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Introduction

David Hume was a leading figure in the Scottish Enlightenment, the period in the eighteenth century that produced new and often radical thinking in philosophy, in economics, in the sciences, in the emerging social sciences, in architecture, and in literature, among many fields.

Although he is now recognized as Scotland's greatest philosopher, Hume's philosophical writings were disdained by his contemporaries as skeptical and irreligious. In his own lifetime (1711–1776), he was probably more famous as an essayist and historian. Certainly, Hume did not then – and does not now – spring immediately to mind as a contributor to legal thought.[1] But, in fact, original jurisprudential insights are found throughout his philosophical and historical works. Indeed, Hume's approach to law and legal concepts has had a significant – if not always acknowledged – influence on modern jurisprudence.[2]

Hume was not unfamiliar with the law; he started but did not complete studies in Law at Edinburgh University:

> My studious disposition, my sobriety, and my industry, gave my family a notion that the Law was a proper profession for me; but I found an insurmountable Aversion to everything but the pursuits of philosophy and general learning.[3]

Although he may not have admitted it, Hume's exposure to the law did have an influence on him, for the conception of justice, which he situated close to the core of his moral and political writing, could not have been more juristic: for him, to be just is to abide by the rules of law. He also spent much time analyzing the prevailing social contract theories of legal obligation; he articulated a distinctive justification of private property and a parallel account of the bindingness of contract; and he wove his *The History of England* around constitutional issues and politico-legal ideas such as liberty. But a grand jurisprudential theory is not set out and must be inferred from his analysis of legal concepts and gathered from various sources.

Writings

Hume's writings include *A Treatise of Human Nature: Being an Attempt to introduce the experimental Method of Reasoning into Moral Subjects* (1739–1740), *Essays Moral and Political* (1741–1742), *An Enquiry concerning the Principles of*

[1]There is only one monograph devoted to Hume's legal theory: Allan (1998).

[2]For a discussion of the literature on Hume and the law see my "Introduction" in Mackinnon K (ed), *Hume and Law* (Ashgate Publishers, 2014), on which this entry draws extensively.

[3]Hume D, *My Own Life*, reproduced in Norton (1993) at p 351.

Morals (1751), *Political Discourses* (1752), and *The History of England* (1754–1762). While it would be difficult enough to build an articulated theory of law from such sources, the task is magnified by the fact that Hume presented different and slightly conflicting arguments in the *Treatise* and the *Enquiry*. Although it is now the *Treatise* that is seen as his most significant work, its challengingly original ideas saw him labelled as a dangerous skeptic. In response to the poor reception it received, Hume largely disowned it and reformulated his ideas in a way that made them more palatable in *An Enquiry into the Human Understanding* (1748), the afore-mentioned *Enquiry concerning the Principles of Morals* (1751), and *A Dissertation on the Passions* (1758).

All of these writings are shaped by two drivers – empiricism and skepticism – that underpin a methodology, the detailed exposition of which is not necessary for an appreciation of the value of Hume's jurisprudential ideas.

Methodology

Hume's radical reassessments of various core concepts that form the architecture of legal systems are bound together not simply by their juristic subject matter but also by a methodology of empiricism that runs throughout his whole philosophy. The key is to be found in the title – and especially the subtitle – of the *Treatise of Human Nature: Being an Attempt to introduce the experimental Method of Reasoning into Moral Subjects.* This experimental method (by which he means an empiricism that studies the workings of the mind) asserts that all knowledge is assembled in the mind from discrete particulars in the form of sensory impressions. This approach led Hume to reject innate ideas; instead we experience, firstly, impressions, which are vivid, and, secondly, ideas, which appear more as copies or abstractions of impressions. The "external reality" which is generally assumed to give rise to these is merely inferred from these.

An illustration which has relevance to law is provided by his analysis of causation. Hume challenged the view that causation is explicable by reference to unobservable forces. Instead, he asserted, when we experience a constant conjunction of pairs of events, we associate them in our minds and believe one event brings about the other. But there is no evidence that such a causal association exists in any way independently of our minds. Hume's radical presentation of causation is as a construct used to explain what we experience, not as something that exists in the world.[4]

When Hume turned to morals, he followed a similar methodology. Again starting with the impressions in the human mind, Hume came to the conclusion that "morality … is more properly felt than judg'd of."[5] Internal impressions, feelings, sentiments, and "calm" passions in the mind (rather than inherent qualities in actions

[4] *Treatise* I iii XIV p 170.

[5] *Treatise* III i 2470.

or abstract principles) drive the moral psychology that operates at the core of his moral theory. Reason does have a role in morality, but it is a secondary one: once passion has identified a desirable goal, reason can tell us how to achieve it. Here, reason is subservient to passions, sentiments, and feelings. This "experimental" method revealed that "[t]he chief spring or actuating principle of the human mind is pleasure and pain."[6] We act to bring about these in ourselves or others. When others act, our natural responses are sentiments of approval toward actions (or – ultimately – the character traits underlying them) that tend to cause us pleasure and disapproval when they cause pain. And by the operation of sympathy (a natural mechanism that allows us to experience empathetically others' feelings, and which is the key to Hume's moral psychology), we approve or disapprove, too, when others are benefited or injured. A disposition to act in such a way as to cause pleasure in others is a virtue. With a simple act of kindness, pleasure is produced directly as a result of a natural motive. Kindness or benevolence is therefore a natural virtue.

But the detailed demands of justice are more complex (e.g., requiring that an heir receives an inheritance specified in a will even if he is not morally deserving), and Hume cannot find in us any one natural motive to do all that justice requires. Yet, we do approve of just acts, even when they are counterintuitive. Thus, for Hume justice is a virtue, but he calls it an "artificial" one.

Theory of Law

Although the Enlightenment, in which Hume was a leading figure, has been described as the "Age of Reason," Hume rejected abstract (a priori) reasoning as a methodology in his law-related writing as much as he did reliance on religious faith or on a speculative teleology. So, for example, a social contract theory based on the "self-evident" proposition of "pacta sunt servanda" was no more acceptable to him than assertions of God-given natural law or a hypothesized essential goal for mankind.

Instead, he extended to jurisprudence his empirical method, with its starting point in human experience, perceptions, and feelings, and was thus drawing upon what would later become psychology and other social sciences to create an original account of law and legal institutions.

Hume can be seen as making a significant break with the natural law tradition that dominated both continental Europe and the Scotland of his day.[7] But his denial that the content of legal norms depends either on reason or on the Will of God did not drive him to a hard positivist position which might hold that laws are the arbitrary diktats of legislators or judges. Instead he viewed law as simply a social institution that was useful, the substantive rules of which were effectively institutionalized conventions.

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[6] *Treatise* III iii 1574.

[7] The leading Scottish jurist of the turn of the seventeenth and eighteenth centuries, James Dalrymple, Viscount Stair, prefaced his account of Scots Law with an accepted rationalist definition of law: "the dictate of reason determining every rational being to what is congruous with and convenient to its nature and condition." Stair, *Institutions of the Law of Scotland* (Edinburgh 1681).

It is to Hume's credit that he is not trapped in a natural law/positivist dichotomy. In his assertion that, while man-made, the rules of justice (a proxy for "law") reflect the nature of the human condition, Hume was laying the foundations for what Hart was later to present as a "minimum content theory of natural law." But it is fruitless to debate whether this makes Hume "count as" a natural lawyer or not. The answer to this question depends more on the scope of the label than on the writings of the jurist. Although he talks of the stability of property, its transfer by consent, and the performance of contracts as laws of nature,[8] they have no predetermined content, and his designating of them as natural laws seems almost metaphorical. On the other hand, the fact that laws must be shaped by their own context does not mean that, for Hume, any law is as good as another. Not only are the best laws those that are suited to their people, having emerged from their traditional customs, but good laws are general in the sense that they are consistent with what later became precepts of the rule of law. This concept is seen by Hume less as the constitutional requirement that Dicey explored, but more as an integral part of the nature of law. Following this latter analysis, this aspect of Hume's account of law can be viewed as a forerunner of Fuller's "inner morality of law."

Legal Concepts

Consistent with Hume's refusal to hypothesize, it is through his particularist analysis of various core legal concepts that the full flavor of his jurisprudence is revealed.

Justice

The aspect of Hume's legal philosophy which has attracted most attention has been his account of justice as "an artificial virtue."

At its simplest, justice is a virtue because we morally approve of "just" actions and the motives behind them; but it is artificial in that there is no natural motive (such as there is with benevolence) to comply rigidly with the general rules of justice. An individual just outcome may seem counterintuitive in that it goes against our natural sentiments: an example that Hume gives is that justice requires that a needy pauper returns goods to a rich miser if the latter has better title. Hume sets out to find an explanation of why certain acts are approved as "just."

The establishing of both the concept of justice and its content is, for Hume, a matter of empirical social science and not an abstract philosophical one. The substantive rules that are its content are not universal, but are contextual, arrived at in each society through convention. Historically, the behavior came first, was then commended, and thereby labelled as just. The initial impulse for rules is self-interest, but this is gradually replaced – through the mechanism of sympathetic appreciation of the beneficial outcomes for self and others ("public utility")[9] of following the rules – with the desire to carry out mutually approved rule-bound conduct.

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[8] *Treatise* II p 293.

[9] Hume D, *EPM* 3.11 and *EPM* App 111 para 257.

In Hume's powerful metaphor of two oarsmen in a boat adrift on a river, each is intent on promoting his own interest.[10] They do not necessarily have a shared final goal: one may be fleeing an enemy; the other may be travelling to a family reunion. However – and without necessarily discussing it, far less agreeing – each discovers that it is in his own interest to row in unison with the other. Hence a convention of pulling together emerges. The following of that convention turns out to be of mutual benefit, promoting the interest of each. There is probably also an indirect "public good" in that an efficient means has been found for crossing the river. Additionally, spectators, through sympathy, approve the rowers' disposition to observe the rules of coordination and condemn failures to do so. The rowers, too, come to appreciate and internalize that approval and disapproval. In the same way as the beneficial rowing convention is, so justice is the unintended consequence of individual actions.

Both the need for, and the content of, the rules of justice are, for Hume, circumstances-dependent. Since the paradigm rules of justice are, for him, about property, the most important circumstances that are determinative are moderate scarcity and limited altruism. Where things are superabundant (such as air), there is no need for exclusive property rights, nor for rules of justice protecting them. Equally, in times of extreme scarcity – as in a siege – the rules of justice are suspended. The rules are therefore peculiar to each society, and susceptible to change over time.

Although man-made, Hume insists that the content of the rules is not arbitrary: the rules have arisen through the individual circumstances of a particular society, and there will have been good reasons for whatever current rules have emerged. But, importantly, there is no necessary distributive principle underlying them. Nor should they be changed to comply with a distributive principle: an attempt to redistribute would be a breach of justice. Hume's refusal to endorse any specific distributive principle may be unusual in a moral philosopher, but it is worth noting that the stance that the rules should be upheld regardless of their moral content is familiar – and frequently praised when adopted by formal-style judges.

Hume does consider, but rejects as impracticable, commonly advocated distributive principles: deserts, needs, and equality.[11] All would need constant adjustment, and the beneficial certainty of inflexible rule-following would be lost if they were adopted.

While Hume's rejection of a distributive element in his account of justice is explicable, a second limitation in his account is more puzzling. Having taken as a starting point for his analysis of justice the respecting of property rules, Hume failed to extend it (except in the cases of promises and chastity) to other situations requiring just action. However, he does not explicitly rule out extending the concept beyond property rules. Indeed, later, in the *History*, Hume does consider the need to develop rules of justice to regulate and protect liberty.

Because Hume's concept of justice is a juridical (or legalistic) one, the obligation to be just is equivalent to the obligation to obey the law. The reason for respecting and following the rules of justice is not a desire to do good, but equally, it is not a fear

[10] *Treatise* III ii p 490.

[11] *EPM* III II para 154.

of sanction or force. It is not based on any agreement to obey the lawmaker. It is not because the specific act produces the greatest utility in itself. And it is not necessarily in the immediate self-interest of someone to follow them. Instead, the long-term benefit of having conventional rules and of following them emerges as the likely driver. But explaining the basis of that obligation is problematic for Hume, as is evidenced by differences between the *Treatise* and the *Enquiry*.

One of the most significant insights in Hume's moral psychology is that while the original motive upon which justice was founded was self-interest, it is not sufficient for its maintenance.[12] In the *Treatise*, that task was undertaken chiefly by sympathy, whereby we experience vicariously the benefits that others have when they are the objects of just actions, as well as the positive sentiments we feel when we benefit. Thus, we approve just actions and motives even when we do not directly benefit. In the *Enquiry*, however, the task falls to utility: we approve justice because of its overall usefulness. Both sympathy and utility can be reinforced by desire for approval and by a sense of duty.

But is that enough? Hume himself had doubts that he had found adequate and coherent grounds for obligation to justice, sufficient to persuade everyone. Hume conjures up the "sensible knave" who decides to go along with the conventional obligation of law only when it suits him (known nowadays as the "free rider"). The difficulty for Hume is, having asserted that it is in one's long-term or the collective interest to obey the law (even when doing so goes against one's immediate interest), he seems to have no argument to persuade the sensible knave to forgo his short-term interest. There are several possible arguments that Hume might use to persuade the sensible knave to conform. Perhaps a desire for approval and conformity, combined with the long-term inconvenience that the knave would experience, would suffice in all but the most extreme case (when nothing would be likely to be effective anyway). For some, their desire to be virtuous may be enough motive; but if that desire is absent, that argument fails too.

Property

As has been noted, closely bound up with justice, in Hume's mind, is property. Entitlement to property is not derived from, nor governed by, natural laws or natural rights, nor is it in the gift of a human legislator. Equally significant is that because it predates the creation of government, property is not merely the product of positive law. The circumstances in which mankind finds itself – especially the combination of human greed and relative material scarcity – lead necessarily in Hume's view to a particular form of ownership, namely, private property.

Hume points out that there is nothing inherent in an object that makes it the property of one person rather than another. We simply associate in the mind an object with an individual – its "owner." Acts of the imagination (and not rules dictated by nature) serve as the basis of the traditional principles of property:

[12] *Treatise* III II p 499.

occupation, prescription, accession, and succession. Thus, for example, when a farmer has cultivated a strip of land for a long time without challenge (and has acted as if it were his), we associate that land with him. A legal rule that gives him a prescriptive title to that land over time is consistent with that association in the mind. In looking at what is involved in having property in something, Hume's appreciation is that it lies in an (often symbolic) association in the mind between a person and an object rather than in a physical attribute of the object. This is then reinforced by the attitude/acceptance/approval of others. For example, in the case of planting a flag on a newly discovered shore in order to claim it (and the entire continent behind it!), no external change occurs: it is all in the imagination of the participants and spectators.

Promises and Contracts

Hume's treatment of promises and contracts[13] parallels his accounts of justice and property. As was the case with the following of property rules, Hume can find no natural motive to bind oneself to doing something which may turn out to be inconvenient or painful. The reason that contracts should be kept is not because of a command of God, nor that there is a self-evident a priori duty to do so, nor because legislation commanded it. But that is not to deny that promises and contracts are binding. Hume's explanation is that a social institution of promise keeping has evolved. Complying with that institution is useful and hence receives moral approval.

Hume suggests that the inconveniences of not being able to rely on future exchanges (of services as much as of goods), to use one of his examples, become apparent when I and my neighbor both lose our harvests through a failure to agree to assist each other to bring them in. The overall advantage of a practice requiring others (and, correspondingly, oneself) to commit to a future action is realized. An acting as if each promise creates an obligation becomes self-perpetuating. Again, that moral and social approval has come to be reinforced by the law.

Social Contract and the Basis of Government

The source of the bindingness of contracts had wider significance because of that stream of natural law jurisprudence which based civil society and/or government and/or positive law on an actual or hypothetical social contract. Hume considered such an explanation of "the duty of allegiance" to be ill-founded and unconvincing.[14] Hume's arguments are not only based on the lack of a natural obligation to keep contracts. He also argues that the social contract theory is unhistorical; that it could not bind subsequent generations; and that the idea of a tacit agreement is unrealistic. Hume is less individualistic than the social contract theorists, and for him allegiance to government is built up collectively over time, as a self-reinforcing practice.

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[13] *Treatise* III ii V p 516.

[14] "Of the Original Contract" in *Essays Moral Political, Literary* (ed. TH Green and TH Grose, 1889).

Influence

In the past century, many philosophers have commented on one or other of the concepts identified above. Hume's demolition of social contract theory is regularly invoked. And there is an extensive literature about his accounts of justice and property as artificial constructs. Rawls noted that his theory of justice, too, owed a debt to Hume.

But to the extent that twentieth-century jurists paid attention to Hume, it was to point out the importance of what was sometimes labelled "Hume's Law" (that ought-propositions cannot be derived from is-propositions) in challenging at least some versions of natural law theory and paving the way for legal positivism.

Perhaps an exception was HLA Hart, who based a surprising amount of his concept of law on Hume's insights: the anchoring of legal obligation in convention; the minimum content theory of natural law; the method of "descriptive sociology"; and the starting point of his account (with Honoré) of causation are prominent examples of Hume's influence.

But, equally, the modern jurist rereading Hume may be reminded variously of Bentham's and Austin's utilitarian positivism when Hume states that laws are to be praised because they promote public utility, the skepticism of the legal realists (both American and Scandinavian), and the historical school, or may see flashes of an economic analysis of law. And his demystification of property rights, contractual rights and duties, and legal obligation will appeal to more recent critical writers.

Hume, then, has had influence on subsequent jurisprudential thought. But his impact has been too often hidden, and his ideas deserve more explicit attention than they have received.

Conclusion

Despite his having apparently turned his back on the law, Hume's thinking is permeated with – almost structured by – legal concepts, values, and methods. Lawyers are certainly familiar with the challenging of what is merely asserted or is unproven, and with reverting to the primary (sensory) evidence to build up an account of what is experienced. But the hours poring over of his texts with an unsympathetic eye seem, too, to have delivered radical insights into the substantive subject.

Superficially, his approach to law and justice appears negative – against natural law, against abstract reason, for example. But this skepticism is purely methodological, a means of clearing away unwarranted assumptions and false premises.

His pioneering social scientific methodology allows Hume to escape this skepticism and delivers a novel perspective, where law is neither dictated by reason nor is the random acts of the powerful but emerges naturally through human interaction, needs, and convention. Law persists but also slowly develops, through social approval of the practice of generally following the resultant rules.

The jurist of today, untroubled by the absence of a divine reference point or by the novelty of social scientific methods, is in an unparalleled position to appreciate the genius of Hume's quintessentially modernist account of law and its concepts, in a way which his contemporaries in the Enlightenment were not.

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