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**Let loose of Locke**



## Abstract

The idea of property rights is to provide a means for settling disputes over the use of scarce resources, to give a rule for deciding whose utility-preference should be prioritized, in face of rivalry. Once agreed that free goods are common goods, different norms of *preference-prioritization* are possible, none providing reasons *per se* for being superior to rival norms. This holds for all normative theories of private property, including that of Locke. Hence, it is suggested to let loose of Locke and think of non-normative alternative ways to defend liberal principles.

Albert's *Münchhausen Trilemma* is introduced to show that all alternatives of justifying norms are fruitless, and to discuss remaining modes of generating norms, including that of initializing rights by contracts. Following the ideas of Anthony de Jasay (and digressing from these regards the normative implication of some conventions), it is argued that the *'finders' keepers' principle* presents no unjustified *preference-prioritization*, because the first comer, exerting his freedom at the time of his arrival, does not meet anyone with competing utility preferences – a fact to which all second comers cannot refer. The reason for the second comer to accept the status quo created by the first comer is *not* that the status quo would imply an obligation for him. The reason rests on asymmetric claims. The second comer requires of the first to accept a worsening of his status quo, leaving that of the second and of all subsequent comers unworsened. In comparison, the demand of the first comer does not worsen the status quo of anybody at all. In face of this, the demand of the second comer is an inequitable one, while that of the first comer is not.

## Contents

Abstract.....	2
Contents.....	3
Introduction .....	4
Locke’s theory of property.....	5
Justifying norms .....	8
Enactment of norms.....	9
Norm enactments without contracts.....	11
Norms by conventions .....	13
Introducing property by finders’ keepers principle.....	14
The asymmetry argument .....	16
Outlook .....	18
Literature.....	19

## Introduction

What do you do when you notice in intellectual debate that the arguments you use show obvious structural similarities to those of your opponents, whereas the crucial point of disagreement owes much, if not most, of its significance to the arbitrariness with which all debating parties suspend the principle of sufficient justification? Do you go on, insisting that the suspension you practice is not arbitrary at all or at least less arbitrary than that of your opponents? Or do you let loose of your initial position and try to replace it by one lacking the weakness of arbitrariness? The author of this paper tends to favor the second alternative and hopes to present good arguments for this preference, particularly as he thinks that the same arguments will prove helpful for the future defense of individual liberty and private property.

The very idea of property rights is to provide a means for settling disputes over the use of scarce resources. After all, rivalry over scarce resources makes it disputable whose utility-preference should be prioritized, in particular in the absence of evident reasons for discrimination among rivals. Classical liberals believe, among other things, that decisions on whom to give priority over the use of goods should be taken by attributing property rights to individuals and by providing norms on the ways and modes of how this attribution should be executed. Probably the most dominant classical liberal norm of attributing property rights is that proposed by John Locke. Locke's theory of property rests, among other hypotheses, on the assumption that free goods are common goods. This assumption is even shared by many who otherwise disagree with Locke on how to convert a common good (or portions of it) into a private good. This paper will neither discuss the reasons for this disagreement nor the positions themselves, which are in disagreement with Locke. Rather, it looks on the assumption that free goods are common goods, and the problems that arise from this assumption. In particular, it will demonstrate that this assumption is a normative claim that, as all other normative claims, does not go without saying, owes much of its significance to the arbitrary suspension of the principle of sufficient justification, and, hence, lacks the proof of primacy over competing norms, for example the Lockean norm over that of proponents of global justice. In other words, once agreed that free goods are common goods, different norms of *preference-prioritization* are possible; none provide reasons for being a superior norm to its competitors and all rest on some portion of arbitrariness with which the particular norm is preferred. Though the author is well aware of the fact that the portion of arbitrariness differs from ideology to ideology and has praised elsewhere the merits of the Lockean approach<sup>1</sup>, he believes that it will be better to let loose of Locke and look for a defense of individual liberty and private property that avoids the problem of defending norms resting on arbitrary preferences and suspension of the principle of sufficient justification.

The paper start by looking at Locke's theory of property, and the problem his approach shares with so many other theories that rest on normative assumptions.

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<sup>1</sup> See my *John Locke. Denker der Freiheit I*, ed. by the Liberal Institute of the Friedrich-Naumann-Foundation, Sankt Augustin: Academia Verlag 1997.

## Locke's theory of property

Probably the most influential theory of property, explaining how property 'came into' our world and why it should be respected, is that of John Locke. John Locke explains the emergence of property in the second treatise of his *Two treatises of government* of 1689.<sup>2</sup> In this book, Locke takes up the issue of legitimate sovereignty over persons and things. The *First treatise* is mainly a rebuttal of the theses of Sir Robert Filmer, expressed in his *Patriarcha*. Filmer had argued that sovereignty over people was passed on from God to Adam and, subsequently, to the firstborn male. Locke detects and presents several logical incoherencies in Filmer's reasoning, before undertaking an own attempt to explain the rise of sovereignty in the *Second treatise*.

Locke starts his reflections by assuming a state of nature, which is, "a *state of perfect freedom* to order their actions, and dispose of their possessions and persons, as they think fit, within the bounds of the law of nature, without asking leave, or depending upon the will of any other man. A *state also of equality*, wherein all the power and jurisdiction is reciprocal, no one having more than another; there being nothing more evident, than that creatures of the same species and rank, promiscuously born to all the same advantages of nature, and the use of the same faculties, should also be equal one amongst another without subordination or subjection, unless the lord and master of them all should, by any manifest declaration of his will, set one above another, and confer on him, by an evident and clear appointment, an undoubted right to dominion and sovereignty." (II §4)<sup>3</sup>

Locke is not interested in a historical thesis, in the modern sense. He provides a scenario as starting point for an explanation of political power, which every rational human being can understand and accept easily. Locke's thesis of a 'state of equality' seems to imply implicitly the leading question, 'Why should we assume that in a world of creatures of the same species some should rule over others?' He who claims sovereignty over others, has to demonstrate what justifies his claim. He has the burden of proof, rather than the one who objects becoming his subject. To use Locke's words again, "there being nothing more evident, than that creatures of the same species and rank, promiscuously born to all the same advantages of nature, and the use of the same faculties, should also be equal one amongst another without subordination or subjection."

Although it was clear to Locke that man has self-ownership (II §27) (a limited one, nevertheless, as man should not take his own life or sell himself to slavery), he did not see a *prima facie* reason for man to have authority over nature. After all, God has given "the world to men in common", says Locke (II §26). As an individual, man can use natural goods only if he can make them his own, if he can transfer them from the state of common property to that of several property, allowing for exclusive use. But how is this transfer

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<sup>2</sup> See John Locke, *Two Treatises of Government*, edited with an introduction and notes by Peter Laslett, Cambridge: Cambridge University Press 1960ff.

<sup>3</sup> (Symbols in brackets refer to the book and paragraphs respectively.)

possible? What makes it legitimate? Locke's attempt to solve that problem starts with the observation that man can mix the produce of nature with his labor. "The *labour* of his body, and the *work* of his hands, we may say, are properly his. Whatsoever he then removes out of the state that nature hath provided, and left it in, he hath mixed his *labour* with, and joined to it something that is his own, and thereby makes it his *property*. It being by him removed from the common state nature hath placed it in, it hath by this *labour* something annexed to it, that excludes the common right of other men: for this *labour* being the unquestionable property of the labourer, no man but he can have a right to what that is once joined to, at least where there is enough, and as good, left in common for others." (II §27)

The passage serves, more or less successfully, two masters. (1) It *describes* the original acquisition of property out of common possession. (2) It *justifies* the legitimacy, claimed for this mode of acquisition. Locke renounces consent as source of legitimate acquisition of property, for practical and technical reasons. For the same reasons he believes that his proposal would meet common sense. "By making an explicit consent of every commoner, necessary to any one's appropriating to himself any part of what is given in common, children or servants could not cut the meat, which their father or master had provided for them in common, without assigning to every one his peculiar part. Though the water running in the fountain be every one's, 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 belonged equally to all her children, and *hath* thereby *appropriated* it to himself." (II §29). We cannot but think that Locke handles the legitimacy issue somewhat too relaxed. The argument that other solutions to the problem are less practical and the proposal would be common sense hardly can defend the legitimacy of the, presumably, most practical solution.

Locke's failure to settle the legitimacy issue has been subject of much learned discussion.<sup>4</sup> His theory does not provide legitimacy to the principle 'first come, first served', although the first impression might be different. His proviso to leave 'enough and as good' to second comers did not help him out either. At a closer look, it is exactly that proviso that erases the necessity of property. Why acquire a good and make it private, when there is plenty of it? And if it is scarce, it is privatization that annuls the chance to leave 'enough and as good' to others.<sup>5</sup>

Devastating as this criticism may be, it reveals not the problem of Locke's theory, mentioned in the introduction, namely the assumption that free goods are common goods (II §27). Once this claim is accepted original appropriation requires legitimacy, for it separates some of the common goods for private

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<sup>4</sup> Interestingly, already Kant has noticed Locke's failure. As he put it in his *Metaphysics of Morals* (*Metaphysik der Sitten*, 1797): "To work on something that is not already my property, hence, does not lead to ownership in it (its substance), but only to the possession of its accidents. If I plow and seed an acre, which is not already my property, I do not acquire the acre through my labor. Through my acting I am in the possession of the labour, diligence, and effort, alone." ("Die Arbeit an einer Sache, die nicht bereits mein Eigentum ist, führt also nicht zum Eigentum an ihr (ihrer Substanz), sondern nur zum Besitz ihrer Accidenzen. Wenn ich z.B. auf einem Acker pflüge und säe, der nicht bereits mein Eigentum ist, erwerbe ich den Acker nicht durch meine Arbeit. Durch meine Tun bin ich lediglich im Besitz der Arbeit, des Fleißes und der Mühe." See Immanuel Kant, *Die Metaphysik der Sitten*, Akademieausgabe VI, p. 268f., translation by the author.)

<sup>5</sup> See Anthony de Jasay, *Choice, Contract, Consent: A Restatement of Liberal-ism*, (Hobart Paperback 30) London: Institute of Economic Affairs 1991, p. 72.

purposes. However, it is far from self-evident that free goods ought to be commonly owned. Claiming common ownership in goods provided by nature is a normative statement. That is to say, the Lockean claim faces all the problems normative statements have in common. What these commonly shared problems of norms are, will be the subject of the next section.

## Justifying norms

According to the ‘naturalistic fallacy’, normative statements cannot be deduced from empirical propositions alone, for logical reasons. Hence, the only conceivable option for justifying norms is deriving them from other norms. However, such a derivation runs the risk of ending in an infinite regress. Those, familiar with the *Münchhausen-Trilemma* by Hans Albert, know that there exist two alternatives to an infinite regress, but also know, that these alternatives are equally hopeless, since they lead to dissatisfying results too.<sup>6</sup>

The trilemma situation, reconstructed by Albert, mainly addresses the procedure, executed in every justificationist philosophy, to verify an empirical statement, an empirical theory. He who wants to demonstrate his statement to be true, can deduce the truth of his statement from pre-assumptions, which in turn deduce their truth from previous pre-assumptions, and so forth, ad infinitum. Instead of pursuing this infinite regression, he can also stop and choose between two other options. One option is to deduce the truth of the statement from another statement, whose truth is already based on the truth of the statement to be proven. Doing so includes, obviously, a logical circle. The final remaining option is a dogmatic stopping point. In this case the truth of the statement is deduced from a statement, whose truth is claimed to be evident and, hence, would not require further proof.

Obviously, Locke’s claim that all free goods are commonly owned belongs to the ‘dogma’ category. That God has given “the world to men in common”, as Locke says, referring to the Bible (II §26), is a dogma, belonging to the natural rights tradition. No more, no less. There is no *prima facie* reason why this dogma should be superior to any competing one, claiming a different treatment of free goods.

If, from a factual perspective, free goods *per se* are nothing else but free in the first place, then at least two questions arise. How can private property be conceived as such that is defensible to approaches hostile to private ownership? And prior to this we may ask, how can norms come into existence if not in one of the fruitless three ways described above?

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<sup>6</sup> The trilemma was already known to the Greeks and is often referred to as *Agrippa Trilemma*, after Agrippa, the skeptic. Hans Albert used it in order to show the fundamental weakness of every justificationist philosophy. He named it *Münchhausen-Trilemma*, alluding to the famous liar, Baron von Münchhausen, who allegedly pulled himself out of a swamp by his own hair. According to Albert, justificationist philosophies use the same strategy to get out of their misery. This misery results from the impossibility to found a conviction “by referring it back to secure and indubitable grounds by logical means, i.e., with the help of logical inferences;” (Hans Albert, *Treatise on Critical Reason*, Princeton: Princeton University Press 1985, p. 18.) “[If] one demands a justification for *everything*, one must also demand a justification for the knowledge to which one has referred back the views initially requiring foundation. This leads to a situation with three alternatives, all of which appear unacceptable: in other words, to a trilemma which ... I should call the *Münchhausen trilemma*. For, obviously, one must choose here between 1. an *infinite regress*, which seems to arise from the necessity to go further and further back in search for foundations, and which, since it is in practice impossible, affords no secure basis; 2. a *logical circle* in the deduction, which arises because, in the process of justification, statements are used which were characterized before as in need of foundation, so that they can provide no secure basis; and, finally, 3. the *breaking-off of the process* at a particular point, which, admittedly, can always be done in principle, but involves an arbitrary suspension of the principle of sufficient justification.” (Ibid, p. 18.)

## Enactment of norms

So far we have demonstrated that a logical derivation of norms is only possible out of normative statements, not from facts. However, there is another way of deriving norms, namely via decision, via enactment. Confronted with these two options and the difficulties the first option faces (infinite regress, logical circle, dogma), nothing is more obvious than turning to the second option. As we shall see in the course of our reasoning the thesis by Anthony de Jasay, that contracts breed rights rather than the other way round, is a successful attempt to generate a solution to our problem.

The starting point of Jasay's position is the assumption that rights and liberties denote two different conceptions. In order to get Jasay's argument right, it is advisable to make oneself familiar with his terminology. Following Jasay, liberties and rights address two different prototypes of relations between persons and things. While 'liberties' comprise feasible actions, which do not violate valid conventions in society,<sup>7</sup> 'rights' constitute a different case. A right entitles A to demand B to execute a particular action, or set of actions, and put an obligation on B to meet the request if A demands fulfillment.<sup>8</sup> (It goes without saying that a right implies that the right holder *may* require the obligor to fulfill his obligation, but not that the right holder *must* require fulfillment.)

A necessary conclusion of this rights conception is that rights imply obligations, and vice versa. There is no point in having a right if there is no corresponding obligation to it. Without a matching obligation on the obligor's side, the right loses its faculty of being enforceable, enforceability being a constitutive character of rights.<sup>9</sup> Analogously, it is nonsensical to talk of an obligation, B owes to A, if A has no corresponding right to it.

Of course, saying that rights can come about by enactment includes several options. An enactment can be one-sided (decided either by the alleged right holder or by the alleged obligor) or mutual (agreed by right holder and obligor). Both enactments, coming from inside, face an external alternative. An enactment can stem from a party that does not belong to either right holder or obligor. Moreover, it can meet the agreement of both (right holder and obligor), one, or none of them. In addition, the enactment can be either identifiable or unidentifiable, with or without difficulties. If it is written on paper it is rather easy to identify, if it is communicated only verbally, the identification is probably more difficult. Be this as it may, among the mentioned options, rights with unanimous consent among all contracting (and enacting) parties give,

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<sup>7</sup> See Anthony de Jasay, "Freedoms, "rights" and rights", in: *Il Politico LXVI.3*, 2001, p. 378: "In the first prototype, a person can choose to perform a certain act because the act is feasible for him, and is not a wrong (i.e. is not made inadmissible by convention)."

<sup>8</sup> *Ibid.*, p. 378f.: "In the second, a person can choose to require another person to perform a certain act whereupon the other person is obliged to perform it. The first is a prototype of a freedom, the second the prototype of a right."

<sup>9</sup> *Ibid.*, p. 392: "[R]ights are part of a relation between two persons and an act which one person, the obligor, must perform if so required by the other person, the right holder. A right without the matching obligation would be only one half of the relation and could not be exercised; and a "right" that cannot be exercised is no more a right than an empty water glass is a glass of water. If this is the sole logically defensible concept of the right-obligation relation, the statement that a right exists entails the statement that an obligation exists, – rights imply obligations and vice versa."

presumably, the least reason to expect controversial interpretations about the right-obligation relation in question, among all parties involved.<sup>10</sup> Moreover, in comparison to the other alternatives, the conditions, that come with this option, for testing whether or not the enacted right implies an inequitable preference prioritization, are relatively undemanding.

Cases in which the obligor enacts the right-obligation relation are pointless.<sup>11</sup> The enactment cannot be enforced practically because the right holder does not have to insist on the alleged right. If the enactment is established by the right holder alone, one is inclined to suspect that the obligor is not prepared to accept it and that a preference prioritization is included that rests on a problematic asymmetry. If the enactment is an external one, but meets the mutual consent of all parties involved, things are similar to the contract case. It is the bigger number of interpreters alone that raises the risk of controversial interpretations of the enactment. Reason for more expectable controversy is given if the external enactment meets the consent of only one or even none of the parties involved. In this case, the inducement for suspicion grows due to the reasons mentioned in the first two cases.

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<sup>10</sup> See Anthony de Jasay, *Choice, Contract, Consent: A Restatement of Liberalism*, p. 91: “[C]ontract is their obvious, self-evident source, because only contracts provide proof that the correlative obligation has been *agreed to* by the obligor, hence its existence does not depend on controversial claims.”

<sup>11</sup> This is not to say that they would not exist. To the contrary, several people believe that they ‘owe’ something to society, although society does not know anything of that debt and its alleged ‘right’ to sue for it.

## Norm enactments without contracts

External enactments without contracts face special problems, which become evident if compared to enactments that rest on the unanimous consent of the enacting contractors. Contracts, as source of enactment of rights and obligations, document at least two things. (1) They document *which* rights and obligations the contracting parties enacted. Identifying a claimed right or obligation is principally feasible in presence of the respective contract.<sup>12</sup> It is the very nature of contracts, written ones in particular, to serve as a *document of identification*, documenting what was agreed upon and, hence, providing a means for identification that goes far beyond mere declamation. (2) Contracts document, moreover, *that* the contractors found an agreement on the subject of the contract.<sup>13</sup> Thereby, it becomes identifiable that the agreed preference prioritization is not facing any objection by any of the contractors. Very simple, the contract is a *document of agreement*, documenting the consent of all contractors to the enacted preference prioritization.

He who claims contractually agreed rights and obligations to exist needs to present the contract alone, which entails the agreement, as reference source to prove his claim. It goes without saying that this sort of documentation is lacking for rights not based on written contracts. If we want to prove the validity of our claims upon rights and obligations, unable to present such a written contract, we have to rely on different sources of reference. If we refer to rights and obligations by external authorities, the respective decree serves as source of reference and documents the initiator of the enactment. Consequently, presenting the edict makes it possible to principally prove the claim and the author of the enactment. If it can also be documented that the originator of the enactment acted on behalf of all parties included, then we face an unproblematic case. Although the enactment has not been originated by the parties involved, it meets their consent. (A sales contract drawn up by a notary would be a typical example.) The initiator of the rights and obligations did everything within his authority to decide. Things are different when he does so beyond his authority to decide; when he only claims the rights and obligations. Since his claim includes a prioritization of utility preferences, we would like to see his arguments for this and additional reference sources, supporting his claim.

Such reference sources can be of all sorts of origins. Some of them are of religious origin. Consequently, it is often claimed, explicitly or tacitly, that an alleged right-obligation relation would exist by a corresponding enactment of the respective religious authority. For example, when it comes to Christendom, one could claim that the alleged right-obligation relation is entailed in Bible. If the involved parties consent to that interpretation, they can document their agreement retroactively. If they dissent, then the ball is in the court

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<sup>12</sup> Contracts can be faked and interpretations can be controversial. Though this is true, it is not a problem of contracts alone. It is a general problem, related to *all* methods of identifying and testing assertions. The means of these methods can be faked and the results controversially disputed.

<sup>13</sup> See Anthony de Jasay, *Choice, Contract, Consent: A Restatement of Liberalism*, p. 91: "... only contracts provide proof that the correlative obligation has been *agreed to* by the obligor, ..."

of the claimant, who, by enforcing his claim, would violate the involved parties in their liberties. To support his claim, the claimant can make an attempt to derive his claims in accordance with one of the three modes, outlined above (infinite regress, logical circle, dogma), hoping to make the involved parties change their minds. If that does not work, he has used up all his peaceful means of imposing his norms. Disillusioning, as it may sound for the claimant, he has not done more than present an unjustified claim for preference prioritization, which is as good or bad as any other unjustified claim. Whatsoever one can derive from it, one cannot derive its validity.

## Norms by conventions

Conventions create a special case. On the one hand, they are *not* representing an enactment imposed externally on a group, claiming the enacted rights and obligations to be justified. On the other hand, they are *not* explicit contracts either.<sup>14</sup> Anthony de Jasay looks at them as tacit contracts, binding its members less strictly.<sup>15</sup> This view is not without any problems. Though it might be applicable to several conventions, it might not to others. The problem is to say to *which* conventions the description applies. The assertion, *x,y* is a convention, hence, expression of a tacit contract, and binding (if only loosely) can be made for any rule one wishes to impose on others without having their consent.

Jasay believes that conventions obliging others without depriving them of any liberty, nor of any right, that they would otherwise have had, should be respected. As he puts it: “There is one clear case where the obligor can be placed under an unrequited obligation without unjustly harming his interests: when the obligation in question does not deprive him of any liberty, nor of any right, that *he would otherwise have had*. The obligation to respect the property of another acquired by ‘finders’ keepers’ would be of this kind; the wider obligation to respect the *status quo* can be derived along the same lines (though there are alternative ways of deriving it, too). In any other case, imposing an obligation on someone without his agreement, and in the really important cases in spite of this explicit dissent, is a *prima facie* injustice.”<sup>16</sup> Jasay’s position entails one conclusion that is not in accordance with our reflections. What is in accordance with them is that conventions, as unrequited obligations, which do not deprive someone of a right or liberty he would otherwise have had, produce a status quo that does not violate formal justice. What is *not* in accordance with them is the thesis that the status quo would cause an obligation for others. It contradicts the argument that empirical statements have no normative implications. Therefore, in the eye of the present author, the *finders’ keepers principle* has *not* to be seen as a rule that would produce an obligation for others due to its conformity with formal justice. Such a conclusion would exemplify the *is-ought fallacy*. Following our reflections, the *finders’ keepers principle* is a convention that, in the absence of any prioritization criteria, can be maintained without implying any claim that would require justification. At the time of his arrival, the first comer does not meet anyone with competing utility preferences. His acquisition of an unowned good is only the exertion of his freedom, which does not collide with any competing utility preference because competing preferences are absent. For all later comers this does not hold. If they want to change the status quo, they violate that idea and that of formal justice. The problem of their acting is not that they would violate an obligation imposed on them by the finder, since that obligation does not exist; rather it is in the collision with the idea that in the absence of reasons for discrimination the prioritization of one utility preference over another is without justification.

<sup>14</sup> Ibid., p. 82: “A convention is only metaphorically a contract because it involves no explicit nor even implicit undertakings to perform.”

<sup>15</sup> Ibid., p. 81: “A convention is best understood as an informally tacit contract loosely binding a large number of people.”

<sup>16</sup> Ibid., p. 92.

## Introducing property by finders' keepers principle

The traditional question of legitimizing property is based on an implicit assumption, *videlicet*, that the acquisition of property, respectively the acceptance of the *initializing mode*, asks for legitimacy. Assume society A has adopted Lockean rules of property for their territory, while in society B different rules of property are applied. Consequently, they have different rules, different modes of *preference prioritization*. To put it simply, they have different rules of the game. More precisely, not only have they different goods, but they also have different modes of how to prioritize the use of these different goods. Does it go without saying that A is justified to ask B to adapt their rules to those of A? Or, vice versa, is it self-evident that B is justified to ask A to adapt their rules to those of B? In other words, have any of the two good reasons why his rules should override those of the other in their playground? The answer is in the negative. None of them has an obvious reason why all should give preference to his rules, i.e. a criterion for deciding on the eventual priority of his rules, and the results possible under these rules. In other words, two different societies, having not only different goods, but also different *initializing modes* and *increasing modes* of property, cannot ask of each other that one society should give up their modes for those of the other because none of them has a criterion that would help to decide on the prioritization of the competing modes.

A stalemate of competing utility preferences means the absence of a criterion to change the status quo one-sidedly. Should any of the parties, or both, wish to have a change of the situation, they face basically two options, a peaceful and an offensive one, basically cooperation or fight.<sup>17</sup> Both options, if taken, can serve the aim to introduce a binding criterion for resolving the issue of prioritization. A and B can come to an agreement about the criterion or can solve the problem forcefully. As long as none of the two options has been pursued successfully, the stalemate remains, i.e., the modes of initializing and increasing property and the distributions of goods that come about under these modes. The same holds if none of the parties even makes an attempt to change the stalemate.

The fact that different initializing and increasing modes of property, and different distributions of property coming about under these different modes, can coexist without making the deduction of any *preference prioritization* is not free of consequences. One of the consequences is the insight that different norms of property and different distributions of property do not imply any demand for legitimization. However, the request by one to change the status quo does create a legitimacy problem.

In a way, the *finders' keepers principle*, that Anthony de Jasay<sup>18</sup> brought into the game, is a consequence that can be deduced from the reflections presented here. In this sense, the principle is not a rule whose plausibility would create legitimacy. Legitimacy caused by plausibility alone would be magic. It would be a

<sup>17</sup> In fact, the peaceful option has sub-options. Apart from cooperation via negotiation, system competition is an option, meaning that the most attractive modes make members of the rival society to swob.

<sup>18</sup> See Anthony de Jasay, *Choice, Contract, Consent: A Restatement of Liberalism*, (Hobart Paperback 30), London: Institute of Economic Affairs 1991, p. 72ff.

clear instance of a *naturalist fallacy*. The *finders' keepers principle* (in face of what was outlined here) is meant as a rule, that, in the absence of prioritization criteria can be followed without creating claims, which to observe, in turn, would require a criterion.

The first comer, and that is what we mean by 'first comer', is someone who finds an un-owned thing first. In the moment of discovery and acquisition, he does not meet anybody (or else, he would not be the first comer) who eventually could have a reason for his utility preference overriding that of the first comer. The question of whether the first comer has a criterion that justifies his preference prioritization does not come up at all. This is quite obvious, in face of the absence of any competing utility preferences. If the first comer acquires what he discovers, in whatever mode of acquisition, no problem regarding preference prioritization occurs.

With the second comer, being interested also in the good acquired by the first comer, things change significantly. Now different utility preferences compete. But the claims of the first comer and the second comer (as that of all other late comers) differ profoundly. The second comer has no criterion that would justify priority of his utility preferences over those of the first comer. (As a sideline, the same holds for all subsequent comers.)

Hence, it is not the case that with the arrival of the second comer the status quo, caused by the first comer, would be nullified. His arrival does not change the status quo into a pending matter. The status quo is a fact, a creation by the first comer, facing no valid objection in the moment of emergence. This, in turn, is exactly the fact to which the second comer (and, of course, each subsequent comer) cannot refer, namely that to lay down new rules and to change existing distributions of goods *would not* face any objection.

## The asymmetry argument

In a way, the situation resembles that of three friends playing canasta, while three other contemporaries, playing poker, pop in and ask the friends to stop it and play poker all together instead. The friends, in turn, insist in the continuation of their game. Let us assume that abandoning canasta would worsen the status quo of the friends, while not worsening that of the contemporaries. Under this condition, the request to stop canasta appears to be inequitable, whereas that of the friends (everything should remain unaffected) does not, the reason being that the first demand asks for a worsening of some people involved whereas the second does not. The two demands are *asymmetric*. Things are the same if the friends playing canasta asked their contemporaries to stop poker and play canasta instead all together, while the poker players wish to keep the status quo. As it is in the previous case, the first request appears inequitable, whereas that of the poker players does not because the former implies a worsening of some people involved, whereas the second implies no such consequence.

This asymmetry is also given if, as it is in the case of original appropriation, the second comer asks the first comer to cease his use of the acquired good, while it is the stance of the first comer to continue his use. Consequently, the second comer requires the first to accept a worsening of his status quo, leaving that of the second and of all subsequent comers unworsened. In comparison, the demand of the first does not worsen the status quo of anybody at all. In face of this, the demand of the second comer is an inequitable one, while that of the first comer is not.

Some might object that every first acquisition by 'finders' keepers' implies a 'worsening' to the status quo of all late comers because the first comer uses a good whereupon all others have no access to it anymore. That, so one might reason, also implies an asymmetry, and, hence, an inequitable demand. Although this asymmetry has to be seen in a different light, as our following reflections will demonstrate, the objection, at first sight, mirrors a logic that seems worth to ponder on. First, it cannot be denied that each individual consumption of a material good implies the exclusion of other uses. It is an unavoidable consequence of the consumption of material goods. Second, let us assume, for the sake of discussion, that it is appropriate to call the above-said consequence a 'worsening' of the status quo of others. (After all, if the good was not in the reach of others, hence, not a part of their feasible options, nothing has changed for them.) Third, and more importantly, the resulting 'worsening', which we call  $W^*$ , is of a different kind than the worsening  $W$  of the first comer would be, due to the second comer's claim.  $W^*$  differs from  $W$ , in as much as it applies to all parties, to first comers as well as to second comers. If A uses good G, then G is not available anymore to B. Vice versa, if B uses good G, then G is not available anymore to A. Both claims, that of A *and* of B, to refrain one-sidedly from using G because of  $W^*$ , are *symmetric*, while that of A *and* of B, to refrain one-

sidedly from using  $G$  because of  $W$ , are *asymmetric*.<sup>19</sup>  $W$  and  $W^*$  would be of the same kind if un-owned goods, rather than being owned by nobody, would be common property. However, as shown above, the claim that all un-owned goods belong to all does not go without saying. It implies a norm and faces, as well as all other norms do, the problems that go along with the justification of norms.

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<sup>19</sup> To put it differently: The first possessor *does not require* from another to give up acquired property (which acquisition would not have been an unjustified one while taking place). The claim to refrain from using a good, because otherwise it would not be at the disposition for another, *does require* from the appropriator to give up property (which acquisition has not been an unjustified one during its execution).

## Outlook

First possessions by 'finders' keepers' have *no normative implications*. They are not normatively binding for any late comer. Such a normative implication, deduced from the fact of acquisition that took place, is impossible. It would be an *is-ought-fallacy*. However, and this insight is even more important for our reflections, any second comer's claim to change the status quo also has *no normative implications*. This implies that no second comer has a right to require the first comer to legitimize what he has appropriated by 'finders' keepers', and increased by applying the increasing mode, compatible with the initializing mode. He who wants a change of the status quo, cannot justify his claims by referring to the first comer's failure not to legitimize his property, acquired in the abovementioned way. In turn, he can justify his claim by presenting documentation for his claim that the status quo is invalid. (A could mistakenly be viewed to be the first.) He also can try to change the status quo either peacefully or offensively. Not pursuing any change is not identical with a declared admittance of the status quo. However, practically it is an indicator for tolerating the status quo, and, hence, the implied priority of utility preference for the time being.

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