

WORKING PAPER SERIES

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CONTRACT IN THE JURISPRUDENCE OF DAVID HUME**

Working Paper No. 15/2012

**FROM SENSORY ORDER TO LEGAL ORDER: PROPERTY AND FREEDOM OF CONTRACT IN
THE JURISPRUDENCE OF DAVID HUME**

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November 2012

Abstract

David Hume's theory of law and justice is a central element of his moral philosophy. Hume's theory of the mind leads to a theory of undesigned social order based on fundamental laws of justice that arise insensibly through experience. The need to secure private property and its free exchange by the performance of promises is the original cause of the emergence of the rules of justice. Hume argues that the moral duty of obedience to authority arises from the need to maintain the rules of justice and that a ruler who violates or fails to uphold justice forfeits the right of allegiance. This paper analyses Hume's theory and argues that it is epistemologically superior to natural rights theory and provides a powerful justification of property rights and contractual freedom that remains valid today.

¹ This paper was researched and written at the University of Economics, Prague during the author's tenure as a Fellow of the International Centre for Economic Research (ICER). The author gratefully acknowledges the support of ICER and its Director Professor Enrico Colombatto. The author thanks Dr David Lipka and Professor Jiri Schwarz of the Department Institutional Economics of the University of Economics Prague for their intellectual and material support during this project. The author also acknowledges the helpful comments of the faculty and members of the Edinburgh Centre for Constitutional Law where a previous version of this paper was delivered on October 12, 2012.

ENLIGHTENMENT, EMPIRICISM AND JURISPRUDENCE

David Hume is considered by many to be the greatest of all British philosophers. (Ayer 2000, 1; Russell 1962, 634) Immanuel Kant confessed that Hume's writings awoke him from dogmatic slumber. (1783, 6) Hume's influence in epistemology, moral philosophy and the philosophy of science is beyond question as shown by the enormous and growing volumes of Hume literature. Hume's contribution to jurisprudence though has received less attention with notable exceptions such as Haakonssen (1989) and Postema (1986). Hume's jurisprudence is inextricable from his general philosophy of which it is a central component. It is part of the jurisprudential legacy of the Enlightenment. Hume rejected social contract, divine rights and patriarchal theories of the state that were influential in his time. He argued that the rules of justice which make society possible and justify political authority are not natural or providential but are artificial in the sense of conventions that grow insensibly out of human experience. Hume's theory of law is grounded in his theory of morals. His theory of morals is based on his theory of the mind. Therefore it is not possible to understand Hume's theory of law without knowing his theory of the mind.

The Age of Enlightenment is known as the Age of Reason. It was the age of reason because it liberated science and philosophy from the grip of superstition and censorial power of State and Church. It represented in the words of Immanuel Kant 'man's emergence from his self-imposed immaturity ... the inability to use one's understanding without guidance from another'. (Kant, 1784) Advances in theoretical reason influenced practical reason and revolutionised politics and law. The driving force of the Enlightenment in England and Scotland was empiricism. In legal philosophy, empiricism generated three distinct traditions. Two of these, natural rights theory and legal positivism are well known. The third tradition generated by Scottish empiricists Hume, Smith and Ferguson (with inspiration from Hale and Mandeville) is less well known. It is the spontaneous order or evolutionary tradition in jurisprudence. This paper explains and evaluates David Hume's contribution to this tradition.

EMPIRICISM AND THE EVOLUTIONARY TRADITION: LAW THAT MAKES LAW POSSIBLE

David Hume was not the first empiricist but was the most rigorous and uncompromising of them. Hume's philosophy was developed in his greatest work *A Treatise of Human Nature* and explained further in the *Enquiries Concerning Human Understanding and Concerning the Principles of Morals*. Further light on Hume's evolutionary thinking is shed by his *Dialogues Concerning Natural Religion*. Hume's jurisprudence unlike that of Bentham and other legal positivists is not about providing a definition of what should count as law. He was fully aware that throughout history deliberate law making to one extent or another has been a feature of politically organised societies. Yet, such lawmaking presupposes the existence of a society and legislative authority. The view that society is the product of designing minds is generally rejected by modern anthropology. There is uncontroverted evidence that human beings lived in socially ordered groups before formal lawmaking institutions were established. In other words society was not legislated but society made legislation possible. Hume argued that that the idea that original society was designed is epistemologically impossible. Hume's entire philosophy is a refutation of the powers of *a priori* knowledge, reason and foresight generally attributed to the human mind.

Any kind of order or system is based on regularities or rules. The social order is not an exception. Positive law in the sense of humanly commanded rules become possible only after the establishment of authority. Society however is antecedent to authority and society is one that is ordered by law, perhaps not by the stipulative definitions of a legal positivist, but by law in the more fundamental sense of the rules that make cohabitation possible. Hume rejected the popular theory of his time that the origin of society is contract because the practice of contracting is based on prior conventions which gave rise to social order. (*Treatise*, 490) His empiricism precluded the Augustinian view of society as God given. If society is not the product of human or divine design and if the human mind is not endowed with *a priori* reason and knowledge, how did it arise? And how is it maintained? Hume addressed these questions in Book III of the *Treatise* entitled 'Of Morals'. However, we cannot fathom his answers without knowing his theory of human understanding and passions discussed in Books I and II. This is where Hume explores what he termed the 'theatre of the mind'. It is impossible to evaluate Hume's entire theory of the mind within a

few pages but it is necessary to set out its key elements necessary to understand his jurisprudence.

HUME'S THEATRE OF THE MIND

Philosophy from Plato to the present day has generally proceeded on the following assumptions.

1. Real things (objects) exist. It is possible to know the world outside the mind the way it actually is, if not perfectly, then approximately.
2. Cause and effect is a valid principle. Some things cause other things. A fire produces heat. A billiard ball moves when struck by another.
3. There is such a thing as a self.

Hume denied all of these beliefs as unproven myths. His scepticism was total. The convulsions that he caused in philosophy are still felt though many philosophers continue with their speculations as if Hume never lived or wrote. Many though have sought to refute him. Others such as the 'New Hume' theorists reinterpret Hume's writings to claim that Hume was not a radical sceptic but a sceptical realist. (Richman 2007) Bertrand Russell sums up Hume's impact.

David Hume (1711-76) is one of the most important among philosophers, because he developed to its logical conclusion the empirical philosophy of Locke and Berkeley, and by making it self-consistent made it incredible. He represents, in a certain sense, a dead end: in his direction, it is impossible to go further. To refute him has been, ever since he wrote, a favourite pastime among metaphysicians. For my part, I find none of their refutations convincing; nevertheless, I cannot but hope that something less sceptical than Hume's system may be discoverable. (Russell 1962, 634)

It would distract from the aims of this essay to join the New Hume debate. Even accepting the 'Old Hume', I do not share Russell's despair. On the contrary, I think that Hume's sceptical empiricism is the valid and indispensable starting point of an evolutionary theory based on blind variation and selective retention. The idea of accumulation of design as

opposed to intelligent design is at the very heart of Hume's philosophy. Hume was clearly aware of the evolutionary insights of Mathew Hale (1671/1713, 39) and of Bernard Mandeville (1674/1733, 142) to whom Hayek pays the extraordinary compliment that he made Hume possible. (Hayek 1978, 264) However, it was Hume who worked out a consistent theory of how the social order can grow out of a state of ignorance of the external world and blindness to the future. In so doing he also brought into reckoning the idea of spontaneous order that modern science of emergent complexity is reinforcing. The empirical evidence to confirm the process of biological evolution by natural selection had to wait for Charles Darwin and Alfred Wallace.

If the Darwinian theory of evolution by blind variation and selective retention applies to the world of culture, its starting point must be something like Hume's empiricist philosophy. One of the key objections to the application of the Darwinian theory to culture is that it ignores human intentionality. It is claimed that cultural evolution is not blind in the way of biological evolution because much of cultural achievements happens by design. However, as Hodgson and Knudsen point out, intentionality is not assumed as given in Darwinian theory but is considered an evolved property. (2010, 48) Evolutionary psychology and evolutionary epistemology address this issue and I will refer to that work in later pages. It is sufficient for the moment to refer to DT Campbell's observation that 'The many processes which shortcut a more full blind-variation-and-selective-retention process are in themselves inductive achievements, containing the wisdom about the environment achieved by blind variation and selective retention'. (1987, 91)

Empiricism did not begin with Hume. Both Hobbes and Locke had previously argued that we have no innate ideas but only those gained from experience. Berkeley had denied the existence of matter outside the mind. (1692/1710) Locke and Berkeley though accepted both the existence of the mind and the also causation both of which Hume questioned. The mind, according to Hume, has no identity though we imagine it as a separate entity. He rejected the Cartesian dualism of mind and matter, holding that the former is made up of perceptions of the latter.

The mind is a kind of theatre, where several perceptions successively make their appearance; pass, re-pass, glide away, and mingle in an infinite variety of postures

and situations. There is properly no simplicity in it at one time, nor identity in different; whatever natural propension we may have to imagine that simplicity and identity.

Hume's starting point was the observation that there is an unbridgeable gap between the physical world as it is and the way we perceive it. The reason is that 'nothing is ever present to the mind but its perceptions, impressions and ideas ... [t]o hate, to love, to think, to feel, to see; all this is nothing but to perceive'. (*Treatise*, 67) When we think of something we are actually thinking of other thoughts. Hume did not pretend to know what causes these perceptions to occur. On the subject of the association of ideas, Hume wrote:

Its effects are every where conspicuous; but as to its causes, they are mostly unknown, and must be resolved into original qualities of human nature, which I pretend not to explain. Nothing is more requisite for a true philosopher, than to restrain the intemperate desire of searching into causes, and having established any doctrine upon a sufficient number of experiments, rest contented with that, when he sees a farther examination would lead him into obscure and uncertain speculations. In that case his enquiry would be much better employed in examining the effects than the causes of his principle. (*Treatise*, 13)

KINDS OF PERCEPTIONS

There are two kinds of perception – impressions and ideas. According to Hume the difference between an impression and its idea is one of vivacity. (*Treatise*, 2) Seeing the colour red causes a more lively effect on us than the idea of the colour red.

Impressions

Impressions can be classified in three different ways: simple and complex, original and reflective, direct and indirect. Simple impressions are irreducible. They cannot be split into distinct perceptions. Complex impressions may be distinguished into component perceptions. Hume gives the example of an apple. We have the complex impression of an

apple but it is made up of the simple impressions of colour, taste and smell. Its observable qualities are distinct from the whole.

Original impressions are impressions that 'without any antecedent perception arise in the soul, from the constitution of the body, from the animal spirits, or from the application of objects to the external organs'. They include 'all the impressions of the senses, and all bodily pains and pleasures'. (*Treatise*, 276) Looking at the keyboard at which I write, I see its colour, feel its hardness and hear the sound it is making. When a bee stings me, I feel pain. Reflective impressions are 'the passions, and other emotions resembling them'. Reflective impressions may be *calm* as in the 'sense of beauty and deformity in action, composition, and external objects' or *violent* as in the case of 'love and hatred, grief and joy, pride and humility'. (*Treatise*, 276) Impressions can also be divided into *direct* and *indirect*. Direct impressions are those like desire, aversion, grief, joy, hope, fear, despair and security and indirect passions include 'pride, humility, ambition, vanity, love, hatred, envy, pity, malice, generosity, with their dependants'. (*Treatise*, 276-277)

Ideas

As a general rule, an impression generates a corresponding idea and an idea is preceded by a corresponding impression. Hume admits exceptions to this rule. In the case of simple impressions, the exceptions are exceedingly rare. He gives the example of a person shown a spectrum of shades of one colour bar one. The person may be able to gain the idea of the missing shade without having seen it. The lack of correspondence between complex ideas and complex impressions is more common. Hume wrote,

I observe, that many of our complex ideas never had impressions, that corresponded to them, and that many of our complex impressions never are exactly copied in ideas. I can imagine to myself such a city as the New Jerusalem, whose pavement is gold and walls are rubies, though I never saw any such. I have seen Paris; but shall I affirm I can form such an idea of that city, as will perfectly represent all its streets and houses in their real and just proportions? (*Treatise*, 3)

Ideas become associated in the mind to form chains of thought. What brings ideas together? Resemblance, contiguity of place or time and the appearance of cause and effect

are factors. The appearance of cause and effect is the most powerful attractor. The ideas of fire and heat are commonly associated as the former seems to cause the latter. Hume does not pretend to know the ultimate causes of mental association. 'To explain the ultimate causes of our mental actions is impossible. It is sufficient, if we can give any satisfactory account of them from experience and analogy.' (Treatise, 22) Elsewhere he says that they are matters for natural philosophers (scientists) and not moral philosophers.

Passions

Human beings are driven by passions. Without passion there is no motive force. If we do not feel pleasure and pain, fear and happiness, love and dislike, hope and anxiety, we would be no different from plants or a programmed robot. Passions are a type of impression in Hume's theory of the mind. He devotes Book II to the discussion of passions. Impressions are direct and original or secondary and reflective. Passions are of the latter kind. An original impression is not derived from another impression. A person who is struck a blow by another feels pain. This is an original impression which may give rise to a secondary reflective impression of anger. Reflective passions can be calm or violent.

Of the first kind is the sense of beauty and deformity in action, composition, and external objects. Of the second are the passions of love and hatred, grief and joy, pride and humility. (Treatise, 276)

Hume cautions that this division is neither exact nor necessary. A person may go to raptures over a piece of music or react calmly to a tragedy. However, generally speaking we do not get angry or joyous or proud or humble over an inanimate object.

Knowledge

Like the other empiricists before him, Hobbes, Locke and Berkley, Hume denied that human beings had innate knowledge. He maintained that even the most abstract systems such as arithmetic and algebra consist of ideas generated by impressions. Hume denied that the human mind has any capacity to comprehend anything by pure reasoning unaided by sensory perception. (Treatise, 72) This contradicts Immanuel Kant's proposition that we possess a form of *a priori* synthetic knowledge that is prior to any experience. Kant maintained that this *a priori* knowledge shapes our experience. Kant's *a priori* categories

were Quantity (unity, plurality, totality); Quality (reality, negation, limitation); Relation (substance, cause, community) and Modality (possibility, existence, necessity). He thought, for example, that we cannot think of any object except in relation to time and space. Hume thought the reverse – that we have a sense of time and space only because we perceive separate objects (Treatise, 35). Kant said that we cannot conceive of something that has no cause. Hume disputed that. Kant had not read Hume's *Treatise* when he published the *Critique* in 1781 (Wolff 1960, 117). Hume never read the *Critique*, as he died in 1776. Hence their disagreement was never resolved. One way of reconciling Hume and Kant is to say that what appears *a priori* is actually knowledge shaped by experience both genetically encoded in the species and also learnt in the development of the individual. We can speculate this in the light of modern genetics and cognitive science which were unavailable to both Hume and Kant.

Hume identifies seven kinds of relation which make up knowledge. (1) Resemblance (2) Identity (3) Relations of time and space (4) Proportion in quantity or number (5) Degrees in quality (6) Contrariety (7) Causation. Of these, resemblance, contrariety, difference in quality and difference in quantity are directly perceived by the senses though minute differences may require more careful observation. These are the only infallible relations. (Treatise, 79) However, identity, relation in time and place and causation are not observable in this way. In the case of identity, I assume that the house I left this morning is the same house that I return to in the evening although I have no perception of it in the interval. A similar problem arises in relation to proximity or distance of objects. I see an apple on an apple tree. There is no reasoning here but only perception as both objects are visible. I assume that apples always grow on apple trees – that apples and apple trees are always associated. In contrast, I assume from the observation that fish are not found on trees, that fish and tree are always remote. We make these assumptions despite the absence of continuous perception. The reason, we do so, Hume pointed out, is because of causation.

There is nothing in any objects to persuade us, that they are either always remote or always contiguous; and when from experience and observation we discover, that their relation in this particular is invariable, we, always conclude there is some secret cause, which separates or unites them. The same reasoning extends to identity. ... Whenever we discover such a perfect resemblance, we consider, whether it be

common in that species of objects; whether possibly or probably any cause could operate in producing the change and resemblance; and according as we determine concerning these causes and effects, we form our judgment concerning the identity of the object. (*Treatise*, 74)

However, causation itself is not a relation that can be perceived. What we see usually are two contiguous events, one following the other but do not see the causation itself. To use Hume's famous example, a billiard ball lying on a billiard table is always set in motion when another billiard ball strikes it. We observe nothing more. Why do we think that the motion of one ball was caused by the other ball? It is because we have seen this happen before. We infer from past experience of the repeated conjunction of the two events that one causes the other. As Hume explained in the Abstract to the *Treatise*,

It is not, therefore, reason which is the guide of life, but custom. That alone determines the mind, in all instances, to suppose the future conformable to the past. However easy this step may seem, reason would never, to all eternity, be able to make it. (*Treatise*, 652)

One critical implication of this is that we do not have prescience or foresight. We can construct theories and test them by laboratory experiments, but this process too is based on the 'general habit, by which we transfer the known to the unknown, and conceive the latter to resemble the former'. (*Enquiries*, 107) Scientific theorizing depends in part on experience and in part on blind speculation. Hume declared that 'experimental reasoning itself, which we possess in common with beasts, and on which the whole conduct of life depends, is nothing but a species of instinct or mechanical power, that acts in us unknown to ourselves' (*Enquiries*, 108)

Reason

So, does reason have any place in Hume's philosophy? It has, but in the theatre of the mind, a greatly diminished place. Moral philosophy through the ages has enthroned reason over passion. The virtuous man is one whose reason rules his passions. This is completely at odds with Hume's theory of how the mind works. He argued 'first, that reason alone can never be a motive to any action of the will; and secondly, that it can never oppose passion in the direction of the will'. (*Treatise*, 413)

Reason plays a part in two kinds of human understanding. In the first case, it is engaged in understanding abstract relations among ideas, most typically found in arithmetic and algebra. Hume points out that this kind of demonstrative reasoning by itself can never motivate action. A design engineer will use mathematics to improve the efficiency of a device. A merchant will calculate his costs in fixing prices. A philanthropist may mathematically determine the most efficient way of distributing her largesse. In each case though, it is not the math that motivates action but some passion such as the pleasure generated by the ideas of profit, success or alleviation of pain.

In the second case, reason helps us understand cause and effect between objects. This is the empirical knowledge that we gain from observation. Here, reason helps the mind to understand the state of things better. However, it is ultimately the prospect of pain or pleasure that determines a person's actions. Reason tells me that overeating makes me sick. But it's the fear of the resulting discomfort that motivates my moderation.

It is from the prospect of pain or pleasure that the aversion or propensity arises towards any object: And these emotions extend themselves to the causes and effects of that object, as they are pointed out to us by reason and experience. ... Where the objects themselves do not affect us, their connexion can never give them any influence; and it is plain, that as reason is nothing but the discovery of this connexion, it cannot be by its means that the objects are able to affect us. (Treatise 414)

If passion and not reason produces volition, it follows that passion alone can oppose volition. My gluttony is defeated not by reason but by discomfort or by fear, although it is the experience of cause and effect that gives rise to the fear. 'It is impossible, therefore, that this passion can be opposed by, or be contradictory to truth and reason; since this contradiction consists in the disagreement of ideas, considered as copies, with those objects, which they represent.' (Treatise, 415) A passion can be considered unreasonable or irrational only if it arises from an error of judgment about facts. Fear, for example, may be caused by a harmless toy gun or the belief in supernatural objects that do not exist. Hume wrote: 'I am more to be lamented than blamed, if I am mistaken with regard to the

influence of objects in producing pain or pleasure, or if I know not the proper means of satisfying my desires'. (Treatise, 459-60)

OF THE MORAL SENSE

Moral philosophy in the classical tradition distinguished pure reason and practical reason. Pure reason operates in the field of abstract ideas, especially in science. It answers the question 'what is the case?' Practical reason concerns moral choice and addresses the question 'what ought to be done or not done?' Hume famously accused philosophers of trying to infer what ought to be done from what is the case. (Treatise, 469) Those who do not commit this error say that practical reason is intuitive. Aquinas, for example, said that the moral law is based on self-evident first principles (*prima principia per se nota*). (*Summa Theologiae*, I-II, q.94, a 2) Finnis constructs his natural law theory on the pillars of what he calls self-evident basic values: life, knowledge, play, aesthetic experience, sociability, religion (broadly understood) and practical reasonableness. (1980, 66-70)

Hume's theory of the mind leaves no room for this kind of intuition. The mind's power of reason depends on the experience of the senses. The only intuition he attributes to the mind concerns relations between objects or, more precisely, their ideas. One object resembles another or it does not. One object is greater or lesser in proportion or quality than another. One object is contiguous or removed from another. And that is it. The exact sciences of mathematics and logic are based on these. So from where do we get our moral sense? Hume's answer is plain and simple. It arises from pain and pleasure. Hume was the first modern utilitarian moral theorist. The *Treatise* was published before Bentham was born.

Pain and pleasure like all things received by the mind are perceptions. Perceptions consist of impressions and the ideas formed of them. Some of these produce positive effects and others negative effects on the mind. 'The mind can never exert itself in any action, which we may not comprehend under the term of perception; and consequently that term is no less applicable to those judgments, by which we distinguish moral good and evil, than to every other operation of the mind. To approve of one character, to condemn another,

are only so many different perceptions.’ (Treatise, 456) Here Hume takes the quintessentially evolutionary view of morals. We do not gain pleasure by witnessing conduct because it is moral. We regard conduct as moral because it gives us pleasure to witness.

An action, or sentiment, or character is virtuous or vicious; why? because its view causes a pleasure or uneasiness of a particular kind. In giving a reason, therefore, for the pleasure or uneasiness, we sufficiently explain the vice or virtue. To have the sense of virtue, is nothing but to feel a satisfaction of a particular kind from the contemplation of a character. The very feeling constitutes our praise or admiration. We go no farther; nor do we enquire into the cause of the satisfaction. We do not infer a character to be virtuous, because it pleases: But in feeling that it pleases after such a particular manner, we in effect feel that it is virtuous. The case is the same as in our judgments concerning all kinds of beauty, and tastes, and sensations. Our approbation is implied in the immediate pleasure they convey to us. (Treatise 471)

HUME’S THEORY OF LAW, SOCIETY, AND STATE

Hume’s theory of law and state arises directly from his moral theory and is an indistinguishable part of it. Society arises not from reason and design but from passions and experience. It is not established by a social contract as imagined by political theorists of the age but is the result of convention that crystallises insensibly through a period of time.

Hume was not the first thinker to notice the phenomenon of spontaneous rule formation by habit meshing. Chief Justice Matthew Hale in the *The History of the Common Law*, described the law as ‘accommodate to the Conditions, Exigencies and Conveniences of the People’ and ‘as those Exigencies and Conveniences do insensibly grow upon the People, so many Times there grows insensibly a Variation of Laws, especially in a long Tract of Time’. (Hale 1971:39) Bernard Mandeville, to whom Hayek pays the extraordinary compliment that he made Hume possible (Hayek 1978:264) said of the law that ‘we often ascribe to the Excellency of Man’s Genius, and the Depth of his Penetration, what is in reality owing to length of Time, and the Experience of many Generations, all of them very little differing from one another in

natural Parts and Sagacity'. (1924: vol. 2, 142). But it was Hume who pursued this insight as far as contemporary scientific knowledge allowed.

Justice – the foundation of social order

Justice is the great virtue that binds persons into society. Human beings have other virtues such as sympathy and beneficence. Hume was a utilitarian but he denied that all good intentions can be reduced to self-interest and devoted Appendix II of the *Enquiry* to this subject. He argued that there are countless instances of 'general benevolence in human nature where no real interest binds us to the object'. (Enquiry, 300) They reflect original passions that are irreducible to private pleasure. Hume recognised the importance of 'social virtues' – sympathy and beneficence in their various forms. However what secures the general peace and order of society is the virtue of justice. Beneficence is directed at particular persons whereas justice is general and impersonal, being owed to all persons. 'Among all civilised nations', he wrote, 'it has been the constant endeavour to remove everything arbitrary and partial from the decision of property, and to fix the sentence of judges by such general views and considerations as may be equal to every member of the society'. (Enquiry, 308) In the *Treatise* Hume argued that justice is anterior to government which arises out of the need to enforce justice. Though men can maintain 'a small uncultivated society without government, 'tis impossible they shou'd maintain a society of any kind without justice and the observance of the three fundamental laws concerning the stability of possession, its translation by consent and the performance of promises'. (Treatise, 541) Government was needed not to make law but to administer the law impartially.

Happiness of society arising from beneficence is like a wall built by many hands that rises with each stone. Happiness of society arising from justice is like a 'vault, where each individual stone would, of itself, fall to the ground; nor is the whole fabric supported but by the mutual assistance and combination of its corresponding parts'. (Enquiries, 304) At one level, justice, unlike beneficence cannot be selective without undermining the whole structure. At another level the different rules of justice function as a system. Property is not secure without personal security and certainty of contract. Contractual certainty is

impossible without security of property and person. Personal freedom is unachievable without private property. Justice is blind and may reward the unworthy as when a bad man inherits riches according to the law of succession. Justice may hurt a good man by depriving him of property acquired by mistake. It is impossible for the rules of justice to prevent all particular hardships without bringing down the edifice. 'It is sufficient', Hume wrote, 'if the whole plan or scheme be necessary to the support of civil society and if the balance of good, in the main, do thereby preponderate much above that of evil'. (Enquiries, 305)

Coevolution of society and its rules

What is the origin of the rules of justice? Hume's explanation points to the coevolution of morals, law and society. There cannot be society without rules and rules have no meaning except in society.

We call an act virtuous or blameworthy because of the motive that produces it. We do not call a person virtuous who drops her wallet unwittingly even if a destitute and hungry person picks it up. We call her careless. Nor do we blame a person who takes another's watch mistaking it to be her own. It does not make sense to say that an act is virtuous because of its virtuous quality. That would be hopelessly circular reasoning. Hume wrote: 'In short, it may be established as an undoubted maxim, *that no action can be virtuous, or morally good, unless there be in human nature, some motive to produce it, distinct from the sense of its morality*'. (Treatise, 179) The essential point here is that the virtuous motive comes into being before society identifies it as virtuous.

Hume uses the following illustration. A debtor repays the creditor when the debt falls due. Why do we call this action just? The answer that occurs to us in our civilised condition is that keeping a promise (honouring a contract) is the right thing to do and that is what justice demands. Hume points out that this answer would be perfectly unintelligible to man 'in his rude and natural condition'. (Treatise, 479-80) How does he know that it is the right thing to do? Reason does not help as this question concerns neither relations between abstract ideas nor cause and effect. The answer must be found by reference to some standard of just conduct that already exists. These standards could not have been set by

moral guardians for they did not exist at the beginning of society. They could not have been set by a social contract because a contract presupposes the virtue of keeping promises. It is absurd to say that one should keep a promise because one promised to keep it. The virtue of promise keeping therefore must have some other origin. According to Hume, the origin of justice is self-love. Rules of justice including the rule concerning promise keeping arise from mutual adjustment of self-interested behaviour. If men had been endowed with a strong sense of the public good, or if every person was self-sufficient they would not have to restrain themselves with rules of justice.

Increase to a sufficient degree the benevolence of men, or the bounty of nature, and you render justice useless, by supplying its place with much nobler virtues, and more valuable blessings.' The selfishness of men is animated by the few possessions we have, in proportion to our wants; and it is to restrain this selfishness, that men have been obliged to separate themselves from the community, and to distinguish betwixt their own goods and those of others. (Treatise, 494-95)

How does self-interested conduct produce rules of justice that serve the public interest? The key is experience. Experience shows the self-defeating nature of unrestrained selfishness. A trader who cheats is shunned by customers. A person who dishonours contracts will find no willing contractors. On the contrary, those who keep their promises earn the trust of others and those who respect the person and property of others are likely to earn similar respect. Hume observed, 'as the self-love of one person is naturally contrary to that of another, these several interested passions are obliged to adjust themselves after such a manner as to concur in some system of conduct and behaviour'. (Treatise, 529; emphasis added.) Hume struck upon the evolutionary idea that rule formation is a process of habit meshing that occurs through the tendency of punishing encounters to extinguish and rewarding encounters to re-enforce behavioural patterns. (Campbell, 1965: 32-33) In Hume's words, rules of justice 'arise gradually, and acquire force by a slow progression, and by our repeated experience of the inconvenience of transgressing it'. (Treatise, 490)

Social life is made possible by the observance of common rules of conduct by individuals, at least by most of them most of the time. Since rules can only emerge from the interaction of individuals, one may be tempted to ask what came first – society or its rules.

Hume's answer anticipated modern paleoanthropology and evolutionary biology by two centuries. It was that society and its rules coevolved. It could not have been otherwise.

It is known now that the earliest human beings, and indeed their hominid ancestors lived in groups that observed a few simple rules even though they lacked the language to state them. (Hayek 1982, vol 1, 78-79) This is of course still the case with other social species. (Lorenz, 1952) The formation of social groups and the rules by which they live are inseparable. Hume thought that the first society would have been the biological family. Even this rudimentary unit needs rules to keep the peace among offspring.

If all this appear evident, as it certainly must, we may conclude, that it is utterly impossible for men to remain any considerable time in that savage condition, which precedes society; but that his very first state and situation may justly be esteemed social. (Treatise, 493)

The head of a family is still a virtual dictator who imposes order within the family group. Social order results from the interactions of independent agents who, for the most part would have been the heads of families. Hume's point was that human beings were always a social species that observed certain fundamental laws of justice that enabled them to cohabit.

Biological evolution, by scientific accounts, is a process of blind variation and selective retention. Cultural evolution, according to Hume's theory of the mind, occurs in the same manner. The human mind is incapable of foresight; hence cultural achievements are equally the result of trial and error. Rules of justice that arise from the strivings of individuals in their own interest turn out to be '*advantageous to the public; though it be not intended for that purpose by the inventors*'. (Treatise, 493; emphasis added.) Hume anticipated twentieth century growth of knowledge theories of Popper and others by showing that synthetic knowledge grows not by proving theories about the world but by conjectures and refutations. (Popper, 1963) Much of this learning happens without conscious effort. We unconsciously experiment and learn from the experience. Hume wrote: 'Experimental reasoning itself, which we possess in common with beasts, and on which the whole conduct of life depends, is nothing but a species of instinct or mechanical power, that acts in us unknown to ourselves'. (Enquiries, 108) There is no other way to learn as the mind

cannot perceive anything that lies in the future. As the twentieth century psychologist and evolutionary biologist Donald T Campbell said, 'a blind-variation-and-selective-retention process is fundamental to all inductive achievements, to all genuine increases in knowledge, to all increases in fit of system to environment.' (Campbell, 1987, p 56) This does not mean that the human mind is a passive receptacle or that human beings are automata. Passions motivate action and reason reveals options for action. All it means is that knowledge grows not by foresight but by trial and error. Unlike other animal species that learn by the process of life and death winnowing, human beings can construct and test theories about their world. As Popper memorably said, we are able 'to let our conjectures, our theories, die in our stead'. (1987, 152)

Fundamental Rules of Justice

According to Hume's analysis, three factors combine to produce rules of justice: (1) material needs of persons, (2) insufficient material resources and (3) self-love that is stronger than other passions such as sympathy. Take away one of these and the need for the rules of justice disappears. This is the reason why even today, resources in unlimited supply such as the bounty of the high seas and the waters of lakes are not the subject of private property rights, until of course they become depleted by over-consumption. Hume observes that of all animals, humans have the greatest wants and feeblest means to gain them. (Animals in the wild do not need fine clothes, houses and cooked food.) Humans extend their capacities by cooperation, specialisation and division of labour. This cooperation though is possible only on the basis of certain mutual forbearances.

Hume identifies three kinds of good we possess – internal satisfaction of the mind, external advantages of our body and material possession gained by industry or good fortune. He thought that of these, only the last is vulnerable. This is quite a puzzling as our mental happiness is often directly affected by what others do and say. Hume says that bodily assets can be ravished from us but the assailant does not gain an advantage. This is an even stranger assertion. Rape, enslavement and even cannibalism in some parts of the world are means by which some gain advantage by inflicting physical harm. In later passages Hume seems to suggest that our mental faculties and physical attributes are less vulnerable

than our possessions and the object of justice is to make the latter at least as secure as the former. (Treatise, 489) His main point was that only material things could be taken undamaged from persons and so may be exchanged for mutual benefit.

The last only are both exposed to the violence of others, and may be transferred without suffering any loss or alteration; while at the same time, there is not a sufficient quantity of them to supply every one's desires and necessities. As the improvement, therefore, of these goods is the chief advantage of society, so the instability of their possession, along with their scarcity, is the chief impediment. (Treatise, 487-88)

Hume's three fundamental laws of justice flow from this condition. As previously discussed, Hume does not discount altogether the passions of sympathy and affection in social life. However, the main directing passions are the pain of loss and the pleasure of gain. 'There is no passion, therefore, capable of controlling the interested affection, but the very affection itself, by an alteration of its direction.' (Treatise, 492)

Hume argued that it is impossible to maintain a society of any kind 'without justice and the observance of the three fundamental laws concerning the stability of possession, its translation by consent and the performance of promises'. (Treatise, 541) Stability of possession is the first requirement. This is achieved by recognising present possession and possession by occupation, prescription, accession, and succession. This basic rule, however, does not eliminate conflict. Since possession in this manner is mostly a matter of chance, it means that goods are not always in the hands of those who most desire them or in whose hands they are most productive. This allocational inefficiency which is a source of conflict is addressed by the rule concerning transference by consent.

This rule can have no ill consequence, in occasioning wars and dissensions; since the proprietor's consent, who alone is concerned, is taken along in the alienation: And it may serve to many good purposes in adjusting property to persons. Different parts of the earth produce different commodities; and not only so, but different men both are by nature fitted for different employments, and attain to greater perfection in any one, when they confine themselves to it alone. All this requires a mutual exchange and commerce; for which reason the translation of property by consent is

founded on a law of nature, as well as its stability without such a consent. (Treatise, 514)

There still remains a major deficiency concerning the transference of possession which is addressed by the rule concerning the performance of promises. The first two rules operate effectively when the thing that is being transferred is present before the parties. The baker exchanges the loaf for the coins that the customer offers. This is not always possible with respect to future goods or distant goods. The carpenter who wishes to make a table for a customer must have assurance that he will be paid on delivery at a future date. The customer who pays a deposit must be assured of the delivery of a table. In Hume's words, 'the commerce of mankind is not confined to the barter of commodities, but may extend to services and actions, which we may exchange to our mutual interest and advantage'. (Treatise, 520) Hence there is a need for the third law of justice that requires contracts to be honoured.

AUTHORITY OF GOVERNMENT

Most states today are the products of conquest, consolidation, confederation or other forms of territorial expansion. There are few, if any, original or 'pristine states' today. (Fried 1978, 37) In the history of the human race, the state is a recent occurrence. What we know as the sovereign nation state is even more recent. The sovereign state is considered the child of the Westphalian international order that grew out of the *Peace of Westphalia 1648* which ended the Thirty Years War. The human race for most of its existence lived in small kindred groups surviving by hunting and gathering. It was not until the emergence of agriculture that we see the semblances of a state. Nevertheless, social anthropology shows that headship institutions generally emerge with social order.

Hume was interested in the causes that led to the establishment of authority in the first instance – before, kings, conquerors, brigands, despots and democratic governments took control of existing societies. What was the need for authority at all? There are different theories of the origin of states. They include social contract theory, divine right theory, and patriarchal theory. Whatever theory one accepts, it is evident that society

predates authority. Government by definition must govern something that already exists. The idea that government is the cause of society is illogical.

As already noticed Hume rejected the social contract theory of the state on epistemological grounds. He also rejected the patriarchal theory of monarchy as historically unsound. There was no place for a divine right theory in Hume's empiricism. Government is needed because human beings have a tendency to violate the rules of justice for immediate gain in preference to long term advantage. Hume was clearly of the view that a society may function without a government at least at its infancy when possessions were too few to cause major conflict. 'The state of society without government is one of the most natural states of men, and may subsist with the conjunction of many families, and long after the first generation.' (Treatise, 541) Hume thought that the government originated not to keep peace within small communities but to deal with foreign aggression. War leads to civil disorder and in Hume's words, 'the laws, which may be well enough observed while men were calm, can now no longer take place, when they are in such commotion'. (Treatise 540) The earliest rulers would have been 'captains' who led in time of war (as in the American Indian tribes) and lost authority when peace returned. This explains, he says, why early rulers were monarchs who led in war and interfered minimally in the daily lives of subjects. Republican forms appeared only when monarchies became despotic.

Authority, of course, requires obedience or, in Hume's terms, allegiance. Allegiance cannot be the result of a social contract. The obligation to honour a contract (promise) is not natural but is conventional. It is one of the three fundamental rules of justice that experience shows are needed for peaceful life. Allegiance to a magistrate who is able to maintain the rules of justice is an independent obligation born of fact that the rules of justice (including that of keeping promises) are not always observed.

We blame all treachery and breach of faith; because we consider, that the freedom and extent of human commerce depend entirely on a fidelity with regard to promises. We blame all disloyalty to magistrates; because we perceive, that the execution of justice, in the stability of possession, its translation by consent, and the performance of promises, is impossible, without submission to government. As there

are here two interests entirely distinct from each other, they must give rise to two moral obligations, equally separate and independent. (*Treatise*, 546)

Hume's reference to magistrates in relation to government is revealing. It is worth remembering in Hume's time, the rulers' functions were limited in comparison to those of modern governments. The pervasive regulation of economic and social life was still a century away. Parliament, despite its supremacy after the Revolution of 1688 was unreformed. Ministerial responsibility for executive affairs was still owed to the Crown, not to Parliament. The chief functions of the government in theory were policing law and order, administering justice through the courts, and defending the realm. Locke's classic statement of the government's role was still influential when Hume wrote the *Treatise*.

And so whoever has the Legislative or Supream Power of any Common-wealth, is bound to govern by establish'd *standing Laws*, promulgated and known to the People, and not by Extemporary Decrees; by *indifferent* and upright *Judges*, who are to decide Controversies by those Laws; And to imploy the force of the Community at home, *only in the Execution of such Laws*, or abroad to prevent or redress Foreign Injuries, and secure the Community from Inroads and Invasion. And all this to be directed to no other *end*, but the *Peace, Safety, and publick good* of the People. (Locke 1970, 371)

Yet, Hume was conscious that government in his time was also engaged in public works that individuals, because of coordination problems, could not efficiently accomplish by themselves or in agreement with others. 'Thus bridges are built; harbours open'd; ramparts rais'd; canals form'd; fleets equip'd; and armies disciplin'd every where, by the care of government, which, though compos'd of men subject to all human infirmities, becomes, by one of the finest and most subtle inventions imaginable, a composition, which is, in some measure, exempted from all these infirmities'. (*Treatise*, 539) Hume did not live to see the expansion of government that was born of parliamentary democracy that we have come to know.

The duty of allegiance is the result of convention born of necessity. The identity of the person to whom allegiance is owed is a separate question. Hume suggests five ways in which allegiance is established: (1) long possession, (2) present possession, (3) conquest, (4)

succession and (5) positive law. Present possession and conquest are justified only where long possession and positive law do not resolve the question. (Treatise, 559 footnote 1) Succession occurs when, at the demise of the first ruler, the people offer allegiance to another person, often a descendant. Hume's view of the entitlement to authority resembles Kelsen's notion of the Basic Norm (*Grundnorm*) of the legal system existing as a matter of political reality. (Kelsen, 1967) When the traditional criteria concur and the public good does not warrant a change, the title to rulership will be unquestioned. But when claims conflict, they 'are less capable of solution from the arguments of lawyers and philosophers, than from the swords of the soldiery'. (Treatise, 562) Such are the circumstances of revolution and civil war that lead to the change of the foundation of authority. After sometime, the people will not be too concerned about the propriety of its acquisition. 'Time alone gives solidity to their right; and operating gradually on the minds of men, reconciles them to any authority, and makes it seem just and reasonable.' (Treatise, 556)

Authority though is not permanent. Since the moral basis of allegiance is mutual advantage, tyranny and oppression negate the duty of allegiance. It is not the breach of contract *per se* that ends the duty but the loss of the advantage that gave rise to it. As government 'is a mere human invention for mutual advantage and security, it no longer imposes any obligation, either natural or moral, when once it ceases to have that tendency'. (Treatise, 563) Where there is a mixed form of government allegiance is owed to the government so formed and not to a particular element of it. If therefore the King attempts to rule without the consent of the other Estates, not only the people but those other elements of the supreme authority (Commons and Lords) may resist him. Thus Hume saw justification in the Revolution of 1688 that dethroned James II and established a new though technically unlawful political order. (Treatise 564) There had been three successors to William and Mary by the time Hume completed the Treatise. Hume wrote anticipating Kelsen that 'a king, who during his life-time might justly be deemed an usurper, will be regarded by posterity as a lawful prince, because he has had the good fortune to settle his family on the throne, and entirely change the antient form of government'. (Treatise, 566)

The difference Hume and Kelsen on the basis of political authority should be noted. Kelsen sought to present a completely logical analysis of law as a system of norms separate from both morals and facts. In Kelsen's theory, the command of, say the British parliament,

that thieves must be punished is an objective fact. It expresses the subjective will of the elected group assembled in parliament. The legal norm is that thieves ought to be punished which is an interpretation of the fact. The norm continues to exist even if the thief goes unpunished, for example, by not being caught. The norm that the thief ought to be punished exists because of another norm, namely: what parliament commands ought to be done. This norm is an interpretation of the ultimate political fact – that parliament's commands are by and large obeyed. (Kelsen 1967, 210)

Hume was on a different quest – to explain how a moral obligation to obey the will of the legislator arises. Hume would agree that the expressed will of a person has no magical power to command obedience. The duty to obey arises because of a convention or artifice and the convention arises because of the coinciding experience of persons as regards its convenience. This convention endures even when rules of succession are not strictly observed provided that the public interest continues to be served.

Hume and Constitutional Design

The moral duty of citizens to obey the ruler arises from the need to enforce the rules of justice. It is not an unconditional duty. A ruler who becomes an oppressor and violator of justice forfeits the moral right to obedience although he may maintain his power by violence. Hume was not unconcerned about this problem and addressed it both in the *Treatise* and in two essays, published in 1741 and 1742 shortly after the *Treatise* appeared.

Allegiance as a moral duty is owed to the constitutionally established authority and not to any other person or body. Where political authority is divided among different organs, each organ can be expected to resist encroachments by others. Although the human mind lacks foresight, people may benefit from experience and improve their political institutions to prevent oppression. Hume believed that it is a mistake to radically change a constitutional system that has worked even though we can imagine a more perfect system. A society is not like a mechanical device that we can safely experiment and redesign. An established form of government has the advantage of being established. Hume had in mind the English constitution whose central features had survived for many centuries. The Revolution of 1688, for him, was a restoration of the subverted constitution. A wise magistrate, he wrote in *The Idea of a Perfect Commonwealth*, 'will bear a reverence to what

carries the marks of age; and though he may attempt some improvements for the public good, yet will he adjust his innovations, as much as possible, to the ancient fabric, and preserve entire the chief pillars and supports of the constitution'. (Essays, II.XVI.1)

This sentiment did not stop Hume from engaging in speculating a system of government to which he could not 'in theory, discover any considerable objection'. (Essays, II.XVI.6) In the 'Idea of a Perfect Commonwealth', he proposed an elaborate republican system of representative and divided government mediated by a system of county level assemblies. In the essay 'Of the First Principles of Government' Hume explained 'For though the people, collected in a body like the ROMAN tribes, be quite unfit for government, yet when dispersed in small bodies, they are more susceptible both of reason and order; the force of popular currents and tides is, in a great measure, broken; and the public interest may be pursued with some method and constancy'. (Essays, I.IV.8) The detail of this proposal need not detain us for what is clear from the essays is Hume's belief that the public interest, the ultimate cause of allegiance, is best served by a system of dispersed power that suppresses the pursuit of sectional interests and promotes the general interest. In his essay, 'Of the Independency of Parliament' Hume made his celebrated observation:

Political writers have established it as a maxim that, in contriving any system of government and fixing the several checks and controls of the constitution, every man ought to be supposed a *knave* and to have no other end, in all his actions, than private interest. By this interest we must govern him and, by means of it, make him, notwithstanding his insatiable avarice and ambition, cooperate to public good. Without this, say they, we shall in vain boast of the advantages of any constitution and shall find in the end that we have no security for our liberties or possessions except the good will of our rulers; that is, we shall have no security at all. (Essays, I.VI.1)

In the essay 'On the Independency of Parliament' Hume wondered how the contemporary English constitution was so successful despite the formal dominance of the Commons among the three estates. The House of Lords had yet to lose its legislative parity with the Commons. (This happened only after the enactment of the *Parliament Acts* of 1911 and 1949.) However, the House of Commons had taken control of public finance and no

money could be appropriated from the treasury or taxes imposed without its consent. The executive power belonged to the Crown but it depended on the Commons to fund the expensive business of government. The revolution had deprived the Crown of its legislative and fiscal prerogatives. The Monarch's power to refuse assent to legislation had last been exercised in 1707 by Queen Anne when she vetoed the Scotch Militia Bill. Overall the Commons' power seemed irresistible. 'How easy, therefore, would it be for that house to wrest from the crown all these powers, one after another, by making every grant conditional and choosing their time so well that their refusal of supply should only distress the government, without giving foreign powers any advantage over us!' (Essays, I.VI.5)

The key to the success of the constitution was the Crown's capacity to control members of parliament by the power of patronage. The great reforms that extended suffrage and created mass democracy were a century away. The electoral landscape was dotted with 'pocket boroughs' and 'rotten boroughs'. The system was open to royal manipulation. Historian Colin Lovell described the constitutional situation in this way.

Control of patronage lay with the crown. The number of government posts, including many sinecures and government contracts was sufficiently large for their distribution to give the crown real power. The extent to which the ruler was willing to allow a politician to allocate jobs and contracts made all the difference in the world to the loyalty he could command from his supporters, to his power as a parliamentary manager and hence as a minister. Without royal confidence, therefore, a politician had little hope of building a following in Parliament to support his claims to office. (Lovell 1962, 419)

Hume saw in this system, the key to the balance of the English constitution. 'We may ... call it by the invidious appellations of *corruption* and *dependence*; but some degree and some kind of it are inseparable from the very nature of the constitution and necessary to the preservation of our mixed government.' (Essays, I.VI.8) The virtue of mixed government in theory was its tendency to broaden sectarian interests into laws that served the general interest. In Hume's time, which some writers have called the Golden Age of the English constitution, parliament was not the forum of the distributional struggles that it became in

the twentieth century. Parliament was still mainly concerned with laws of a general nature. Ilbert wrote:

The eighteenth century was a great age of Parliamentary oratory, but it was not an age of great legislation. The territorial magnates who, or whose nominees, as knights of the shires or members for pocket boroughs, constituted the house of commons, contented themselves in the main with formulating as Acts of Parliament rules for the guidance of landowners as justices of the peace. (Ilbert 1911, 29-30)

This is the English constitution that Hume knew and connected to his theory of the mind. The convention of obedience to established authority arises from self-interest that identifies the need to maintain the fundamental rules of justice – stability of possessions, their translation by consent and the performance of promises. In Hume's time, arguably, this is what the government did for the most part.

The constitutional equilibrium of Hume's time did not survive the *Reform Acts*. The Crown gradually lost its power to manipulate the reformed parliament and ultimately lost its executive power to the ministry responsible to the House of Commons. The new equilibrium is maintained by national and international political constraints on the Commons' power as well as the strength of the judicial branch to check the excesses of executive power. The electorate today expects more of government than the maintenance of the rules of justice. It demands and receives material benefits even at the cost of violence to the fundamental laws of justice. Yet, the primary moral justification of authority remains the maintenance of the rules of justice that makes social life possible. It is hard to imagine that a government that fails in this respect will remain in power except by corruption and coercion.

Hume's theory of law and state has the great virtue of being epistemologically sounder than the social contract, divine right and patriarchal theories. In exposing the limits of human knowledge, the role of reason and the process of undesigned legal emergence, Hume inspired the tradition of evolutionary theory in social science.

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