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HUGO GROTIUS AND SAMUEL PUFENDORF ON THE POWER OF NECESSITY TO OVERRIDE PROPERTY RIGHTS

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Resumen

En el presente trabajo analizo el "derecho de necesidad" que Hugo Grocio y Samuel Pufendorf reconocen a las personas que atraviesan una situación de necesidad extrema. Explicito su estatus deóntico, su base justificatoria y sus exigencias con el objetivo de evaluar sus consecuencias distributivas. Me propongo mostrar que, a pesar de la considerable atención que ambos autores prestan a la cuestión de la fuerza de la necesidad de unos individuos para sobreponerse a los derechos de propiedad de otros, las consecuencias distributivas del derecho de necesidad que justifican son poco significativas.
Palabras clave: Grocio, Pufendorf, derecho de necesidad, derechos de propiedad.

Abstract

In this paper, I examine the "right of necessity" which Hugo Grotius and Samuel Pufendorf acknowledge as belonging to persons in direst need. I will make explicit its deontic status, justificatory basis and demands, with the aim of assessing its distributive implications. As I will show, although both authors devoted considerable attention to the question of the power of necessity to suspend, override or dissolve property rights, the distributive implications of the right of necessity they put forward were almost insignificant.
Keywords: Grotius, Pufendorf, right of necessity, rights of property.

During the seventeenth century, a greater public awareness of poverty and a special interest in finding a strong philosophical justification for private

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property converged and raised the question of the power of necessity to suspend, override or dissolve property rights. Do the poor have a claim-right to the means of preservation? Which other rights may be affected by upholding such a right? How to justify taking resources from some people (who probably deserve them and acquired them through legitimate channels) so as to give them to other people who desperately need them to preserve their lives? These were some of the major questions involved in this centuries-old debate.[1]

In recent decades, several authors have significantly advanced our understanding of this seventeenth-century discussion by pointing to the importance of charity within John Locke´s theory of property.[2] According to the principle of charity put forward in the *First Treatise*, property-owners have an obligation to cede some of their surplus possessions, so that these can be used to satisfy the pressing needs of the very poor. Thus, the many enquiries with respect to this topic have paved the way for a new comprehension of seventeenth century political thought. Little by little, the traditional view, according to which seventeenth century philosophers placed individual rights at the centre of political morality while neglecting (or even rejecting) social duties, has been set aside in favour of the idea that, in this period, the defence of property did not always exclude a rationale for aiding the poor.[3]

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[1] Some general works which connect the seventeenth-century philosophical debates on private property with poverty are: R. Tuck, *Natural Rights Theories: Their Origin and Development*, Cambridge, Cambridge University Press, 1979; I. Hont and M. Ignatieff, "Needs and Justice in *The Wealth of Nations*: An Introductory Essay", in I. Hont and M. Ignatieff (eds.), *Wealth and Virtue: The Shaping of Political Economy in the Scottish Enlightenment*, Cambridge, Cambridge University Press, 1983, pp. 1-44; M. Ignatieff, *The Needs of Strangers*, New York, Viking, 1984; T. Horne, *Property Rights and Poverty. Political Argument in Britain, 1605-1834*, Chapel Hill and London, The University of North Carolina Press, 1990; S. Buckle, *Natural Law and the Theory of Property: Grotius to Hume*, Oxford, Oxford University Press, 1991; J. Brewer and S. Staves (eds.), *Early Modern Conceptions of Property*, New York, Routledge, 1996.

[2] Some recent works on this field are R. Lamb and B. Thompson, "The Meaning of Charity in Locke's Political Thought", *European Journal of Political Theory* 8:2 (2009), 229-252; S. Forde, "The Charitable Locke", *The Review of Politics* 71 (2009), 428-458; J. Udi, "Justicia versus caridad en la teoría de la propiedad de Locke", *Revista Latinoamericana de Filosofía* 38:1 (2012), 65-84; J. Udi, "Propiedad lockeana, pobreza extrema y caridad", *Revista de Estudios Políticos (nueva época)* 157 (2012), 165-188.

[3] For a paradigmatic example of the traditional view, see C. B. Macpherson, *The Political Theory of Possessive Individualism. Hobbes to Locke*, Oxford, Oxford University Press, 1962.

On the subject of property rights and necessity, though, Locke was engaged in a discussion that was already old in his days.[4] In this paper, I will examine two previous and much less-discussed seventeenth-century accounts of property rights and what they say with respect to the fact of extreme want, namely, the rights of necessity put forward by Hugo Grotius and Samuel Pufendorf respectively. I will make explicit the deontic status, and justificatory basis of these accounts as well as the demands which they include, with the aim of assessing their respective distributive implications.

As I will show, even though both authors devoted considerable attention to the relation between property rights and subsistence (much more than is usually admitted in the intellectual history of this period),[5] they regarded the "right" of necessity as a mere liberty instead as a claim-right. Moreover, they imposed very strict conditions on the exercise of the right of necessity. In this sense, the power that Grotius and Pufendorf attributed to necessity to override property rights was weak and the distributive implications of the right of necessity they upheld were almost insignificant.

Hugo Grotius' Right of Necessity

In *The Rights of War and Peace*, Grotius introduces his account of the right of necessity in the course of discussing the origins of private property, this latter topic being dealt with within his major investigation into the "causes that justify war". According to Grotius, there are two types of just war: those wars made to punish injuries and those made to defend or to recover property.[6] Only if it is clear what belongs to whom, is it possible to decide whether a particular war is justified in this second sense. Thus,

[4] For a brief account of the medieval origins of this debate see S. Van Duffel and D. Yap, "Distributive Justice before the Eighteenth Century: The Right of Necessity", *History of Political Thought* 32:3 (2011), 449-64. A more extensive account of the medieval development of this doctrine is to be found in S. Swanson, "The Medieval Foundations of John Locke's Theory of Natural Rights: Rights of Subsistence and the Principle of Extreme Necessity", *History of Political Thought* 18: 3 (1997), 399-459.

[5] This is Thomas Horne's thesis in *Property Rights and Poverty. Political Argument in Britain, 1605-1834*. A good (and very critical) review of Horne's attempt is to be found in R. Ashcraft, "Liberalism and the Problem of Poverty", *Critical Review* 6:4 (1992), 493-516.

[6] H. Grotius, *The Rights of War and Peace*, ed. by R. Tuck from the edition by Jean Barbeyrac, Indianapolis, Liberty Fund, 2005, 2.2.1. My citations to this work, abbreviated as "DJBP", are by book, chapter and section.

the treatment of the second type of just war led Grotius to develop a very detailed theory of the origins of private property.

The starting point of his justification of private property is the donation made by God to all men in common. This original community is a constant in the natural-law tradition, though its meaning varies considerably from one author to the other. Since Grotius presents the right of necessity as a "revalidation" or a "return" to the original situation, it will be helpful to begin by briefly clarifying his particular conception of this original community.

In the very early stages of human development, Grotius says, when men were few and peaceful and their needs and wishes very modest, they took from the common only what they needed to live. While using or consuming these things, they were exercising a right that the others had a duty to respect.[7] This "common right of mankind" was not a right of common *property*. It was a right of *use* and it was common in the sense that everybody had it. (A common right of common ownership would have given men much more than an inclusive right of use: it would also have given them the right to exclude or limit other's actions.) Of course, some things, once used, cannot be re-used —at least not without losing value. If someone takes an apple from the common, this apple will not be available to be used with the same purpose by other men. In this sense, the first user "excludes" the possibility of subsequent users. In those cases in which using something amounts to consuming it, the exercise of the original right of use resembles, *in practice*, an exclusive right. However, it is *de iure* an inclusive right of use.

As John Salter has observed, the deontic status of this original use right can be made clearer by applying the terminology introduced by Wesley Hohfeld and developed by H. L. A. Hart. This terminology makes it possible to classify it more precisely as a liberty or privilege, rather than as a claim-right. A claim-right entails responsibilities, duties, or obligations on the part of other parties regarding the right-holder. In contrast, a liberty-right does not entail obligations on other parties, but only freedom or permission for the right-holder. To have a liberty or privilege to use a resource means that others (here, the owners) lack the right to exclude the liberty holder (here,

[7] Grotius, DJBP: 2.2.2.1.

a needy person) from its use —although, obviously, others can prevent the liberty holder from using it by using it themselves.[8]

As soon as the initial conditions of friendship, simplicity and abundance turned into discord, sophistication of needs and desires and scarcity of resources, property rights became necessary. A larger number of people competing for scarce resources —Grotius observes— could no longer live in peace without a clear delimitation of property.[9] But, although these spontaneous changes in the circumstances prepared the way for the introduction of property rights, according to Grotius, their institution was conventional. That is to say, while rights of use were established by individual non-consensual acts, property rights were established by a singular general agreement that formally divided what had been taken in possession by the parties (permitting everybody to conserve what they already possessed). This agreement also established that, in the future, things belonging to no one may become the property of the first person who takes them (right of first possession).[10]

Within this conventional account of the emergence of property rights, Grotius reflects on the situation of those men who, after this process, remain without property. Specifically, he raises the question "whether Men may not have a Right to enjoy in common those Things that are already become the Properties of other Persons".[11] His answer is that "in Case of absolute Necessity, that ancient Right of using Things, as if they still remained common, must revive, and be in full Force".[12] Grotius is aware of the strangeness of his statement, but he attributes it to a poor comprehension of private property's finality:

> the Establishment of Property seems to have extinguished all the Right that arose from the State of Community. But it is not so; for we are to consider the Intention of those who first introduced the Property of Goods. There is all the Reason in the World to suppose that they designed to deviate as little as possible from the Rules of natural Equity.[13]

After observing that the principle in favour of necessity was acknowledged "even amongst Divines" —for instance, by Aquinas— he adds that

[8] J. Salter, "Grotius and Pufendorf on the Right of Necessity", *History of Political Thought* 26:2 (2005), 287-8.

[9] Grotius, DJBP: 2.2.4.

[10] Grotius, DJBP: 2.2.2.5.

[11] Grotius, DJBP: 2.2.6.1.

[12] Grotius, DJBP: 2.2.6.2.

[13] Grotius, DJBP: 2.2.6.1.

> whoever shall take from another what is absolutely necessary for the Preservation of his own Life, is not from thence to be accounted guilty of Theft: That Sentiment is not founded on what some allege, that the Proprietor is obliged by the Rules of Charity to give of his Substance to those that want it; but on this, that the Property of Goods is supposed to have been established with this favourable Exception, that in such Cases one might enter again upon the Rights of the primitive Community.[14]

It is possible to distinguish between different variants or instantiations of Grotius' right of necessity. First, there is what we may call a right of necessity *stricto sensu*, that is, the right of persons in the direst and most unavoidable need to use the surpluses of property holders even if this entails a worsening of the owner's situation. Second, Grotius also speaks of a "right of innocent use", which refers to what a person is allowed to do with someone else's property provided this does not injure the property holder. Third, Grotius believes that the right of necessity also entails a "right to such actions as the occasions of human life require"[15] —for instance, to buy means of subsistence at a "reasonable" price.[16]

According to the right of necessity *stricto sensu*, in virtue of the hypothesis of a "benign reservation", the existence of men in direst need justifies a return to the original community of goods and so the needy are allowed to take (use, use up, destroy) what they need in order to survive. And they are allowed to do this even when this entails a relative worsening of other's situation.

Grotius illustrates the scope of this right with several examples. At sea, when there is a scarcity of provisions, what each man had reserved in store for himself becomes a common stock. In cases of fire, a man may demolish his neighbour's house if he has no other means of preserving his own. If the ship of *x* gets entangled in the cables of the ship of *y*, or in the nets of a fisherman *z*, *x* may cut those cables and nets if there is no other way of being disengaged.[17]

As already said, Grotius conceives the right of necessity as a "revalidation" or a "return" to the original situation. That is to say that Grotius´ right of necessity was the same kind of right as the primitive liberty right. People in need have the liberty right to use the possessions of property holders. They do not acquire a claim-right over these possessions; they cannot demand

[14] Grotius, DJBP: 2.2.6.4.
[15] Grotius, DJBP: 2.2.18.
[16] Grotius, DJBP: 2.2.19.
[17] Grotius, DJBP: 2.2.6.3.

that property holders hand them over, or use force to acquire them. They cannot even demand that property holders refrain from consuming their possessions themselves. But they cannot be legally or physically prevented from using them. In other words, as Salter puts it, the necessitous merely become free from the normal duties implied by the rights of property holders.[18]

In any case, Grotius considers that "some Precautions are to be observed, that the Privileges of Necessity may not be too far extended".[19] Consequently, he establishes several conditions for the application of the right of necessity *stricto sensu*. Firstly, Grotius warns that the situation which allows a man to use, consume or destroy someone else's property must not only be extreme, but also unavoidable. That is to say that the person in need must not be in need due to laziness or any other fault of his own. Secondly, before seizing another´s goods, the necessitous must first appeal to a magistrate in order to find out to what extent he would offer relief or persuade the owner to share what they lack.[20] Thirdly, if possible, what was seized (or something equivalent) must be returned to its owner.[21] Further, Grotius stresses that nobody has a right to take something from someone who needs it with the same urgency, "for all Things being equal, the Possessor has the Advantage".[22]

This last condition may seem quite disconcerting since Grotius stresses that the necessitous may take or use someone else's property even when this worsens the owner's situation. Let us remember one of Grotius' examples: in cases of fire, Grotius stresses, a man may demolish his neighbour's house if he has no other means of preserving his own.[23] However, a more general objection may apply to all the conditions Grotius establishes. According to Grotius, in the face of necessity private property as such disappears. But then it makes no sense to speak of a priority which pertains to the *owner*'s needs or of a duty of first asking him for permission before taking what is needed by force.[24] In fact, this is one of the reasons given by Pufendorf

[18] J. Salter, op. cit., 288.
[19] Grotius, DJBP: 2.2.7.
[20] Grotius, DJBP: 2.2.7.
[21] Grotius, DJBP: 2.2.9.
[22] Grotius, DJBP: 2.2.8. "Possessor" refers here to the original owner.
[23] Grotius, DJBP: 2.2.6.3.
[24] This objection was first posed by S. Pufendorf, *De Jure Naturae et Gentium Libri Octo*, trans. of the edition of 1688 by C. H. and W. A. Oldfather, Oxford, Clarendon Press,

for rejecting the Grotian theory of the revival of the natural right of use. Pufendorf argued that the restrictions that Grotius had placed on that right, and which Pufendorf regarded as essential if the security of property owners was not to be entirely undermined, were incompatible with the theory of a return to a state of common ownership.

Most interpreters take up this inconsistency objection without questioning it.[25] In my view, however, it is possible to interpret Grotius' words in a way that do not generate such a flagrant inconsistency within his theory. According to Grotius, it is true, extreme need justifies a "revalidation" of the original liberty of use. In fact, the right of necessity applies *after* the institution of private property. It is impossible to *ignore* property rights once they are established. Thus, a difference should be drawn between the original community itself and the later state of affairs to which the right of necessity stipulates one returns in case of extreme want. This latter community, indeed, only very partially resembles the original one, as it involves only two parties (the person whose goods are required by someone in need and the needy person) and exists only in so far as the needs of one party are met from the surplus of the other._

The justification of this right of necessity that, in very strictly delimitated circumstances, allows men to seize someone else's property resides in the very justification Grotius gives of private property: the preservation of peace and, consequently, of men. In justifying private appropriation in this utilitarian way, Grotius also establishes its limitations: things must remain common if their appropriation is not required for peace (that is, if they are abundant and can therefore benefit everybody without conflict). Every time someone appropriates something, all the others lose their liberty of using what previously had the liberty to use. For Grotius, this loss is justified only if it represents a benefit for everyone, such as the reduction —or the elimination— of interpersonal conflicts or an increased incentive to produce more. In other words, private property has the burden of proof; by default, there is a common liberty of use that may last so long as it remains efficacious in realising the end of preserving peace and men.

1934, 2.6.6. My citations to this work, abbreviated as "DJNG" are by book, chapter and paragraph. Pufendorf, DJNG: 2. 6. 6.

[25] Horne is right in emphasizing that the real concern behind Pufendorf's objection was his fear that "the Grotian formulation of the right [of necessity], with its presumptions in favor of common property, could also be used to undermine civil law and the property rights it protected". T. Horne, op. cit., 34.

As an example of a good that must remain indefinitely common –because of its abundance and the fact that it can be used by every nation without conflict– Grotius stresses the case of the seas:

> The Cause which obliged Mankind to desist from the Custom of using Things in common, has nothing at all to do in this Affair: For the Sea is of so vast an Extent, that it is sufficient for all the Uses that Nations can draw from thence, either as to Water, Fishing or Navigation. The same might be alleged of the *Air* too.[26]

The immediate aim of Grotius was to show that the open seas ought to remain common, but the implications of the foundation he gives to private property go beyond this point and involve also the distribution of natural resources in general, and of subsistence goods in particular. Potentially, this position could be very radical. However, actually, its distributive implications are almost insignificant, since according to Grotius private property serves in general more effectively the aims of peace and concord between men.

According to Stephen Forde, while Grotius is sure that the institution of property includes a provision for giving assistance to those in need, he is not certain why.[27] However, Grotius sounds quite convinced when he maintains that the grounding of this principle is not to be found in the assertion of the Christian law of love but rather in the original compact establishing property.[28] When making reference to the original agreement which established private property, Grotius speculates that the intention of those who introduced it for the first time must have been to deviate as little as possible from the rules of natural equity. In discussing the interpretation of personal contracts, he stresses that these should always be understood in light of the intentions of the parties. Thus, according to his perspective, a fair judge may release a person from the obligation of an agreement if it becomes burdensome or unbearable as a result of modified conditions, and if it can be inferred from the intentions of those making the contract that they never intended the obligation to apply under such circumstances.[29] If we apply this general reasoning about personal contracts to the particular case of the contract that establishes private property, one should conclude —says Grotius— that someone in a situation of extreme necessity must be exempted from the obligation of respecting property. Necessity was not the

[26] Grotius, DJBP: 2.2.3.1.
[27] S. Forde, "The Charitable Locke", *The Review of Politics* 71 (2009): 441.
[28] Grotius, DJBP: 2.2.6.4.
[29] Grotius, DJBP: 2.16.27.

condition under which private property was established. Instead, private property was established to replace a situation in which everybody had a right of use. Consequently, when a situation of necessity arises, the initial agreement of respecting property becomes onerous, and it should no longer be considered a duty to fulfil its requirements.

As well as the right of necessity *stricto sensu*, Grotius also upheld another right "that remains of the ancient Community",[30] namely, a right of "innocent profit". Both this right of innocent profit and the right of necessity *stricto sensu* refer to what someone is allowed to do with someone else's property in face of necessity. The main difference between them is that the right of innocent profit applies only when aiding or benefiting someone does not entail damage or loss for the proprietor.[31] For this reason, it can be assumed that its justification is already contained in that of the right of necessity *stricto sensu*. Why should we not, asks Grotius, when we can do it without any detriment to ourselves, permit another man to light a fire by means of our own?[32] Why not let another man drink of our own running water? This principle also entails a "right of passing lands and rivers" if this is necessary for someone and does not damage anybody else. "The reason", Grotius says, "is the same with that which we have applied above, *viz.* that the Right of Property may have been established with the Reservation of such a Use, as is advantageous to some, without injuring others".[33]

As mentioned at the beginning of this section, Grotius not only asks whether necessity gives a right to use or to consume things owed by other persons without their consent; he also investigates whether necessity gives men a right to certain *actions*. According to Grotius, the possibility of buying subsistence goods "at a reasonable rate" has to be included amongst the "actions as the occasions of human life require".[34] At first sight, this seems to indicate a misunderstanding of the right of necessity: that right entitles the necessitous to the owner's surplus even if they cannot pay for them. Nevertheless, there is a sense in which this right imposes a limit to property rights in the name of necessity. If a man has a right to buy at a reasonable price things which are indispensable to his subsistence, then

[30] Grotius, DJBP: 2.2.10.
[31] Grotius, DJBP: 2.2.11.
[32] Grotius, DJBP: 2.2.12.
[33] Grotius, DJBP: 2.2.13.1.
[34] Grotius, DJBP: 2.2.19.

those who have surplus goods are doubly obligated: they have to put them on sale and they have to do so at a "reasonable" —that is, not unfair— price. According to Grotius, the only circumstance which could exempt an owner from the *obligation* of selling his surplus goods (at a reasonable price) to someone who needs them is his own need for these things. When Grotius states that "one has not the same right to sell his own commodities as to buy those of another", he means that some men's freedom to sell what they own (an implication of ownership in itself) can be restricted in order to grant the right that all men have to buy subsistence goods.[35]

Samuel Pufendorf's Right of Necessity

To examine Pufendorf's right of necessity, it is not necessary to review his whole theory of property. This is so, first, because it is, in essence, very similar to that of Grotius (presented in the previous section) and adds only a few conceptual distinctions introduced so as to solve contradictions or to clarify Grotius' imprecise statements.[36] One innovation introduced by Pufendorf is the distinction between a negative and a positive original community. However, since Pufendorf does not present the right of necessity in terms of a return to the original community of goods, this innovation is irrelevant to the primary concern of this paper. Furthermore, unlike Grotius, Pufendorf does not discuss the question of the power of necessity within a special investigation into the origins of property. He develops a theory of property in book IV of his major work *De Jure Naturae et Gentium* and, in this book, the right of necessity is not even mentioned in chapter 8, which is entirely devoted to "the rights over other's things".[37] Instead, Pufendorf deals with the "right and privilege of necessity" in the last chapter of book II in the context of a general investigation of natural law. This decision is not arbitrary: Pufendorf conceives of the right of necessity in a broader sense, and in his account of this right, the connection with property appears as only one of its various aspects.

[35] Grotius, DJBP: 2.2.20.

[36] For Stephen Buckle, Pufendorf's revisions of the Grotian view on this matter "are more than merely cosmetic" and there are much more important discontinuities between them, which Buckle considers motivated by Pufendorf's need to debar Hobbesian conclusions. S. Buckle, op. cit., viii.

[37] Pufendorf, DJNG: 4.8.1-12.

Pufendorf's treatment of the right of necessity consists of three parts. Firstly, he explains why, *in general*, it is reasonable that the laws admit exceptions in cases of extreme necessity. Secondly, he introduces a classification of needs that helps him to circumscribe his analysis to a particular type of necessity, the "simple and absolute" ones. Finally, after these preliminary remarks, Pufendorf's primary concern is to determine the power of necessity in suspending the application of rules that govern the generality of cases. His analysis of the power of simple and absolute needs discriminates between three different domains: (i) the life or the integrity of the own body; (ii) the life or the physical integrity of other persons; (iii) the integrity of private property.

Pufendorf is aware that "the power of necessity" is a very controversial issue. On the one hand, many authors consider that necessity "carries the right to do many things which, apart from it, were held to be forbidden"; on the other hand, "some writers apparently attribute to it little or no efficacy in determining the morality of actions".[38] With the purpose of introducing his own position regarding this matter, Pufendorf asks

> what force the necessity of safety has to free some act from the obligation of general laws. Whether, in other words, we may sometimes do what the laws forbid, or neglect to do what they command, when, through no fault of our own, we are in such straights that we cannot secure our safety in any other way.[39]

The essential question here is, then, what can be assumed when the law is not explicit about particular cases. The answer is that, in these cases, the principle of equity has to be applied. According to this principle, judges do have to correct or interpret the law when it can be shown from natural reason that a particular case is not covered by a general law —this being demonstrated by the fact an absurd situation would result if it were. Since not every case can be envisioned by the legislator, the judges have to apply and interpret the law, and to make the exceptions that the legislator would have done, if he could have foreseen all the circumstances in which the law may be applied.

Pufendorf's position resembles, in essence, that of Grotius. Both consider that extreme necessity has enough power to justify exceptions to the law. No human institution, Pufendorf says, "ha[s] such power that, if another neglects to do his duty toward me, I must perish rather than depart from

[38] Pufendorf, DJNG: 2.6.1.
[39] Pufendorf, DJNG: 2.6.1.

the customary and usual manner of procedure".[40] For Pufendorf, this can be easily inferred by recognizing just two considerations. The first of these is the nature of man, who, by definition, is weak and incapable of "avoiding and repelling whatever tends to his destruction41 but who does have, at the same time, a natural duty and right to do everything in his power to secure his own preservation:

> whatever right, or privilege, or indulgence is allowed necessity proceeds only from the fact that a man cannot avoid straining every nerve for his own preservation, and therefore it is not easy to presume such an obligation to be resting upon him, as ought to outweigh the zeal for his own safety.[42]

The second, according to Pufendorf, is the general purpose which guided the sanctioning of the laws. Whoever passed these positive laws,

> or introduced among men particular ordinances, since they had as their purpose the promotion through these laws and institutions of men's safety or convenience, are supposed always to have had before their eyes the weakness of human nature, and how man cannot help avoiding and repelling whatever tends to his destruction. For this reason most laws, and especially positive laws, are understood to make an exception of a case of necessity, or to lay no obligation, when such an obligation will be attended by some evil, destructive of human nature, or too great for the common constancy of mankind.[43]

After dealing with the question of the power of necessity in general terms, Pufendorf paves the way for making a detailed analysis of this matter by introducing the classification of needs made by Cicero in *De Inventione*. On the one hand, there are "simple and absolute" needs, "which cannot be resisted on any account, and which can be neither changed nor weakened"; on the other hand, there are also limited needs. These latter can be divided into three classes, which concern honourable conduct, safety or convenience. Pufendorf also organizes these different kinds of needs into a hierarchy: the need of honourable conduct "is the highest", the need of safety comes "close to it" and the need of convenience "is of slight importance". However, although honourable conduct takes precedence over safety, "yet now and then the latter can be preferred to the former if, in consulting for our safety, what for the present has been detracted from honourable conduct, could at some later time be restored by virtue and justice". As already observed,

[40] Pufendorf, DJNG: 2.6.5.
[41] Pufendorf, DJNG: 2.6.2.
[42] Pufendorf, DJNG: 2.6.1.
[43] Pufendorf, DJNG: 2.6.2.

Pufendorf's "first concern in this matter is to inquire what force the necessity of safety has to free some act from the obligation of general laws".[44]

First, Pufendorf investigates the power of the need of security in relation to one's own life or physical integrity. He considers that, in general, no man has a right over his own body: men are neither allowed to destroy their bodies, nor to deform or mutilate them. However, Pufendorf admits that these actions, normally forbidden, could be permitted in cases of extreme necessity, that is, if there is an imminent risk of dying. For instance, a man could be allowed "to cut off some part that is infected with an incurable disease, or that has been rendered useless by a wound, in order that his whole body may not perish, or that the well parts be not infected, or that the use of other parts be not impeded by some useless portion".[45] Pufendorf also asks whether necessity gives us a right over others. By answering this question, he considers that using the bodies of other men as food, when there is no other way to preserve the own life, is a thing "deserving of every commiseration, but not in itself sinful".[46] He comes to the same conclusion in an analogous case, namely, that of a shipwreck in which many men compete for a place in a lifeboat which is not big enough to save everybody. Pufendorf believes that in this case it is acceptable to throw someone overboard to avoid the death of all.[47]

Finally, Pufendorf focuses on the question "whether the necessity of preserving our life gives us any right over the property of others".[48] In his opinion, in order to answer this question, it is necessary to consider the main reasons behind the introduction of private property. On the one hand, private property avoids quarrels arising from the original community of ownership. Moreover, it increases the industry of men, in that each man has to secure his possessions by his own efforts, and, far from excluding mutual aid, the existence of property serves the purpose of making it possible:

> property was not distinguished with the purpose of allowing a man to avoid using it in the service of others, and to brood in solitude over his hoard of riches, but so that each man might be able to dispose of its use according to his pleasure [...] After the introduction of the ownership of things, men were given the ability not only of

[44] Pufendorf, DJNG: 2.6.1.
[45] Pufendorf, DJNG: 2.6.3.
[46] Pufendorf, DJNG: 2.6.3.
[47] Pufendorf, DJNG: 2.6.3.
[48] Pufendorf, DJNG: 2.6.5.

> carrying on commerce with signal advantage to all mankind, but also, after securing such means, of making a richer display of humanity and kindness to others.[49]

In Pufendorf's view, aiding the needy is not only possible but also a duty. Pufendorf stresses that proprietors have an "obligation" or "duty" towards the necessitous. However, he makes clear it is an imperfect one:

from the point of view of mere natural right, a man is expected only on the basis of an imperfect obligation, in so far as it arises from the virtue of humanity, to aid another in the latter's extreme necessity, with property of which he himself has no such present need.[50]

Pufendorf aims to minimize as much as possible intervention into the patrimony of the owners —which should always remain a measure of last resort— and he never calls into question the owners' entitlement. Even when the proprietor of a surplus has the obligation to share it with someone in direst need, the surplus belongs to him unquestionably. It is true that Pufendorf encounters a tension between the "power of property" and the "power of necessity": "such is the force of ownership", he stresses, "that a man is able himself to dispose of his property, even such as he is obligated to hand over".[51] However, he does not expect to dissolve the conflict between necessity and property. Rather, he limits the scope of application of the right of necessity and formulates it so as to secure for everybody access to the means of subsistence while acknowledging, at the same time, the title of those who are obligated to permit the needy to use what they possess. This is something that, according to Pufendorf, Grotius failed to do, with the consequence of not sufficiently securing the integrity of private property.

Pufendorf's emphasis on the owner's interests becomes evident in the many conditions he establishes for the application of the right of necessity. First, Pufendorf insists on the importance of following a certain procedure:

> a person may not himself lay hands at once on property owed him by another, but should demand of the owner that he hand it over to him of his own accord. If, however, the owner refuses of his own accord to meet his obligation, the power of ownership is by no means so great that property owed another may not be taken from an unwilling owner, through the authority of a judge in commonwealths, or, in a state of natural liberty, by the might of war.[52]

Another condition is restitution, at least

[49] Pufendorf, DJNG: 2.6.5.
[50] Pufendorf, DJNG: 2.6.5.
[51] Pufendorf, DJNG: 2.6.5.
[52] Pufendorf, DJNG: 2.6.5.

> when the article taken was of great value, or else of such value that the owner cannot afford to give it for nothing. But if the article be of little value, and such as cannot burden a man's means, it will suffice if we show, when the opportunity arises, as if we owed him gratitude, that we would have been glad to be indebted to him for his kindness, if his stinginess had allowed.[53]

Moreover, Pufendorf considers that the necessity which justifies the transfer of goods from a proprietor to a non-proprietor must be extreme, and neither attributable to laziness or negligence, nor avoidable by other means.[54] Furthermore, the owner from whom the aid is expected should not himself be in a similar situation as the person making the demand. All these conditions or, as Pufendorf calls them, "precautions", were already contemplated in Grotius' theory. However, Pufendorf reproached Grotius for the contradiction of recognizing them and affirming, at the same time, that in case of necessity a return to the original community takes place:

> if, under stress of necessity, any man secures the right to appropriate the property of others to his own use, as if it lay open to all, there appears no good reason why any man, if he is strong enough, may not take such possessions from their owner, even if the latter is straitened by an equal necessity. But this is not allowed by Grotius. Furthermore, certainly no restitution need be made of things of this kind, which I take as my right, on the ground that they are open to all; and yet Grotius requires such restitution. [...] And so, in my opinion, this matter is better explained on our theory.[55]

Conclusion

Certainly, both Grotius and Pufendorf devoted considerable attention to the relation between property and subsistence rights. They both upheld the principle that a person in extreme and unavoidable need has a right to use the surplus property of others. And they both derived this right from an interpretation of the logic of the original contract which established property rights. However, they were fully aware of the importance that this right of necessity should not undermine the stability of property rights. Thus, in the end, the power they attributed to necessity *vis à vis* property was weak and the distributive implications of this right were almost insignificant.

[53] Pufendorf, DJNG: 2.6.6.
[54] Pufendorf, DJNG: 2.6.5.
[55] Pufendorf, DJNG: 2.6.6.

One reason for claiming the weak character of the right of necessity put forward by Grotius and Pufendorf is the deontic status they attributed to it. Even though Grotius regards the right of necessity as a secure and binding moral rule, he considers it grounded on a *presumption*: we must presume, he says, that the original compactors included a clause providing for private property to be suspended in case of extreme want.

Moreover, Grotius never stresses that the owners have a duty to the needy. And although Pufendorf speaks sometimes of an "obligation" or "duty" on the part of the owners, he makes clear that these are only imperfect obligations, which cannot be legally enforced. Thus, in both cases, the "right" of necessity is not a claim-right, but rather a license or liberty-right recognized to the needy. It does not impose any obligation on the proprietors. It merely allows the necessitous to occasionally take (use, use up, destroy) what they need to survive.

Finally, both authors agree on imposing very strict conditions on the exercise of the right of necessity. First, with the aim of restricting as much as possible the universe of legitimate beneficiaries, both Grotius and Pufendorf stress that the necessity which allows a man to take something owed by another must be extreme and really unavoidable by other means. Grotius and Pufendorf also agree in the delimitation of the universe of persons who can be affected by the demands of the "right of necessity": those individuals in possession of some surplus goods. Both consider, furthermore, that under equally unfavourable conditions, the owner's interest must prevail: nobody is allowed to take something from a person in a similar need. Additionally, they also subject the exercise of this right to the condition of restitution.

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