



### **Legal Obligation in Hume**

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## LEGAL OBLIGATION IN HUME

There is one aspect of the thought of David Hume that seems to me to be important and topical, especially if considered in relation to two reductionist and dogmatic tendencies that are still noticeable in the general theory of law. By dogmatic I understand conceptions that are insufficiently founded on experience. The first of these two dogmatic tendencies is the emphasis placed on the notion of sanction which is viewed by some as prevailing over the concept of obligation to the point of absorbing it within itself. Law is that which the superior bodies of the dominant class impose. This doctrine has been affirmed even recently.<sup>1</sup> But the master example is given by Bentham. To say that a man has the obligation to behave in a certain way is equivalent to saying that if he does not behave so, he will experience pain (or the absence of pleasure). Legal sanction is the source from which this pain comes. Thus Bentham goes so far as to say that pain is constitutive of obligation in all its forms.<sup>2</sup> This seems to be contrary to experience and common sense. In fact, one can observe a legal obligation independently of the consideration of the consequences inherent in its violation. For this and other reasons the doctrinal tendency to give prevalence to the notion of sanction over the notion of obligation does not take account of experience and is dogmatic. Against this dogmatism one observes even today that the concept of an obligation that arises from a constriction, the concept of Zwangspflicht, is a contradictio in adjecto.<sup>3</sup>

Nevertheless, in order to avoid the contradiction inherent in the prevalence of sanction over obligation and the dependence of law on political power and on the power of those who command, it is easy to fall into a second and opposite dogmatism. This second dogmatism consists in affirming the existence of fundamental legal obligations deducible from a priori principles understood platonically

as ὄρα τῆ ψυχῆS and as vision of the mind.<sup>4</sup> But demonstrative reason, so understood, is determined exclusively through relations of ideas which, in Hume's opinion, cannot themselves constitute legal obligation. A legal system requires modifications and limitations to the passions and interests of individuals. As is well known, Hume argues that a passion and an interest cannot be modified by self-evident rational principles.<sup>5</sup> No criterion that is deducible from demonstrative reason can function as a guide to human behaviour.

Now between the two dogmatisms to which I have referred, Hume represents a third way on the basis of experience and of common sense.<sup>6</sup> The advantage offered by Hume's thought is that of showing both the distinction between and the complementary nature of legal obligation and sanction. In what follows I shall discuss what I consider to be the kernel of Hume's legal theory as contained in his conception of human nature, setting aside secondary elements that do not directly concern the subject proposed.

First: A legal system is not conceivable without setting up fundamental legal rules which, in Hume's opinion, are the rules of justice. Consequently, the discussion of law implies the discussion of justice. And the discussion of justice is part of legal theory. Here I restrict my consideration to the obligations that are expressed by fundamental legal rules which are: stability of possession, transference of possession by consent, and performance of promises. We know that, according to Hume, such rules cannot be derived from demonstrative or a priori reason but are revealed to empirical knowledge.

Second: Hume distinguishes between the setting up of legal obligation and the moral evaluation of the legal obligation. In order to grasp the peculiarity of legal obligation as compared with moral evaluation, I refer here to the constitution of legal obligation. In order to understand the third book of the Treatise, it is in my

opinion absolutely necessary to take into account the distinction between the setting up of the legal obligation and its moral evaluation.

Third: The obligations expressed in fundamental legal rules do not arise through a natural inclination but by artifice or by convention. The concept of artifice implies in Hume a specific and original concept of convention<sup>7</sup> which is at the centre of his legal theory:

*A father knows it to be his duty to take care of his children: But he has also a natural inclination to it. And if no human creature had that inclination, no one cou'd lie under any such obligation. (T518-19)*

It is important to note here the difference between the use of the word duty and the use of the word obligation to distinguish between moral duties and legal duties. In the essay entitled Of the Original Contract, Hume in fact states:

*The first (moral duties not legal) are those to which men are impelled by a natural instinct or immediate propensity which operates in them independent of all ideas of obligation and of all views, either to public or private utility.<sup>8</sup>*

In short, the constitution of moral (not legal) duty depends upon a natural inclination. Let us take instead, for example, the legal duty of performance of promises. In Hume's opinion:

*there is naturally no inclination to observe promises, distinct from a sense of their obligation; it follows, that fidelity is no natural virtue, and that promises have no force, antecedent to human conventions. (T519)*

Here we find ourselves face to face with the great theme of convention and of artifice constitutive of legal obligation.

This theme is at the centre of Hume's legal theory. His point of view is concentrated in the following passage:

*I observe, that it will be for my interest to leave another in the possession of his goods, provided he will act in the same manner with*

promises even against my immediate and present self-interest, because if no one respected their given word, I myself could not count on the behaviour of others. Since it would be impossible to live socially, it would also be impossible for me to obtain the satisfaction of any self-interest of mine. From this standpoint in certain primitive societies the legal convention is sufficient to ensure social peace. The legal obligation is sufficient; there is no need of sanctions or of governments. For this reason, Hume says: *the state of society without government is one of the most natural states of men.* (T541)

Fourth: From experience it is found that this natural situation may be completely transformed with the development of the community and the wealth of the society. The present interest in obtaining goods and wealth prevails over the common interest when *on every emergence*, urged by the liveliness of a present interest, man ceases to act for the maintenance of peace and justice. (T540) In a more and more complex modern society, it occurs obviously that not all those who in theory accept the legal convention, resist the temptation to set themselves against it. For example, Tom, while accepting, at least theoretically, the convention establishing the obligation to perform promises, yields to the present interest of not paying his debt; and thus places himself in conflict with his future interest of being able to count on the promises of others. If in fact everybody violated the obligation of performance of promises, he himself could no longer trust the promises of others, and social living would be impossible. Briefly, we can properly say here that Tom's future interest is sacrificed to his present and immediate interest.

Fifth: At this point sanction comes in as the consequence of the violation of legal obligation. Sanctions were invented as the correlative artifice to the legal convention. The convention constitutive of the obligation faces a formidable obstacle that depends upon human nature.

regard to me. He is sensible of a like interest in the regulation of his conduct. When this common sense of interest is mutually express'd, and is known to both, it produces a suitable resolution and behaviour. And this may properly enough be call'd a convention or agreement betwixt us, tho' without the interposition of a promise...Two men, who pull the oars of a boat, do it by an agreement or convention, tho' they have never given promises to each other. Nor is the rule concerning the stability of possession the less deriv'd from human conventions, that it arises gradually, and acquires force by a slow progression, and by our repeated experience of the inconveniences of transgressing it....In like manner are languages gradually established by human conventions without any promise. (T490)

This analogy between law and language seems to me to be extremely topical and significant.<sup>9</sup> The convention is not a contract because it does not imply reciprocal promises. The legal obligation to perform promises is derived from a convention that is constituted without the need to presuppose promises. This convention is not a statically conceived datum but is a process going on which reveals itself through experience. Moreover the convention is determined as a modification and alteration of individual self-interest. Self-interest in Hume's language is passion and affection. He speaks in fact of *passion of self-interest* and of *interested affection*. (T492)

Through convention self-interest is set up as common interest. Common interest is what results from processes of modification, of limitation, of control through which self-interest is susceptible to achievement (beyond its present immediacy) in a more or less proximate future. This possibility of future achievement of self-interest on the basis of the observance of fundamental legal obligations is revealed upon the least reflection (T492) to be based on observational experience.

For example, legally I am obliged to perform my

This is the narrowness of soul by which men tend to prefer the present to the remote (T537) and make self-interest prevail over common interest. Hume develops the treatment of this problem in Treatise III, II, VII. He says that men

*...cannot change their natures. All they can do is to change their situation and render the observance of justice the immediate interest of some particular persons, and its violation their more remote. These persons, then, are not only induc'd to observe those rules in their own conduct, but also to constrain others to a like regularity... (T537)*

This change of situation is an expedient that is necessary to re-establish in some way or other that prevalence of the future over the present in which the setting up and the observance of the obligation consists.<sup>10</sup> As compared with convention constituting legal obligation, sanction is thus the result of a second convention and of a second artifice. The situation in which Tom is led to prefer his present interest to his future interest is modified by the situation in which the present interest of Dick (Magistrate, Governor, etc.) may coincide with the future interest of Tom. This suffices, I think, to demonstrate Hume's originality and his topicality with respect to the contemporary debate between the opposed dogmatisms concerning the relationship between obligation and sanction. Hume shows us the complementary nature of obligation and sanction. He avoids both treating obligation in an absolute way as regards sanction, and treating sanction and political power in an absolute way as regards legal obligation.

Against all "essentialism" he bases obligation and sanction on two artifices (or conventions) which have their basis in experience and in common sense. And he argues that these artifices correspond to natural needs, that is, to the needs of human nature whose significance is exclusively inducible by means of reflection and experimental control. But if law is a kind of fulfilment of human

nature, is the need to which law corresponds exclusively reducible to observational and empirical analysis? The answer to this question is beyond the limits that I set myself,<sup>11</sup> but it corresponds to the deep problem of just what Hume understands empirical analysis to be, and, as a consequence, the status of the conception of human nature revealed by such an analysis.<sup>12</sup>

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1. Cf. e.g. R. Lucic, Théorie de l'état et du droit (Paris 1974) 84 ff. and id., "La giustizia e obiettività del diritto" (1964) 6 Rivista internazionale di filosofia del diritto 687-688.
2. J. Bentham, An Introduction to the Principles of Morals and Legislation in A Fragment of Government (ed. W. Harrison, Oxford 1948) 147ff., at 106: "...no notion can we have of either right or duty". See also id., Essay on Logic in 8 Works (ed. J. Bowring, Edinburgh 1843) 246-248 and id., Pannomial Fragments in 3 Works 217: "...obligations may exist without rights - rights cannot exist without obligations. Obligations - a fictitious entity, is the product of a law - a real entity. A law, when entire, is a command; but a command supposes eventual punishment; for without punishment, or the apprehension of it, obedience would be an effect without a cause." Cf. H. L. A. Hart, "Il concetto di obbligo" (1966) 2 Rivista di filosofia 129 ff.; N. Bobbio, "Considerazioni in margine", ibid. 237-239.
3. H. Welzel, "Naturrecht und Rechtspositivismus" in Festschrift für Hans Niedermeyer (Göttingen 1953) 293.
4. Cf. B. Snell, Die Entdeckung des Geistes (Hamburg 1955) 32.
5. Hume, Treatise of Human Nature (ed. Selby-Bigge, Oxford 1946) 463-470. For the bibliography see also L. Bagolini, Esperienza giuridica e politica nel pensiero di D. Hume (2nd ed., Torino 1967). As a matter of special interest for the relevant point see N. Capaldi, David Hume: The Newtonian Philosopher (Boston 1977) esp. 42 ff., 164 ff. For the subject specifically treated see K. Haakonssen, "Hume's Obligations" (1978) 4, No. 1 Hume Studies 72-92; D. Miller, Social Justice (Oxford 1976) 157-179.

6. Capaldi, op.cit., 42-43: "Within the rationalist model, all explanation proceeds from basic and self-evident first principles. The challenger will argue that in an important sense there can be no logic which is totally independent of the facts. Put more strongly, it can be argued that what we think are our logical principles are really abstracted from the world of common experience. The serious problem for those who insist on the factual foundation of logic is how one is to interpret the notion of abstraction. Is logic the structure already embodied in the facts, or is logic the activity of the mind applied to the facts? Starting with Ockham, there were those who argued the latter point. Logic was to be construed as the activity of the knowing mind, and since it was universally present in all men, common sense reasoning was already the depository of this structure. One could by the analysis of common sense find some, if not all, of the elements of that structure. In this sense Ockham was the founder of the continuing "common sense" tradition in British philosophy, a tradition stretching through Hume right up to contemporary linguistic analysis." Hume's first work is an "attempt to introduce the experimental method (of Newton) into moral subjects." But J. Noxon, in the conclusion of his book Hume's Philosophical Development: A Study of His Methods (Oxford 1975) 192, says: "...what seems to me certain is that mid-way in his career, when writing An Enquiry Concerning Human Understanding,...Hume decided that the student of human nature has more to learn from history than from experimental method".
7. See P. S. Årdal, "Conventions and Value" in D. Hume, Bicentenary Papers (ed. G. P. Morice, Edinburgh 1977) 51-68. See also P. Brownsey, "Hume and the Social Contact" (1978) 28, No. 3 The Philosophical Quarterly 134-148 and D. Forbes, Hume's Philosophical Politics (Cambridge 1975) 59 ff., especially as regards points of interest here.
8. Hume's Political Discourses (ed. W. B. Robertson, London 1906) 186.
9. On the other hand, as R. J. Glossop says, "Hume's ethical theory shows a sensitivity to linguistic matters such as verbal disputes and emotive evaluate meanings". See his article "Hume, Stevenson and Hare on Moral Language" in Hume: A Re-evaluation (ed. D. W. Livingston and J. T. King, New York 1976) 383. Of great importance is J. T. King's essay "The Place of the Language of Morals in Hume's Second Enquiry", ibid. 343-361.

10. The problem of the relationship of past, present, and future in Hume's legal and political theory presupposes a deeper interpretative inquiry into his conception of time such as is acutely developed by D. W. Livingston in his essay "Hume's Historical Theory of Meaning" in op.cit., 221 ff., and in his more recent brilliant article "Hume's Conservatism" in 7 Studies in Eighteenth Century Culture (ed. R. Runte, Wisconsin 1978) 223 ff.
11. See L. Bagolini, "On Hume's Theory of Justice in the Treatise and Original Contract" (1977) 63 Archiv für Rechts- und Sozialphilosophie 557-566.
12. See R. Brandt, "The Beginnings of Hume's Philosophy" in Morice (ed.) op.cit., 124, and, from another point of view, D. D. Raphael, "The True Old Humean Philosophy and Adam Smith", ibid. 36-37. According to Livingston in the essay cited in note 10, 237: "The empirical tradition, with the exception of Hume, has been profoundly ahistorical and, consequently, has not developed the conceptual tools for a just and searching criticism of historical metaphysics. In Hume's historical theory of meaning, however, and the narrative patterns of understanding he built upon it, we find an appreciation of the importance of narrative thought and a recognition of its limits."