfitted to our use; it requires labour, art and thought, to suit them to our occasions."¹³⁶ But the same nature that furnishes us with these material resources also limits the amount that an individual in moral terms ought to take from the commons without the consent of the rest of the commoners.¹³⁷ In the state of nature and before the invention of money, Locke believes that there was sufficient amount of resources for every individual. No one had a right to deny another person access to any of the natural resources that she needed for the support of her life. At this stage the only thing that determined the measure of any individual's appropriation is the extent of her labour.¹³⁸ And since there was plenty of resources for everyone and also naturally a limit to what an individual could remove and keep for oneself, Locke supposes that "no man's Labour could subdue, or appropriate all: nor could his Enjoyment consume more than a small part".¹³⁹

But soon Locke finds that individuals do actually have the tendency as well as the capacity to subdue and appropriate more than their own needs required. This tendency to 'exceed the bounds' of their fair share came in with the introduction of money into the state of nature.¹⁴⁰ With money came greed and consequently scarcity of resources.¹⁴¹ Apparently aware of the flaw and inconsistency of his "supposed labour limitation"¹⁴², Locke intuitively finds another moral limitation from the obligation of natural law. The rule now goes like this: every one has a right to whatever she has mixed her labour with so long as she leaves *enough*

¹³⁵ Locke, *ibid.* 2.26.

¹³⁶ Locke, MS., 1936, p. 84 quoted in James Tully, *op.cit.* p.121

¹³⁷ Locke, *Two Treatises*, 2.31.

¹³⁸ *Ibid.* 2.36. [It is partly for this reason that Macpherson includes labour as the third limitation to appropriation besides the principles of sufficiency and spoliation. For fuller discussion on this, see C.B. Macpherson, *ibid.*, p. 214.

¹³⁹ Locke, *ibid.* 2.36

¹⁴⁰ *Ibid.*, 2.47 [More on this in the section on money].

¹⁴¹ *Ibid.*, 2.45.

¹⁴² Confer Macpherson, *ibid.* p.214.

and as good in common for others.¹⁴³ What this rule implies, is that every one is entitled to whatever her honest industry fetches her from the plenty that nature has provided as long as she does not worsen the condition of the others who are yet to appropriate.¹⁴⁴ Another's condition is worsened when there is not enough for her or if what is left for her is of little use.

To concretise this proviso, let's say that all the people in Khayelitsha Township own a vineyard farm. Going by Locke's proposition, everyone in this township irrespective of age, gender, class or race has the right to whatever grapes she appropriates from the vineyard by her labour provided she leaves as good and enough grapes for the folks who are yet to take. No one has the right to ask Mr Xolela who hails from Khayelitsha why he has taken a hundred bushels of grapes from the vineyard if there were still plenty of good grapes left in the vineyard for others. No member of the Khayelitsha community should think himself injured by Mr Xolela's hundred bushels of grapes if the vines are still heavy with grapes and there were several hundred bushels of grapes left unappropriated in the vineyard.

Whether it is the gathering of the grapes, acorns, or other fruits of the earth or whether it is the appropriation of the earth itself, the same principle is to be observed. No one could consider herself injured by another who appropriates a piece of land by improving it where there is still enough and as good parcels of land left.¹⁴⁵ In other words, this rule provides that before enclosing a piece of land as his, a man should ensure that the situation of others is not worsened thereby¹⁴⁶ and that "there was never the less left for others because of his inclosure for himself."¹⁴⁷ To leave as much that another can make use of Locke considers harmless and fair, because it is as good as taking nothing at all.¹⁴⁸ What Locke seems to be saying here

¹⁴³ Locke, *ibid.*, 2.27

¹⁴⁴ *Ibid.*, 2.33

¹⁴⁵ *Ibid.*, 2.33

¹⁴⁶ Nozick, *op.cit.*, p.175

¹⁴⁷ Locke, *ibid.* 2.33.

¹⁴⁸ *Ibid.*

is that it does not really matter how much you take inasmuch as you ensure that you have left enough behind to forestall causing harm to those yet to take. This is why for him nobody should complain of being injured by the drinking of the man who took a good draught of the water while still a whole river of the same water was left.¹⁴⁹

But one of the difficulties with this proviso is that Locke's argument appears to set no definite or clear limit to individual appropriation. Locke has permitted every individual to take from the commonwealth as much as his labour enables him, and to leave for others as much as reason, (which in Locke's term suffices for natural law)¹⁵⁰ considers good and sufficient. This proviso obviously would be unnecessary under the condition of abundance just as it would also fall away in the condition of absolute scarcity. So it is not inapt to say that Locke's proviso is meant to function properly in the condition of relative scarcity.¹⁵¹ Yet Locke's argument here is too vague and thus needs to be further clarified. If goods and resources are relatively scarce how is it that Locke maintains that each individual is to be the judge in his own case of what is enough for himself and what is good for others? By consigning the just measure of appropriation to the subjective judgement of the individual, Locke here seems to betray a strange sense of naivety regarding the selfish tendencies of human beings. With relative scarcity of a basic need such as water, one would think that the correct thing to do would be to regulate the use and the distribution of the water so that it will serve everybody as long as it lasts. But Locke thinks that the best thing is for each individual

¹⁴⁹Ibid.

¹⁵⁰Ibid., 2.31

¹⁵¹A condition of scarcity though in this instance an exceptional case, is well illustrated by the scenario sketched by Nozick of someone who comes upon the only water hole in a desert. In this situation of scarcity the sufficiency proviso must clearly come into operation. In this case according to Nozick the person may not appropriate the only water hole in the desert for herself alone nor may she charge what she will if she possesses a water hole and unfortunately all the water holes in the desert dry up except for hers. And similarly, a person who owns the only island in an area is not permitted by this proviso to order a castaway from a shipwreck off his island as a trespasser, as this would violate the Lockean proviso. See Nozick, op.cit., p.180. See also Hastings Rashdall, "The Philosophical Theory of Property," in Property, its Duties and Rights, 1915.

to take as much as he considers 'a good Draught' of the water and to leave for others what he considers also to be 'a good Draught'. So long as an individual reserves 'enough and as good' for others of whatever he appropriate, Locke doesn't see why there should arise any complaints or quarrels.¹⁵²

Another difficulty with this Lockean proviso concerns the meaning of leaving "as much and as good" for others. Taken as a definite measure in an objective sense, this proviso would evidently raise all sorts of issues about how we are to measure how much is left and whether it is as good. Going back to our above example, if Mr Xolela leaves behind a hundred bushels of grapes after he has taken a hundred, how do we measure that what he has left behind is sufficient and as good for the rest members of Khayelitsha community? In a way Locke would not be troubled by Mr Xolela's appropriation insofar as he ensured that he had left more than a hundred good bushels behind for others. In other words, Locke appears not to be concerned with the possible enrichment of the first taker, but only with its impact on others. But since there is no definite measure of what is 'good and enough' save what each individual's reason considers as such, the singular appropriation of the first taker and that of subsequent takers might ultimately lead to the total consumption, exploitation or 'privatization' of the common property and therefore the impoverishment of the rest of the community who are yet to take or unable to appropriate. But this awry scenario could have been prevented if there had been a certain and definite measure of what is good and enough for every taker. Put differently, disproportionate appropriation as well as injustice to the yet-to-take commoners could have been averted if there was some measure of regulation set by the community and held as binding on all the commoners, both the first takers and the subsequent takers.¹⁵³

¹⁵²Locke, *ibid.*, 2.33

¹⁵³Macpherson, "Natural Rights", *ibid.*, p.12

Now with respect to just appropriation, what happens if there is not enough and as good left for the last man? Shall we have to surrender what we had already taken and used or will there be another way to compensate the injured person(s)? Curiously Locke's proviso leaves out the important issue of reparation for what has been taken from the common property and he does not argue for the virtue of compensation for the harm done to others by an individual's injurious appropriation.¹⁵⁴ As against this Fourier observes that since the process of civilisation had deprived the members of society of certain liberties (to gather, pasture, engage in the chase), a socially guaranteed minimum provision for persons appears justifiable as compensation for the loss.¹⁵⁵ On this point also Honoré notes that however we may interpret Locke's requirement that the acquirer must leave 'enough and as good' in common for others, the intention behind it is not satisfied unless entitlements are adjusted from time to time in accordance with what then remains for others.¹⁵⁶ This I think is part of the logic of the notion of relative scarcity. The quantum of relatively scarce resources cannot remain fixed but must continually be contextually adjusted. Theoretically this could be developed into a *reductio ad absurdum* when the remainder becomes of infinitesimal proportions that further appropriation becomes impossible or insufficient for the rest of the population.

It is ostensibly for this reason that Nozick argues that though the sufficiency principle might have held in the past, it does not hold any more. Nozick defends this position by considering a long chain of appropriators beginning from A and ending in Z who has not enough and as good left for him to appropriate. That Z has not enough and as good left for him means that the last man before him, Y, had through his particular appropriation worsened

¹⁵⁴ The only "compensation" that Locke vouches for is that in the state of nature an individual has the right to seek reparation (or compensation) from, and execute justice on, another who tries to steal his property from him. See Locke, *Two Treatises*, *ibid.*, 2.8 & 10.

¹⁵⁵ Alexander Gray, *The Socialist Tradition*, p.188. [Nozick, however, contends that compensation should rather be due to those persons for whom the process of civilisation was a net loss, those for whom the benefits of civilisation did not counterbalance being deprived of the particular liberties that Fourier mentions. See Nozick, *op.cit.*, p.179].

¹⁵⁶ Honoré, "Property, Title, and Redistribution", *ibid.*, p. 176.

the situation of Z and thereby had violated the proviso that enough and as good be left in common for others to appropriate. And by regression, it means that X, W, V, down to A had also violated the proviso and *ipso facto* had worsened the condition of others after them. And thus Nozick concludes that if the rule that 'enough and as good' be left for others no longer holds (particularly in civil society) it cannot ever have held (even in the state of nature) so as to yield any permanent and inheritable property rights to anyone.¹⁵⁷

Nozick's argument here is in fact a *reductio ad absurdum* argument seeking to invalidate the sufficiency proviso in conditions of relative scarcity but Nozick's argument is indeed not a coherent one. The fact that Y's appropriation worsened the condition for Z does not necessarily imply that the appropriation by X regressively down to the first appropriator, A worsened the condition for the last appropriator, Z. Nozick seems to forget that Y could have cheated by taking more than his fair portion of the cake thereby defrauding Z of his fair share and worsening his condition. Must we now say that because Y cheated by defrauding Z of his fair share therefore all appropriations prior to Y was fraudulent? This obviously amounts to a fallacy of overgeneralization.¹⁵⁸ We cannot justly suffer A, the first man to appropriate, who had taken a fair portion and left enough for others after him because of the greed of Y who had taken more than his fair share. In principle what Nozick's argument implies is that if the sufficiency principle is to mean anything as a natural proviso, then no individual appropriation from the common wealth could ever be justified. In practice it is unclear what constitutes a fair share or 'enough' for an individual. And Locke further

¹⁵⁷ Nozick, op.cit., p. 176. [I suppose here Locke would argue that the chief reason why the principle no longer holds is to do with the invention of money since the latter brought with it the increase in acquired possessions and consequently gross inequalities].

¹⁵⁸ I recognise the possibility also where Y might have taken his fair share but the injurious appropriation could have been someone else's say X or W or both. But since this is speculative, the argument will remain moot.

complicates this by proposing that an individual's fair share is however much he can make use of before it spoils.¹⁵⁹ This brings us to the next proviso.

2.2.2 The Spoliation Principle¹⁶⁰

Locke tries to remedy some of the lapses and complications of the sufficiency proviso with the spoliation proviso. To the question of the just measure for private appropriation, Locke proposes that as much as an individual can make use to the advantage of his life before it spoils so may he "by his labour fix a Property in."¹⁶¹ Thus "the exceeding of the bounds of his just Property" lies not in the largeness of his accumulations but in the useless perishing of any part of it.¹⁶²

The underlying value informing Locke's spoliation principle in some way appears to involve a *duty* on the part of the proprietor to put his property to proper use. This is significant in two respects. First, it reflects the condition that ultimately the world is God's property, and that humankind is obliged to act as trustees or custodians of His property, they are duty bound to God to put His property to proper use. Secondly, it is relevant in the context of the Hohfeldian analysis that the right to property does *not* amount to the liberty of the proprietor – the absence of any duties, with respect to that property. Individuals are rather under a liability to God to deliver on the goods entrusted to their charge.

Hence Locke further argues that since nothing was made by God for man to spoil or destroy, it is foolish as well as dishonest for a man to hoard up or accumulate more than he can possibly make use of.¹⁶³ Thus any one who had taken pains to appropriate any of the

¹⁵⁹ Locke, Two Treatises, 2.31.

¹⁶⁰ This limitation is also sometimes referred to as the "spoilage" or "non-waste" limitation. See Simmons, A. J. The Lockean Theory of Rights, p.282.

¹⁶¹ Locke, *ibid.*

¹⁶² *Ibid.*, 2.46

¹⁶³ *Ibid.*, 2.31

spontaneous fruits of nature 'did thereby acquire a Propriety in them' provided they did not perish or rot in his possession.¹⁶⁴ In other words this proviso presupposes an agrarian society where money has not been in use since money being more durable than the fruits of the earth, would imply that individuals can horde up large amounts of possessions without violating the spoliation principle. It is, however, a punishable act of injustice for a man to allow any of his possessions to waste since that wasted excess would not be his just possession because

if the Fruits rotted, or the Venison putrified, before he could spend it, he offended against the common Law of Nature, and was liable to be punished; he invaded his Neighbour's share, for he had no Right, farther his Use called for any of them.¹⁶⁵

For instance with respect to this proviso, I do not think that Locke would object if the management of McDonalds Fast Foods buys up more than sixty percent of all the beef on the market from the butchers so long as they put the meat to good use and not allow it to rot away. But should McDonalds Fast Foods allow even five percent of the total beef purchased to waste, this would amount to a violation of the spoliation proviso. The wasted five percent was not supposed to have been taken by McDonalds because that percentage belongs to others who might have been deprived of this meat by the excess takings of McDonalds.

Similarly, what does Locke's principle of spoliation mean with respect to land? Does land "spoil" if it is left untilled or undeveloped? If so, then the spoilage proviso in relation to land amounts to an imperative to cultivate the land. This is though a highly contentious issue in the context of the encounter between agrarian and nomadic or subsistence societies, especially in the context of colonisation. Locke's spoliation proviso would not be violated if for instance Roy Bennett were to appropriate as much land as "he tilled, and reaped, laid up and made use of, before it spoiled".¹⁶⁶ "Spoiling" in this instance amounts to letting the land

¹⁶⁴ Ibid., 2.37.

¹⁶⁵ Ibid.

¹⁶⁶ Ibid., 2.38.

lie fallow, unutilised. The tilling of the land and the making good use of it thus gives Bennett a peculiar right to the land he has appropriated.¹⁶⁷

On the face of it, Locke's argument here appears plausible. Simply put, Locke is saying that a labourer deserves his wage (or in another context a capitalist deserves the profits accruing from his capital investments). McDonalds deserve all the beef they purchased just as Bennett deserves all the land he has appropriated as long as both parties are able to convert these resources to a useful end before they spoiled. But does Locke not undercut his sufficiency proviso with this spoliation proviso? So if an individual is allowed to take as much as can benefit him before it spoiled, does it not matter any more that he leaves 'enough and as good' for others? This seems to underscore an internal contradiction in Locke's natural provisos. Suppose that for some reason there is a scarcity of good beef on the beef market. The spoliation principle is inapplicable even if McDonalds buys up sixty percent of the available good beef provided McDonalds is able to use up all the beef without allowing them to rot. But the question and implication of whether there was enough and as good beef left for others now appears to be overlooked. The new emphasis is that one consumes all that one takes without wasting any part of it.

That Roy Bennett's particular appropriation of sixty percent of all the available acres of arable land in Bulawayo worsens the condition of the native Ndebeles and the Tongas who also have a right of nature to the land, does now seem to be neglected provided that Bennett is a maximally efficient farmer who puts his acreage to beneficial use without wasting any part of it. Yet if all individuals have rights to all the resources that God has bequeathed to humanity in common, as Locke claims, why should the native Ndebeles or the Tongas not have right to invade Mr Bennett's enclosed farmland, if his singular appropriation has denied other commoners the right to also appropriate a fair share of the common property?

¹⁶⁷ Ibid.

Unfortunately, Locke thus appears to have shot himself on the wrong foot by failing to ensure a smooth coherence between the two provisos.

The whole question of wastage in itself also is very moot. It is controversial to say what really constitutes wastage or spoilage. Does the fact that five percent of the total sixty percent of the beef bought by McDonalds was cast into the garbage bin at the end of their service constitute waste? In the process of production some things have to be literally 'wasted' in the course of unavoidable production spillage in order to obtain the desired value. Would this production waste be considered spoliation in Locke's sense? I do not think so. Often, unless something is wasted or spoiled in the process of production, the desired end-result may not be achieved. A sculptor frequently chips off some part of his marble just as the wood carver does to his wood so as to produce the desired product. Would the 'chip offs' count as spoliation in Lockean parlance? What of the case where the winepress literally mashes and destroys all grapes before it can turn them into good use in making wine? On this score Simmons reasons that Locke cannot have intended to ban all "destructive" uses of natural resources. In Simmons' words:

Locke's real concern, I think, must be with productive use (and waste), not spoilage. For goods are only a part of our purposive activities when they are used by us.... It is not, then, spoilage that should be prohibited by this limit on natural property, but waste – where waste includes not only holding without using, but frivolous destruction (both of which deny others the opportunity of productive use). We must not 'waste the common stock'(II, 46)".¹⁶⁸

In line with Simmons I think Locke's spoliation proviso prohibits the purposeless, careless and extravagant use of limited resources. To "fail to make full or good use of"¹⁶⁹ any appropriated resources is to waste it. It must be noted that to make good use of something is not just about adding value to it. An individual who picks up an apple and consumes it has

¹⁶⁸ Simmons, op.cit., pp. 285-6

¹⁶⁹ South African Concise Oxford Dictionary, p.1326.

made good use of it for the preservation of his life. The man who hunts a deer and consumes it as food or exchanges it for money fulfils the logic of usefulness. The deer has thus achieved its purpose: "to afford him (the hunter's) Conveniences of life."¹⁷⁰

Contrarily, the spoliation proviso prohibits the useless stockpiling of resources for no purposive or useful end.¹⁷¹ It prohibits a consumerist culture that produces excess food that is eventually discarded into the garbage incinerator whereas some of the rest of the world suffers acute food shortage and starvation. The useless perishing of any excess food according to Locke's proviso is an offence "against the common Law of Nature, and was liable to be punished".¹⁷² Since all humanity shares a joint ownership of the stock of nature, to appropriate any part of this common stock unproductively or wastefully is simply to deny others the opportunity of productive use. Waste harms others because by wasting a common resource I infringe others' rights by precluding their access to the goods I wasted. Inasmuch as labour, says Locke, grants a man property right in all the wild fruits he gathered, and also in all the wild beasts he hunted, yet none of these is allowed to perish in his possession without due use. But if any of the "Fruits rotted, or the Venison putrified, before he could spend it, he offended against the common Law of Nature" and thus deserved to be

¹⁷⁰ Locke, *Two Treatises*, 2.37.

¹⁷¹ This proviso must certainly prohibit as well the useless stockpiling of military wares and armaments. I think it must bear hard on military stockpiles for I do not see any beneficial ends for which these armaments are being produced and stocked. I am not disposed to consider using these monstrous weapons as a defence to instigate and prosecute wars, conflicts or terrorism as a purposeful end. And there cannot be any effective uses of these lethal instruments save for the improvement of life as in minerals explorations and in stone quarries. Any other end aimed at the destruction of life is a grossly useless and wasteful end. At the Robben Island prison for instance lies a rusty, useless and gigantic military tank that consumed a huge amount of human resources and the tax payers money to produce during the Apartheid regime. But this equipment was never used and today, it lies waste in disuse as a historical symbol of wasteful investment and purposeless invention. The same is applicable to many other countries especially the technologically advanced countries who stock purposeless armouries while millions of people die of diseases, starvation, unemployment and hunger. Of what use is it for any countries of the world to manufacture, amass and preserve nuclear armaments and weapons of mass destruction (WMD) when most people in Asia, Africa and the so-called emerging economies have virtually lost their right to self-preservation owing to the structural deprivation and systemic denial of access to the useful natural and economic resources of the earth?

¹⁷² Locke, *ibid.*

punished.¹⁷³ Even in his personal attitudes, Locke found waste of any kind reprehensible. One of his biographers filed this report about Locke: "Waste of any kind he could not bear to see...nor would he, if he could help it, let anything be destroyed which could serve for the nourishment, maintenance, or allowable pleasure of any creature."¹⁷⁴ For Locke nature abhorred waste in a like manner as it abhorred a vacuum for the scientists. The useless wastage of any of God's resources is irresponsible precisely because we have a duty to God as the proprietor *par excellence*.

In section thirty-eight of the *Second Treatise*, Locke enunciates that whatever land a man cultivated and improved upon was his, including all the products of the earth and the cattle, so long as he forbade that the grass of his enclosure nor the fruits of his planting rotted uselessly.¹⁷⁵ The basic issue, however, is whether the spoliation principle is equivalent to a positive imperative for development and improvement of the land. Suppose a man were to hold a piece of land fallow though he chooses to water the grasses on it regularly, does this act amount to a waste of the common stock of land?¹⁷⁶ What if the meadows are being maintained for a future sport say as a golf course, Locke I suppose would consider them to be of use. But if the land is merely a 'status' property of the idle rich who leaves it unused and undeveloped, this would constitute a contravention of the no-waste principle even if there is still enough and as good land left elsewhere for others to use. Every acre of land appropriated must be put into good use otherwise it should be exchanged for some other needs.

¹⁷³ Ibid.

¹⁷⁴ Fox Bourne, H.R. *The Life of John Locke*, 2:536.

¹⁷⁵ Locke, *ibid.*, 2.38

¹⁷⁶ Alan Ryan is of the view that in the case of a man who gathers apples and let them decay, though his behaviour may be foolish, it is doubtful if wicked. This is because the man may enjoy watching apples decay or playing bowls with them. (*Property and Political Theory*, p. 37) But I should think this is a capital sin against the Lockean spoliation proviso. The man not only invaded the right of others to the good use of the decaying apples, he also allowed what God had given him to rot in his hands (See Locke, *ibid.* 2.31).

The barter of the surplus perishable produce of one's labour is permissible so long as nothing is allowed to perish uselessly in one's hand.¹⁷⁷ Alan Ryan argues that the point of Locke's speculation here is the claim that property is to secure a morally worthwhile life for all members of society so much so that nobody can take refuge in the assertion that, 'yeah, 'it's mine, therefore, I will do what I like with it'¹⁷⁸. Well, you can do what you like with it so long as what you do with it is useful and not wasteful. This is directly relevant to the Hohfeldian analyses whether property rights involve only liberties on the part of the proprietor as correlative to no-claims by others, or whether proprietors have duties (with regard to their properties) to God as correlative of His claim-rights as ultimate proprietor. Further, Locke states that a man who fairly acquires more land than he can make use of is at liberty to exchange his 'overplus' with "Gold and Silver, which may be hoarded up without injury to any one, these metals not spoiling or decaying in the hands of the possessor".¹⁷⁹

With the introduction of money, therefore, Locke seems to have solved or rather transcended the inconveniences of the spoliation limitation.¹⁸⁰ However, while money on the one hand seems to have solved the problem of spoilage of natural resources, it on the other hand increases men's greed and want for more property. It allows people to pile up property that does not spoil, to employ the services of other people and to acquire as much as land as their means can afford. Thus with money the moneyed individuals who have accumulated excess capital, are able to privatise large portions of the useful parts of mankind's common weal. And with privatisation of useful resources, access to the commons now becomes strictly controlled (or in some cases exclusively denied) to the rest of the commoners who

¹⁷⁷ Locke, *ibid.*, 2.46.

¹⁷⁸ Alan Ryan, *Property*, p. 71.

¹⁷⁹ Locke, *ibid.*, 2.50

¹⁸⁰ MacPherson, *Possessive Individualism*, p.204

may have been dispossessed and harmed by the injurious appropriation of the individual capital accumulators.

2.3 Property, Labour, Money, and the Market

In the view of some scholars, the notion of property in Locke can be categorised into two types, to wit: “the property serving to guarantee the needs of life (property in the state of nature) and the property used for accumulation (property according to the agreement on the use of money).”¹⁸¹ For the sake of convenience I shall call the former, “subsistence property”; and the latter, “capitalist property”. Whereas subsistence property prevailed before the invention of money, capitalist property became predominant after the introduction of money into the state of nature and subsequently into civil society. As a consequence of the invention of money, the two natural provisos that limited the amount of property an individual could appropriate for the benefit and convenience of her life were disregarded “amongst that part of Mankind, that have consented to the Use of Money.”¹⁸²

There are three pertinent questions that we need to ask at this stage. How did money find its way into the economic system of the state of nature in the first place? Was it necessary for Locke to introduce money into the state of nature, and if so what are the implications for the entrenched principle of the natural provisos, which was supposed to constrain appropriation of the sufficient resources that could previously “suffice double the Inhabitants” of the earth?¹⁸³ And lastly, what are the implications and the significance of founding the origin of

¹⁸¹ Ulrich Duchrow & Franz J. Hinkelammert, Property for People, Not for Profit, p. 64.

¹⁸² Locke, *ibid.* 2.45.

¹⁸³ *Ibid.* 2.36.

money on the tacit consent¹⁸⁴ of individuals in the state of nature prior to the formation of the civil society?

In order to better appreciate Locke's convoluted arguments on the relation between property, productive labour, money, and the market we need first to delineate the three levels of economies that are discernible in his theory of property. These include in an ascending order of complexity: (i) Pre-agrarian economy, (ii) Agrarian economy, and (iii) Exchange/Market economy. The pre-agrarian economy was operative, as Locke informs us, "in the first Ages of the World, when Men were more in danger to be lost, by wandering from their Company, in the then vast Wilderness of the Earth, than to be straitened for want of" of their daily bread.¹⁸⁵ This was, in other words, basically a subsistence economy in which individuals in the state of nature depended entirely on the spontaneous natural provisions for the satisfaction of their biological needs and desires. People led a free nomadic life wandering from pillar to post in pursuits of survival while avoiding the beasts of prey. There was no form of agricultural cultivation of the earth since individuals "for the most part, contented themselves with what un-assisted Nature offered to their Necessities".¹⁸⁶ As there were superabundant natural provisions for the few inhabitants of the world, people satisfied their wants and desires without requiring the consent of another person.¹⁸⁷ Every one had an equal right to everything and *ipso facto* a natural entitlement to whatever she took out of the

¹⁸⁴ Locke makes a distinction between two levels of consent: "one is the consent between free, equal, rational men in the state of nature, to put a value on money, which Locke treats as accompanied by conventional acceptance of the obligation of commercial contracts.... The other level of consent is the agreement of each to hand over all his powers to the majority; this is the consent that establishes civil society." [MacPherson, op. cit., p.210. Whereas the consent to money in the state of nature is tacit, voluntary and independent of the civil society, the consent to form a civil society is explicit, that is categorical albeit also voluntary but whose *raison d'être* is the protection of the contracts that individuals made in the state of nature. See Locke, *Two Treatises*, 2.50; 2.14.

¹⁸⁵ Ibid. 2.36

¹⁸⁶ Ibid. 2.45.

¹⁸⁷ Ibid. 2.28-9.

common stock.¹⁸⁸ Locke cites examples of the hunting and fruit gathering communities of the 'wild Indians' of seventeenth century North America as the perfect examples of this type of pre-agrarian economy.¹⁸⁹

The agrarian economy developed subsequently from the pre-agrarian economy. As the races and families of peoples increased, infinitely exceeding the small number at the beginning,¹⁹⁰ the abundance of the spontaneous natural provisions dwindled, and the penury of the condition of life forced individuals to cultivate the earth to improve it for their subsistence. Although Locke regarded the hunting and gathering regime in the pre-agrarian economy as a primitive form of labour, he affirms that the cultivation of the earth that prevailed in the agrarian economy is the principal form of labour that was commanded by God and natural reason.¹⁹¹ In this otherwise subsistence economy, an individual had title to as much land as she "Tills, Plants, Improves, Cultivates, and can use the Product of".¹⁹² The measure of any one's property being naturally limited by the extent of the person's labour confined each individual's possessions to a very moderate size, thus making it

impossible for any Man, this way, to intrench [sic] upon the right of another, or acquire, to himself, a Property, to the Prejudice of his Neighbour, who would still have room, for as good, and as large a Possession (after the other had taken out his) as before it was appropriated."¹⁹³

So we see how the agrarian economy "naturally" evolved from the pre-agrarian economy, marking the decisive difference between those who could appropriate, namely the rational and the industrious, and those who lacked the power to appropriate, namely the

¹⁸⁸ Ibid.

¹⁸⁹ Ibid., 2.26; 2.30.

¹⁹⁰ Ibid., 2.36

¹⁹¹ Ibid., 2.32.

¹⁹² Ibid.

¹⁹³ Ibid., 2.36 [Further on Locke warns that "he that had as good [land] left for his Improvement, as was already taken up, needed not complain, ought not to meddle with what was already improved by another's Labour: If he did, 'tis plain he desired the benefit of another's Pains, which he had no right to" 2.34].

quarrelsome, lazy and contentious individuals.¹⁹⁴ The distinctive character of the agrarian economy was the “*Property of Labour*” (that is productive labour or in this instance, the mediated cultivation of the land), which superseded the “Community of Land” that had characterised the pre-agrarian economy.¹⁹⁵ This “property of labour”, which in the state of nature required no mutual consent or the permission of another, gave individuals distinct titles to several parts of the land that was formerly held in common for their private use, “wherein there could be no doubt of Right, no room for quarrel.”¹⁹⁶ Again, Locke affirms the caveat that no individual had any right to amass more land or resources “further than his Use called for any of them” before they spoilt otherwise “he invaded his Neighbour’s share” and so “was liable to be punished” for breaching the law of nature.¹⁹⁷

By productively labouring on the land, however, individuals produced surpluses that surpassed their levels of subsistence and their rates of consumption. But as “it was a foolish thing, as well as dishonest” and punishable for individuals to hoard up more goods than they could make use of before they spoilt,¹⁹⁸ people had to devise a way to deal with the surplus products of their industry. The system that arose in the bid to tackle this problem gave birth to trade and exchange, and later the market economy in its incipient form. Thus in lieu of letting their surplus produce rot away, individuals bartered these excesses with their neighbours for other commodities, which they desired. Or they gave away their superfluities to those who desired them. Locke considers these exchanges as valid, useful and appropriate.

Locke decrees:

If he gave away a part to any body else, so that it perished not uselessly in his Possession, these he also made use of. And if he also bartered away Plumbs that would have rotted in a Week, for Nuts that would last good for his eating a whole

¹⁹⁴ Ibid.

¹⁹⁵ Ibid., 2.40.

¹⁹⁶ Ibid., 2.39.

¹⁹⁷ Ibid., 2.37; 2.12-3.

¹⁹⁸ Ibid., 2.48,37.

Year, he did no injury; he wasted not the common Stock; destroyed no part of the portion of Goods that belonged to others, so long as nothing perished uselessly in his hands.¹⁹⁹

We must note that at the early stage of this primitive exchange economy, money had not yet been invented. It was still primarily a barter economy in which individuals exchanged the goods they owned or wanted to get rid of for other goods that they lacked but desired. What this means in the view of some modern economists is that:

For example, a wheat farmer who needs clothing for his family first has to find a tailor who needs wheat. Then the exchange can take place. If no tailor who happens to want wheat can be found, the farmer will be obliged to exchange the wheat for something else that the tailor does require. In other words, before the exchange of two goods can take place, there has to be a double coincidence of wants between the parties concerned.²⁰⁰

For each of the individual's many requirements, another individual had to be found who was willing to engage in a mutual exchange of goods. Similarly, there was no system or a unit of account for the measure or the relative proportion of goods that individuals had to trade for their commodities. Thus, the value of an individual's six months of industry or husbandry could be exchanged for another's five days of labour depending on the circumstances of need and the availability of a willing 'buyer'. In other words, whereas one man might barter "his Nuts for a piece of Metal, pleased with its colour", another man exchanged "his Sheep for Shells, or Wool for a sparkling Pebble or a Diamond".²⁰¹

The cumbersome inconveniencies and the inefficiencies of the barter economy eventually led to the evolution of a monetary/market economy. This latter economy began with the invention of money, which resulted, as Locke opines, from mankind's long search for some "lasting thing that Men might keep without spoiling, and that by mutual consent

¹⁹⁹ Ibid., 2.46.

²⁰⁰ Philip Mohr, et al. Economics for South African Students, p. 354.

²⁰¹ Locke, *ibid.* 2.46

Men would take in exchange for the truly useful, but perishable Supports of Life.”²⁰² Interestingly, this significant piece of invention known as ‘money’, that Locke describes as “*a little piece of yellow Metal*, which would keep without wasting or decay”,²⁰³ in Locke’s account, included things such as gold, silver, and diamonds, which men’s “Fancy or Agreement hath put the Value on, more then real Use”.²⁰⁴

The invention of money thus marked a crucial turning point in Locke’s state-of-nature economics. It not only addressed the tedious inconveniences of bartering of goods and the difficulties associated with respect to the double coincidence of wants, it also principally provided a unit of account by means of which individuals could measure the value of the commodities they traded. Locke believes that by their mutual albeit tacit consent to money individuals had also implicitly agreed that this piece of lasting metal “should be worth a great piece of Flesh, or a whole heap of Corn”.²⁰⁵ Logically, therefore, with the invention of money, the wheat farmer who wanted clothes did not have to look for a tailor who wanted his wheat. He could now exchange his “heap of Corn” for an ounce of gold, and with the latter he was at liberty to purchase his desired clothes from a variety of tailors or cloth-merchants. In so doing, money thus has served as a lubricant or intermediary to smoothen the tedious process of exchange that characterised the barter economy.

Another significant contribution brought about by the invention of money was its capacity to enable individuals to transcend the limits of the natural provisos, especially the proviso of non-spoliation of goods. With money, individuals found the means to exchange the products of their industry and the “perishable Supports of Life” for an equivalent piece of gold or silver, which they were free to keep all their lives without violating the right of others

²⁰² Ibid. 2.47.

²⁰³ Ibid. 2.37

²⁰⁴ Ibid. 2.46

²⁰⁵ Ibid. 2.37

or prejudice to any one.²⁰⁶ It is exactly on this point that Locke's liberal theory of property found its most brilliant and most ingenious justification for capitalism. Locke entrenches his position with the illustration that the farmer, for instance, who exchanges his nuts for, say, a piece of gold, or his wool for diamonds, was at liberty to "heap up as much of these durable things as he pleased; the exceeding of the bounds of his just Property not lying in the largeness of his Possession, but the perishing of any thing uselessly in it."²⁰⁷

The immediate consequence of this 'unlimited accumulation' argument was irredeemably the beatification of the possessive individual and the canonisation of the principle of capitalist accumulation. From this point onwards, Locke has provided his bourgeois individuals with the infallible dogma of massive accumulation. He has set his individuals free from the constraints of the natural provisos. He had earlier unshackled them from the reins of Filmer's patriarchal control. Now Locke 'sanctifies' with the cold logic of his money argument the base instinct for unlimited acquisitions in his bourgeois man. Hence he says: "Find out something that hath the *Use and Value of Money* amongst his Neighbours, you shall see the same Man will begin presently to *enlarge his Possessions*."²⁰⁸ Yet before the invention of money, "the intrinsic value of things' depended entirely on "their usefulness to the Life of Man", but following the introduction of money, "the desire of having more than Men needed" set in.²⁰⁹

It is no accident, however, that Locke establishes the origin of money as well as of the market economy on the mutual consent of individuals in the state of nature.²¹⁰ A historical reading of Locke's economic writings reveals that money occupied a crucial place in these works and its definition impinged critically upon his conceptions of the natural order and the

²⁰⁶ Ibid. 2.46

²⁰⁷ Ibid. 2.46

²⁰⁸ Ibid. 2.49

²⁰⁹ Ibid. 2.37

²¹⁰ Ibid. 2.50

essence of the civil society in his political philosophy.²¹¹ Historically, as Joyce Appleby contends, Locke confronted a situation in which the civil government in England possessed powers that controlled the value of money and also arbitrarily interfered with Englishmen's liberal use of their private property. The sovereign had so much right as to determine the weight, fineness, denomination and extrinsic value of coin.²¹² His political fiat in fact assigned an extrinsic value to the silver coins. As Nicholas Barbon puts it, "tis the Public Authority upon the Metal that makes it money; and without such Authority, Silver would not pass for money than gold".²¹³

Thus the sovereign in Locke's seventeenth century England had such overbearing powers and control over the economic life and the property of Englishmen that, as John Briscoe observed, "when the sovereign manipulated the coin, the subject was made rich or poor; had a Competency, or was beggared; became a freeman, or lived in fetters at his pleasure".²¹⁴ But this apparently authoritarian regime was most repugnant to Locke. And his reaction was unambiguous. In the face of the pervasive evidence of formal, arbitrary and unlimited sovereign authority in managing the economy, Locke asserted the reality of the natural inalienable and equal rights all citizens to their 'private property', which rights were independent of, and prior to, civil government. Private Property, Locke defended, was the reward for each individual's initiative and effort, which reward enabled the individual to satisfy her unlimited desires and to pursue other life-projects.

In Locke's scheme, therefore, public interference with the individuals' private properties was in fact an unjustifiable obstruction against individuals' capacity for reasoning, and for

²¹¹ Joyce Oldham Appleby, "Locke, Liberalism and the Natural Law of Money" In Richard Ashcraft (ed.), *John Locke: Critical Assessments*, Vol. II, p.317.

²¹² Ibid. p.318.

²¹³ Nicholas Barbon, *A Discourse concerning Coining the New Money Lighter* (1696). Quoted in Joyce Oldham Appleby, *ibid.* p.316. See also Albert Feavearyear, *Pound Sterling*, pp.148-9

²¹⁴ John Briscoe, *A Discourse of Money* (1696). Quoted in Joyce Oldham Appleby, *ibid.* p. 318.

free/full self-government, which demanded free access to property. Thus although the need to have access to the means of creating property in order to attain full human development and of safeguarding one's property from the interference of others warranted the need for civil government, Locke argued that should the sovereign therefore seek to control or to regulate the private property of individuals, then this would be to trespass the bounds of his mandate since such interference stood outside the domain of his control and beyond the terms of his reference. Individuals' right to their property was a right of nature acquired by means of personal initiatives and industry. And their agreement to exchange their private properties by means of money was mutual, voluntary and independent of the purview and paternalism of civil government.

In sum, it is clear from the foregoing how much Locke labours to remain within the bounds of his liberal perimeter. He has demonstrated how private property originates from the rational initiative and the productive effort of the individual in the state of nature. He has shown how autonomous individuals freely consented to exchange their private properties for the price of specie without the constraints of regulation and interference by public authority. Lastly, Locke has also argued that the total quantity of money in the world in proportion to the total trade equals the general value of money. Put differently, the total quantity of the 'embodied labour' of all rational and industrious individuals in the world in proportion to the sum of all the exchange on the free market adds up to the universal value for money. That is to say that money, in Locke's words, in itself as a specie or metal "is a barren thing", with no value and "produces nothing" but due to the universal compact of mankind that fixed an imaginary value in money, the latter is able to transfer "that profit that was the reward of one man's labour, into another man's pocket".²¹⁵ It is moot to argue that it was owing to the

²¹⁵ Locke, *Works*, 5, p.36.

correlation between an individual's productive labour and money as the exchange or reward of that labour that Locke emphatically opposed putting a legal ceiling on the interest rate.²¹⁶

More importantly, I contend that Locke's speculative correlation between an individual's industry and money as the reward of that labour is inconsistent with and in fact makes absurd his identification of money with capital accumulation, which betrays a certain disposition towards mercantilism. This mercantilist orientation comes out clearly in Locke's contention that money yields an income in the form of interest.

From my having more Money in my Hand than I can, or am disposed to use in buying and selling, makes me able to lend: And another's want of so much Money as he could employ in Trade, makes him willing to borrow. But why then, and for what Consideration doth he pay Use? For the same Reason, and upon as good Consideration, as the Tenant pays Rent for your Land.²¹⁷

It is inconsistent that Locke, the liberal humanist who in the *Second Treatise* argued for the regime of private appropriation that is based on utility and consideration for others unable yet to appropriate, now makes a total *volte face* in his *Considerations* to argue for the adverse appropriation and accumulation of property, which has little connection with moral desert for industry, or the improvement of nature. For another instance he says:

But everybody being ready to receive money without bounds, and keep it by him, because it answers all things: therefore the vent of money is always sufficient, or more than enough. This being so, its quantity alone is enough to regulate and determine its value, without considering any proportion between its quantity and vent, as in other commodities.²¹⁸

²¹⁶ Ibid. pp.63-4. [Arthur H Leigh points out that Locke made the exception that if a legal ceiling is to be set on interest for any purpose, 'it should be within such bounds, as should not, on the one side, quite eat up the merchant's and tradesmen's profit, and discourage their industry; nor, on the other hand, so low, as should hinder men for risking their money in other men's hands, and so rather choose to keep it out of trade, than venture it upon so small profit.' And further Locke stated that if the interest rate "is too high, it so hinders the merchant's gain that he will not borrow; when too low, it so hinders the monied man's profit, that he will not lend; and both these ways it is an hindrance to trade'. Confer. Locke, *ibid.*, 63-4. See also Arthur H. Leigh, *ibid.* footnote on p. 297].

²¹⁷ Locke, *Some Considerations*, 1691, pp. 55-6.

²¹⁸ Locke, *Works*, 5, p. 45.

In identifying money with capital, Locke has substituted the intrinsic value of labour with the imaginary, fanciful human value for gold. Gold as specie, in Locke's inconsistent judgement, no longer serves as a proportionate measure for value added to natural resource; rather it becomes a value in itself so invested and infused by fantasy into this "barren thing". By perhaps inadvertently creating this intellectual rift between "embodied labour" as value and also at the same time justifying the rat race for money or gold (as an "imaginary value" not necessarily as a human need), Locke has passed an eminent vote of approval on the unlimited accumulation not of natural provisions but of lasting gold money. It is against this score that Jacob Viner believes Locke occupies a place in the "intermediate stage in the evolution of the theory of the formation of capital". According to Viner,

Locke had argued that it was only the existence of money which created any incentive for the accumulation of physical capital, since without the possibility of exchanging physical goods for something not perishable and which could be hoarded men would have no motive to acquire possession of land, cattle, etc., in greater amount than they could themselves consume its product.²¹⁹

Nevertheless, even though unlimited appropriation of either natural resources or lasting gold contravenes Locke's sufficiency proviso especially in the circumstances of relative scarcity, yet in certain cases, it may not be easy to establish that individual capital accumulation harms any one. In fact the invention of money precisely thrusts up instances where capital accumulation benefits the majority of the society by increasing productivity, efficiency and entrepreneurship. The more relevant question for our purposes here is whether efficiency, increased productivity, or adding value to a part of a common natural resource thereby justly entitles an individual to own a disproportionate chunk of the common property?

²¹⁹Viner, Jacob. Studies in the Theory of International Trade, pp. 89-90, n. 51.

2.3.1 Private Property, Productive Labour and Adding Value

Earlier we distinguished two forms of appropriation in Locke namely unmediated appropriation of natural provisions and the mediated appropriation for increased productivity of natural resources. We noted that, according to Locke, the latter form of appropriation is superior to the former because it improves (adds value to) nature.²²⁰ We need also to recall that in section thirty-four of his *Second Treatise*, Locke insists that although God had given the earth to all humanity in common, God did not intend that the bounties of the earth should so remain in common, unexplored, unutilised and undeveloped. Instead, God had provided all the resources of this world for the benefit and the greatest conveniences of all mankind, which the industrious and the rational part of humanity may then by their labour, fix a private property in.²²¹

Therefore, “As much Land as a Man Tills, Plants, Improves, Cultivates, and can use the Product of, so much is his Property.”²²² By cultivating and improving any part of the natural donations of God, the individual is obeying God’s command for mankind to join her labour with what had already been provided by God for the satisfaction of his daily needs and for his preservation. And further on Locke says: “He that in Obedience to this Command of God, subdued, tilled and sowed any part of it, thereby annexed to it something that was his Property, which another had no Title to, nor could without injury take from him.”²²³

These passages represent an important shift from Locke’s initial stress on the world as the common property of mankind, implying a concomitant natural right of equal access for all individuals, to the differentiated and unequal realm of enterprise and private property. Locke appears to underline a vital recognition that although all humanity holds common and

²²⁰ Locke., op. cit. 2.32.

²²¹ Ibid. 2.34

²²² Ibid. 2.32

²²³ Ibid.

equal right to all the riches and wealth of this world, not all individuals are equally industrious nor are they all of like initiatives and enterprise. It is only the intelligent, the enterprising, the talented, and the hardworking people who know how and are able to deploy these vast resources of nature for their own benefits and for the execution of their life projects. We should recall that this was the goal Locke announced in the first paragraph of his chapter on property: to demonstrate how and the means by which individuals may come to appropriate as their private (and exclusive) property the huge resources of the earth, which God had given to them in common, for the best advantage of their lives.²²⁴

Now in the thirty-fourth section of that pre-eminent chapter, Locke seems to have got to grips with his set project. Significantly this involves a differentiation between different classes of individuals. Locke is beginning to realise that even if opportunities may abound for all individuals to develop themselves, not every individual is able to see, to seize, and to 'maximally' utilise these opportunities. Only the intelligent and the industrious crop of humankind are able to perceive and to tap the opportunities for self-development or for personal aggrandisements. And so for Locke, the proper index of rationality is revealed in productive labour! But what is this animal called productive labour?

In Locke's terms, productive labour is that labour that puts "the difference of value on every thing".²²⁵ It is the labour that "makes the far greatest part of value of things, we enjoy in this World".²²⁶ The labour that is productive is that activity that is aimed at transforming the provisions of nature by means of human industry, intelligence, and ingenuity so as to make these natural provisions more useful for the benefit of life and for the service of humanity. Locke illustrates this with the following example:

²²⁴ Ibid. 2. 25

²²⁵ Ibid. 2.40

²²⁶ Ibid. 2.42

Bread, Wine and Cloth, are things of daily use, and great plenty, yet notwithstanding, Acorns, Water, and Leaves, or Skins, must be our Bread, Drink and Clothing, did not labour furnish us with these more useful Commodities. For whatever Bread is more worth than Acorns, Wine than Water, and Cloth or Silk than Leaves, Skins, or Moss, that is wholly owing to labour and industry. The one of these being the Food and Rayment which unassisted Nature furnishes us with; the other provisions (being what) our industry and pains prepare for us....²²⁷

This appears to represent a major shift in Locke's position and argument. Previously, his approach had been "theological", beginning with God's creation of the world and His bequest of that as the common property of mankind. From this perspective private appropriation appears as derivative, claiming exclusive access to what had been granted in common. But with the stress on productive labour as "value-adding" there appears to be a "humanist" turn elevating the creative function of some kinds of human activity. Notably this must imply that "value" is not so much given objectively, but relative to human and social purposes: an object that is out there unknown and unowned by any individual lacks real value, (consistent with the perspective of this "value-adding" scheme), until it has been acquired and improved upon by an industrious individual. Before the first appropriation of the object and the exertion of human productive energy, the object appears to have little value. But after the appropriator has cultivated his land or mashed his grain into bread, the value of his labour becomes evident and so does the utility of the object increase:

...let any one consider, what the difference is between an Acre of Land planted with Tobacco, or Sugar, sown with Wheat or Barley; and an Acre of the same Land lying in common, without any Husbandry upon it, and he will find, that the improvement of labour makes the far greater part of the value.²²⁸

Although Locke lays great emphasis on the 'value' added to a material resource by improving it as the measure of the productivity of labour, he does not go to any length to clarify what he means by such 'value'. Locke states that value differentiates the wild acorns

²²⁷ Ibid.

²²⁸ Ibid., 2.40.

from the bread where acorns are part of the natural resources unimproved by labour while bread is the refined product of human labour.²²⁹ Again in some place he hints that the value of labour and industry also sets the difference between living in poverty and privations as in the several nations of the Americans and living in comfort and conveniences of life as seen in England.²³⁰ But Locke does not say precisely what he means by this value that is so significantly transformative and useful. Locke does not explicitly indicate whether value is related to the amount of time spent labouring on the material resource, or to the total quantity of energy or labour invested in a material object as other property theorists like Karl Marx argue?²³¹ Or does value have to deal with the market price of a thing or the number of things, which can be given in exchange for an object of commodity?²³² Nevertheless, according to some theorists like MacPherson, Locke's insistence on productive labour as the "adding of value" to natural provisions and his proposal that money can be used in exchange for labour commodifies labour and sets the tone for unlimited accumulation.²³³

²²⁹ *Ibid.*, 2.42

²³⁰ *Ibid.*, 2.41.

²³¹ Marx famously argues that the 'value' of a commodity is "the common substance that manifests itself in the exchange-value of commodities, whenever they are exchanged" (See Karl Marx, Capital: A new abridgement, p.15). Marx considers this "common substance" as the "congealed homogenous labour" of the labourer (*Ibid.*). For Marx it is this congealed labour, not merely the usefulness of a commodity, that in the first instance gives it a value. In Marx's materialist perspective, as for Locke, productive labour confers value in a basic sense before use-value or exchange-value comes into play. Marx certainly distinguishes between "use-value" and "exchange-value" but considers these as secondary to the basis of value in productive labour. Whereas the utility of a thing confers on it a use-value, and the proportion in which one sort of value is exchanged for those of another sort of value gives the commodities an exchange-value neither of these should be confused with this basic sense of value (*Ibid.*). On this score, a thing can have a use-value and yet not be a value. This is the case when the usefulness of the thing is not a product of human labour but the unassisted product of nature. Marx cites examples with air, virgin soil, and natural meadows (*Ibid.*).

²³² According to Adam Smith, in the olden times the value of things were measured according to the number of cattle, which had been given in exchange for them. Quoting Homer's *Iliad*, Smith says that the armour of Diomedes cost only nine oxen while that of Glaucus cost an hundred oxen (See Adam Smith, *op.cit.*, p.34).

²³³ Locke, *ibid.*, 85.

²³³ It is not possible within the scope of this thesis to pursue the discussion of Locke's commodification of labour and MacPherson's interpretation of Locke's principle of unlimited capitalist accumulation.

2.4 Productive Labour, Inequality and Justice: Towards a Critical Appraisal of Locke's Labour Theory of Property

From our arguments thus far, we can see how in moving from the absolutely egalitarian phase of the pre-agrarian economy through the relatively egalitarian condition of the agrarian economy, the invention of money and the universal consent to its value catalysed the rudimentary state of inequality, which had been induced by productively labouring on the land in the agrarian economy. With the use of money, this initial state of inequality was perpetuated and sealed by compact and agreement in the market economy, the latter being the distinctive economy of the civil society.²³⁴ This situation, Locke believes, was occasioned by “the unequal distribution of money; which inequality has the same effect too upon land, that it has upon money.... For as the unequal distribution of land, ...brings you a tenant for your land; ...the same unequal distribution of money, ...brings me a tenant for my money”.²³⁵ The consent to the use of money thus spurred individuals by “positive agreement” as well as by “Laws within themselves” to regulate “the Properties of the Private Men of their Society” that were settled “in distinct Parts and parcels of the Earth”.²³⁶ This “positive agreement”, we must note, is the agreement, which gave rise to the civil society.

It is important, however, to observe that although money exacerbated and entrenched the state of inequality in the civil society, this state of inequality already preceded the invention of money in the state of nature. In the pre-agrarian economy, of course, inequality was not

²³⁴ Ibid. 2. 45. See also Alan Ryan, *Property and Political Theory*, p. 37.

²³⁵ Locke, *Works* (1759), 2.19.

²³⁶ Locke, *ibid.* 2.45. [It might appear inconsistent that Locke who had in the last section vehemently opposed regulation and interference with individuals' property is now speaking of the regulation of the properties of private men. But this I think is not an obvious inconsistency since, I think, Locke's opposition of regulation in the previous section was specifically against the public authority of the absolute monarchy or the authoritarian sovereign, which government, according to Locke, is inconsistent “with Civil Society, and so can be no Form of Civil Government at all.” (Ibid. 2.90). Locke, on the other hand, seems to favour the kind of regulation of property, which the individuals freely consent to in a democratic setting – the latter being for him the rule of the majority].

known. Being a state of perfect freedom and a state of equality²³⁷, every individual had a common and equal right to every natural provision. But “as different degrees of industry” in the agrarian economy aptly afforded individuals the occasion for “disproportionate and unequal Possession of the Earth,”²³⁸ so the use of money “gave them the opportunity to continue to enlarge” their possessions, which they later brought with them into the civil society.²³⁹ So individual industry and money, in the Lockean scheme, created different degrees of inequalities and consequently also caused the scarcity of economic resources.

On the contrary, however, Locke finds that amongst that part of mankind who have not “joyned with the rest of Mankind, in the consent of the Use of their common Money,” “there are still *great Tracts of Ground* to be found, which ...lie waste, and are more than the People, who dwell on it, do, or can make use of, and so still lie in common.”²⁴⁰ But this situation, Locke concludes, “can scarce happen amongst that part of Mankind, that have consented to the Use of Money.”²⁴¹ For Locke, therefore, the capitalist entrepreneur (notwithstanding his rabid accumulation of more than he needs²⁴²) is a great benefactor of the society, because by his productivity he puts into gainful use a part of the common stock and thereby multiplies the quantity of stock originally provided by nature.

For the provisions serving to the support of humane life, produced by one acre of inclosed and cultivated land, are (to speak much within compasse) ten times more, than those, which are yielded by an acre of Land, of an equal richnesse, lyeing wast in common. And therefore he, that incloses Land and has a greater plenty of the conveniencys of Life from ten acres, than he could have from an hundred left to Nature, may truly be said, to give ninety acres to Mankind.²⁴³

²³⁷ Ibid. 2.4

²³⁸ Ibid. 2.50

²³⁹ Ibid. 2.48

²⁴⁰ Ibid. 2.45

²⁴¹ Ibid.

²⁴² Ibid. 2.37

²⁴³ Ibid.

For Locke, it is more beneficial to the society for some individuals to have entitlements to unequal distribution of the common stock, which they can improve upon and sell the product of to others than for the common stock to lie waste in common or for every individual to have her own piece or equal parcels of the stock, which may not be utilised as productively and as efficiently. In the context of the colonial encounter, Locke's argument here has implications for colonial claims to a superior right to the land over the indigenous peoples. This claim of superior right derives from the so-called productive use of the land in contrast to the inferior right of the native peoples owing to their "unproductive" use of the land, that is, non-improvement of the land. In other words, applying the Hohfeldian scheme, whereas the English colonialists, for instance, have a strong claim-right to the land in America, the Amerindians have a mere liberty right. Thus, in most unambiguous terms Locke postulates:

There cannot be a clearer demonstration of any thing, than several Nations of the Americans are of this, who are rich in Land, and poor in all the Comforts of Life; whom Nature having furnished as liberally as any other people, with the materials of plenty, i.e. a fruitful Soil, apt to produce in abundance, what might serve for food, raiment, and delight; yet for want of improving it by labour, have not one hundredth part of the Conveniencies we (the English) enjoy.²⁴⁴

Yet, according to critics like James Tully, what actually belies this productive labour argument in the context of colonialism is Locke's clever attempt to justify the colonial expropriation of the Aboriginal peoples especially the "dispossession of Amerindians of their political organizations and territories, and to vindicate the superiority of European, and specifically English forms of political society and property established in the New World."²⁴⁵ While it is beyond our scope here to consider at any length the historical nitty gritty of Tully's argument, it would seem that Locke's comparison of the superiority of English forms

²⁴⁴Ibid. 2.41 [My emphasis].

²⁴⁵See James Tully, "Rediscovering America: The Two Treatises and Aboriginal Rights", in G.A.J. Rogers, (ed.), *Locke's Philosophy: Content and Context*, p. 167.

of political society and property with the indigenous Amerindian “unproductive” practices of land use is highly relevant to our purposes here. It would appear polemical at this stage to argue what Locke meant by ‘productive’ as opposed to ‘unproductive’ labour.²⁴⁶ Our concern here rather pertains to the justice and the justification of the colonial dispossession of the native peoples and the expropriation of the latter of the land on which they had been living and making use of.²⁴⁷

If the principle of justice, as Locke says, “has but one measure for all men,”²⁴⁸ why is it possible to posit productive labour as a ground for the conquest, dispossession, and enslavement of the native peoples whereas no justification is tenable and no argument sustainable for the reverse expropriation, conquest, and dispossession of the white colonial lords and their progenies?²⁴⁹ Again, if justice is the ‘great social virtue’²⁵⁰ that allocates to man what he has a clear title to, including the fair acquisitions of his ancestors descended to him,²⁵¹ it is difficult to see how the argument about efficiency or productive improvement of resources can override the moral pre-eminence of the principle of first occupancy of a land or prior appropriation of a natural resource. For instance, the fact that Tinashe’s parents have owned a certain acreage of land for several generations (which was passed on to them from

²⁴⁶ For a clear but controversial distinction between productive and unproductive labour, see Adam Smith, *op. cit.*, p 422.

²⁴⁷ Some scholars like Charles Mills have dismissed Locke’s *Second Treatise* especially Locke’s arguments about the social contract as an ambitious racial contract that was cleverly used to justify the expropriation of the native peoples of their land and to legitimise colonialism. See Charles Mills, *The Racial Contract*, pp. 3-5

²⁴⁸ Locke, “Venditio,” 85.

²⁴⁹ It is thus not surprising, but consistent with the pattern of Locke’s moral inconsistencies and theoretical ambiguities that in spite of his laborious stresses on the natural liberty and equality of humankind and his frequent appeal to natural law, Locke while he was the colonial Secretary to Lord Shaftsbury in North Carolina, was actively involved in the slave trading of captured aborigines and greatly profited from human chattel enterprise as a major shareholder in the Royal Africa Company. Also as a draftsman of the 1699 Constitution of Carolina, a text which prescribed the power of freemen over that of slaves, Locke’s position on human equality and freedom was grossly ambiguous [See Helen Thomas, “Romanticism and Slave Narratives: Transatlantic Testimonies”, Available: <http://www.rc.umd.edu/bibliographies/CUP/thomas/thomas1.html>]. Date Accessed: June 12, 2005].

²⁵⁰ Locke, *Education*, 110.

²⁵¹ Locke, *Two Treatises*, 1. 42.

their forebears) in the Manicaland province of Zimbabwe ought to take precedence over the productivity of a latter settler who uses the land much more efficiently than Tinashe's parents or a conqueror of the city who appropriates all the land by claiming the right of conquest. In fact on the latter score, Locke says:

That the Aggressor, who puts himself into the state of War with another, and unjustly invades another Man's right, can, by such an unjust War, never come to have a right over the Conquered, ... [nor are men] bound by promises, which unlawful Force extorts from them. Should a Robber break into my House, and with a Dagger at my Throat, make me seal Deeds to convey my Estate to him, would this give him any Title? Just a Title by his Sword, has an unjust Conqueror, who forces me into Submission. The injury and the Crime is equal, whether committed by the wearer of a Crown, or some petty Villain.²⁵²

Of course, the moral priority of the right of indigeneity²⁵³ or what Locke calls the right of first occupancy over that of the conqueror must be consistent with certain principles of justice. Robert Nozick has brilliantly enunciated some of these principles in what he brands the 'entitlement theory' of justice. Briefly, the entitlement theory holds that

the holdings of a person are just if he is entitled to them by the principles of justice in acquisition and transfer, or by the principles of rectification of injustice (as specified by the first two principles). If each person's holdings are just, then the total set (distribution) of holdings is just.²⁵⁴

Basically, the entitlement theory stipulates that a distribution is just if and only if individuals are legitimately entitled to the holdings they possess under the historical principle of the distribution. In other words, to ascertain whether individuals justly own whatever they

²⁵² Ibid., 2.176

²⁵³ Jeremy Waldron uses this term to refer to indigenous people's original occupancy of a territory that had descended to them from the first human inhabitants of the land or from the descendants of those who inhabited the land at the time of European colonization [See Jeremy Waldron "Indigeneity? First Peoples And Last Occupancy," Available at: <http://www.queensu.ca/conferences/reparations/papers/Waldron%20paper.pdf>, Date accessed: June 2, 2005].

²⁵⁴ Nozick, *ibid*, 151, 153.

claim to own demands an inquiry into the history of the acquisition or transfer of their particular holdings. If they acquired these holdings either directly from the stock of previously un-owned things around them (that is by original acquisition, or by first occupancy in Locke's terms) or by means of a series of legitimate transfers between legitimate previous owners then their right to their holding is unimpugnable.²⁵⁵ Injustice, according to this theory, slips in when either of the principles of original acquisition and/or of legitimate transfers is violated. In that case, Nozick postulates the necessity of rectification of the historical injustice of acquisition or transfer of holdings.

All in all, since the administration of justice forbears the "invasion of another man's right"²⁵⁶ as well as the collective rights of peoples, it is therefore imperative that the injuries and historical acts of injustices perpetrated against the colonised indigenous peoples must in some clear and practical way be repaired, rectified or remitted in order to smoothen the rigor mortis of past injustices and to ensure a positive socio-political balance between the descendants of the colonised peoples (historical victims) and those of the colonial masters. In saying this I do, however, partly support what Waldron calls a "supersession thesis"²⁵⁷ of historic injustice. What this thesis means, according to Waldron, is that although acts of injustice had been done in the past, the original injustice might have been trumped by other intervening events or it might have been superseded by time.²⁵⁸ The supersession thesis in my view would stand better than a proposition that advocates for a reversion to the *status ante* if the intervening events have been historically benevolent to the past victims of injustice. Of course, the thesis of supersession of injustice cannot mean that we would wish away or forget

²⁵⁵ *ibid.*, pp. 150-53. See also Alan Ryan, *Property*, p. 66.

²⁵⁶ Locke, *ibid.*, 2.176.

²⁵⁷ Jeremy Waldron, "Who Was Here First? Two Essays On Indigeneity And Settlement," http://www2.law.columbia.edu/faculty_franke/Thursday%20Lunch/Waldron.facultylunch.indigeneity.pdf
Date accessed: June 2, 2005.

²⁵⁸ *Ibid.*

about historic injustice and the injuries committed. "Apologies and acknowledgments are properly demanded and at least symbolic compensation may be due to descendants of those who were originally treated unjustly."²⁵⁹ Whereas on the one hand, public apologies and acknowledgement of past wrongs by the descendants of the past colonialists can be a practical way of reparation of the original injustice, on the other hand public forgiveness on the part of the colonized peoples can serve as a powerful way of granting remission for past injuries committed against them.

²⁵⁹ Ibid.

3. Conclusion:

The Archimedean point of Locke's property theory is the 'omniscient' assumption that all natural resources (and indeed all reality) are God's gift to mankind in common.²⁶⁰ In Locke's view God is the author and the maker of the world and all mankind and therefore God has absolute proprietorship over all his creatures. Yet God generously bequeathed to all humanity in common the entirety of the resources in this world. This belief is the stronghold of Locke's property theory. Puncture this *indubitandum* and watch Locke's magnificent edifice collapse into rubbles.

As much as I consider this Lockean *indubitandum* relevant and even necessary, I have found it problematic that Locke employs it as the basis on which to build his magnificent 'tower of Babel'²⁶¹ theory. It is indeed problematic that Locke begins his theory of property by affirming the positive values of: equality, freedom, and joint (or inclusive) ownership of God's bequest²⁶²; and only later to end by sowing the seeds of division: exclusivity of private appropriation, the natural inequality of money and private possessions, and the unlimited accumulation of capital²⁶³. Locke had vehemently argued against Filmer's patriarchal prioritization and absolution of ownership of property, which excluded the rest of the citizenry and the children of God. And Locke's argument here stands almost infallibly. However, it is rather unfortunate that Locke in trying to establish the universal human right of access to this common property of all mankind makes a tour de force that appears even more radical and more exclusive than Filmer's patriarchal arguments. It is this that greatly undermines the luster and the grandeur of Locke's property theory. It is in fact a disappointment.

²⁶⁰ Locke, *ibid.* 2. 25

²⁶¹ The 'tower of Babel' in the Old Testament connotes rivalry, competition, and alienation of man from man as well as from God.

²⁶² Locke, *ibid.* 2.22-26.

²⁶³ *Ibid.* 2.50

In my critical analysis of Locke's theory I have in the main retained his theological foundation of property because I find it logically coherent. To me, it is rationally acceptable to conceive of the world and all mankind as the workmanship of God.²⁶⁴ It is also logically consistent as it is cogent to consider the abundant resources of this world as God's gift to mankind. It is, however, overzealous if not brazenly arrogant to conceive of this colossal bequest as expressly given to mankind in absolute disregard and exclusion of the masses of other workmanships of God including animals and the natural environment. This, in my opinion, is the height of arrant anthropocentrism. Worse still, it is morally ambiguous as it is logically lame to try to justify the massive and disproportionate appropriation of the bourgeois capitalist with powerful arguments that seek to alienate man from man in relation to God's common bequest to all the generations, races, and multitudes of peoples. This is precisely what Locke's private (ownership of) property argument tries to achieve. And we are now familiar with the traps and pitfalls of that argument.

It is chiefly our familiarity with the several inconsistencies and contradictions in Locke's theory of property as well as the moral ambiguities of private ownership of property together with its practical limitations that warrant us to posit the alternative possibility of personal ownership. Personal ownership though is founded on the framework of private ownership. In fact personal ownership can be said to be private ownership straightened out or turned inside out (onto the right side). Hence, both our ideal of personal ownership and Locke's private ownership theory uphold the moral significance of property as a right for all humanity. Both also affirm the necessity of labour for the improvement and increase of economic and natural resources.

But whereas private ownership projects labour as the high ground for the justification of the individual's unlimited and exclusive ownership of God's bequest, personal ownership on

²⁶⁴ Ibid. 2. 6.

the other hand, posits labour as mankind's moral responsibility towards God as stewards of His bounteous provisions, as well as a responsibility to oneself and to all mankind (both the living and the unborn) as joint partners in this divine enterprise. In a way, it can be said that whereas Locke's private ownership argument was an attempt to find a justification for the colonial status quo in the 17th century world, the ideal of personal ownership is an attempt to turn the current global capitalist hegemony inside out. The major point of divergence between our alternative ideal and Locke's property theory is that whereas the latter engenders rivalry, egocentrism, contentious competition, and the exclusion of the Other; the former is fundamentally Other inclusive, altruistic, and posterity-oriented.

And lastly, the ideal of personal ownership is a humble but rigorous attempt to respond to the stark and numbing reality of misery, abject poverty, and starvation of the majority of mankind in the midst of the abundant economic and natural resources of this world. It is an attempt to envision a more just, caring, egalitarian, economically sufficient, and future-oriented society. It is motivated by a belief that so long as exclusive individual private property entitlements cover most if not all the relevant and available resources, there is practically little that can be done within the present global circumstances in order to achieve more distributive justice as the private property rights that particular individuals (especially the bourgeois and the privileged) have over their particular holdings simply fill the space of rights²⁶⁵, leaving no room for the disadvantaged amongst us nor for the latter's posterity. Personal ownership proposes the right to property as a moral and practical imperative for all humanity.

²⁶⁵ Nozick, *ibid.*, p. 238.

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