



Hume's liberalism based on Scottish jurisprudence

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Abstract

This study develops a view of Hume's *is/ought* distinction as an extension of Scottish jurisprudence that, in turn, was influenced by Pufendorf's discussion of *entia moralia*. Further, it investigates the unique role that Hume's sentimentalism played in the production of elements in the context of liberalism under the rule of law, independently of previous philosophical traditions.

First, we observe that Hume's *is/ought* distinction corresponds to a distinction between uncivilized and civilized entities, rather than between amoral rationality and moral passions. Next, analyzing Hume's argument for "moral evidence," we find that such evidence is necessary for various activities, such as consent or trading, in the field of moral entities as civil societies. Finally, a study of Hume's stance with respect to civil and common laws shows that his moral sentimentalism, which includes the *is/ought* distinction and moral evidence, suggests a new possibility for social development that is distinct from previous rational forms of jurisprudence. From this discussion, a unique sprout of modern liberalism can be seen in Hume's theory of justice.

Keywords Scottish jurisprudence · Hume · Sentimentalism · Liberalism

1 Introduction

This paper aims to demonstrate that Hume's moral sentimentalism, which is sometimes thought of as a naïve subjectivism, has significant implications for social philosophy, as in the case of Scottish legal philosophy.

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The argument is developed over seven sections (including this introduction and the concluding remarks). Section 1 shows the similarity between Hume's theory of passions and Hutcheson's moral sense theory in terms of moral hedonism. Section 2 observes that Hume's is/ought distinction should be interpreted as corresponding to natural/artificial or uncivilized/civilized qualities rather than to a prototype of belief-desire model in philosophical psychology, based on evidence derived from the text and context. In Sect. 3, we see that the jurisprudential implications of such a distinction is related to Pufendorf's conceptions of *entia physica* and *entia moralia*. In Sect. 4, through an inquiry into Hume's usage of "moral", it will be clear that any judgments of agency can be made within the sphere of *entia moralia*. Section 5 describes how those arguments have been developed within the framework of civil law that Scottish jurisprudence has traditionally adopted to remedy defects in traditional common law. In conclusion, it becomes clear that Hume's moral sentimentalism suggests, in the context of the Scottish jurisprudence, the possibility of a liberalism that allows all passionate person to be prosperous through social development by following rules and making something new simultaneously in the legal sphere of civilized societies.

2 Sentimentalism of the Scottish Enlightenment

In the seventeenth and eighteenth centuries, British moral philosophy was dominated by two schools: Cambridge rationalism (e.g., Cudworth, Clarke, Shaftesbury, and Balguy) and Scottish sentimentalism (e.g., Hutcheson, Hume, and Smith). While these philosophical positions were entirely different according to the philosophical tradition that distinguishes reason and the passions, Cambridge rationalism seems to have brought Scottish sentimentalism to a reasonable form of sentiment based on human nature.

In *Inquiry*,¹ *Essay*,² and *Philosophiae*,³ Hutcheson, the founder of the Scottish Enlightenment, argues that a "moral sense" distinguishes good from evil, acting, in the place of reason, through feelings of approbation or condemnation. This internal sensation, sometimes called "conscience," encourages us to act morally in a manner not limited by self-interest (*Philosophiae* 1.1.10.2; 2.2.2; 2.3.1.1; 2.4.3.1). This shift from rationalism to sentimentalism seen in Hutcheson's work may have been influenced by Scottish Calvinism and the conception of natural theology—Hutcheson clearly sees this special moral sense as a gift from God that universally determines human nature: "the Determination to be pleas'd with the Contemplation of those Affections, Actions, or Characters of rational Agents, which we call virtuous" (*Inquiry*, preface, 9). Further, he notes that "[t]his natural Determination to approve and admire, or hate and dislike Actions, is no doubt an occult Quality" (*Inquiry* 2.2.7.3/180). That

¹ Francis Hutcheson, *An Inquiry into the Original of Our Ideas of Beauty and Virtue* (Hutcheson 2004). Hereafter cited as the *Inquiry*, followed by treatise, section, part, paragraph, and page.

² Francis Hutcheson, *An Essay on the Nature and Conduct of the Passions and Affections, with illustrations on the Moral Sense* (Hutcheson 2002). Hereafter cited as *Essay*, followed by page numbers.

³ Francis Hutcheson, *Philosophiae Moralis Institutio Compendiaria, with A Short Introduction to Moral Philosophy* (Hutcheson 2007). Hereafter cited as *Philosophiae*, followed by book, chapter, section, paragraph, and English page numbers.

is, the divine sense, determined by God, exceeds the ability of human rationality to understand the actions that might be necessary for public good: "Action is best, which procures the greatest Happiness for the greatest Numbers" (*Inquiry* 2.3.8/125). At this point, Hutcheson's theory of the moral sense, based on Calvinism, paved the way for the works of Scottish sentimentalists such as Hume and Smith by providing an explanation for how people with differing tastes and passions can reach one and the same truth and create affluent societies.⁴

Hume's moral sentimentalism is similar to Hutcheson's sentimentalism at many points, setting aside any relation to Calvinism. The chief commonality is the analogy between morality and beauty found in their hedonism. Hutcheson compares virtues and beauty as inner satisfactions (*Inquiry*, preface/10). Actions are evaluated morally due to such satisfactions because the moral sense conveys a moral pleasure that such satisfactions include in their evaluations of rightness and beauty (*Philosophiae*, 1.1.10.2/35). This evaluative sense, which Hutcheson calls moral perception, is a kind of pleasure in affections or sentiments that are reflected upon in ourselves or observed in others (*Essay* 1.1.3/16–17).

This feature is seen in Hume's discussion of passions as well. In his distinction between calm and violent passions, "the sense of beauty and deformity in action, composition, and external objects" are examples of the former, which are stable and somewhat objective. Similar to Hutcheson, Hume's moral sentimentalism depicts this sense as "particular pains and pleasures" (T 3.1.2.3/471)⁵ or "certain peculiar sentiments of pains and pleasures" (T 3.3.1.3/574). In this regard, moral approbation necessarily includes a unique pleasure: "[o]ur approbation is imply'd in the immediate pleasure they [judgments of beauty or sensations] convey to us" (T 3.1.2.3/ 471). Thus, in *Enquiry*, "[t]he hypothesis which we embrace is plain. It maintains that morality is determined by sentiment. It defines virtue to be *whatever mental action or quality gives to a spectator the pleasing sentiment of approbation*; and vice the contrary" (EPM 289).⁶ Therefore, in one respect, Hutcheson and Hume seem to put forward a moral hedonism; in another, they espouse a phenomenology that draws moral knowledge from the sensations of beauty or deformity that are experienced in consciousness.⁷

As the Scottish Enlightenment further emphasized the role of sentiments or the passions, Hume's distinction between "is" and "ought" became an extension of this role (T 3.1.1.27/469).⁸ Here, the "is" governs thought or understanding concerned with relationships of objects or of matters of fact, such as mathematics, logic, or

⁴ M.A Stewart indicates the influence of Calvinism on the Scottish enlightenment (Stewart, 2019).

⁵ References to the Treatise are to David Hume, *A Treatise of Human Nature*, eds. David Fate Norton and Mary J. Norton (Hume 2000). Hereafter cited as T, followed by book, part, section, and paragraph with pages in the Selby-Bigge and Nidditch editions.

⁶ References to the Enquiry are to David Hume, *An Enquiry Concerning the Principle of Morals*, ed. T.L. Beauchamp (Hume 1999). Hereafter cited as EPM, followed by page numbers in the Selby-Bigge and Nidditch editions.

⁷ Gill observes that moral phenomenology is common to Hutcheson and Hume, calling it "the occurrent phenomenal presence claim." See Gill (2009), p.572.

⁸ Hutcheson denotes that the content of moral sense is neither propositional nor concrete (*Inquiry*, 2.1.8.2/100). Here he appears as a precursor of Hume, who divides knowledge into "is" and "ought."

causal inference in nature: “Reason or science is nothing but the comparing of ideas, and the discovery of their relations” (T 3.1.1.24/466). Meanwhile, the “ought” indicates virtues or vices as values or norms that are projected onto the “is”, depending on the situation and sentiment: “if the same relations have different characters, it must evidently follow, that those characters are not discover’d merely by reason [but by passions],” such as in the distinction between when a sapling destroys its parent tree and when a child murders their parent (T 3.1.1.24/466–467).

While this distinction has frequently been considered to be an extreme instance of sentimentalism, representing the distinction between reason and the passions as one between amoral and moral ability, as in contemporary metaethics, I think that placing this distinction in the context of Scottish jurisprudence shows another meaning.

3 Is/ought distinction

Let us consider what Hume is doing with his is/ought distinction. First, the “is” refers to matters of fact, whereas the “ought” means a mental state of values or morals that are added to “is” qualities:

Nor does this reasoning only prove, that morality consists not in any relations, that are the objects of science; but if examin’d, will prove with equal certainty, that it consists not in *any matter of fact*, which can be discover’d by the understanding. (T 3.1.1.26/468)

From this, Hume proceeds immediately to the next section, “Moral distinction derive’d from a moral sense” (T 3.1.2), where he demonstrates that moral judgments are made by a moral sense in the mind, rather than in nature, and that this moral sense is dealt with by practical philosophy. Following this, Hume draws a distinction between natural and artificial virtues in T 3.2.1, corresponding to the distinction between innate morals in nature and artificial morals in civil society; he then discusses “the origin of justice and property” in T 3.2.2. If we trace the flow of these arguments, we find that Hume’s is/ought distinction reflects the distinction between the worlds of nature and civil society, where a range of concepts, such as property rights and contracts, must be rooted in the latter. The following quote concisely demonstrates this notion:

In vain shou’d we expect to find, in *uncultivated nature*, a remedy to this inconvenience, or hope for any inartificial principle of the human mind, which might control those partial affections, and make us overcome the temptations arising from our circumstances...The remedy, then, is not derived from nature, but *artifice*, or more properly speaking, nature provides a remedy in the judgment and understanding, for what is irregular and incommodious in the affections... they must seek for a remedy, by putting those goods, as far as possible, on the same footing with the fix’d and constant advantages of the mind and body. This can be done after no other manner, than by a convention of those external goods, and leave every one in the peaceable enjoyment of what he may

acquire by his fortune and industry. By this means, every one knows what he may safely possess; and the passions are restrain'd in their partial and contradictory motions. (T 3.2.2.8-9/488–489)

Hume's is/ought distinction appears to correspond to the distinction between uncivilized and civilized society rather than that between objective and subjective values, though it has a role for the passions in giving rise to values and concepts, which is not seen in the natural state.⁹

If Hume's is/ought distinction and the metaphor of the slave, "reason is, and ought to be the slave of the passions" (T 2.3.3.4/415) are interpreted together, this would imply a prototype of belief/desire model that is often used in meta-ethics. The belief/desire model is a kind of theory of action and motivation, based on practical reasoning. It has been developed under the influence of Davidson's action theory insisting that motivating reasons are causes and they necessarily include any pro-attitudes (Davidson, 1963). The model has gradually come to be called "Humean theory of motivation", as it became the main topic argued between Humeans and anti-Humeans (See Smith, 1987). In this context, the model is understood insisting that a belief on its own cannot motivate an agent whereas one can be motivated by his/her own desires. It may be understood as the appearance of Hume's subjectivism because it seemingly implies that each agent is respectively motivated only by their own desires or passions.

However, it is more plausible to interpret it as mirroring the uncivilized/civilized distinction, similar to the distinction between a state of nature, in which no one has property rights, and civil society, in which everyone has them guaranteed legally. This interpretation is supported by Hume's discussion of property rights:

In all these cases, and particularly that on accession, there is first a *natural* union betwixt the idea of the person and that of the object, and afterwards a new and *moral* union produce'd by that right or property, which we ascribe to the person (T 3.2.3/510, fn).

Next, let us examine the background of the is/ought distinction. We can therefore analyze not only Hume's criticism of rationalism but also the tradition of Scottish jurisprudence.

4 Entia moralia

Although Hume's is/ought distinction is seemingly intended to demonstrate that reason is inert while the passions are active in producing moral evaluations, this distinction implies another comparison—that between nature and civil society.

⁹ He also says that "[t]hus the distinct boundaries and offices of *reason* and of *taste* are easily ascertained. The former conveys the knowledge of truth and falsehood: the latter gives the sentiment of beauty and deformity, vice and virtue. The one discovers objects as they really stand in nature, without addition or diminution: the other has a productive faculty, and gilding or staining all naturel objects with the colours, borrowed from internal sentiment. Raises in a manner a new creation" (EPM 294).

As is well known, Hume rejects the Hobbesian state of nature due to its exaggeration of selfishness, which draws human beings as “monsters, which we meet with in fables and romances” (T 3.2.2.5/486); likewise, Hume denies the Lockean social contract in the state of nature, pointing out that “a promise is not intelligible naturally, nor antecedent to human conventions; and that a man, unacquainted with society, cou’d never enter into any engagements with another, even tho’ they could perceive each other’s thoughts by intuition” (T 3.2.5.2/516). For Hume, the state of nature, in which anyone can make any social contract based on their own natural rights, is a “mere philosophical fiction” (T 3.2.2.14/493), for such rights do not exist in the state of nature but only in civil societies. Notably, this criticism of social contract theories based on natural law and rights is not only found in Hume’s thought but also goes back to the Scottish jurisprudence that accepted Pufendorf’s jurisprudence and adopted it in their sentimentalism.

Although Pufendorf advocates the natural law theory in the same way as Grotius and Hobbes, in *De Jure Naturae et Gentium* of 1672 (hereafter, JNG),¹⁰ he holds that some rights are not natural; these rights are superadded to humans to govern their conduct and duties in civil society. Here, he distinguished between *entia physica* and *entia moralia*, or physical entity and moral entity, asserting that people are obligated not to violate another’s property under the individual property system in *entia moralia*. This field is where people can act freely and take responsibility for their own actions.

We may define our *moral Entities* to be *certain Modes superadded to natural Things and Motions by understanding Beings, chiefly for the guiding and tempering the freedom of voluntary Actions, and for the procuring of a decent Regularity in the Method of life*. We call them *Modes*, because we conceive *Ens*, or *Being*, in general, to be more conveniently divided at large into *Substance* and *Mode*, than into *Substance* and *Accident*. (JNG 1.1.3, trans: italics present in the original)

The distinction between the physical and moral entity corresponds to the distinction between absolute and hypothetical natural law. Pufendorf asserts that people establish institutions to guarantee their property rights, which are based on *Covenant* (JNG 2.3.24), and impose civil duties on them by *Sign* (JNG 4.1.5). This reminds us of Hume’s distinction between natural and artificial virtues and his argument that in justice, as an artificial virtue, we can understand promises and property rights only under a *certain form of words* that is unique and important in that it must be invented only in civil society rather than in the state of nature. (T 3.2.5.10/522). Further, he adds that “the will or consent alone never transfers property, nor causes the obligation of a promise (for the same reasoning extends to both) but the will must be expressed by words or signs, in order to impose a tie upon any man” (EPM 199, fn). Here, we

¹⁰ References to the translated version of *JNG* are to Samuel Freiherr von Pufendorf, *The Law of Nature and of Nations in Eight Books* (Pufendorf 2005), trans. Basil Kennett D.D, followed by book, chapter, and section numbers.

find a similarity between Hume's theory of justice and Pufendorf's discussion of a moral entity.

It comes as no surprise that Hume was influenced by Pufendorf, as eighteenth century Scottish jurisprudence drew upon Pufendorf's natural law theory and Roman civil law.

Gershom Carmichael, the first chair of moral philosophy at the University of Glasgow, used Pufendorf's text in his lectures and published it with extensive annotations and commentary in 1718 (Glasgow edition) and 1724 (Edinburgh edition). Hutcheson, Carmichael's successor at the University of Glasgow, seems to have accepted Pufendorf's thought and arranged it to suit his theory of the moral sense. He criticizes the Lockean theory of occupation in the state of nature as follows: "[t]he difficulties upon this subject arise from some confused imagination that property is some physical quality or relation produced by some action of men" (*System* 2.6, 318). Here, public interest in institutions requires people to not violate others' property rights. In this case, people with the moral sense necessary for public good feel disapproval of the violation of another's:

From these strong feelings in our hearts we discover the right of property that each one has in the fruits of his own labour; that is, we must approve the securing them to him. Where no public interest requires the contrary... Whatever institution therefore shall be found necessary to promote universal diligence and patience, and make labour agreeable or eligible to mankind, must also tend to the public good; and institutions or practices which discourage industry must be pernicious to mankind. (*System* 2.6/320–21)¹¹

For Hutcheson, the violation of another's property as an infringement of ownership must be disapproved of in terms of civil feelings. Of course, although this behavior is opposed to the command of reason and God's will in nature, what we can note here is that it must receive moral disapproval in the feelings or sentiments that aim at public interest in civil society. This can be seen in Hutcheson's distinction between natural rights, such as that to one's life and body, and artificial rights, which are guaranteed in any institution: "Private rights are either *natural* or *adventitious*. The former sort, nature itself has given to each one, without any human grant or institution. The adventitious depend upon some human deed or institution" (*Philosophiae* 2.4.2.3/129). Here, we can see the influence of Pufendorf's distinction between absolute and hypothetical laws, corresponding to that between natural and moral entities. As Pufendorf and Hutcheson propose, moral entities tend to achieve social development, while natural entities are the basis of human societies. We should emphasize here that property rights and pacts or conventions in institutions are tied to moral entities in both theories. This trend seems to have been a feature of Scottish jurisprudence in the eighteenth century because Adam Smith, the fourth chair of moral philosophy at the University of Glasgow, explains in *The Theory of Moral Sentiments*

¹¹ Francis Hutcheson, *A System of Moral Philosophy in Three Books* (Hutcheson 2018), book, chapter, and page numbers following.

that there are degrees of illegitimacy of violations of others' rights based on the gradation of laws:

The most sacred laws of justice, therefore, those whose violation seems to call loudest for vengeance and punishment, are the laws which guard the life and person of our neighbour; the next are those which guard his property and possessions; and last of all come those which guard what are called his personal rights, or what is due to him from the promises of others. (TMS 2.2.2.2/121)¹²

Hume's is/ought distinction seems to be in line with this argument of Scottish jurisprudence. In his criticism of an opposing idea that holds that justice is a natural virtue, as held by natural law, he says that "[t]hose rules, by which property, right, and obligation are determin'd, have in them no marks of natural origin, but many of artifice and contrivance" (T 3.2.6.6/528). For Hume, as for Pufendorf, property rights, as a moral entity, are simply profit derived from projecting their relation onto natural entities and people, as follows.

As property forms a relation betwixt a person and an object, 'tis natural to find it on some preceding relation; and as property is nothing but a constant possession, secur'd by the laws of society, 'tis natural to add it to the present possession, which is a relation that resemble it. (T 3.2.3/504-5, fn)

For Hume, it is natural to derive the idea of property from human nature, although this is done in a way that differs from natural law theory. In the former meaning, Hume says that.

Tho' the rules of justice be *artificial*, they are not *arbitrary*. Nor is the expression improper to call them *laws of nature*; if by *natural* we understand what is common to any species, or even if we confine it to mean what is inseparable from the species. (T 3.2.1.19/484)

At any rate, Hume distinguishes between natural and moral objects and explains that property rights in civil society belong to the latter. Elsewhere, similar to Pufendorf's suggestion that property brings moral effects without a change in physical substance (JNG 4.1.1), Hume indicates that the meaning of natural things such as fruits or houses can change depending on the situation like a "superstition," although property rights are much more useful than superstitions (EPM 199).

Regardless of this similarity to Pufendorf's argument for moral entities, Hume distances himself from rationalism and natural law theory, unlike Pufendorf.¹³ Instead

¹² Adam Smith, *The Theory of Moral Sentiments* (Smith 2000). Hereafter referred to as TMS with part, section, chapter and page numbers following.

¹³ Smith criticizes Pufendorf's natural law theory as casuistry (TMS 7.4.11/487), because Smith argues that such natural jurisprudence, like the casuists in the Christian church, "do not content themselves with characterizing in this general manner that tenor of conduct which they would recommend to us, but endeavour to lay down exact and precise rules for the direction of every circumstance of our behaviour" (TMS 7.4.7/485).

of this approach, he moves closer to practical civil law. To show this, we move to Hume's concept of agency.

5 Moral evidence and the figure of agent

Hume criticizes the metaphysical entities that rationalism supposes in *Treatise*, Book I, and elucidates in Book II that every agent with their own will who acts freely must be motivated not by reason but by passions, even if reason may contribute to the accomplishment of the purposes of the subject's passions, in the way a slave or servant may carry out a master's purpose. These critiques of rationalism are connected to criticisms of English social contract theory, namely, that just societies cannot be created by any contract of rational agents in the state of nature. To examine this closely, let us focus on Hume's argument concerning "moral evidence" in *Treatise*, Book II, Part III.

Hume distinguishes between the liberty of *indifference* and that of *spontaneity* (T 2.3.2.1/407); he denies that the former grounds civil liberty but acknowledges the latter. For Hume, the liberty of indifference is a false sensation or experience motivated by the desire to show our liberty (T 2.3.2.2/408). Hume denies that this represents the ideal agent of rationalism who determines every action on their own, independently of any other factor. The agent cannot be a bearer of civil society in reality:

The necessity of any action, whether of matter or of the mind, is not properly a quality in the agent, but in any thinking or intelligent being, who may consider the action, and consists in the determination of his thought to infer its existence from some preceding objects. (*Ibid*)

This means that the actions and figure of an agent must be understood from considerations of determination based on preceding objects. Hume calls this "moral evidence" (T 2.3.1.15–17/404–406).

He calls this "nothing but a conclusion concerning the actions of men, deriv'd from the consideration of their motives, temper and situation" (T 2.3.1.15/404–405). However, regardless of this underdetermination, Hume is positive in acknowledging the other liberty, that of spontaneity: "the same kind of reasoning runs thro' politics, war, commerce, œconomy, and indeed mixes itself so entirely in human life, that 'tis impossible to act or subsist a moment without having recourse to it" (T 2.3.1.15/405). This supposes that a subject with the liberty of spontaneity is an agent who can conclude a contract and be responsible for their actions under the rule of law. Just as people cannot survive without the use of causal inferences in nature, they cannot live and enjoy the protection of the laws without moral evidence in civil societies. This comparison shows a correspondence between natural and moral entities.

And indeed, when we consider how aptly *natural* and *moral* evidence cement together, and form only one chain of argument betwixt them, we shall make no scruple to allow, that they are of the same nature, and deriv'd from the same principles. (T 2.3.2.17/406)

For Hume, moral evidence is a necessary condition to understand the figure of the moral agent who lives under laws.

[N]ot only 'tis impossible, without the necessary connexion of cause and effect in human actions, that punishments cou'd be inflicted compatible with justice and moral equity; but also that it cou'd ever enter into the thoughts of any reasonable being to inflict them. (T 2.3.2.6/411)

We should note that here, “moral” means “character” or “legal” rather than “ethical.” This is why a free agent who is acknowledged as such by the moral evidence can be qualified as a party with property rights in civil societies in the sphere of a moral entity and civil law. However, although Hume’s theory of justice seems to correspond to Pufendorf’s natural/moral entities thus far, it has unique features and provides important insights into Hume’s legal position, which differs from that of Pufendorf.

Hume’s argument regarding moral evidence implies the fundamental fact that although the parties are supposed to be agents with free will by moral evidence, they are actually not rational but can take part in co-operative activities, such as production and trading, due to their obedience to justice based on sympathy. Thus, the property rights of emotional people can be objects of legal protection. This sentimentalism is entirely different from Pufendorf’s theory of natural law, which is based on rationalism under God’s authority. In addition, another important comparison is notable, namely, that between civil law, which regards the intention of agents to consent, and common law, which places less emphasis on the intention than on the fact. Hume and other philosophers, such as Lord Kames and Adam Smith, who think about Scottish jurisprudence as influenced by civil law, paid particular attention to a factor such as moral evidence. It is a key concept to overcome premodern social systems, which should be changed to allow for the achievement of a modern society through freedom and commercialization.

6 Civil law and common law

Adam Smith, who distinguishes between property and personal rights in the context of civil law, criticizes the irrationality of entailment as found in common law because it disregards the occupation of land and never allows it to be freely traded. In the eighteenth century, if land was transferred in accordance with an entail, it could be passed to an indirect family member who may have lived in a distant place without ever occupying the land. Like Smith, Hume regards actual occupation as implying property rights (T 3.2.3.5-7/505–506), and he implicitly criticizes entailments as an abnormal succession system (T 3.2.3.11/510–513, T 3.2.5.8/510–521). For Hume, common law that restricted the trading or transfer of properties of entailment was a deviation from human nature because it was far beyond individual property systems, such that agents with free will could not make decisions to transfer or sell regardless of that those were their properties. It was inconvenient not only for non-owners who were hoping to use or live on the land but also for the owner.

Tho' possession be *stable*, men may often reap but small advantage from it, while they are possess'd of a greater quantity of any species of goods than they have occasion for, and at the same time suffer by the want of others. The *transference* of property, which is the proper remedy for this inconvenience, cannot remedy it entirely; because it can only take place with regard to such objects as are *present* and *individual*, but not to such as are *absent* or *general*. (T 3.2.2.8/521)

Smith calls the entail system of common law that was in effect, which restricted or prohibited transfer without concern for agents' intentions, as clearly irrational and an obstacle to social development, as the land would be cultivated or improved if the property of the land could be converted to anyone else (LJ(A), ii. 1).¹⁴ The same is true of Lord Kames as well.¹⁵ For Scottish philosophers in the mid-eighteenth century, the system should be changed in the legal context of civil law, because the system had deviated too far from human nature to ensure the affluence of the civil society. In this context, the figure of the free agent that Hume delineated with moral evidence implies a bearer who can sustain civil societies in the sphere of the moral entity, in contrast with the figure that rationalism or the traditional common law theory supposes in the stubborn and worn-out social system.

However, we meet a different figure in Hume's convention. Common law in 18th century had already allowed farmers to freely take part in and utilize common fields in exchange for rent. Whether with farming or grazing, people tried to profit as much as they could. However, sometimes they could not help cooperating with each other in a small land, as Hume says:

Two neighbours may agree to drain a meadow, which they possess in common; because 'tis easy for them to know each others mind; and each must perceive, that the immediate consequence of his failing in his part, is, the abandoning the whole project. (T 3.2.7.8/538)

This is an example of convention according to which free agents can cooperatively maintain the general utility for each property under the protection of law. Here, Hume's theory of justice and convention seems to conform to the forms of common law prevalent in his time (Jensen 2022). Postema holds that Hume's theory of justice, which considers that a social constitution necessary for property rights must include common law as well,

To this extent, then Hume identifies justice with rules defining property...Justice, so understood, defines a *social* constitution, the 'fundamental law' of a society. Viewing property in this way, Hume simply reflects the dominant Com-

¹⁴ Adam Smith, *Lecture on Jurisprudence*, eds. R.L. Meek, D.D. Raphael, and P.G. Stein (Smith 1982). Hereafter, LJ(A), with volume and lecture numbers followed.

¹⁵ In response to the statute of 1685 enacted in Scotland, Lord Kames observes, "That entails are subversive of industry and commerce, is not the worst that justly can be said of them" in Henry Homes, Lord Kames, *Historical Law-Tracts* (Kames 2019), p.116.

mon Law view. Feudal law, and the modern Common law which developed out of it and which structured British society, was in origin and basic outline a law of property. (Postema, 1986: 102–103)¹⁶

Certainly, Hume’s idea of convention is similar to the history of common law in terms of its spontaneous development without explicit institutions and social contracts,¹⁷ just as the parties seem to be agents who have the liberty of spontaneity rather than being rational agents who never changed or were influenced by anything.

Hume considers that the activity of agents who are motivated by passions produces convention; property, in their human nature, is the basis of cultivated society, either in the context of common or civil law or in that of English or Scots law. In the eighteenth century, Scottish jurisprudence was informed by various legal factors, such as common law,¹⁸ equity,¹⁹ and civil law. Here, Hume depicts, through a moral sentimentalism that appears radical, the possibility of developing Scottish societies into the sphere of moral entities, wherein the freedom of people as agents of free will can ensure profits and property rights in their production, trading, and contracts.

All things considered, Hume’s is/ought distinction emerges from a unique form of Scottish jurisprudence that was influenced by Pufendorf and liberalism rather than a naïve form of moral subjectivism or the foundation of the belief/desire model in contemporary metaethics. Although Hume’s sentimentalism is certainly radical enough to be interpreted as skepticism or anarchism, he takes pains to demonstrate the compatibility of the rule of law with civilized societies based on freedom and trading.

7 Conclusion

As Hume’s is/ought distinction implies a distinction between reason and passion corresponding to the fact/value distinction, there can be no doubt that he prioritizes the role of passions, in contrast with the tradition of rationalism, in terms of its making societies affluent. Even with respect to the topic of religions, in “Of Superstition

¹⁶ However, Postema notes that Hume’s “legal training, which was substantial, would have been largely in Scots law, not English Common Law, and there is much evidence of this influence in his writings” (Postema, 1986: 88).

¹⁷ However, this necessarily means that Hume thinks that conventions as a kind of common law, as he insists that “[i]n general, we may observe that all questions of property are subordinate to the authority of civil law, which extend, restrain, modify, and alter the rules of natural justice according to the particular *convenience* of each community. The laws have, or ought to have, a constant reference to the constitution of government, the manners, the climate, the religion, the commerce, the situation of each society” (EPM 196). For him, civil law should function using analogies, imagination, and utility, rather than rationality (EPM 195–196). Therefore, it appears that his theory of justice is explained by convention.

¹⁸ Smith regards English common law highly, as “being more formed on the natural sentiments of mankind” than the law of any other nations in Europe (LJ(A), ii. 74–75), while introducing the advantage of civil law.

¹⁹ Kames, in *Principles of Equity* (Kames 2014), emphasizes the use of a court of equity to remedy the imperfection of common law while acknowledging common law as a general rule.

and Enthusiasm,” he has a high opinion of religious passions connected to freedom: “Superstition is an enemy to civil liberty, and enthusiasm a friend to it” (EMPL 78).²⁰

However, he warns against the excesses of freedom, in the same way as Edmund Burke:

But the people must not pretend, because they can, by their consent, lay the foundations of government that therefore they are to be permitted, at their pleasure, to overthrow and subvert them. There is no end of these seditious and arrogant claims. (EMPL 499)

Moreover, it would be dangerous for all citizens if merchant activity as civic freedom had a huge influence on national finance.²¹ The field of passions includes not only positive possibility but also risk, as Hume suggests that violent confrontations between parties may occur because of the variety of passions and interests: “*Real* factions may be divided into those from *interest*, from *principle*, and from *affection*” (EMPL 59). For these reasons, Hume holds that it is necessary for politicians, judges, and ordinary citizens to take a neutral viewpoint in general: “In order therefore, to prevent those continual *contradiction*, and arrive at a more *stable* judgment of things, we fix on some *steady* and *general* points of view” (T 3.3.1.15/581-2).²² However, there is no guarantee that such a general point of view can be established or function regularly to solve such confrontations. Therefore, he proposes a mixed government, such as the British one, as an ideal that can accomplish a good balance without partiality to any parties under the rule of law.

On the whole, Hume seems somewhat optimistic in his belief in the possibility of freedom, as seen in his discussion of “Of the Liberty of the Press” or “Of the Rise and Progress of the Arts and Sciences” in EMPL, presenting an expectation that many things would come about and enable people to enjoy an abundance of resources in civilized society. Of course, such a society, as the sphere of the mental entity, includes various possibilities of changing civil life, beneficially or dangerously or, alternately, virtuously or viciously. However, for Hume, it is important that citizens can be secured and guaranteed maxima freedom without oppression unless public interest is seriously damaged. This is the very business of the fundamental law (EPML 118). Hume’s sentimentalism, along the lines of Scottish jurisprudence, demonstrates such a vision, which contrasts with that of English rationalism.

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²⁰ David Hume, *Essays, Moral, Political, and Literary*, revised edition by E.F. Miller (Hume 1985). Hereafter referred to as EMPL, followed by page numbers in Miller’s edition.

²¹ “The source of degeneracy, which may be remarked in free governments, consists in the practice of contracting debt, and mortgaging the public revenues, by which taxes may, in time, become altogether intolerable, and all the property of the state be brought into the hands of the public” (EMPL 95).

²² In another discussion, when a person denominates another as vicious or depraved rather than as an enemy or adversary, the person “must here, therefore, depart from his private and particular situation, and must choose a point of view, common to him with others” (EPM 272).

Declarations

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