 Etica & Politica / Ethics & Politics, XXIV, 2022, 1, pp. 287-306
ISSN: 1825-5167

LOCKE'S THEORY OF PROPERTY AND THE LIMITS OF THE STATE'S FIDUCIARY POWERS
A CRITICAL APPRAISAL OF THE *SECOND TREATISE ON GOVERNMENT*

CLAUDIO CORRADETTI
Department of Literary, Philosophical and Art History Studies
University of Rome Tor Vergata
claudio.corradetti@uniroma2.it

ABSTRACT
The paper addresses Locke's political implications in the theory of fiduciary powers presented in the *Second Treatise on Government*. I proceed by analysing Locke's conception of natural rights in the state of nature as well as his conception of property in accordance with its different articulations (particularly the idea of the private ownership of an acquired object). I reconstruct the logic of the social contract theory and the foundation of the modern bourgeois (liberal) state. The paper concludes by showing the limits of Locke's minimalist conception of the state. It argues that the original placing of the civil society in the state of nature prevents the recognition of a conflictual and dynamical composition of class interests whose mediation is the proper task of politics at the parliamentary level.

KEYWORDS
Civil government, property, Locke, state of nature.

1. INTRODUCTION

Locke's *Second Treatise on Government* (1689) [*Second Treatise*] is a work whose fate has encroached the alternate fortunes of historical political events. Published anonymously, its authorship was vindicated only upon the opening of the codicils the author left upon his death.[1] Considered as a banner of republican freedoms in the battle of the Whigs against the Tories (due to the defence of the role of the Parliament), it was later even adopted as a flag supporting a socialist ideology.[2] The political context of discussion in which the *Second Treatise* was conceived was that of the Exclusion Crisis (1679-81), a period where the discussion

[1] See, J.Farr, 2020, p.1.

[2] For the reconstruction of the theological debate underlying Locke's conception of freedom/liberty see J. W. Yolton, 1993, p.128 ff.

concerned the dynastic succession of a Catholic (James II) rather than an Anglican king.

Locke's *Second Treatise* opens with the critique of Filmer's *Patriarcha* [1680].[3] A full blown rejection of Filmer's justification of the natural power of kings and their divinely conferred powers for the subjugation of people (as that "of a father over his children"[4]) was already part of the *First Treatise on Government* [*First Treatise*]. Far from being just an academic quarrel, the confrontation with Filmer revealed a fierce political battle over the newly emerged subjects of law and their achievement to political representation. The Glorious Revolution (1689-90) and the fight against the absolutism of the Stuart dynasty was the historical landscape behind Locke's intellectual project.[5]

Whereas the *First Treatise* justified the depart from the false principles of Sir Rober Filmer, the *Second Treatise* argued for a more constructive understanding of the origins, extent and finality of the civil government.

Filmer was wrong in conceiving freedom as "a liberty for everyone to do what he lists, to live as he pleases, and not to be tied by any laws".[6] Contrariwise, Locke affirmed in a republican-like fashion that one should aim to "freedom from absolute, arbitrary power".[7] This was the way for Locke to guarantee the preservation of life as the most important natural law: "the fundamental law of nature, man being to be preserved as much as possible".[8] Due to this law, no one could consent to his own enslavement, nor could he "put himself under the absolute, arbitrary power of another, to take away his life when he pleases".[9]

As it shows the incipit of the *Second Treatise*, there is no doubt that the *Two Treaties* are argumentatively connected. This is even more the case if Filmer's work is recognized as a political manifesto identity to which Locke's *Second Treatise* stands as a political reply.

The purpose of Locke's *Second Treatise* is revealed openly with the announcement of the definition of political power. At the end of Chap. I, Locke affirms: "Political power, then, I take to be a right of making laws with penalties of death [...] for the *regulating and preserving of property*, and of employing the force of the community, in the execution of such laws, and in the defence of the

[3] R.Filmer, [1680] 1991.

[4] J.Locke, [1689] 2003a, p.14.

[5] It is a matter of scholarly debate whether and to what extent the Glorious Revolution was the real inspiring outcome of Locke's political design. Against those who think that the events of 1689 were Locke's ideal see J.W.Yolton, 1958, pp.477-498.

[6] J.Locke, [1689] 2003b, p.110.

[7] Ivi.

[8] J.Locke, [1689] 2003b, p.107.

[9] J.Locke, [1689] 2003b, p.110.

commonwealth from foreign injury; and all this only for the public good (emphasis added)".[10]

Methodologically speaking, Locke reinterprets the medieval conception of the natural law theory in conjunction with the contract-based construction of a secular will for positive laws – the parliamentary will of the bourgeoisie. In so doing, he transfers the theory of political obligation into a modern conception of a self-legislating reason. The two prongs for the foundation of Locke's theory of obligation - the will of God and the will of the collective body of citizens - cannot coexist: only one can say the last word. Locke's solution to this problem can only be the transformation of God's will for the law of nature into the rational articulation of universal principle of self-legislating by the political body. This requires a universal assumption to be made: man's freedom, and oaths and promises are deployed to reflect a commitment to them. There appears to be a differentiation between the epistemic route to the apprehension of the divinely grounded natural law and the moral-political obligation grounded by the social covenant.[11] The dynamics revealed by the epistemic theological soundness of the laws of nature and the collectively self-binding power of social contracts explain Locke's innovation and the limits of his natural law theory as well as its relation to the social contract.[12] The Christian (Protestant) bourgeois, a syncretic new social and anthropological identity, becomes the new political subject in Locke's theory of the modern state.[13]

Accordingly, civil government for Locke orients itself primarily into the promulgation of positive laws having the aim to preserve property in view of the public good. Such public good configures itself primarily in terms of "mutual *Preservation* of their Lives, Liberties and Estates, which I call by the general Name, *Property*".[14]

As it will be apparent later, property is grounded within a natural condition. This occurs in advance to the institution of the civil government to which it is assigned the instrumental function of social guarantee through positive, coercible laws.[15]

[10] J.Locke, [1689] 2003b, p.101.

[11] On the relation between Locke's epistemological theory and its practical (moral and political) import, particularly with the relation between knowledge and belief, see N.Wolterstorff, 1996.

[12] On the problematic relation between the double voluntarist and rationalist foundation in Locke, see G DeHart, 2017, pp.197– 232.

[13] On similar interpretive lines, see G.Forster, 2005, pp.17. On the political theology turf of Locke's views in the *Second Treatise*, see J. Tetlow, 2017, pp. 197–232.

[14] J.Locke, [1689] 2003b, p.155.

[15] I stand here with MacPherson's reading of Locke's conception of private property as founded within the state of nature (MacPherson, 1962, pp.209 ff.), contrary to those who see at that stage only private possession, i.e. J.Tully, 1980.

2. LOCKE'S 'NATURAL MAN' AS A FREE PROPRIETOR

In the *Essays on the Law of Nature*, written between 1660-4[16] and never published by the author, Locke formulates the set of principles holding in a state of nature. These are conceived in terms of half-imaginative, half-logical deductions of rules for social interaction.[17] For Locke, the state of nature is not a state of war. The two have been confused by Hobbes.[18] Indeed, the state of nature is the condition of "men living together according to reason, without a common superior on earth", [19] whereas "force, or a declared design of force [...] is the state of war".[20] The difference between the two is that whereas the state of nature is identified by the lack of a common judge having power-authority, "the force without right"[21] always determines a state of war independently from whether there is a judge or not. It is for this reason that the entry into a civil society coincides with the delegation of authority to an independent judge.

This early engagement with the topic explains why in the *Second Treatise* Locke assumes, without adding many arguments, that such law is certain, evident and pervasive to those who exercise reason.[22] But how do we come to *know* the content of natural law? Here things become more complicated, but also interesting insofar as a systemic link can be identified between the *Essays* and *An Essay Concerning Human Understanding* (1690) [*Essay*]; that is, between Locke's practical and epistemic works.

In the *Essays*, Locke excludes that natural law can be known either in virtue of its innate character, transmission by tradition, or agreement by consent (*Essay* 2-3). Rather, he defends the view that natural law is known "by reason and sense-perception" (*Essay* 4).[23] Reason provides guidance to the sensible material submitted via perception.[24] The type of natural law Locke conceives is therefore something constructed on experiential reflection. It goes without saying that in order to be universal, stable and valid, natural law has to be based on an a priori guarantee. This is, for Locke, God's will; that is, that who wants the world we live in in the way it is, and accordingly, in the manner in which we experience it rationally. As Locke

[16] J.Locke, [1663-4] 1997, pp.79-133.

[17] The issue is readdressed also in J.Locke, [1689], 2003a, p.106.

[18] J.Locke, [1689], 2003b, p.108.

[19] Ivi.

[20] Ivi.

[21] J.Locke, [1689], 2003b, p.108.

[22] J.Locke, [1689], 2003b, p.115.

[23] J.Locke, [1663-4] 1997, p.100. For an interpretation of the epistemic acquisition of the natural law and its relation to the theory of knowledge in the *Essays*, see W.Euchner, 1979, Chap.8.

[24] For Bobbio, this is a naive oversimplification of the status of the natural law. From Bobbio's criticisms one can argue that if knowledge of natural law is based on sensible objects due to a theological necessary assumption, then, there is not much philosophical discussion to be made but only an act of faith. On this critique see N.Bobbio, 1963, p.84.

puts this: "Hence it is undoubtedly inferred that there must be a powerful and wise creator of all these things, who has made and built this whole universe and us mortals who are not the lowest part of it".[25]

At the basis of Locke's theory of natural law is the theological assumption that the world is a divine creation and that such evidence can be hardly ignored. This position, I hold, is consistent with Locke's later claims in the *Letter* that atheists cannot be trusted because they do not keep promises, but also, by extension to Locke's view, that Catholics are also not reliable partners since they obey a foreign sovereign.[26] Moreover, in §6 of the *Second Treatise,* Locke repeats the theological mantra that "all the servants of one sovereign Master, sent into the world by his order".[27]

The state of nature is presented as "a state of perfect freedom"[28] regulated under the constraints of the natural law. It is not "a state of licence".[29] Law is constitutive of freedom and it is not simply a regulative tool for a pre-existing status of licence.[30] The natural state is "a state [...] of equality";[31] a deontological kind of equality, it should be added, insofar as "all the power and jurisdiction is reciprocal"[32] and no factual features such as force or skills count as decisive.

Problems arise in the execution of natural law. At this stage, each is equally entitled to execute the law of nature. Nevertheless, divergences in interpretation might arise and stability as well as legal certainty vanishes. Accordingly, a stage where there is no one who has an independent authority over the other, but where each is equally entitled to the interpretation of the law becomes ultimately a condition of anomy and war. Self-love, partiality towards friends and therefore lack of justice and honesty in admitting one's guilt are only some of the biases preventing the correct application of the law of nature.

It is in virtue of the limits revealed by the possibility of sharing on equal footing the executive power of the law of nature that the necessity to exit the natural state becomes justified. If one cares about one's life and subsistence, then a civil condition of positive and externally coercive laws enforced by public authorities is to be preferred. Locke points to the inefficiencies in the protection of private property within the state of nature in terms of a valid reason for the formation of a civil covenant.[33] The law of nature, as previously indicated, is unstable and its

[25] J.Locke, [1689], 2003b, p.103.

[26] J.Locke, [1689], 2003c, p. 246

[27] J.Locke, [1689] 2003b, p.102.

[28] J.Locke, [1689] 2003b, p.101.

[29] J.Locke, [1689] 2003b, p.101.

[30] On the analysis of Locke's conception of freedom see J.Tully, 1980, pp.297-8.

[31] Ivi.

[32] Ivi. For a discussion of Locke's is/ought perspective in discussing equality see M.H.Kramer, 1997, pp.37 ff.

[33] J.Locke, [1689] 2003b, p.155.

enforcement assigned to the interpretation of each subject. Thus, the political government has to provide remedies and supply the limits of the state of nature by defining an independent authority as well as organizing public powers for the benefit of a whole through the preservation of citizens' individual properties.

The primary aim in view of which men enter into a civil society is thus "the enjoyment of their properties in peace and safety".[34] For Locke, freedom is possible thanks to the guarantee of the material conditions that only the protection of property can guarantee. It is in such a respect that property virtually incorporates the idea of freedom as non-domination. Independence from arbitrary power rests ultimately on the possibility of enjoying the material benefits of one's possessions, either being agricultural production, wealth, or leisure. Since parliamentary representation *is* a projection of politically preordained interests from the state of nature (private property), the mandate of a legitimate government is for Locke that which *preserves* the prerogative already affirmed in the natural condition. For this reason, non-domination amounts to having one's property protected within the civil state.

If this is the scope of the civil government then, Locke argues, it must be recognized that not all states have, in fact, overcome a state of nature. Here Locke criticises implicitly Hobbes' idea of an absolute Leviathan who is the only free being among those who have delegated their powers.[35] Accordingly, this being the case, it would be better to remain in the state of nature rather than to submit oneself to the unjust power of an absolute monarch. The instauration of a civil condition requires that a just civil society be established. This in turn sets the scope and the limits of the government.

Insofar as the purpose of instituting a state is done in view of protecting private property, the civil government stands as the guarantor, or as Locke himself prefers to call it, the 'fiduciary power' of citizens' elective body: "the legislative being only a *fiduciary power* to act for certain ends [emphasis added]".[36] To be a fiduciary power implies, as it is for any power of that sort, that any time a state's mandate is betrayed, it ceases to be considered as a legitimate entity. It follows that the citizens are entitled to revoke the mandate.

This gives the people a right to redefine the political-institutional architecture of their state by allocating their fiduciary powers to yet another arrangement of state entity through a new pact. The fiduciary power of the citizens is therefore a reversible conferral due to its grounding on private entitlements. Once the majority of the citizens is negatively affected by the illicit acts of a government endangering

[34] J.Locke, [1689] 2003b, p.158.

[35] The reference to Hobbes is the following: "I desire to know what kind of government that is, and how much better it is than the state of nature, where one man, commanding a multitude, has the liberty to be judge in his own case, and may do to all his subjects whatever he pleases, without the least liberty to anyone to question or control those who execute his pleasure?" In, J.Locke, [1689] 2003b, p.105.

[36] J.Locke, [1689] 2003b, p.166.

their liberties and properties, the people can *resist* and overturn the government.[37] Power, and this is an important qualification, insofar as the society remains in place, returns to the collectivity understood in terms of individual membership.[38]

If the sovereign or the legislative assembly refuses to solve the conflict with the people, as for instance with regard to the interpretation of a fundamental norm, "the appeal then lies nowhere but to Heaven"[39] and the bourgeois revolution can take place.

3. APPROPRIATION AND PROPERTY

The peculiarity of Locke's theory of property consists of avoiding the use of a social contract theory, that is, in establishing private property "without any express compact of all the commoners".[40] Whether Locke is thinking only of individual property or equating the former ultimately with private property is an issue subjected to a long-contested interpretive matter.[41] The thesis defended here is that there does not seem to be an antagonism between individual and private property. Given a non-contractualist premise to justify property, the individualistic dimension of possession legitimates private ownership. The conceptual grounds on which such interpretation is based is due to a shift from Locke's idea of private ownership of one's body to the private appropriation by labour of an external object of nature. As Locke states explicitly: "every man has a property in his own person: this nobody has any right to but himself. The labour of his body, and the work of his hands, we may say, are properly his".[42]

Locke's argumentative strategy starts from the consideration of the private property of one's physical integrity to its transferring to the private property of an external object. Locke applies not only a criterion to justify appropriation but also the lesson he learned from his mentor and leader of London mercantilism, the Earl of Shaftesbury, on the labour-theory of value.[43] There remains to be seen what the private dimension of individual property adds to the latter; namely, whether what is later termed as *possessio noumenon* integrates at all the idea of a *possessio phenomenon*.[44]

[37] J.Locke, [1689] 2003b, p.192. See also §221, at J.Locke, [1689] 2003b, p.197.
[38] J.Locke, [1689] 2003b, p.208.
[39] Ivi.
[40] J.Locke, [1689] 2003b, p.111.
[41] See J.Tully, 1980, pp.111.
[42] J.Locke, [1689] 2003b, p.111.
[43] See W.Euchner, 1979, Chap.6.
[44] As in I. Kant, [1797] 1999, 6:259, p. 412.

The starting point of Locke's reflection is the usual biblical standpoint according to which "God gave the world to Adam and his posterity in common"[45] and its inheritance through natural transmission to the actual kings according to Filmer's thesis. This theological beginning is already sufficient to exclude the possibility that a single monarch could act as the only legitimate proprietor. How to move from common to individual property? How did humans come to own portions of what God gave in common without resorting to a collective pact? It would be quite counterintuitive, Locke observes, to resort to the idea of a pact as subscribed by all in order to justify individual property: "If such a consent as that was necessary, man had starved".[46]

Locke aims to solve this puzzle.

To begin with, for Locke, the hypothesis of a collective consent justifying the move from common possession to private property would be absurd because it is factually impossible to achieve. His next step is to explain how the process of *appropriation* of natural objects can be brought about. Appropriating a natural object is to remove it from the natural condition of commonality in which it stands. This in turn means to advance proprietary rights over it. How? By "mixing"[47] one's labour with the object. That the process of exclusive appropriation leads to the category of private property from within the state of nature ("makes it his property"[48]) can be inferred, among other things, by the role assigned to the state to protect individual property. The right to property leads to one's capacity of excluding others from interference and from exercising the same right (it "excludes the common right of other men"[49]). As man owns his labour as a property, so he owns the object of his work. There occurs a transferring process between one's labour property and the productively transformed natural object.

Property, as exclusive appropriation, precedes the construction of the state. For Locke, to comply with a natural right to self-preservation[50] one must be able to formulate a legitimate claim on exclusive possession. Both strands of justification, either through natural reason or by revelation (as according to the idea of the earth given in common), lead to the same outcome: private property in the state of nature is justified as a necessary category in order to guarantee the means for subsistence.

The argument runs in the following way:

a) Either there is a right to survival or, necessarily, the use of earth was given in common
b) if a), a fortiori, it must be *possible* to legitimately appropriate natural goods

[45] J.Locke, [1689] 2003b, p.111.
[46] J.Locke, [1689] 2003b, p.112.
[47] J.Locke, [1689] 2003b, p.111.
[48] Ivi.
[49] Ivi.
[50] J.Locke, [1689] 2003b, p.111.

Locke's mixing theory of labour justifies exclusive appropriation as possibility.[51]

There are three steps in the theory of mixing one's labour with natural objects:

a) I have "a *property* in [my] own *person*".[52]
b) Everything I do through my labour, my body, my hands, is *mine*.
c) Whatever is removed from the state of nature through labour is my private property.[53]

Locke's theory of mixing one's labour is the key to understanding the process though which property is acquired in a natural condition. It does not suffice simply to occupy a territory or to grab an object. The labour theory tells us that the idea of transferring one's body into something else is to make that something a product of a labour process. In so doing, labour first constitutes and then privatizes those goods originally placed in a state of nature. After all, Locke's view represents a value theory of labour focussing only on production and not also on exchange. It is a theory conceiving labour production as an individual, not as a collective process. Last, it is a theory considering as a limit of appropriation the principle of "enough, and as good left in common for others".[54]

Overabundance of natural resources is a requirement for just appropriations. This can barely be seen in Locke as simply a standard of sufficiency rather than as a condition of necessity.[55]

Why so? A right to one's survival is an original law of nature placed at the top of the natural appropriation by labour. Similarly, and for reasons of normative coherence, individual property is also said to be a "law of reason".[56] To the degree that reason is the source of the law of nature, it can be concluded that this too is a law of nature.

This inference is confirmed when Locke affirms: "amongst those who are counted the civilized part of mankind, who have made and multiplied positive laws to determine property, this original law of nature, for the beginning of property, in

[51] I disagree with Waldron with regard to the hypothesis of an original Lockean "negative communism" based on Hohefeldian privileges. I consider instead that Locke proposes a claim-rights argument. See, J.Waldron, 1988, p.153 ff.

[52] J.Locke, [1689] 2003b, p.111.

[53] "The labour that was mine, removing them out of that common state they were in, hath fixed my property in them", in, J.Locke, [1689] 2003b, p.112.

[54] J.Locke, [1689] 2003b, p.114.

[55] On the sufficiency reading and the crucial interpretive consequences it brings in legitimizing unconstrained property acquisition see J.Waldron, 1979, pp. 319-328 and M.H.Kramer, 1997, pp.105 ff. With regard to the interpretation of the spoliation proviso as a sufficiency condition see also J.Waldron, 1988, p.210: "to say that appropriation is justified *'at least where'* there is enough left for others is not, on the face of it, to *restrict* appropriation to those circumstances". Support for my reading of the spoliation proviso as a necessary condition is in MacPherson, 1962, p.201.

[56] J.Locke, [1689] 2003b, p.112

what was before common, still takes place".[57] By this statement, Locke also clarifies the type of relation held between natural and positive laws of property, specifying that no positive measure is valid if it transgresses the validity of the natural law of property. The relation between natural and positive law of property is both necessary and sufficient.

Nevertheless, there is still another limiting condition responding to the same natural principle of life preservation as the one mentioned above. This is what has been termed as the spoilage proviso which is explained in the following way: "As much as anyone can make use of to any advantage of life before it spoils, so much he may by his labour fix a property in: whatever is beyond this, is more than his share, and belongs to others".[58]

The theological life-preserving conditions of Locke's reflection on the state of nature are clear: natural goods must not be spoiled because "Nothing was made by God for man to spoil or destroy".[59] Who violates such law of nature is said to have "offended against the common law of nature".[60] As a result of all this reasoning the concept of "property [is] so established".[61]

God has given men the world in common for his (men's) advantage and life sustenance. For this reason, it should be admitted that men agreed on the possibility of territorial division and therefore on exploitation through privatization of the common good.[62] Indeed, commonality of ownership would legitimize uncultivated lands and allow, accordingly, a spoilage of the Creation. However, this cannot be the case and, therefore, benefits production and the harvesting of land is justified starting from a theological assumption.

Within the natural conditions of agricultural production and industry there holds, in Locke's words, a balanced tuning between the limit of what can be physically appropriated through labour, on the one hand, and the respect of the spoilage condition, on the other.

Problems arise with the introduction of money by tacit consent in the state of nature. It is money which paves the ground for unlimited accumulation. To the extent that money as a conventional good is not subjected to a natural spoilage condition, it grants an unlimited amount of value saving.

Unconstrained faith in social advancement through production is the key factor to understand Locke's theory of labour property. That who appropriates land through labour, by so doing, "does not lessen, but increase the common stock of

[57] J.Locke, [1689] 2003b, p.113.
[58] Ivi.
[59] Ivi.
[60] J.Locke, [1689] 2003b, p.116.
[61] J.Locke, [1689] 2003b, p.113.
[62] J.Locke, [1689] 2003b, p.114.

Mankind".[63] This is the way in which the theological mandate of the preservation of natural goods is fulfilled in view of the exclusive advantage of human life.

However, such abstract and socially unqualified defence of production not only dismisses consideration of power-domination and allocation of productive goods; it also legitimizes a slippery slope argument in favour of colonization. Locke traces a comparison between cultivated and uncultivated lands by referring to a ratio of profit of "hundred to one",[64] respectively, as in the case of American uninhabited lands which would greatly benefit from human exploitation rather than indigenous disinterest.

There is no better example than the Americans in showing how one can be: "rich in land, and poor in all the comforts of life".[65] So that Locke can add: "a king of a large and fruitful territory there feeds, lodges, and is clad worse than a day-labourer in England".[66]

Introduction of money and intensification of land exploitation are at the roots of capital accumulation. What was once worthless accumulating because of exposure to deterioration was exchanged for gold or silver (money), thus, becoming preservable and leading to accumulation.

The ideological justification of modern capitalism was born.[67]

4. PROPERTY AND EQUAL FREEDOM

For Locke all men are equal. Yet such equality is not a factual characteristic. That would be inadmissible since "age or virtue may give men a just precedency".[68] The kind of equality to which Locke refers is the "equal right that every man hath to his natural freedom, without being subjected to the will or authority of any other man".[69] To attain such a level of independence from other's arbitrary interference requires the redefinition of the role of law in relation to freedom. Whereas for Hobbes, freedom coincided with the space left open by the strictures and

[63] J.Locke, [1689] 2003b, p.116.

[64] Ivi.

[65] J.Locke, [1689] 2003b, p.117.

[66] J.Locke, [1689] 2003b, p.118.

[67] As lucidly recognized by Macpherson: "...what is relevant here is that Locke saw money as not merely a medium of exchange but as capital. Indeed, its function as capital, for in his view the purpose of agriculture, industry, and commerce was the accumulation of capital. And the purpose of capital was not to provide a consumable income for its owners, but to beget further capital by profitable investment", in, Macpherson, 1962, p.207. From the perspective of the history of thought there holds a link between desire, accumulation and social activism with Lockean traces of neo-Epicureism. It remains a problematic issue to determine how Locke makes neo-epicureism compatible with the Christian-stoic tradition to which his views on the law of nature are indebted. On this point see W.Euchner, 1979, Chap.2 and Chap. 3.

[68] J.Locke, [1689] 2003b, p.122.

[69] J.Locke, [1689] 2003b, p.123.

impediments of the law or other means,[70] for Locke "the end of law is not to abolish or restrain, but to preserve and enlarge freedom".[71] Freedom, in turn, is ultimately justified in view of the capacity to obey natural law. It is of a moral character. Human beings insofar as they are rational, are capable of moral self-determination in line with God's outlines of natural law. This kind of freedom is only in *foro interno* and it requires a translation into public institutions and positive coercive laws in order to also become in *foro externo*.[72]

Liberty is not just to dispose as one likes, but, as specifies Locke, it is the capacity to do so "within the allowance of those laws under which he is, and therein not to be subject to the arbitrary will of another".[73] To be at liberty is to be under the law. Since liberty is to make use of property, law must protect property. As seen before, Locke has a broad notion of property. This includes not only life and goods but also the safeguard of liberty itself.[74] So liberty is a presupposition and an end for property protection. But also property, and this is crucial in Locke's conception of the bourgeois state, is the reason for which one enters into a state, as well as in the justification of the finality of state government. Accordingly, this is also the limit of Locke's individual possessive state since only those who already possess a property can enter into the civil covenant and form a majority, not those that are propertyless.[75] Locke's spoilage proviso on the 'enough, and as good' left to the others avoids such difficulty. All members of the human community are entitled to appropriate natural goods, have a property and therefore be the authors and addressees of the laws of the civil government. The problem of individual exploitation and domination does eventually arise after the civil state is instituted. Yet, Locke does not discuss this point.

As he instead presents his view:

> The supreme power cannot take from any man part of his property without his own consent : for the preservation of property being the end of government, and that for

[70] "Liberty, or FREEDOM, signifieth (properly) the absence of opposition; (by opposition, I mean external impediments of motion);" and may be applied no less to irrational, and inanimate creatures, than to rational", in, T.Hobbes, [1651] 1998, [107], p.139. To be sure, Hobbes upholds a more complex conception of freedom which considers freedom as a) absence of external impediments, either animate or inanimate b) men's capacity to act in accordance to their will c) men's self-determination through deliberation. Cfr. W. (von) Leyden, 1981, pp.32 ff.

[71] J.Locke, [1689] 2003b, p.123-4

[72] On the link between morality, freedom and political covenant, see R.Polin, 1969, pp.1-18.

[73] J.Locke, [1689] 2003b, p.124.

[74] J.Locke, [1689] 2003b, p.136.

[75] The examination of this point and its relation to majorities formation is in Macpherson, 1962. The author recognizes correctly that: "If the men of no property were to have full political rights, how could the sanctity of existing property institutions be expected to be maintained against the rule of the majority? [...] there is no conflict between Locke's two assertions, of majority rule and of property right, inasmuch as Locke was assuming that only those with property were full members of civil society and so of the majority". In, Macpherson, 1962, pp.252 ff.

> which men enter into society, it necessarily supposes and requires, that the people should have property, without which they must be supposed to lose that, by entering into society, which was the end for which they entered into it ; too gross an absurdity for any man to own.[76]

All in all, the passage from the individual in the state of nature to the community in the civil state is mediated by resorting to the execution of the law by an independent authority. For Locke, it is not so much a problem of having a parliament formulating laws. It is rather the more practical problem of having an independent body – the judiciary – to do the job that individual men cannot do properly if they are left in the state of nature. Standardization of independent rules, as well as the overcoming of individual subjective judgments, are the necessary passages that define the entry into a civil society. If such measures are not adopted, then one remains confined in a state of nature.

Political society is characterised by the institutional presence of an autonomous judiciary and by the pervasive presence of an enforceable rule of law. It is not a Leviathan, as it was in Hobbes, which makes of a society a civil and political union. Since the purpose of creating a civil society is to avoid those pitfalls permeating the individual and the self-referential capacity of adjudication in a state of nature, the institutional solution cannot allow the hypothesis of an absolute monarch. Therefore, adds Locke, those who still live under the dominion of an absolute sovereign do in fact still live in a state of nature.[77] This condition is even worse than that of an original Adamitic state of nature. Whereas in such case I could be an autonomous arbiter of my injustices, in the case of a natural condition under the rule of an absolute monarch, I am left with no power whatsoever, being subjected only to his arbitrary will.

To think in the same fashion as Hobbes proposes appears quite counterintuitive. Hobbes' description of a violent state of nature ultimately leading to the recognition that all men - but one -enter into a social covenant is for Locke rationally unsound.[78] For Locke this condition is akin to thinking, as a reduction ad absurdum, that the most secure way to save oneself is "to be devoured by lions".[79] However, if there is at least one reason to form a civil government, this must be based on an equality-preserving status. Equality is for Locke equality of citizens before the law. It is also an equal standing in front of the legislative process. Accordingly, Locke refers to the arousal of collective bodies, such as the senate and the parliament, for the articulation of the legislative capacity. It is also in virtue of associative freedom that the constellation of states arising from the natural condition must be understood.

[76] J.Locke, [1689] 2003b, p.161
[77] J.Locke, [1689] 2003b, p.138.
[78] J.Locke, [1689] 2003b, p.140.
[79] Ivi.

This also demonstrates for Locke why human political history did not develop from a father authority directly to universal monarchy.[80]

Within civil society, Locke considers the necessity to preserve the essential features of the natural condition - freedom, equality and independence - under the constraining force of legitimate power authority. Consent is a necessary requirement to one's submission to the power of someone else. Once political power is instituted, however, such consent could be assumed as tacitly given. For Locke it suffices that one enjoys his properties within the boundaries of a state or even that he freely walks within a territory to impose on him an obligation to obey the laws of that country.[81] At any rate, at the foundational phase of the state, mutual consent and the entry into a civil covenant leads to the construction of majoritarian and minoritarian groups competing for the administration of the state. Locke could not be more clear on that point: "that which begins and actually constitutes any political society, is nothing but the consent of any number of freemen capable of a majority [...] this is that, and that only, which did or could give beginning to any lawful government in the world".[82]

It might well have been the case, as the historical and religious documents testify, that original power formation was in the hands of one single individual. Yet, says Locke, this is not a counterevidence to the purported thesis of a subsequent adaptation to the best form of government men considered adequate for themselves.[83] This reflection sketches an initial trajectory of institutional transformation of monarchical power along the history of civilization. It also clarifies that notwithstanding conceptual similarity between the authority of the father and the authority of the monarch, even original monarchies were indeed elective forms of governments.[84]

5. THE LIMITS OF STATE'S FIDUCIARY POWERS

Locke introduces the definition of the legislative as fiduciary power in Chap. XIII *Of the Subordination of the Powers of the* Commonwealth. He refers to the fiduciary character of the legislative power which is the power of the state *par excellence* in the following terms:

> yet the legislative being only a fiduciary power to act for certain ends, there remains still "in the people a supreme power to remove or alter the legislative", when they find the legislative act contrary to the trust reposed in them: for all power given with trust for the attaining an end, being limited by that end: whenever that end is manifestly

[80] J.Locke, [1689] 2003b, p.151.
[81] J.Locke, [1689] 2003b, p.152.
[82] J.Locke, [1689] 2003b, p.143.
[83] J.Locke, [1689] 2003b, p.146.
[84] Ivi.

> neglected or opposed, the trust must necessarily be forfeited, and the power devolve into the hands of those that gave it [...].[85]

Indeed, legislative power incorporates that of civil society, namely, the constituent power of the people (commonwealth) who agree to join a common covenant to validate a public coercive power - the legislative. For Locke, even the executive receives legitimacy on the basis of a fiduciary status.

The capacity an executive has for "assembling and dismissing the legislative [...] is a fiduciary trust placed in him for the safety of the people".[86] The trust depends on the capacity of the executive to act in the interests of the people *even when* the legislative proves incapable of doing so. Therefore, the origin of the fiduciary power derives from the protection of the fundamental interest of property as identified in the state of nature. This stands as the fundamental reason to exit the state of nature in view of a political covenant.

Locke's recognition of a fiduciary role is based on the compliance to the respect of a mandate on private property by the legislative.

The following is the rationale behind Locke's theory of fiduciary powers:

a) the relation between the commonwealth and the state is fundamentally *a private-like* relation. Locke describes the process of appropriation as an individual (a-social) connection of a person to an object to be transformed.

b) the interests upon which the mandate of the state is constructed are derived from the state of nature (property) and remain fixed in the political arena.

This implies that b.1) the role of the Parliament is a politically conservative role – not a transformative one – that is, one made of pre-politically defined interests, so much that:

c) if the government betrays the mandate of civil society, the constituent power (commonwealth) can withdraw its fiduciary trust.

For Locke, conflicts of interest are limited to the domain of the state of nature; that is, at a non-positively legalised domain. For this reason, Locke does not conceive parliamentary debates in terms of agonistic politics. Due to the common mandate of property protection, the inclusion of the Whigs in the Parliament simply adds the recognition of naturally unbound interests of the free market to the medieval property-legacies of the Tories.

The state is a guarantor of the unregulated capital accumulations displaced in the natural society. An example in this direction is the power of the constituent power to call for new elections, or even to destitute a government, whenever a taxation on capitals is deeply contested (we know that Locke agreed on the principle of 'no taxation without representation').[87] The result is that the hegemonic forces

[85] J.Locke, [1689] 2003b, p.166.

[86] J.Locke, [1689] 2003b, p.169.

[87] "[...] that nobody hath a right to take their substance or any part of it from them, without their own consent [...]". In, J.Locke, [1689] 2003b, pp.161-2.

prevailing in the state of nature - the power-relations dominating the process of appropriation - are replicated at the level of government and their parliamentary organization.[88] Accordingly, the result of Locke's theory of appropriation amounts to translate into political ideology an apology of the natural power relations dominating the pre-political social sphere. This is not a condition of total anomy; the state of nature is under the regime of natural laws. However, these are laws which work individually all the way through: they are deduced from reason and are not the result of political bargaining. As rights, they belong to singular beings in that they establish individual duties. Last but not least, as abstract commands, they are incapable of self-constraint whenever another right is opposed. It follows that all cases of rights-conflicts cannot be properly addressed.

Locke's conception of natural rights intersects the nexus between natural freedom and property. Taken together, these are the basic concepts at the basis of the definition of Locke's bourgeois state. Unfortunately, these also mark its limit. To the extent that natural freedom falls under the laws of nature, this objectifies into an extended concept of property (of oneself, of one's labour, of the crafted object); the problem is that this process is not accompanied by equal positive guarantees *within* the civil state. The limits of natural freedom under the laws of nature are also reflected in the limits of civil freedom for the positive laws of the state.

Indeed, state justice is already normatively defined within the concept of property of the law of nature. If appropriation in the state of nature is included in the clause of the 'enough, and as good' left to the universalizable access to the goods, due to the introduction of money and capital accumulation of non-perishable goods (money), an imbalance of goods between individuals is also legitimized. This is not to mention the possibility of someone losing the opportunity to access property or to lose acquired goods by adverse factors.

Whether or not the state, as in these cases, should provide a service, in Locke's conception remains undiscussed. Thus, Locke does not assign to the bourgeois state of proprietors a normative-constructive function; in other words, something in response to the transformations of citizens' interests. What Locke does provide is merely a fiduciary justification of citizens' delegations of their natural property prerogatives. In so doing, Locke furnishes only a justification to exit the state of nature precisely because the standards of legitimacy of Locke's bourgeois state originate and terminate within the state of nature.

Locke's state is therefore internally insensitive to the political dynamics of changing interests and social fortunes. It is deprived (and it could not be otherwise) of any consideration regarding the composition of the interests as well as of the

[88] The problem therefore is not to ascertain that Locke "would have discouraged a monopolistic accumulation of commodities in too few hands, if only because the free flow of capital would suffer as a result" (W.von Leyden, 1982, p.107), but to recognise *to whom* utilities of social arrangements are directed and *by whom* they can be legitimately adjusted.

conflicts of the social groups. Locke is the ideologue of the bourgeois revolution but not of the internal rebalancing of the bourgeois interests.

What is termed today as a dynamical construction of public and private interests is not part of Locke's picture. Why so? The reason is that there was no consideration in Locke of the civil society as a fully legitimate sphere located within the state boundary. Nor did Locke assign commerce and wage-relationships a role pertaining to social-state interactions. All these trajectories occurred almost two centuries after Locke's *Second Treatise*.

The representation of the fixity of interests in Locke's politics is further represented by the way in which the fiduciary state is discharged by the withdrawal of citizen's power delegation when it betrays the mandate of the citizens (protection of private property). The theory of civil resistance and power destitution is based on the mandate transferred to the state by a constituting group of proprietors who share the same property - owning interests.[89] The problem is that it seems unrealistic to hypothesize such agreement in the state of nature once wealth disparities are legitimized by Locke through capital accumulation. By anticipating social differentiation and inequality from within the realm of the state of nature, Locke's attempt to construct a just state vanishes.

Locke's idea of freedom as non-domination, expressively referred to in *The Second Treatise*, turns ultimately into a civil protection of individual private owning. To be sure, there is no real form of collectivism in Locke's liberal state, notwithstanding his position on mercantilist doctrine in the background.[90] There are only self-interested proprietors who join together to protect their private interests. Freedom as non-domination translates into a general prevention from interference by individuals and the state alike. Nonetheless, this amounts to the legally positivized entrenching of private interests.

6. CONCLUSION

In this essay, I have aimed to reconstruct an overall intellectual atmosphere, a *Stimmung*, in order to depict some of Locke's intellectual contributions to the theory of state. Locke's *Second Treatise on Government* stands at the crossroads of medieval and early modern conceptions of natural law. Moreover, it defines the birth of the conception of the modern bourgeois liberal state. Indeed, Locke's ideas

[89] On the target of Locke's theory of resistance against Filmer sovereign empowerment, see J.Marshall, 2004, p.207 ff.

[90] I disagree though with Macpherson's remark according to which Locke by following a Mercantilist approach favoured a nation-perspective understanding of wealth maximization. From the overall argumentative structure, it emerges instead that Locke maintained an individualist-based conception of appropriation and capitalist accumulation that led to the constitution of the state. In, Macpherson, 1962, p.207.

stand with an equal footing on these two cliffs: on the one hand, on the Thomistic conception of a holy origin of the law of nature based on the will of the Christian God and the rationalistic reinterpretation of the foundation of natural law; on the other hand, on the bourgeois Whig party, conception of an enhanced role of the parliamentary powers constraining the will of the King.

The latter is conceptually put forth by the theory of the social contract. While Locke's intellectual merits reside in the theorization of rights as prerequisite of legitimate ruling, the role of democratic power is greatly diminished by a predefinition of private interests by the electoral body. The state of nature fixates the fluidity of changing interests and social mobility in civil society. This prevents the possibility of conceiving intra-societal bodies oriented towards the catalyzation of interests, as well as the conceptualization of a vibrant and stratified society aiming for a greater service-provision of the state. Both of these goals figure in the role of a plurality of political parties.

Locke's fiduciary state resembles the dynamics of the administration of a trust company. This minimal conception of public powers, justice and interest-formation legitimizes the arousal of economic interests from yet another new emerging interest group of that time: the bourgeoisie. Locke could not yet see, and therefore failed to recognize, the social contradictions generated by an unbound competitive market. It is not by chance, therefore, that later reflections on state and justice developed along such points by showing social and value inadequacies of the bourgeois state.

REFERENCES

N.Bobbio, *Locke e il diritto naturale*, Giappichelli, Torino, 1963.

G.DeHart, "Fractured Foundations: The Contradiction between Locke's Ontology and His Moral Philosophy", *Locke Studies* 17, 2017, pp.197– 232. Accessed on 24.7.2021 at: https://doi.org/10.5206/ls.2017.885

W.Euchner, *Naturrecht und Politik bei John Locke*, Suhrkamp, Berlin, 1979.

J.Farr, "'Absolute Power and Authority': John Locke and the Revisions of the Fundamental Constitutions of Carolina", *Locke Studies*, vol.2020, 2020, pp.1-49. Accessed on 1.2.'22 at: https://doi.org/10.5206/ls.2020.10310 | ISSN: 2561-925X

R.Filmer, *Patriarcha and Other Writings*, Cambridge University Press, Cambridge, [1680] 1991.

G.Forster, *John Locke's Politics of Moral Consensus,* Cambridge University Press, Cambridge, 2005.

T.Hobbes, *Leviathan*, Oxford University Press, Oxford, [1651] 1998.

I.Kant, "The Metaphysics of Morals (1797)", in, M. Gregor (ed.), *Immanuel Kant. Practical Philosophy*, Cambridge University Press, Cambridge, 1999.

M.H.Kramer, *John Locke and the Origins of Private Property*, Cambridge University Press, Cambridge, 1997.

W.(von) Leyden, *Hobbes and Locke. The Politics of Freedom and Obligation*, Palgrave, Macmillan, New York, 1982.

J.Locke, "Essays on the Law of Nature (1663-4)", in, M.Goldie (ed.), *Locke, Political Essays*, Cambridge University Press, Cambridge, [1663-4] 1997, pp.79-133.

J.Locke, "First Treatise", in, *Two Treatises of Government and a Letter Concerning Toleration*, I.Shapiro (ed.), Yale University Press, [1689], 2003a, pp.7-99.

J.Locke, "Second Treatise", in, *Two Treatises of Government and a Letter Concerning Toleration*, I.Shapiro (ed.), Yale University Press, [1689], 2003b, pp.100-210.

J.Locke, "A Letter Concerning Toleration", in, *Two Treatises of Government and a Letter Concerning Toleration*, I.Shapiro (ed.), Yale University Press, [1689], 2003c, pp.211-256.

C.B.MacPherson, *The Political Theory of Possessive Individualism. Hobbes to Locke*, Oxford University Press, Oxford, 1962.

J.Marshall, *John Locke. Resistance, Religion and Responsibility*, Cambridge University Press, Cambridge, 2004.

J.Tetlow, "Locke's Political Theology and the 'Second Treatise'", *Locke Studies* 17, 2017, pp. 197–232. Accessed on 24.7.'21 at: https://doi.org/10.5206/ls.2017.885

J.Tully, *A Discourse on Property. John Locke and his Adversaries*, Cambridge University Press, Cambridge, 1980.

J.Waldron, *The Right to Private Property*, Clarendon Press, Oxford, 1988.

J.Waldron, "Enough and As Good Left to Others", *The Philosophical Quarterly*, 29(117), 1979, pp. 319-328.

N.Wolterstorff, *John Locke and the Ethics of Belief*, Cambridge University Press, Cambridge, 1996.

J.W.Yolton, *A Locke Dictionary*, Blackwell Publishers, Oxford, 1993.