

The Ideal of Liberty in the Political Philosophy of David Hume

DANIEL GETE GARRIDO

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Abstract

There have been two major themes in recent studies of Hume's political philosophy: on the one hand, the implications, the nature, and the extent of Hume's anti-rationalistic scepticism; and on the other hand, his continuation of and contribution to the natural law tradition, as it had been generally developed in the late seventeenth century most notably by Grotius and Pufendorff, and in the direction it took within the Scottish Enlightenment in particular. Though these two aspects cover a substantial part of Hume's work, it has been particularly difficult to place Hume in the context of another major way of thinking about politics, what has been called the Civic Humanist or Republican tradition, which runs parallel to the jurisprudential tradition though often clashing with it in a way that it still debatable and problematic to determine. Though Hume's entirely secular moral theory is rightly regarded as revolutionary (in philosophical terms) his politics are considered rather conservative and entirely devoted to the principles of peace and stability as central to commercial modernity. From this it would follow that the question of political freedom and free government, especially in regard to its republican understanding, should be a marginal interest in Hume.

In fact, what we find is that Hume actively engages in a crucial question that preoccupied the minds of previous generations of Scottish thinkers, most notably Andrew Fletcher, no less than the post-Union one, in which he belongs: that is the question of whether virtue, as the requirement of personality in the civic humanists' sense, has any place, and if so which one, in a modern commercial world; or, in its more immediately political sense, whether political freedom, understood as the status of a free individual not as a civil right, has any realistic or desirable role to play. Though Hume's answer to both questions is a resounding 'no' (civic virtue and full exercise of citizenship is possible only in warlike and slavery-based societies) the fundamental insight of republicanism, namely government by law, is not only incorporated into his theory but occupies a central place. First, Hume's utilitarian-evolutionary account of ethics can, in

part, be understood in this context as an assault on the civic humanist or classical republican conception of virtue. Secondly, Hume's realization—central to his political thought—that modern 'civilized monarchies' represent an entirely new political phenomenon, that they mark the new paradigm of government by 'general and inflexible' laws, can be understood as a criticism of the classical republican understanding of politics associated with citizenship, political liberty (as opposed to civil) and the 'active life'.

However, despite Hume's thorough criticism of classical- and other forms of republicanism, namely Whig contractualism, I argue that Hume's concept of liberty remains essentially republican: liberty is for Hume the absence of arbitrariness guaranteed by the rule of law, not absence of interference, as in Hobbes. Having argued that modern politics, including the politics of a republic, consists in a perpetual balance between liberty and authority, Hume does not need to radically reform the traditional concept of liberty, because it is no longer the single most important principle. The republican understanding of liberty holds that we might be rendered unfree not only by the actual exercise of interference, but by our being subject to the arbitrary power of someone else, by our being under his domination, by our freedom being dependent on someone else's will. It is as important to ascertain the target of Hume's criticisms as their extent. Hume's revision of contemporary forms of republicanism does not entail a renunciation of the basic republican understanding of freedom but an adaptation of it to the conditions of modern commercial civilization.

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Abbreviations

David Hume:

THN – A Treatise of Human Nature (Oxford: Oxford University Press, 2000, Ed. by David Fate Norton and Mary J. North)

EHUM – An Enquiry Concerning Human Understanding and Concerning the Principles of Morals (Oxford: Clarendon Press, 1955, ed. and Int. L. A. Selby-Bigge)

EMPL – Essays Moral, Political and Literary (Indianapolis: Liberty Fund, 1987)

DNR – Dialogues Concerning Natural Religion (Edinburgh: William Blackwood, 1907)

HE – The History of England, from the Invasion of Julius Caesar to The Revolution in 1688 (Indianapolis: Liberty Fund, 1983), vol. I - VI

LETT – The Letters of David Hume (ed. J. Y. T. Greig, Oxford: Clarendon Press, 1932) v. I and II

Secondary sources:

TCL – Isaiah Berlin, Two Concepts of Liberty (Oxford: Oxford University Press, 1958)



Introduction

Hume's politics as a citizen of Eighteenth century Britain and Hume's politics *qua* philosopher depart from each other in some important respects. My concern here is to examine the latter, that is, his philosophical ideal of political freedom, leaving aside, as far as this is possible, his more controversial and ambivalent attitude to the contemporary practice of political freedom and the developments of British liberty which he witnessed.¹ In particular, I shall avoid the question of the nature and development of Hume's political views as a participant in the debates over national debt and Whig radicalism during the 60's and 70's crises, which, as has been suggested, reinforced the 'Tory' or 'country' aspects of his politics.²

This division is by no means neat. Hume's view of contemporary politics, his relative sympathy for the government side in the ideological clash between commercial modernity and neo-Harringtonian politics (that is, between Walpole's patronage-based administration and the opposition led by Bolingbroke, the nostalgic politics of ancient constitutionalism) is informed by his historical view of British liberty as well as by his interest-centred moral theory, but it is not always consistent, as is apparent from his conservative anxieties towards national debt. However, as a philosophically detached observer of English constitutionalism and of wider European history, that is, as a 'speculative politician'³ Hume could allow himself to be far more moderate and consistent in his accommodation of opposing political principles than as a commentator and participant of contemporary political debate. Especially, as it turns out, with respect

¹ For the ambivalence of Hume's politics and its relationship with the different strands of his 'philosophical politics', see John Pocock in *Virtue, Commerce, and History. Essays on Political Thought and History, Chiefly in the Eighteenth Century* (Cambridge: Cambridge University Press, 1985), ch. 7, 'Hume and the American Revolution: The dying thoughts of a North Briton', pp. 125-141. It is suggested here that Hume seemed to exacerbate his Toryism because he could not conceive any '*via media*' between the euthanasia of British liberty and what he perceived as the destructive anarchy of its abuse by the radicals.

² For a reading of Hume's politics as increasingly conservative see Giuseppe Giarrizzo, *David Hume Politico e Storico* (Torino: Giulio Einaudi Editore, 1975). For a criticism of this view, see Forbes (1985) and Stewart (1992).

³ Term used by Douglas Stewart. *The Unity of the Sciences*, in Alexander Broadie (ed.), *The Scottish Enlightenment. An Anthology*, p.49

to the radical Whig demands associated with the Wilkesite movement, which prompted him to appear in the latter days of his life as fiercely anti-Whig, showing not the least sympathy or attempt at accommodation. Hume's later pessimism towards the contemporary practice of liberty is partly allowed by his admission that although the republican form of government is the most refined and perfected it is not the only civil (i.e. legitimate) government, in fact it breeds instability of its own. Nevertheless, this does not compromise Hume's commitment to the speculative model of a modern commercial republic, for him the only meaningful context in which it makes sense to speak about liberty. Hume could thus write that he was 'an American in my Principles' while manifesting quite outspoken anti-Whig leanings a few lines afterwards (in the same letter) when he favours the punishment of 'those insolent Rascals in London and Middlesex' ⁴ closer at home –incidentally showing the inverse effect of sympathy the greater the moral distance to political experimenters. ⁵ What is relevant for us is that despite his later mitigated recantation from Whig political practice Hume remains a theoretic republican and his system of politics a thorough 'scientific Whig' ⁶ project. I mean republican in the sense that the model for a politically stable 'system of liberty' ⁷ can only be thought of in terms of constitutional checks and balances and non-dependence on the character of particular men even though it is not politically prudent to tamper with established institutions, which carry the 'opinion of right' in most men's eyes.

⁴ *LETT*, 2, p. 303. Compare this with: "Knowledge in the arts of government naturally begets mildness and moderation, by instructing men in the advantages of humane maxims above rigour and severity, which drive subjects into rebellion, and make the return to submission impracticable, by cutting off all hopes of pardon" (*EMPL*, pp. 273-74). Hume reflects about these tensions when he writes: "I wish that my Indignation at the present Madness... may not throw me into the opposite Extreme" (*LETT*, p. 216).

⁵ Naturally, one has a greater opportunity of hating the political engineers the closer they are.

⁶ Duncan Forbes, however, stresses the connection between Hume's politics and his 'philosophical politics', *Hume's Philosophical Politics* (Cambridge: Cambridge University Press, 1975), an establishment history and an essential commitment to Walpole's Whig administration.

⁷ *HE*, vol. VI, p.531: 'And it may justly be affirmed, without any danger of exaggeration, that we, in this island, have ever since enjoyed, if not the best system of government, at least the most entire system of liberty, that ever was known amongst mankind'. Even so, Hume engages in the explanation of a pure speculative model of republic for Britain in the essay 'Idea of a Perfect Commonwealth'.

I shall focus on the more permanent, philosophical aspects of his political thought: first, I examine the critique of the limitations of *classical* republican politics, as it transpires from the thoroughly utilitarian, mechanical and naturalistic conception of morality and politics. Secondly, I go on to argue that Hume's apologia for commercial modernity is compatible with a non-repudiation of an essentially republican understanding of liberty, that is, as absence of arbitrariness. The first question is, in other words, how a peculiar idea of political freedom arises both from Hume's moral theory and from his political and economic thought.

By contrast with Hume's moral theory, which strikes immediately as one of the most outstanding contributions in philosophy and which is dominated by a full mounted attack on virtue ethics and rationalism, his political thinking appears at first somehow less easy to identify. It is not so manifestly defined by a single target because neither of the political idioms that Hume subjects to criticism, such as neo-Roman republicanism and Whig contractualism, is full-heartedly rejected, as I will try to show. As Hume's political thinking is not expounded in any single work but is imbedded in the whole project of the 'science of man',⁸ it is essential to turn to his moral theory.

Hume's *naturalist* or Newtonian project of grounding the moral world on the same footing as the natural world, on the simplest observed scientific principles and no further, is partly manifest in his peculiar fusion of anthropological, psychological, moral and political insights with 'experiments' from the 'common course of the world',⁹ in particular from history. The principles of human nature that govern our ideas of necessity and causation constitute for Hume the philosophical basis of moral responsibility (the duty of justice) and the foundation for any legal framework in which it makes sense to speak of political freedom. The reason is this: without the necessary working of our faculties, which Hume has fully established in the first book of the *Treatise* and in the first *Enquiry*, there can be no steady expectations in human behaviour and therefore no human intercourse; anything and everything might be possible because effects do not follow causes by natural necessity, or rather –to use a term that Hume

⁸ *T*, p. 4

⁹ *T*, p. 6

could have found useful- by 'moral necessity', that is, by the specific kind of causality involved in human action.¹⁰ Without it human association becomes impossible to understand. But if the establishment of the necessity principle is a requirement for predictability in a small scale, as social and economic complexity increases along with the development of both mechanical and liberal arts, it becomes also a requirement of any notion of legal regularity, including the rule of law on which the concept of political freedom depends.

This is what we should expect from Hume's epistemology and this is exactly the conclusion that he draws in his moral and political theory. Both the account of justice and of the rule of law follow the same argument from human nature: patterns of human behaviour tend to develop into arrangements that answer the fundamentally human need for stability. The difference is this: that the emergence of free institutions (including the rule of law), given an increased social complexity, constitutes the first attempt to subject human affairs to stability and predictability in a more conscious and deliberate way, deliberation (reason) being always preceded by necessity (passions). Political freedom is specific to such institutional arrangements which are sustained, even if not devised, for the purpose of maintaining the rule of law. But, political freedom here has two aspects: one that is universal and common to all *civilized* governments, republican or monarchical, ruled through general and regular laws, and one that is more specific and contingent, the freedom of a republic or free government. Liberty can be strictly defined only in the latter sense because legal regularity is a genuinely republican phenomenon and remains so even though the developments of civilized monarchies show that 'the arts of government, first invented in free states' can be transplanted into other forms of government.¹¹

Looking at Hume's moral theory, the utilitarian-evolutionary account of the 'artificial virtues', the undesigned and unintended origins of justice, not only constitutes

¹⁰ The term 'moral necessity' describes well the intermediate position Hume adopted between the doctrine of free will as indifference and strict necessitarianism. Cf. James A. Harris, *Of Liberty and Necessity, The Free Will Debate in Eighteenth-Century British Philosophy* (Oxford: Clarendon Press, 2005), p. 73.

¹¹ *EMPL*, p.125

a thorough critique of the teleological conception of duty, (that of the moralists), but it is also – and this is the important point for us – the first critical assessment of the classical republican politics associated with it.¹² From a scrutiny of human nature it becomes apparent that, given our ‘limited generosity’¹³ and the slavery of reason to the passions, there can be no innate sense of duty, and no spontaneous regard for the common good, let alone for the interest of mankind. In particular, public virtue, in the civic humanist sense, cannot be the basis of political association because interest and the passions are the single principles of action. Hume’s original moral theory can thus be understood, in part, as a systematic attempt to undermine the ideal of civic virtue and classical republican liberty. Just as commerce replaces war, interest replaces public spirit. The rules of property (stability of possession, transfer by consent and promise keeping) emerge by the same mechanism by which the rules of justice are established. Rules are established to correct our natural selfishness¹⁴ and they constitute our sense of duty. In a further layer of complexity, rules are in turn established to correct the defects of our sense of duty and this constitutes the origin of government. The central role of virtue, in the classical republican sense, is displaced by the concepts of interest and utility.

Now, it would seem natural to assume that such a thorough criticism of civic virtue and of classical republican politics necessarily leads to a total repudiation of the republican understanding of liberty as absence of subjection to arbitrary power (legally unrestrained *arbitrium* or will of someone else). However, as it turns out, Hume does not elaborate any alternative theory of political freedom. In particular, no *negative* theory of political freedom is systematically adopted by Hume, though it was readily available, especially as elaborated by Hobbes and Locke. Instead, Hume revises the republican understanding of liberty without rejecting it altogether. He relaxes its boundaries in order to accommodate the phenomena of ‘polished’, ‘mild’ or ‘civilized’ governments as

¹² The divide between the moralists, notably Hutcheson and Ferguson, and the ‘economists’, Hume, Smith and Millar, corresponds, naturally, with the divide between those that maintained and those that abandoned the traditional language of civic humanism. Cf. Haakonsen, ‘Natural Jurisprudence and the Identity of the Scottish Enlightenment’ (unpublished seminar presentation, University of Glasgow, May 2008).

¹³ *T*, p. 317

¹⁴ Reflection might correct both the senses (this appears first in *T*. p. 36), and the passions (*T*, p. 309) Correction by reflection works contrary to the prevailing influence or ‘bias’ of custom over our imagination: *T*, p. 100.

based on interest rather than on political participation, and on private rather than public virtue, but liberty remains possible only under a legal framework of security from arbitrariness. I shall briefly explain this.

I argue that the critique of classical republicanism is compatible with retaining the core republican understanding of liberty, and even his condemnation of the polity of the ancients, that they 'were extremely fond of liberty; but seem not to have understood it very well'¹⁵ (the closest Hume gets to an alternative definition of liberty), has to be understood in the context of a revision but not a rejection of liberty as absence of arbitrariness. The emergence of 'polished' or 'civilized' government and the decline of feudalism transcend the political practice of ancient republics; they give rise to new requirements and a fundamentally new sort of stability. If liberty is to be sustained under modern conditions these new phenomena must be recognised to be of moment. Hume makes it clear that his defence of commercial modernity undermines the basis of classical republican practice. Luxury and inequality of possessions as the spur to industry, technical and moral progress through the material betterment of humanity, primacy of private interest and social relations, these elements all concur to give us an idea of this new non-republican principle, which all modern governments, including free ones, need to acknowledge according to Hume. The modern development of milder manners under a civilized inequality displaces an artificially incensed militaristic patriotism, the violent egalitarian independence of the ancients. The ideal of modern liberty consists in combining a free form of government, that in which power is partitioned so as to prevent aristocratic as well as monarchical tyranny, with the stability provided by men's social interdependence through the pursue of luxury and commerce.

Though commerce emerges from liberty, notably by the dissolution of feudal personal dependency, and retains a connection with it, the former gives rise to independent forces that come to be in tension with liberty.¹⁶ For Hume liberty is not guaranteed by this modern development and therefore it is not the same with the unrestrained pursuit of interest (which would be the case had he developed a

¹⁵ *EMPL*, p. 408

¹⁶ *EMPL*, 'Of the populousness of ancient nations'

thoroughly *negative* theory of freedom), even though this is a fundamental aspect of it. The first phase of Hume's analysis is negative. Trade, material prosperity and the attendant flourishing of the arts and learning undermine the social basis of ancient liberty, namely, slavery. But this is not enough for modern liberty to emerge and be maintained. A special 'opinion of right' is required, by which a correspondence between property in the commons and a share of political power is established. The peculiar set of habits and practices that constitute a free government are not entirely ascribable to the development of commerce and the enriching of a middle power: 'As men are commonly much attached to their ancient government, it is not to be expected, that the public would ever favour such usurpations. But where the original constitution allows any share of power, though small, to an order of men, who possess a large share of the property, it is easy for them gradually to stretch their authority, and bring the balance of power to coincide with that of property. This has been the case with the house of commons in England.'¹⁷ This is the positive phase. Here Hume develops a theory of the specific authority of a free government. It is only in this context that it makes sense to speak of the kind of liberty enjoyed in a *free* modern government.

Hume's analysis of allegiance in general introduces new strands of political thinking that are independent from but not fully opposite to the republican understanding of liberty. It is in the context of a contrast with the 'admirers of antiquity', who simply equate civil society with free government,¹⁸ that we should understand Hume's idea that liberty and authority are in a perpetual struggle in which neither can prevail.¹⁹ That is, the authority specifically derived from free institutions is to be contrasted with the authority of government in general and –Hume argues, in modern conditions, the former has to give room to the latter; there has to be a compromise and a balance between liberty as absence of arbitrariness and the requirements of government in general. To simply equate authority (of free institutions) with liberty without admitting the importance of allegiance to government as such and independently of

¹⁷ EMPL, p.35. Hume considers the effect of forms of government on the national character as 'moral causes' (See essay 'Of national character'), that is, as part of the customs or 'opinions' that sustain institutions.

¹⁸ EMPL, p. 383

¹⁹ EMPL, p. 40

popular consent, as the utopian republicans do, is a delusional distortion of the reality of any modern free government, which is also founded –as any other- on opinion. If liberty is no longer the single defining principle of a free government this is *not* because it is understood as simple negative liberty (which by hypothesis must be limited) but because allegiance to free institutions (balance of power and property) is to be considered as important as allegiance to government in general. Now as far as liberty is contrasted with allegiance in general, or ‘authority’, a fundamental part of the notion of liberty *is* indeed negative (i.e. silence of the laws), but because this contrast does not exhaust all its meaning, as far as it is contrasted with despotism, it retains a republican sense (i.e. rule of law). Both aspects are found combined in Hume’s political philosophy.

One of the reasons why Hume does not simplify the notion of liberty to the point of making it identical with the pursuit of private interest and the administration of private property, that is, with the undersigned workings of self-interest towards social harmony, is precisely because he acknowledges that modern political practice, which involves institutional deliberate interventions, is not entirely free from tensions, setbacks and disadvantages.²⁰ Even under modern commercial republics, where greater stability exists than in ancient republics lacking a representative and a functioning rule of law, liberty is particularly vulnerable because it requires especial arrangements, which can never be infallible. Free governments, unlike simpler forms of government, are thus like machines that are prone to wear out by their internal motion (faction) as well as by their external motion (their tendency to engage in self-destructive conquest overseas).²¹ Therefore, the accommodation Hume is seeking does not turn into a full redefinition of liberty in ‘negative’ terms but on the recognition that the general as opposed to specifically republican principle of government is also and to a great extent valid in free governments. For Hume there remains an ‘authority’ specifically republican, which is not the opposite of but the producer of liberty, that is, the specific guarantees of free

²⁰ *EMPL*, ‘Of the populousness of ancient nations’

²¹ Referring to the ‘severe moralists’ who decry luxury as the source of moral and political degeneracy, Hume argues that the real source of decline in republics is defective institutions and conquest: ‘[T]hese writers mistook the cause of the disorders in the Roman state, and ascribed to luxury and the arts, what really proceeded from an ill modelled government, and the unlimited extent of conquests’. *EMPL*, p.276

governments or republics, i.e. the various mechanisms to ensure the rule of law. The *authority* that the rule of law carries in a republic does not curtail freedom, it produces it. But such form of authority has to give certain room to the more general one. Even free governments (or rather especially they) are sustained by 'opinion', habit and the authority of antiquity²², rather than solely by consent.

Nonetheless, Hume's complex accommodation puts the question on an entirely new footing, which (arguably) can eventually be developed into what has been called the 'negative' theory of liberty, and into a simpler and more analytical conception in which liberty and authority (or rather *imperium*) finally come to be wholly divorced. From a contemporary point of view Hume's concept of liberty appears messy and difficult to capture.

The first chapter opens with an analysis of the essay 'Of the liberty of the Press', in which Hume's observation on the peculiarity of the free press in a mixed constitution like Britain leads him to an analysis of forms of government in general. Here he identifies the most fundamental modern development with respect to ancient political practice, i.e. civilized monarchy and the widespread acquisition of legal regularity, which constitutes the core of Hume's critique of republicanism. I show how Hume's criticism attempts to introduce a new political vocabulary not entirely developed but clearly pointing towards the modern distinction between *political* liberty and *civil* liberty, which corresponds to Constant's liberty of the ancients and liberty of the moderns and to Berlin's distinction between *positive* and *negative* liberty. I also try to show that despite this thorough revision of the republican tradition, Hume's ideal of liberty remains essentially within the republican understanding of it. In the second chapter I summarize the philosophical basis of this distinction and its utility for an understanding of Hume's political thought. In the third chapter I examine how Hume's ideal of liberty arises from his moral theory and, finally, in the fourth chapter I briefly examine this development as it appears in the *History of England*.

²² EMPL, p.33

CHAPTER I

Analysis of the essay 'Of the Liberty of the Press'

As much as submission to a petty prince, whose dominions extend not beyond a single city, is more grievous than obedience to a great monarch; so much is domestic slavery more cruel and oppressive than any civil subjection whatsoever. The more the master is removed from us in place and rank, the greater liberty we enjoy; the less are our actions inspected and controled; and the fainter that cruel comparison becomes between our own subjection, and the freedom, and even dominion of another.¹

1. Reason for analysing this essay

In this chapter I shall give a close reading of Hume's essay 'Of the Liberty of the Press'. I choose this essay for detailed examination because to a modern reader, familiar perhaps with John Stuart Mill's celebrated discussion in chapter 2 of *On Liberty*, Hume's treatment will appear very strange. Clearly a very different account of the value of liberty is in play here. As such, this essay is a good introduction to the unfamiliarity and the difficulties of Hume's account. It demonstrates just why a careful articulation of Hume's complex understanding of liberty is necessary.

The essay 'Of the Liberty of the Press' provides a starting point from which to consider what I shall argue is the fundamental feature that defines Hume's concept of liberty, namely the criticism of classical republican politics. Hume's philosophical reflections on the phenomenon of free press in this essay turns into a full revaluation of what was, in Eighteenth century Britain, a common understanding of liberty, that which conceived it in classical republican terms, as the status of a fully participant citizen. The same line of argument can be found essentially in the essay 'Of Civil Liberty'. Hume revises here the usual opposition 'free government - absolute monarchy', and replaces it

¹ 'Of the Populousness of ancient nations', *EMPL*, p. 383

with that of 'free government – despotism', thus redefining the concept of liberty in wider terms in order to accommodate what he perceives as a fundamental characteristic of modernity, namely, the social and political centrality of commerce. For Hume, liberty is no longer exclusively circumscribed to republican political practice but is in a fundamental way connected with commercial modernity as a whole.

Though the essay I examine here is the most synthetic in explaining the argument, it is also developed in the essays 'Of Commerce', 'Of the Rise and Progress of the Arts and Sciences', and in 'Of the Populousness of Ancient Nations', as well as being implicit in other essays. I argue that the effect of the criticism of classical politics is a revaluation of the republican concept of liberty: in order to accommodate it to new political developments Hume's assessment results in a minimization of the public and active aspect of liberty, stressing instead the negative constitutional controls on political power. Liberty is thus the effect of an established rule of law rather than the capacity of citizens to have a share in political power.

There are thus various elements at play in this conception that might be easily overlooked and I shall spell them out here in detail. One of the difficulties of studying this essay (and the *Essays Moral Political and Philosophical* in general) is that Hume does not engage in detailed conceptual definitions, as we would expect from a fully analytical discussion, and instead he relies on an understanding of the received political idioms of the time. We shall be clarifying these idioms in our review of the arguments of the text.

2. Review of the argument: Reconciling the republican concept of liberty with the modern phenomenon of mild government

In the opening remarks of this essay Hume states the problem he is going to discuss, namely, the reasons for 'the extreme liberty... of communicating whatever we please to the public, and of openly censuring every measure, entered into by the king or his ministers'.² Hume seeks to explain the paradox that such liberty is 'not indulged in

² *EMPL*, p. 9

any government, either republican or monarchical'.³ In a passage later withdrawn, he addresses a second question, namely, the value of this form of liberty and its specific function within the British mixed constitution.⁴

With respect to the first question, Hume explains the reason why liberty of the press is so peculiar to the British constitution and states, first, that modern monarchies (notably France) are not as destitute of liberty as is commonly supposed and, secondly, that the peculiar liberty enjoyed in Britain is the result of there being a balance between a monarchical and a republican part within it. By doing so Hume undermines the common republican assumption that liberty is the exclusive privilege of free governments and that an important part of it is common to all civilized governments.

The term Hume uses is explained by Thomas Paine; liberty of the press was settled in Britain by certain enactment of the 1688 settlement:

At the Revolution, the office of Imprimeur was abolished, and as works could then be published without first obtaining the permission of the government officer, the press was, in consequence of that abolition, said to be free, and it was from this circumstance that the term Liberty of the Press arose.⁵

If this is when it was first settled (as Hume would agree), the crucial point is how and why is maintained. The relatively high degree of freedom of printing in Britain is due, Hume argues, to the central role that is obliged to play to maintain a balanced constitution. It is precisely because the British government is not a perfect republic that the stability of the balance between its parts requires negative controls and limits on the executive by the watchful eye of the press over any encroachment of those rights that constitute their share of political power. For Hume freedom of the press is a genuinely modern phenomenon and it reflects a profound change in political practice from classical politics in terms of direct political engagement.

By examining the extent and balance of liberty and authority in the three archetypal modern forms of government that Hume considers, monarchy, republics and mixed government, Hume effectively turns the essay into an analysis of liberty in its

³ *EMPL*, p.9.

⁴ For the 1770 edition of *Essays and Treatises on Several Subjects*.

⁵ Thomas Paine, 'Liberty of the Press' [1806]

<<http://www.uark.edu/depts/comminfo/cambridge/tpliberty.html>>.

most general form. Hume's concept of liberty becomes visible through the explanation of, on the one hand, the way in which absolute monarchies too may enjoy some civil liberties, and on the other, the reasons for a greater enjoyment of liberty in a mixed government than in republics. This concept is further developed throughout all of his political essays, but is probably best expressed in this essay thus: the security of 'everyone's life and fortune by general and inflexible laws',⁶ that is, the kind of liberty guaranteed by the rule of law.

In a style typical of other essays as well, Hume starts with a paradox. It is not surprising that the press is less free in monarchies. What appears at first inconsistent and what is going to be explained is, on the one hand, the fact that monarchies too may enjoy a degree of liberty, and on the other, that a mixed government such as the British one actually enjoys more liberty than republics. This depends on the suggestion that the political constitution is the fundamental thing we have to look at in order to explain certain social institutions and practices, in this case, liberty of the press. In fact this becomes a crucial principle throughout all of Hume's political philosophy, and here it provides the link between the sociological question of free press and the discussion on forms of government. Thus, Hume quickly extends the argument from liberty of the press to liberty in general; the former is indeed presented as a paradigmatic example of the latter.

The paradox could be expressed more bluntly with Hume's own dichotomy: how can there be more liberty under a constitution that is defined as a mixture of republics and monarchy, that is, as a mixture of liberty and its opposite slavery, than in a purely republican form of government? The answer is that the strict dichotomy between liberty and slavery should be abandoned and that there should be allowed a new broader sense of liberty in order to capture the said fact. Such broader sense of freedom should serve to embrace the fair degree of security of property and life that is enjoyed in absolute monarchies like France.

In order to explain why there is such liberty in a mixed constitution (Britain) Hume focuses first on the two simple forms of government: 'It will be found, ... that the two extremes in government, liberty and slavery, commonly approach nearest to each

⁶ *EMPL*, p.12

other'.⁷ At first –as I have just explained- this appears puzzling: it means not only that there is liberty in *other* forms of government than that which is (supposedly) identified with liberty (republics) but also that there is actually less liberty there than in the 'mean' – to use Hume's term – between the extremes liberty and slavery, that is, in the mixed constitution. The answer to the paradox becomes clearer when observing that Hume is using two different senses of liberty in this essay.

First there is the kind of liberty Hume is enquiring about, liberty in its non-exclusivist sense. Secondly, Hume uses the word liberty as identified exclusively with free government, that is, precisely the republican understanding of liberty that Hume rejects – albeit in a rather oblique way. It is in the first non-exclusivist sense that liberty can be said to flourish best in the 'means',⁸ which is the second part of the observation, analysed immediately after the passage cited above, that a mixed form of government may be the freest or the most despotic, depending on whether distrust becomes regular and beneficial or unstable and destructive .

What Hume is saying is that liberty in its republican sense does not lead unproblematically to a greater enjoyment of what (in the political essays of the same name) he terms 'civil liberty', as applied not only to republican governments but to all civilized governments, including the civilized monarchies of Europe,⁹ that is, liberty as security under a system of general laws. On the contrary, republics too may endure some form of despotism. This stems from the two ideas of the passage cited above, namely: that the extremes, monarchy and republics touch so that the former may enjoy some liberties while the latter may endure certain despotism; and that the 'means' might be the freest. Each of the two observations, on the two simple constitutions and on the mixed constitution, is treated separately, but before analysing them, I shall briefly clarify

⁷ *EMPL*, p.10

⁸ *EMPL*, p.11

⁹ 'Private property –writes Hume in the essay 'Of Civil Liberty' –seems to me almost as secure in a civilized European monarchy, as in a republic; nor is danger much apprehended in such a government, from the violence of the sovereign; more than we commonly dread harm from thunder, or earthquakes, or any accident the most unusual and extraordinary' (*EMPL*, pp.92-93). In 'That politics may be reduce to a science' Hume distinguishes two 'manners' in which monarchy can be exerted: a despotic, or that of the 'eastern princes', or 'after a milder manner', like that of modern absolute monarchies (*EMPL*, p. 22).

a formal aspect of Hume's thesis which is crucial for bringing Hume's concept of liberty forward.

The lack of terminological precision makes the original argument of the essay difficult to follow at times. A term such as 'political' as opposed to 'civil' liberty would have been useful as it denotes a sense of liberty associated *exclusively* with the system of government where citizens enjoy a share of political power; one being active and the other more or less passive. This would have made clear the implicit distinction between the exclusively republican sense of liberty, which included political liberty, and the non-exclusivist sense of liberty, which the term civil liberty conveys. The fact is that Hume never makes this distinction explicit, even though it was available in the vocabulary of eighteenth century political thinking,¹⁰ and often employs the word liberty in a sense that would now appear ambiguous. Nevertheless, I shall make use of this distinction as it is particularly useful for understanding the essay's two main ideas: firstly, that there might be more liberty under a mixed constitution since the press is there even more important than in republics, free press being a kind of *civil* liberty, and secondly, that republics have large arbitrary powers while civilized monarchies can have a degree of liberty, that is, they can enjoy some *civil* liberty. What this shows is that liberty remains republican in its full sense, even though it admits of degrees: it might be considerably secured in the sense that the power of monarchs is mediated by general laws and institutions, but it is only fully secured in republican institutions: in fact modern monarchies are civilized thanks to a republican invention, the rule of law ('Of the Arts and Sciences' essay). There is thus on the one hand, a kind of liberty common to all civilized governments and on the other, a more demanding kind of liberty peculiar only to republics.

¹⁰ In applying this distinction I follow Duncan Forbes' suggestion in his *Hume's Philosophical Politics*, (Cambridge: Cambridge University Press, 1975), p. 160; and his article 'Sceptical Whiggism, Commerce, and Liberty', in A. Skinner & T. Wilson (ed.), *Essays on Adam Smith*, pp. 180-201 (p. 185). However I do not think, as he does, that this makes Hume indifferent to the political or republican aspect of liberty but only that, contrary to Whig 'rant', liberty admits of degrees. Hume's concept of liberty fits well into Pettit's description of republican liberty as non-domination, even though Pettit regards certain relations as dominating that Hume would not. Cf. *Republicanism: A Theory of Freedom and Government*. (Oxford: Clarendon Press, c1997). According to Forbes, Bolingbroke and Blackwell had made a similar distinction (p. 161).

If the first observation focused on the two simple forms of government, monarchy and republics, the second observation (which comes immediately after the paragraph cited above) continues with the mixed form of government: ‘as you depart from the extremes, and mix a little of monarchy with liberty, the government becomes always the more free; and on the other hand, when you mix a little of liberty with monarchy, the yoke becomes always the more grievous and intolerable.’¹¹ It can be noted that Hume does not completely follow here the classical idea of the mixed constitution, which goes at least as far back as Aristotle and Polybius, that is, that a combination of monarchy, democracy, and aristocracy conveys the most stable constitution. Hume presents two simple forms of government (monarchy and republics) rather than three and two types of mixed government rather than one: one is free and stable and the other that is despotic and unstable. The example of free mixed constitution is modern post-1688 Britain,¹² and the example of despotic one is Imperial Rome in its initial stages, when a prevailing despotism was increasing at the expense of a long-established liberty, that of the Roman Republic. Again, to make sense of this second observation it is necessary to apply the above-mentioned distinction between the exclusivist (or demanding) concept of liberty and the non-exclusivist (or general) concept of liberty, between the kind of political liberty exercised in republics and the kind of civil liberty enjoyed in all civilized governments, including absolute monarchies. Before going into the details of this analysis it is useful to summarize the second question Hume sought to answer, the utility of free press, in order to get a complete glance into the essay’s argument.

‘Of the liberty of the press’ appeared in the first volume of the essays in 1741 and underwent one substantial correction for the 1770 edition, in which a long final disquisition praising the almost universal usefulness of the liberty of the press (answering the other initial question, ‘whether the unlimited exercise of this liberty be advantageous or prejudicial to the public?’¹³) was replaced by a short paragraph which warned that its abuse might be a threat to the very existence of that liberty. As has been

¹¹ *EMPL*, p.10

¹² *HE*, vol. VI, chapter LXXI, p.540: ‘Till the revolution, the liberty of the press was very imperfectly enjoyed in Britain’. Hume argued extensively for the uncommon view that the Revolution was the true foundation of modern liberties.

¹³ *EMPL*, p.9

widely commented, the change reflected a greater conservative pessimism, and it is in other respects interesting to consider from a historical point of view.¹⁴ This change however does not substantially modify the main argument, which is, a predominantly utilitarian (or proto-utilitarian) rationale for the liberty of the press linked to peculiar constitutional circumstances. The sentence that Hume retained in further editions, sums up the essential idea: 'As long, therefore, as the republican part of our government can maintain itself against the monarchical, it will naturally be careful to keep the press open, as of importance to its own preservation'.¹⁵ The British mixed constitution such as it is, requires a free press in order to function effectively, and without it, it would collapse because one branch of the government, the 'republican part of our government'¹⁶, that is, the commons, would cease to be able to support itself and keep the balance of the constitution.

I shall now discuss the two main concerns of the essay separately: the reason for that extent of liberty in the mixed government and the question about its usefulness. Both aspects of the argument shall give us a good understanding of what is involved in Hume's explanation of free government and liberty.

3. Liberty of a mixed government compared with that of republics

As explained above, the investigation of the reasons for the extensive free press in Britain led Hume to a broader discussion of the forms of government and a general concept of liberty. These two aspects, liberty and forms of government, are indissolubly

¹⁴ Giarrizzo speaks of 'una marcata evoluzione in senso nettamente conservatore' ['a marked evolution in an effectively conservative sense'] (*David Hume politico e storico*, Turin: Giulio Einaudi Editore, 1962, p. 82). His analysis is fruitful in insights into the intellectual context of the time (extensively supplied by the *Letters*) but the label 'conservative' has, as Hugh Cecil notes, a limited explanatory utility for any author who lived before the French Revolution (Lord Hugh Cecil, *Conservatism*, London: William and Norgate, 1912. Giarrizzo identifies Hume's republican aspects (pp. 101, 104) with his sympathy with the *country-party* or anti-Walpolean opposition, but Hume's fierce critique of ancient constitutionalism, the crux of Bolingbroke's and the *Craftsman* assault on Walpole, and his defense of 'influence' or 'corruption' as a necessary evil of the new system of government make him more sympathetic with the Court Whig camp. Although Hume may have influenced later British conservatives, he could not have adopted Burke's type of conservatism without abandoning most of his political theory and his understanding of English political history.

¹⁵ *EMPL*, pp.12-13

¹⁶ *EMPL*, p.12

linked. The idea that the 'extremes' touch, that the two simple and opposite forms of government (monarchy and republics) are bound to resemble each other 'in some material circumstances', ¹⁷ constituted the first part of Hume's observation. Because of their circumstances, in practice each form of government would adopt aspects of the other, and there would be a degree of liberty in monarchies as well as a degree of coercion in republics. In Hume's own words, there is a 'species of liberty in monarchies, and of arbitrary power in republics'.¹⁸ The examples are those of Holland, the archetype of the modern commercial republic, and France, the archetype of civilized monarchy (i.e. civilized as opposed to despotic and feudal). The key to understanding these—how a republic may be coercive and how a monarchy may allow some liberties—is the different sociological and political roles played by 'jealousy' in each case and how it has different effects on stability, the essential condition for liberty.

In monarchies such as the French the lack of jealousy of the king towards his subjects, who have no political aspiration, naturally results in great stability. In his usual condensed style Hume writes: 'law, custom, and religion concur, all of them, to make the people fully satisfied with their condition'. ¹⁹ The strength and security of the magistrate's position provides the opportunity for granting a greater protection for the security of his subjects. Liberty is essentially the same for all particular forms of government: it results from the provision of 'general and inflexible laws'. In republics the lack of jealousy has the contrary effect: it diminishes liberties because it increases the power of magistrates and thus the likelihood that subject would be interfered with. Those powers, in Hume's words, 'lay a considerable restraint on men's actions, and make every private citizen pay a great respect to the government'.²⁰ Since citizens of a republic naturally have little jealousy against the magistrate's powers, of which they themselves have a share, such powers are pervasive enough to constitute an actual constraint on liberties.

The idea that 'civilized monarchies' may enjoy some degree of civil liberty, that, as Hume puts it in the essay 'Of Civil Liberty', they too '*are a government of Laws, not of*

¹⁷ EMPL, p.11

¹⁸ EMPL, p.11

¹⁹ EMPL, p.10

²⁰ EMPL, p.10

Men',²¹ constitutes Hume's first blow against the simple identification of liberty with free government. Monarchies enjoy a degree of civil liberty so far as their government is mediated and regulated by forms, practices, and institutions, and thus are distinguished from blunt despotisms, which are governed directly by the ruler's will.²² The stabilizing political function of an aristocracy is present also in free governments, but here the existence of 'rank' does not entail strict personal dependence within an organic hierarchy. In the essay 'Of Public Credit', Hume writes that the maintenance of liberty depends on the existence of intermediate social bodies, that is, a 'middle power' between king and people.²³ This does not mean however that Hume dismisses the difference between civilized government and free government. A connection between a certain minimum equality and liberty is suggested in the context of Hume's criticism of 'arbitrary' ways of levying taxes, that they are a 'punishment on industry; and also, by their unavoidable inequality, are more grievous, than by the real burden which they impose'.²⁴ This suggests that for Hume liberty is inseparable from a measure of equality with regard to the rule of law, and therefore with regard to liberty as security under it, the only condition under which material prosperity can develop. Hume argues nevertheless that this inconvenience in monarchies was remediable.

The other assault on the exclusivist notion of liberty, as mentioned above, is the observation that liberty is actually constrained by and diminished as a consequence of the exertion of political power itself, that citizens' share on such power does not diminish it but rather makes it, indirectly more pervasive. Political liberty and civil liberty are connected in a problematic way: In a republican government the latter certainly needs the former but at the same time it imposes great restrictions on the private lives of its subjects. The idea that power collectively held may be especially intrusive of civil liberties is a clear anticipation of John Stuart Mill's line of argument

²¹ *EMPL*, p.94 [italics in the original]

²² The main difference between monarchy and despotism is that the former contains intermediary powers, a hierarchy of ranks. See *EMPL*, 'Of Civil Liberty' (originally called 'Of Liberty and Despotism') and especially 'Politics a science', p.22.

²³ *EMPL*, p. 358

²⁴ *EMPL*, p. 245

with respect to the so called tyranny of the majority in his essay *On Liberty*.²⁵ For Hume, political liberty in the sense of share in political power is only the instrument for maintaining civil liberties but not the end of political association.

The second observation, that mixed governments can be either free or despotic, brings Hume's modern notion of liberty forward in an analogous way. This consists in examining whether jealousy has a positive or a negative effect on stability, given the specific fabric of the constitution in question. The prime examples are Imperial Rome and England. Only under certain circumstances can a mixed government be free: 'the mixtures of monarchy and liberty [may] render the yoke either more easy or more grievous'.²⁶ Here Hume departs from the classical discussion on mixed government in an important respect: he does not examine the case of republican Rome, which is the classical model of mixed government;²⁷ instead he takes the Roman government when her republican institutions are collapsing as a case of despotic mixed government, the one to be examined. As the remains of republican institutions become an obstacle to the increasing power and authority of the emperors this naturally excites their jealousy and thus a growing despotism prevails. The reason is that the shift of power towards emperors is not immediately followed by a shift of authority in the same direction (because of the sanction of antiquity in favour of republican forms²⁸), thereby creating the conditions for distrust on their subjects, which is naturally destructive of all liberties. For the same reason that the shift of power produces despotism in Rome, the shift of power in the hands of the Commons produces liberties in Britain. The reason is that the sanction of antiquity naturally attached to a monarchy is not interrupted even when the constitution has changed fundamentally. The free form of government is sustained in Britain not only despite a steady distrust of the executive but precisely because of such

²⁵ John Stuart Mill, *Utilitarianism and On Liberty* (Oxford: ed. Warnock, Mary, Blackwell Publishing, 2003). See in particular, *On Liberty*. And also A. de Tocqueville, *Democracy in America* (New York: Everyman's Library, 1994).

²⁶ *EMPL*, p.11

²⁷ As in Machiavelli's *Discourses*, Book 1, ch. 2. In the essays 'Of some remarkable customs' Hume examines the exceptional circumstances that keep the republican constitution of Rome relatively stable and peaceful despite being divided between two legislature bodies.

²⁸ For a development of this idea, cf. Gibbon's *The Decline and Fall* (London: Warwick House, 1840?), p.51

distrust, which prevents despotism by checking the progress of the monarchical part of the government and the ministers.²⁹

Unlike the beginning of Imperial Rome, modern Britain produces greater liberties because the checks and controls function in a stable way. In this case, jealousy plays a constructive role; it is an institutionalized and limited distrust. The kind of jealousy that is destructive of Rome's liberty, however, that of magistrates over the people, results from the fact that the emperors' authority is at first not naturally acknowledged among the citizens, whose distrust necessarily produces a constant threat to the stability of the state. By contrast, in the British mixed constitution, liberty flourishes because there a useful but nevertheless precarious³⁰ jealousy of the people over the chief magistrate prevails. Free press is the institutionalized form of this regular and controlled distrust of rulers. The republican part of the government can only maintain its share in government by a 'watchful jealousy' over the magistrates, the executive. The extensive liberty of the press allowed in Britain serves such a function.³¹

The answer to the main question of the essay is that there is such an extensive free press in Britain because it serves there a crucial political function without which liberty could not prevail to that degree. In the British mixed constitution, liberty of the press is an essential instrument for keeping the balance of the constitution on which liberties depend, and is for that reason more necessary than in republics, where the usual mechanisms of participation, of rotation and election of magistrates are thought to be sufficient means of protecting everyone's liberties³². As the balance cannot entirely depend on such provisions in a mixed constitution, where a branch of government, the

²⁹ Philip Pettit examines this paradox and concludes –retrieving the republican tradition– that institutional distrust of the rulers can be compatible with a reasonable trust in them and so with good government. Cf. Pettit, 'Republican Theory and Political Trust' in M. Levi and V. Braithwaite, eds., *Trust and Governance*, (1998) New York, Russell Sage Foundation, pp. 295-314.

³⁰ We learn that liberty is precarious even in this constitution in the last two paragraphs of the essay 'Whether the British government inclines more to absolute monarchy or to a republic'. After pointing out that the 'tide' of change is now moving towards monarchy because of the increase of influence and revenue in the hands of the executive, Hume writes: 'absolute monarchy, therefore, is the easiest death, the true *Euthanasia* of the British constitution' (*EMPL*, 'Whether the British Government inclines...', p. 53).

³¹ *EMPL*, p.12

³² However, by contrast with republics, where 'virtue and capacity' coincide with the chief magistrates' authority, the 'unavoidable disadvantage' of the British mixed government, its dependence on the character of the king is a perpetual source of instability. See *EMPL*, 'Independence of Parliament', p. 46.

executive, holds some discretionary powers (prerogative), the only way the commons can maintain themselves and those liberties are through public scrutiny, that is, by allowing more freedom of speech than even republics can allow.

Liberty of the press is both the instrument for the protection of and a peculiar manifestation of civil liberty. The important aspect of British liberty is not that people have a share in government so much as its being the unique means by which they are bound to defend their rights. Liberty does not depend primarily on the kind of political liberty provided in republics, i.e. citizens' share in government, but on the constitutional provisions of 'general and inflexible laws'. By contrast, republics are only free so far as citizens protect those liberties by means of their participation in the legislature. What Hume is implying is that outside their public role citizens of a republic may be bound to a more extensive authority than in a mixed government. This mixed form of government can be considered free, among other reasons, because liberty of the press, being an indirect form of control, compensates here for the lack of purely republican institutions (that is, for the absence of a constant exercise of direct political participation) as the only means by which citizens guarantee their civil liberties. Because it has a political or institutional role and it nevertheless manifests itself as greater civil liberty, it shares characteristics of both political and civil liberty; it has an institutional aspect besides an obvious private and social one.

By this comparative analysis of forms of government Hume has criticised the simplistic, reductionist conception of liberty, one associated strictly with *free* governments in the exclusive republican sense, and has conveyed a complex understanding of liberty as common to all 'mild government[s]'.³³ Liberty is common to all mild or civilized governments but in its perfection it belongs only to free ones. Before examining how this more general notion of liberty is developed in Hume's political theory there is one more element to be considered: his utilitarian rationale for liberty of the press. This is important because it shows that Hume's idea of the limits of a mixed form of government in guaranteeing the kind of liberty he is describing is consistent with his system of politics as a whole.

³³ *EMPL*, 'Of the populousness of ancient nations', p. 382.

4. The utilitarian rationale for liberty of the press

As we mentioned before, the second question Hume proposed to answer in the original 1741 edition, concerning the utility of free press, is withdrawn in the 1770 edition and replaced with a short ending that addressed this question only tangentially. The original paragraph seems to reflect Hume's concern that the abuses of such liberty might become a source of instability and a threat to the known system of government so that he is careful to remove any excessive optimism: Britain may become either a republic, which in the essay 'Of the Principles of Government' might be 'of no inconvenient form'³⁴ or an absolute monarchy, which in the essay 'Whether the British Government . . .' is preferable.³⁵ Since this has usually been interpreted as a conservative retraction from an initially extensive defence of free press,³⁶ it might be useful to cite this paragraph in full in order to ascertain whether or not there is a substantial change of argument in the latter correction or whether in fact there is only a change of emphasis within an essentially invariable argument, regarding the instrumental value of free press in a mixed government. The paragraph of the correction proceeds thus:

It must however be allowed, that the unbounded liberty of the press, though it be difficult, perhaps impossible, to provide a suitable remedy to it, is one of the evils, attending those mix forms of government.³⁷

Free press is unambiguously described as a necessary evil and necessary only to mixed governments. Undoubtedly this is a more cautious remark than the withdrawn digression, where Hume, developing the argument on the usefulness of free press in detail, seems to convey the idea that it is universally useful. But, important though the change was from a historical point of view, it does not substantially modify the rationale Hume gave for liberty of the press, which remains predominately utilitarian in both versions of the essay.

³⁴ *EMPL*, p. 36

³⁵ *EMPL*, p. 53

³⁶ See footnote commenting on Giarrizo's account of Hume's conservatism, pp. 9-10.

³⁷ *EMPL*, p.13

The question Hume answers in the original 1741 edition, '*Whether such a liberty be advantageous or prejudicial*'³⁸, was formulated in the context of a discussion on forms of government and therefore in the same terms. Hume had in fact only developed in more detail the same argument, namely, that it is only its peculiar utility to such a mixed government that explains the degree to which it is enjoyed in it. In his words, 'that liberty is so essential to the support of our mixed government; this sufficiently decides the second question'.³⁹ This answer is not inconsistent at all with the replacement or with the rest of the essay. It is rather the original more optimistically Whig digression that appears problematic because Hume seems to suggest there that a free press is universally useful regardless of forms of government; and that is arguably far more than his political theory can allow. The instrumental value of that liberty, which was the core of his argument, is played down so much that it seems almost to disappear completely when Hume continues a few lines after the sentence just quoted with the following:

But I would fain go a step farther, and assert, that this liberty is attended with so few inconveniences, that it may be claimed as the common right of mankind, and ought to be indulged them almost in every government: except the ecclesiastical, to which it would prove fatal.⁴⁰

Here Hume is close to suggesting that free press is a right, or a privilege that exists regardless or prior to any form of government. If we take this not just rhetorically but literally and without the qualifying terms 'almost' and 'may be claimed as', it would simply be inconsistent with the main idea of the essay. The rather pessimistic paragraph which substituted this digression in the later edition is in fact more in tune with the general argument of the essay: that liberty of the press was indulged in Britain to such an extent because, and only because, of her peculiar constitution, that it was thus a necessary evil. But the truth is that the difference between the two versions of the essay is superficial: whether we focus on the inconveniences of free press (the evil) or on its blessings (the privilege), it exists solely because it is necessary to the constitution. The emphasis of the main argument is consistently on the instrumental value of free press.

That correction however reflected something important for understanding Hume's view of the practicalities of free press. As commentators have pointed out, it

³⁸ *EMPL*, p.604

³⁹ *EMPL*, p.604

⁴⁰ *EMPL*, p.604

seems that the abuses of liberty perceived to be committed by Wilkes and his followers persuaded Hume that free press and liberty in general were precarious even in those special circumstances that the mixed constitution provided.⁴¹ This prompted him to think that the abuse of liberty would force government to take extraordinary measures without which it could not sustain itself. In other words, a free press was precarious because the evil that it necessarily causes (popular ferments and faction) could increase until it may outweigh its utility (as guardian of the constitution) and therefore put an end to all civil liberties. In any case, in the original version Hume seemed to have been carried by a greater proselytising enthusiasm for 'this peculiar privilege of Britain'⁴² than is customary in his work, a step perhaps too far, towards the very 'vulgar Whiggism' which Hume himself seeks to criticise.⁴³

The core of the essay's argument remains in any case utilitarian in both versions. Allowing free press is a means of preventing the usurpation of powers of one branch of government over the others: it spreads any apprehension of encroachments of the constitution and is a check to 'arbitrary power'.⁴⁴ This is explained in more detail in the original version. Among the reasons why this freedom is more beneficial than harmful is that it is the very form in which this type of free speech is conveyed, the printed text, which makes it less capable of exciting sedition than the harangues of the ancient demagogues: 'A man reads a book or a pamphlet alone and coolly'.⁴⁵ The key is the principle of habit: the exercise of a free press makes citizens less ready to be excited into 'tumults or rebellion' and less seduced by false accusations and whispers.⁴⁶ But for Hume this depends on an even more fundamental point, which was that people are capable of reason, that they might be guided rather than driven.

The emphasis on the pragmatic function of free press, to scrutinize magistrates in order to guard the balance of constitution, is not absolutely modern nor does it

⁴¹ See the essay 'Whether the British government inclines...' and Hume's letter to Montesquieu, where he observes that the *wheels* of a free mixed government like the British, with its delicate balance of powers, is more liable to wear out than 'simple forms of government', that is, monarchies like the French one, and that this is one of its chief inconveniencies (*L I*, [1749] p.65).

⁴² *EMPL*, p. 605

⁴³ Cf. Forbes, ch. 5.

⁴⁴ *EMPL*, p.11

⁴⁵ *EMPL*, p.604. Hume does not seem to consider here that newspapers were read aloud.

⁴⁶ *EMPL*, p.604

constitute a complete break with traditional republican ideas. In fact this utilitarian rationale has some echoes of Machiavelli's explanation, in chapter eight of the *Discourses* ('As much as accusations are useful to a republic, so much so are calumnies pernicious'), of the usefulness of public accusations as a way of preventing the spread of calumnies in republics: public accusations through constitutional provisions prevent the kind of factious divisions provoked by calumnies, which invariably spread in the public squares and private lodges when there is 'no institution that provides an outlet for the malignant humours to which men are prone, without their taking unconstitutional action'.⁴⁷ For Hume, a free press supplies the lack of such republican institutions in Britain and is a much more effective remedy for misgovernment. Being conveyed in a written form, ideas are less liable to seduce people into rash uncritical action.⁴⁸ This pragmatism is not only present in republican writings before Hume but it will also be recurrent after him. In a similar way Tocqueville, in *Democracy in America*, justifies free press in pragmatic terms, and writes that he approves 'of it from a consideration more of the evils it prevents than of the advantages it ensures'.⁴⁹

The two essential features of this utilitarian rationale for liberty of the press are, in the first place, that it might not be incompatible with monarchy; and secondly, that its full enjoyment depends nevertheless on certain constitutional arrangements that can be roughly described as republican. Therefore, though a free press may be common to all civilized governments, its maximum expression is found only in strictly free ones. This means that, although free press in particular and civil liberties in general belong to all civilized governments, in the last resort they have a distinctively republican character. They ultimately depend on implicit or explicit constitutional provisions, i.e. forms of control of public power itself, even though this may not need a constant exercise of direct political intervention (or rather precisely because they do not). Hume's concept of liberty is therefore an enlargement and modification but not a complete rejection of the

⁴⁷ Niccolò Machiavelli *The Discourses*, Trans. by Leslie L. Walkwer (London: Routledge and Kegan Paul, 1975, p.229.

⁴⁸ A similar reason for allowing liberty, in the *Enquiries*: 'the state ought to tolerate every principle of philosophy; nor is there an instance, that any government has suffered in its political interests by such indulgence. There is no enthusiasm among philosophers; their doctrines are not very alluring to the people', p. 147. Literacy was relatively limited anyway.

⁴⁹ (New York: Everyman's Library, 1994), p. 181

republican understanding of liberty. The role of political liberty is to be de-emphasised and replaced by the more regular institutional mechanisms that ensure the rule of law.

5. The close connection between the constitution and liberty in Hume's political thought

The general concept of liberty that stems from this essay, the one I hope to have outlined, is a conspicuous one but it is also difficult to characterize because, although it constitutes a definite break with the common republican association of liberty exclusively with free government, it remains nevertheless quite distinct from Hobbes' famous definition of freedom in the *Leviathan* in purely negative terms, unconnected with any constitutional arrangement.⁵⁰ Hume's concept of liberty is a corrected republican one. As Hume writes in the essay 'Of the Origin of Government', 'it must be owned that liberty is the perfection of civil society'.⁵¹ The full enjoyment of liberty is only possible in free governments, those that retain fundamentally republican institutions.

The two main revisions of the republican conception of liberty undertaken by Hume are to make it less dependent on institutions of self-government than on a system of general laws protecting all citizens and to make it capable of degrees and therefore common to all civilized governments. This is the sense in which general laws protect individuals from arbitrary interference. Civil liberty is understood as providing security not only against the abuses of other individuals but also against arbitrary political power itself, that is, by enforcing general laws in a regular or constitutional manner.

So far, I have taken distinctions among the different senses of liberty as unproblematic for the sake of presenting the various elements of Hume's concept of liberty. But in order to grasp the criticism on which it is based it is necessary to engage in the analytical study of liberty. This concept of liberty looks unusual to those versed in contemporary debates. However we shall find, following a close inspection of contemporary writings on freedom, that Hume's concept can be revealed as a complex amalgam of familiar constituents.

⁵⁰ Hobbes *Leviathan*, (Cambridge: Cambridge University Press, 1904), ch. XXI.

⁵¹ *EMPL*, p.41

CHAPTER II

Analytical background: The contemporary debate on political freedom

In those days there was no medium between a severe, jealous Aristocracy, ruling over discontented subjects; and a turbulent, factious, tyrannical Democracy¹

There is written on the Turrets of the city of Lucca in great characters at this day, the word LIBERTAS; yet no man can thence infer, that a particular man has more Libertie, or Immunitie from the service of the Commonwealth there, than in Constantinople. Whether a Common-wealth be Monarchicall, or Popular, the Freedom is still the same
(Thomas Hobbes)²

1. Berlin's dyadic characterization

In the last chapter I outlined some of the features of Hume's theory of liberty as displayed in one of his political essays. The first task consisted in synthesising Hume's arguments in his own terms. But I also pointed out a conceptual difficulty that arises from this: if restricted exclusively to such terms we would not be able to make full sense of Hume's complex concept of liberty. Broadly speaking, the word liberty contained both a social aspect, as personal security, and a political aspect, associated with citizenship and participation in a self-governing community. Hume sought to emphasise the first aspect, which appears more suitable to modern commercial civilization, at the expense of the political aspect, the one associated with the independent and military

¹ EMPL, 'Of Populousness of Ancient Nations', p.416

² *Leviathan*, part 2, ch. XXI, p. 151.

mode of life of the ancient republics. This stemmed partly from Hume's observation that all civilized governments and not just free ones, could enjoy liberty in its less restricted sense, i.e. as civil liberty. As will be seen in chapter three, this is also implied in Hume's clearly institutional and instrumental (as opposed to civic-moralist) approach to politics, serving social and economic needs and whose essential characteristic is a regular administration of justice that provides stability to property and security to contracts. However, we also saw that if it is true that in Hume's concept of liberty the connection between the civil and the political is deemphasised, they nevertheless remain connected because liberty is inseparable from those political arrangements that provide special constitutional guarantees. Where institutional or social checks to arbitrary power are lacking, where there is not a middle rank of citizens between magistrate and people, there can be no liberty. There is an institutional or republican element in Hume's conception of liberty, besides the two other aspects above-mentioned. In order to unravel all these elements it is necessary to turn to the contemporary debate. Applying analytical categories will help understand this complexity.

The starting point of the contemporary debate on political liberty is Isaiah Berlin's 1958 inaugural lecture 'Two Concepts of Liberty'. This is not because it offers the last words on the subject but because, having developed Constant's thesis in his lecture 'Liberty of ancients and moderns' (1816)³ to its ultimate consequences, it presents a useful conceptual tool for understanding and situating the main political theories of the history of western political ideas. Although Berlin's conclusions have been challenged from all fronts, his work remains central. The present analysis is not exhaustive; besides offering a brief criticism of Berlin's project it will focus on those aspects that will illuminate subsequent explanations of Hume's ideas of liberty in the following chapter. In this section I shall summarize Berlin's thesis and the most relevant lines of criticism of his two concepts of freedom.

³ Berlin makes this connection explicit when he writes that 'no one saw the conflict between the two types of liberty better, or expressed it more clearly, than Benjamin Constant' (*TCL*, p. 48). Incidentally, I shall use the words freedom and liberty interchangeably, just as Berlin does, despite that they might be used with different connotations.

* * *

In that his famous 1958 lecture Berlin observes that the ambiguity in the different uses of this 'protean word'⁴, freedom, is due to the fact that there are two neatly distinct conceptions, positive and negative, associated with two intellectual traditions. The difference could be summarized thus: Positive freedom is the capacity and the exercise of self-mastery and negative freedom is the absence of human obstacles or interferences. The positive concept of freedom focuses on the subject and thus seeks to specify the conditions which make an agent *truly* free, while negative concepts of freedom focus on the obstacles and thus seek to specify the range of unrestrained human agency. The former has been called by Taylor, one notable proponent of it,⁵ an exercise concept of freedom because it emphasizes allegedly objective (psychological and social) conditions for an agent to be free in the full sense, and the latter an opportunity concept of freedom because it merely enunciates the lack or presence of obstacles, i.e. the range of possible actions available to an agent, without questioning whether her autonomy is well founded or not.

Berlin's declaration of intention at the start of the essay is to be neutral about this disagreement, presenting the arguments on both sides, his only explicit purpose being to introduce some conceptual clarity in this field of political philosophy. The idea is to establish a neutral conceptual framework. They are both considered as theoretically valid conceptions, and there is no 'overarching formula'; each of them should be considered 'an ultimate value which, both historically and morally, has an equal right to be classed among the deepest interests of mankind.'⁶ However, as the exposition proceeds we are led to reject the positive concept on the grounds that it may easily – even if not necessarily – lead to coercive forms of paternalism, organicism, collectivism, to the subjection of individuals to allegedly higher principles and ultimately to the exact opposite of freedom, paternalistic totalitarianism. This conceptual distinction underlines an irreducible philosophical-anthropological disagreement: they are 'two profoundly

⁴ *TCL*, p.6

⁵ Taylor, Charles, *Philosophical Papers*, 1 (Cambridge: Cambridge University Press, 1985)

⁶ *TCL*, p. 52

divergent and irreconcilable attitudes to the ends of life.⁷ To make use of Constant's ancient-modern categories, the liberty of a hoplite in a Greek city-state and that of a bourgeois trader in modern commercial societies are not just superficially divergent, nor is the one valid and the other a distortion or misrepresentation of the true one; they simply are two historically valid but incommensurable notions. Furthermore, not only is the concept changing historically but it also varies dramatically within coexistent cultures and ideologies. The assumption seems to be that our choice between negative freedom and positive is an ultimate moral decision.

Berlin's acknowledgment of both concepts as intellectually valid constitutes the starting point of the argument for pluralism, a central idea that runs through the essay. Pluralism is based on the observation, taken as a fundamental social fact, that the multiplicity of values that are manifest cannot be reduced to unanimity by means of social technology or any other allegedly objective or rational means; that they may be ultimate. However, it is precisely the objections raised against its opposite, monism, that leads Berlin to the rejection of the associated positive concept of freedom later in the essay⁸. This is due to what he calls the organic metaphor: 'The perils of using organic metaphors to justify the coercion of some men by others in order to raise them to a 'higher' level of freedom.'⁹ Now, we may share Berlin's preoccupation about some of the loosely associated implications of the positive concept as he presents it; but we need not suppose that the link between this and despotism is a necessary one.¹⁰ Although the dichotomy reflects a fundamental distinction, to conceive that it implies such a dramatically incompatible option as Berlin presents it, is not realistic and it might obscure the complexities of historical accounts of the concept, in particular that of Hume. It is not even clear that Constant completely dismisses the liberty to public participation as completely irrelevant and incompatible with modern conditions.¹¹ As

⁷ TCL, p. 52

⁸ On 'Berlin's paralogism' see Jean-Fabien Spitz, *La Liberté Politique, Essai généalogie conceptuelle*. (Paris: Presses Universitaires de France, 1995), p. 84.

⁹ TCL, p.17

¹⁰ In fact, there are at least two different meanings of pluralism at work here. For a reconstruction of a conceptually valid reconstruction of negative freedom see Dudley Knowles, *Political Philosophy* (London: Routledge, 2001), pp. 79-82.

¹¹ Cf. Benjamin Constant, *Political Writings*, (ed. and tr.) Biancamaria Fontana (Cambridge: Cambridge University Press, 1988), p. 307.

Berlin himself admits in other parts of his lecture, the positive concept of freedom makes perfect logical sense if properly formulated and captures a considerable part of the truth about what we mean by liberty.

Berlin offers various definitions of both concepts. The meaning of positive freedom is conveyed with the terms self-direction, self-mastery, self-fulfilment, self-realization and self-control, all of which are politically innocuous without some additional assumptions. The positive concept of liberty is defined in terms of the right and rational source of human actions: if and only if those actions are autonomous, in the sense that they arise from the subject's rational faculties rather than from, in Kantian terms, heteronomous sources -e.g. passions or someone else's manipulation- can they be properly regarded as free. By contrast, liberty in the negative sense is primarily concerned with the area of non-interference for human actions: the greater the extent of actions that can be performed without the intervention of others, the greater the freedom in question. Negative freedom leaves the choice to the individual, taking her expressed will as ultimate and unproblematic. Since negative freedom is based on an individualist understanding of the relation between the individual and society or the state, this conception is naturally identified with the liberal ideal of a minimum sphere of private life and relations, and it is usually, though not necessarily, expressed in terms of rights.

At first it might seem that the word autonomy could help mark the conceptual distinction under analysis. However it turns out that, since both concepts claim to be consistent with the idea of autonomy, this does not provide a solution but only shifts the question further. For example, autonomy might be defined negatively as the capacity to act without anyone's interference, whether I misjudge my real interest or not, as the right to make mistakes; or positively, as the capacity to perform rational actions only. The decisive point of disagreement according to Berlin is the different understandings of the 'self', the subject of that autonomy. There will be different accounts of freedom as there are different theories about the self, or different anthropological perspectives. Positive accounts of liberty rely on the philosophical tradition, salient representatives of which are Plato and Kant, that conceives man as divided between higher rational

faculties and lower ones dominated by passions. The focus is thus on 'the true self'¹², which is thought of as the real basis of a fully autonomous rational being. They prescribe what can be considered rational courses of action and what cannot, and judge a subject's freedom accordingly.¹³ The case is the opposite with regard to negative accounts: they do not postulate or prescribe a unique rational choice on the basis of an allegedly objective intellectual access to the self. On the contrary, they recognise the inner value of an individual's choice as ultimate.

Of the various characterizations of the conceptual difference Berlin offers, there is perhaps one that singles out best this distinction; it refers to the two kinds of questions that each concept seeks to answer. Negative freedom can be expressed in the answer to the question: "What is the area within which the subject - a person or group of persons - is or should be left to do or be what he is able to do or be, without interference by other persons?".¹⁴ Positive freedom is expressed in the answer to the question: 'What, or who, is the source of control or interference that can determine someone to do, or be, this rather than that?'.¹⁵ The first is concerned with the scope of possibilities for human action and is measured by the area of non-interference or non restriction of options, regardless of the *real* value of these options. The second, positive one, by contrast, is concerned with the source of human action and is inseparable from that value, which needs to be the 'real', 'rational' or 'objective' one. In this case, since freedom consists in acting according to what is rational, our options could be curtailed in that direction without compromising our freedom.

The distinction between negative and positive freedom as self-government is succinctly expressed by Berlin thus: "The answer to the question 'Who governs me?' is logically distinct from the question 'How far does government interfere with me?'"¹⁶. These terms echo Popper's observation that in politics 'the vital question is not 'Who should rule?' but 'How can we minimize misrule?'"¹⁷, with the crucial difference that,

¹² *TCL*, p.24

¹³ *TCL*, p.19

¹⁴ *TCL*, p.7

¹⁵ *TCL*, p. 7

¹⁶ *TCL*, p. 14.

¹⁷ Karl R. Popper, *The Open Society and Its Enemies*; vol. 1, *Plato* (Princeton, N.J.: Princeton University Press, 1962), p. 121.

unlike Popper, Berlin does not entirely override the legitimacy of the first question, the one associated with positive freedom. The question 'who governs me?' is not only legitimate, it forms a fundamental part in a historical conception of liberty in its own right, the republican. This point can illuminate the question of the extent to which Hume carries his critique of classical republican politics and the 'active life', that is, his critique of the positive freedom of the ancients: Hume stresses the second negative question without altogether eliminating the first one.

2. The historical basis of the negative concept of freedom

In order to assess the extent to which Hume's criticism of classical republicanism advances the liberal notion of liberty or alternatively, the extent to which, as I argue, it constitutes a revision of the former it is necessary to treat Berlin's characterization and the responses to it in some detail.

'I am normally said to be free', writes Berlin, 'to the degree to which no human being interferes with my activity'.¹⁸ Freedom in its simpler intuitive sense consists in the area where someone is unrestrained to act as they wish without interference. But it is so –critics of negative freedom may add– because it is the one sense we take for granted within contemporary thinking in most *civilized* countries, the supposedly hegemonic liberal sense. Berlin himself admits that the negative understanding of freedom is relatively recent, that the ideal of a minimum inviolable sphere of private life has not been the driving ideological force of most of the modern political actions and social movements.¹⁹ It is nevertheless the definition of freedom that belongs to the classical liberal tradition as it developed since the seventeenth century, especially in England, and continued presumably to its full intellectual dominance in the nineteenth century. This historic point is important for the republican criticism of Berlin's dichotomy, which

¹⁸ *TCL*, p. 7

¹⁹ *TCL*, p. 46

will focus on how the pervasive triumph of the liberal ideal of freedom displaced the previous republican one.²⁰

The first formulation of negative freedom in fact is made not by a liberal writer but by an absolutist one, namely: Hobbes. In a footnote Berlin cites the well-known definition of freedom from *Leviathan* as silence of the law: 'A free man is he that [...] is not hindered to do what he hath a will to do'.²¹ From such deceptively simple definition it follows that law is always a constraint on freedom, no matter its content; it is always invariably the legitimate coercion for the interest of common peace and stability. Citing Hobbes approvingly, Berlin writes: 'Law is always a 'fetter', even if it protects you from being bound in chains that are heavier than those of the law, say, arbitrary despotism or chaos. Bentham says much the same'.²² This is a recurrent idea throughout Berlin's essay and it reflects his preoccupation with conceptual clarity. It implies that we should clearly distinguish freedom (in its negative sense) from other equally legitimate values, such as justice, decency, self-recognition, equality, etc., that they are competing values and thus that a compromise is always needed. Hobbes' insight that 'the area of men's free action must be limited by law'²³ is nevertheless incorporated into the liberal tradition, notably by Locke. The main political question of freedom thus defined becomes that of how to ensure the complex balance between a minimum individual sphere of action and legitimate State interference, between the ideal of *personal* freedom and other values.

This points to the need for a more fundamental distinction: in order to disambiguate the term freedom and make it clear that we are not concerned with freedom of the will, Berlin distinguishes between natural and artificial obstacles: 'Coercion is not, a term that covers every form of inability... [but it] implies the *deliberate*

²⁰ Pettit, *Republicanism*, esp. pp. 45-50.

²¹ Part II, ch. 21, p. 148. There is, however, more than one definition of freedom in Hobbes. One is legal and implies that people consent to give up natural liberty to the sovereign in order to gain protection and security. But the other physical definition equates freedom with voluntary act so he can account for the right of conquest. Nozick uses the same argument to explain how an industrial worker whose only alternative is to starve is nevertheless free not to work for a given capitalist, his decision being voluntary. Cf. Robert Nozick, *Anarchy, State, and Utopia* (Oxford: Blackwell, 1974).

²² *TCL*, p.8

²³ *TCL*, p.9

interference of other human beings'.²⁴ Freedom is then not mere absence of interference, but absence of interference of a particular –human– kind. In order to be regarded as meaningful absence of freedom in this sense interference must be *of* other people. Or, in other words, lack of freedom should be distinguished from inability. The implication is that a relevant human obstacle has to involve both deliberate and direct intervention in the form of coercion. Nevertheless, when Berlin illustrates the distinction between lack of freedom and incapacity, we find that the boundaries between them are not perfectly clear and uncontroversial.

The ambiguity appears when the term 'economic freedom' (in the sense of economic independence) is brought into discussion in this context. Then the boundaries of that distinction between natural and human obstacles become uncertain. If the term economic freedom is theoretically acceptable then this would enlarge the scope of relevant obstacles to include not only those that are both direct and deliberate but also those that are indirect and non-deliberate. Economic constraints would fall under such category, being the product of social structures under the control of no particular person. We might thus be rendered unfree in an economic sense when my inability to provide myself with means of sustenance can be attributed to particular institutions or to the social structure. It might thus be possible to reconcile the concept of freedom as non-interference with the socialist intuition that workers may be rendered unfree by virtue of being under the constraint of economic forces beyond the control of particular persons or even of the class that they serve.²⁵ Whether this is the case or not, Berlin's difficulty in demarcating freedom from other values proves that the negative formulation of freedom as the legitimate area of non-interference is not as clear-cut and intellectually satisfying as it might seem.

The most immediate political implication of the negative concept of freedom – thus defined as the extent of human non interference–, which Berlin wants to highlight is that freedom could not in practice be unlimited: "Natural' freedom would lead to social

²⁴ *TCL*, p. 7 [my italics].

²⁵ This the argument is developed by G. A. Cohen, 'Capitalism, Freedom and the Proletariat', in *Liberty*, ed. David Miller (Oxford: Oxford University Press, 1991), 163-82.

chaos'.²⁶ Coercion by the state becomes necessary to the very existence of that minimum scope of freedom. Natural (as opposed to civil) freedom is then restrained by the requirements of government. Berlin's analytical formulation of freedom as the legitimate area of non-interference essentially rests on the writings of Hobbes and Locke: freedom as non-interference is what the 'classical English political philosophers'²⁷ understood by this concept.

For Locke, civil as opposed to natural liberty consists in the protection of a common authority expressly instituted by the consent of all and for the interest of all. That the end of civil society is protection is clear from this passage: 'The only way by which any one divests himself of his natural liberty and puts on the bonds of civil society is by agreeing with other men to join and unite into a community for their [...] security [...] and property.' The end for which that common power is instituted defines in turn its limits: 'the power of the Society, or *Legislative* constituted by them, *can never be supposed to extend farther than the common good*'.²⁸ Locke's idea that the only way to create civil liberty is by instituting a civil society (a 'common authority'), appears to be inconsistent with one of Berlin's assumptions about freedom as simple non-interference, namely: that freedom thus defined is perfectly compatible with the very opposite of civil society, autocratic government, as long as it happens not to interfere with subjects' lives, such as in a benevolent ruler. Berlin's discussion of the problem of the benevolent ruler seems thus open ended, and what appeared to be a neat analytical conception becomes marred. Berlin is not so much interested in the specific terms on which this frontier between authority and freedom can be accounted for (for example, natural law, the contract theory or utilitarianism) as in seeking a general formulation that encapsulates all the historical accounts of the liberal tradition. However, even the claim that the negative concept of liberty is implicit in most of the tradition of political theory since the seventeenth century is problematic. The hegemony of such tradition in the development

²⁶ *TCL*, p. 8

²⁷ *TCL*, p. 8

²⁸ John Locke, *Two Treatises of Government*, ed. Peter Laslett (Cambridge: Cambridge University Press, 1967), §95, p. 48.

of constitutional ideas in the eighteenth century has been contested, notably by John Pocock.²⁹

The earliest response to the newer negative formulation of freedom is made by James Harrington. Hobbes had advanced one of the most important political theses in the history of ideas: freedom of the subject as silence of the law remains the same regardless of the form of government. Freedom is here the range of actions which the law does not prohibit; one is free in so far there are no legal restraints. When Harrington replies to this idea in *Oceana* the contest fully displays the stark distinction between freedom as self-government and the alternative *negative* understanding of freedom as non-interference. Responding to Hobbes's dismissive remark about the boldly displayed word 'libertas' on the turrets of the city of Lucca and his observation that 'a particular man' has no more liberty there than in Constantinople, Harrington contrasts Hobbes's 'liberty or immunity *from* the laws' with 'liberty or immunity *by* the laws'³⁰, which he claimed to be the correct understanding. For Harrington liberty could not be understood merely as immunity from the laws if indeed there was to be a significant difference between free and despotic states and between freedom and slavery.

The distinction Harrington was making was one between freedom as silence of the law and freedom as the legislative voice of the citizens. Hobbes' sense of freedom as the area of human action exempt from the enforcement of laws, could have no real meaning for Harrington, whose position was the classical one. According to this classical tradition liberty is the exemption from the dominion of anyone *by virtue of* the law, particularly, by virtue of the laws of a free state, and thus it involved having a share in the common institutions of the republic. Harrington's synthesis of the civic republican tradition, whose most important modern retriever he acknowledges to be Machiavelli, constitutes the first response to the liberal jurisprudential formulation of freedom. For Harrington, liberty according to the political practice of 'ancient prudence' is defined by the source of the law: the criterion for establishing the freedom of a person is thus whether he participates or not in the making of the laws to which he is subject. Someone

²⁹ Cf. J.G. A. Pocock 'The Myth of John Locke and the Obsession with Liberalism', in J. G. A. Pocock and Richard Achcraft, *John Locke, Papers read at a Clark Library Seminar*, (Los Angeles: William Clark Memorial Library, 1980), pp.3-24.

³⁰ James Harrington, *The Commonwealth of Oceana* (London: Routledge, 1887), p. 27 [my italics].

is unfree to the extent that he does not participate in such a process and thus his security and life depends on someone else's will. Power follows property and so, only those who have the capacity of independent citizens, bearing arms and participating in the body politic, can be regarded as free in any meaningful sense.

John Pocock examines the way these two traditions, 'civic humanism' and jurisprudence, coexisted in Roman political experience and connects it with the distinction between positive and negative freedom respectively: 'The world *libertas*', he observes, 'might be found in both contexts, yet there was a profound distinction between its use in a juristic and in a humanist context, one connected –as has been pointed out by Hester- with the distinction between liberty in the negative and the positive sense'.³¹ Hume elaborates his political concepts in the context of these two languages, the civic and the jurisprudential one, both extremely important in the intellectual debate of the Scottish Enlightenment in which Hume participates.³²

It is possible to explain Hume's concept of liberty as a solution to the tensions between the two traditions and –as I shall argue- as an attempt to rescue some republican principles from what is otherwise a thorough critique of classical politics. As Pocock argues, 'It is certainly not the case that the Scottish theorists in general regarded republican and jurisprudential language as distinct and ideologically opposite rhetoric'.³³ Despite Hume's devastating criticism of the central political concern with virtue in its civic Aristotelian sense and his view of political life as instrumental and subordinated to the needs of society, he in fact –as I shall argue, preserves the republican insight that liberty in its full extension can only subsist within essentially republican institutions, i.e. the rule of law. In fact it is significant that both civic republican and negative elements are present in Hume's use of the word liberty, which remains ambiguous from our contemporary point of view, as containing two traditions that

³¹ J. G. A. Pocock, 'Virtues, Rights, and Manners: A Model for Historians of Political Thought', in *Political Theory*, vol. 9 (1981), pp. 353-368 (p. 356).

³² James Moore, 'Hume's Political Science and the Classical Tradition', in *Canadian Journal of Political Science*, Vol. 10, No.4. (Dec., 1977), pp. 809-839; and John Robertson, 'The Scottish Enlightenment and the limits of the civic tradition', in Istvan Hont and Ignatieff, Michael (ed.), *Wealth and Virtue; The Shaping of Political Economy in the Scottish Enlightenment* (Cambridge: Cambridge University Press, 1983), 137-178.

³³ J. G. A. Pocock, 'Cambridge Paradigms and Scottish Philosophers', in *Wealth and Virtue*, pp. 235-252 (p. 251)

would eventually become far apart from each other to the point of appearing incompatible.³⁴

3. Criticisms of Berlin's dichotomy: Taylor, MacCallum and republicans

According to Charles Taylor, a notable critic of Berlin's negative freedom, freedom 'simply as the absence of external physical or legal obstacles'³⁵ is insufficient to capture a crucial aspect of freedom, an idea that ought to form part of a correct understanding of freedom, and particularly of any liberal ideal of individual autonomy itself, which is essentially post-Romantic.³⁶ Taylor distinguishes between an *opportunity* concept of liberty, or mere absence of obstacles, and an *exercise* concept of liberty, or rational self-direction or self-control. Since there can be internal as well as external obstacles to our freedom this suggests that positive freedom consists in getting rid of irrational and inauthentic desires.

A meaningful understanding of freedom entails that we take into consideration not only external constraints but also internal obstacles to the realization of our goals. We may for example, be deceived by dreams so as to misjudge our real permanent interest. In such a case we are rendered unfree by the presence of internal obstacles. Taylor seeks to discredit the belief that tends to privilege the negative concept of freedom as being the natural and *common sense* one. In actual fact, he argues, it can be shown that it has a major defect: it describes freedom in such a formal and undetermined way that it becomes unable to capture what we understand by freedom in a real situation. The mere absence of obstacles does not automatically render the subject

³⁴ The first encounter between the ideal of the city state and the Stoic ideal of universal law is described by G. H. Sabine and S. B Smith ('Introduction', in Cicero, *On the Commonwealth*, Ohio: The Ohio State University Press, 1929): They trace the influence of natural law on Roman jurisprudence to the later Stoic Panaetius, who having united native Roman Stoic ideals and Roman common law with Hellenic rationalism and *humanitas*, he create an ideal of 'a body of legal principles which are at once in general use and also represented the dictates of equity, reason, and justice', an ideal that 'never was fully realized' but nevertheless played an crucial role in shaping modern jurisprudence and political theory and practice. (p. 37).

³⁵ Charles Taylor, 'Atomism', in *Philosophical Papers*.

³⁶ Taylor, p. 176

free; something else is needed on the part of the subject, namely a capacity to take a determined course of action according to their rational will. Furthermore, by Taylor's account, the self, besides endorsing rationality, is inherently social. Society cannot be reduced to the simple aggregation of 'atomic' individuals. Our beliefs and actions have an inextricable social nature. Liberal and especially contractualist theories are claimed to be grounded in an unrealistic anthropology, one which conceives men as unhistorical entities, complete and perfect autonomous beings quite independently of their societal location.

This characterization might be brought into a description in negative terms, namely, as absence of internal *as well as* external obstacles to action. However, Taylor has an important reason to think that this notion is nevertheless a positive one: He argues that being (self)-conscious of the existence of these internal obstacles immediately involves the subject in the process of removing them, and therefore exercising a capacity, which is action. Negative freedom, since it entails a passive subject, is an *opportunity* concept. In contrast with this, positive freedom, entailing an active self-mastering of our own life, is an *exercise* concept: 'being free can't just be a question of doing what you want in the unproblematic sense'³⁷; there has to be a notion of rational self-control. The crucial difference is that between merely testifying to the presence or absence of obstacles to our freedom and actively and self-consciously engaging in overcoming them. This intervention to remove the internal obstacles involves judgment, a capacity of discriminating among motives (rational and irrational) and determining the will in a particular direction.

Hume's idea of spontaneous social order coming from passion-driven individuals is mitigated by his observation that free institutions require deliberate, conscious and informed rational choice to uphold them, which is an element of positive liberty. Indeed the whole moral theory is grounded on the fundamental empirical observation that men tend to 'prefer contiguous to remote'.³⁸ Hume's moral theory is not individualistic in the modern liberal sense.³⁹

³⁷ Charles Taylor, 'Atomism', in *Philosophical Papers*, c.7 Cambridge (1985), p. 180.

³⁸ *THN*, p.344

³⁹ See below, p.81 and Forbes, *Hume's Philosophical Politics*.

Contrary to Berlin's thesis about the irreconcilability of negative and positive freedom, not only can there be a compromise between these two concepts but such a compromise might even be necessary for any realistic account of freedom when studying a specific thinker on political freedom. If Berlin writes that 'no doubt every interpretation of the word liberty, however unusual, must include a minimum of what I have called 'negative' liberty'⁴⁰, the same must be said about a minimum of what he calls positive freedom, a minimum definition of the limits and conditions for exercising free human agency. This is a point raised by those who see negative freedom as too simplistic and narrow to be able to account for freedom in an intellectually acceptable way. Though the individual is normally the sole judge of his own choices, there is a reasonable limit to this: a collective fallible convention as to what is human action is necessarily involved in every assessment of an agent's freedom: neither the agent herself nor society or an allegedly privileged observer can be considered ultimate judges on that. The fact that we do not have an infallible privileged access to the 'true self' does not prevent us from judging someone's autonomy on the basis of what is rational and thus, accepting certain forms of paternalism as legitimate in certain circumstances. Some forms of positive freedom seem perfectly valid and there is no reason to reject formulations of the content of freedom on the grounds that they are necessarily dogmatic.

* * *

The second criticism of Berlin's dichotomy that I want to consider proceeds also along analytical lines. This is the case of MacCallum, who observes that Berlin's dyadic categorization lead to 'an excessively crude justification of the conventional classification of writers into opposing camps'.⁴¹ It is not surprising that real historical accounts often include elements from both concepts or that writers on political freedom can rarely be located within Berlin's strict categorization. In response to 'Two Concepts of Liberty'

⁴⁰ *TCL*, p. 46

⁴¹ Gerard C. MacCallum, 'Negative and Positive Freedom', *The Philosophical Review*, Vol. 76, No.3. (Jul., 1967), pp. 312-334 (p. 321).

MacCallum writes that 'attempts to arrange writers on freedom into two opposite camps [are] distorted and ultimately futile'.⁴² Though plastic and historically changing there is a basic intuitive notion of freedom –MacCallum argues– whose three elements may vary in emphasis. A basic triadic formula is proposed encompassing subject, obstacle and ends. According to this formula, the positive and the negative concepts of freedom would then only stress one of the elements of this scheme more than the other two.

In his article 'Negative and Positive Freedom', MacCallum makes the case for the idea that rather than two different concepts of liberty, there are different perspectives about the three constitutive elements of a single core understanding of liberty. All the alleged 'conceptions' of liberty could then be brought under a single triadic formula: freedom of someone *from* something *to* do something; and that the variety of accounts would only differ in the emphasis put on any of those terms. What is a person and what is a relevant obstacle to freedom are co-defined: 'given differences on what a person is, differences in what counts as an obstacle or interference are not surprising'.⁴³ The adherents of the so-called positive concept of freedom would only differ from the friends of negative freedom in defining the concept of a 'person' in a particular way, namely: as the rational self and as a having a social nature, but not as really constituting another *concept*. But defining the concept of 'person' in terms of her rational faculty would entail that we count passions and other forms of irrationality as theoretically legitimate or meaningful obstacles to freedom. Accordingly, for those who favour liberty as self-mastery, a subject would be free when there are no internal *as well as* external impediments to prescribing their own goals.

MacCallum's appeal to a more flexible middle ground is particularly attractive and useful for the task of analyzing Hume's complex concept of liberty. As already seen, there is a complex combination of elements in Hume's conception of liberty: on the one hand liberty could be described as predominately negative, since it was protection *from* arbitrary power, but on the other hand, such protection was inseparably linked to institutions that could be broadly described as republican: checks and controls that ensured the rule of law.

⁴² MacCallum, p.327.

⁴³ MacCallum, p. 239.

* * *

A third criticism of Berlin's categorization has come predominantly from the historiography of ideas. Berlin is aware that the ideal of negative freedom is relatively recent in political history⁴⁴, but he regards it as the only alternative to positive freedom, in particular positive freedom as self-government, that which answers 'who should rule'. According to these historians, Berlin fails to recognize a third concept which is positive in one respect, as it connects with political participation, but negative in another respect, as it is freedom *from* arbitrary power. According to these writers, this classical republican understanding of freedom⁴⁵ has been overshadowed by the relative intellectual hegemony of the negative notion of freedom. A great part of this highly productive intellectual discussion of republicanism is relatively recent. Among the works in this field, we should highlight those of Quentin Skinner, Philip Pettit and Jean-Fabien Spitz.⁴⁶ It turns out that the tradition these writers describe is very much dominant until the late eighteenth century.

As this is the intellectual context in which Hume elaborates his political theory, we may naturally get a substantial amount of clarification and insight by analysing it in reference to this tradition. Yet, there are limits to this perspective since to a great extent Hume is consciously seeking to explore new philosophical grounds.⁴⁷ Hume's work is not easily classifiable and to a great extent it stands independently of any single philosophical tradition. Although, by a comparative analysis of the classical republican language and Hume's concept of liberty I do not expect it is possible to capture it completely, this nevertheless throws considerable light on it. I shall thus explain the

⁴⁴ It never constituted a 'conscious political ideal' in the ancient world and it 'is scarcely older, in its developed state, than the Renaissance or the Reformation' (*TCL*, p. 14)

⁴⁵ The term classical republicanism is from Zera Fink, *The classical republicans: An essay in the recovery of a pattern of thought in seventeenth-century England* (Chicago: Northwestern University Press, 1962).

⁴⁶ I focus on Pettit, *Republicanism*; and Quentin Skinner, 'A Third Concept of Liberty', in *Proceedings of the British Academy* 117 (2002), pp. 237-268; Spitz, *La Liberté Politique*.

⁴⁷ John Robertson, 'The Scottish Contribution to the Enlightenment' in Paul Wood (Ed), *The Scottish Enlightenment: Essays in Re-interpretation* (Rochester, NY, 2000).

republican criticism in more detail in the following sections and how does Hume relate to it. I argue that Hume's concept of liberty can be fitted well within this categorization.

This third *republican* conceptualization –so these authors argue– can be distinguished both from the negative and from the positive concepts: 'Freedom', writes Skinner, 'is not only restricted by actual interference or the threat of it, but also by the mere knowledge that we are living in dependence on the goodwill of others'.⁴⁸ Skinner's model for his version of republicanism is the neo-roman one, which contrasted the condition of free citizen and that of a slave: 'freedom may be limited by coercion... [but] it may also be limited by servitude'.⁴⁹ Skinner argues that it is in this respect negative because it does not imply the exercise and realization of the legitimate goal in question and instead focuses on *absence of*: '[T]he idea of negative liberty not as absence of interference but as absence of dependence'.⁵⁰ Pettit summarizes the republican concept in very similar terms: freedom as non-domination is the 'absence of *arbitrary* interference'. The exposition of republican liberty that these authors put forth displays a combination of negative and positive conceptualizations of freedom.⁵¹

They point that there has been a crucial historical development from a concept of liberty centred on the notion of citizenship towards a less demanding conceptualization that started with Hobbes and reaches its full manifestation in Bentham.⁵² This third republican concept of freedom has an element of both negative freedom, because it is centred on protection from something, and positive freedom, because that something from which we are protected is not just interference but domination (Berlin's 'mastery' by others). An agent is free in this sense when she is protected not merely from non-interference but from non-domination or non-dependence.⁵³ To be free in this sense entails certain absolutely essential conditions: either the agent is in a disposition to contest that arbitrary power herself, through a share of power in the republic, or there

⁴⁸ Skinner, 'A Third...', p. 247.

⁴⁹ Skinner, 'A Third...', p. 257.

⁵⁰ Skinner 'A Third...', p. 250.

⁵¹ For the idea that Pettit's account of republican liberty is a complex amalgam of both negative and positive freedom see Knowles' 'Review of Republicanism: A Theory of Freedom', *Philosophical Quarterly* (1999), pp. 415-419.

⁵² Cf. Pettit, *Republicanism*, p. 47.

⁵³ Non-domination is Pettit's term for what Quentin Skinner calls non-dependence. See Skinner, 'A Third...'

are mechanisms in place for ensuring that she is not subject to arbitrary interference, usually through various constitutional arrangements that guarantee the rule of law, that is, by being exempted both from arbitrary interference by other agents *and* by the state itself.

For our analysis the distinction between these two ways in which republican freedom can be realized is of the greatest relevance since it helps us understand the complexity of Hume's revision of the classical republican tradition. As pointed out earlier, such a revision does not entail that the concept he puts forward could be equated with Berlin's negative freedom as non-interference. In fact Hume's solution can be perfectly identified with the second way or condition for realizing freedom as non-domination: that is by constitutional, political and legal arrangements that ensure the rule of law. Although Hume's critique of the liberty of the ancients anticipates in some important respects the new paradigm of negative freedom, Hume does not abandon the republican insight about liberty altogether but adapts it to the new social and economic conditions of modern commercial society. But he rejects the more 'populist' –to use Pettit's term- or 'democratic' –to use Hume's term- aspect of it.

The target of Hume's criticism coincides with what John Pocock has called neo-Harringtonian Country ideology, the combination of civic humanism and ancient constitutionalism.⁵⁴ First retrieved in modern times for serving the claims of the Renaissance's Italian republics, this tradition was adapted to the cause of seventeenth-century English parliamentarianism by James Harrington, whose ideal of independent propertied citizens forming a militia was in turn revived in the eighteenth-century to become the ideology of the court opposition to Walpole led by Bolingbroke's *Craftsman*. This tradition was thus very much alive during Hume's life.

Hume's work can be and is indeed very widely considered a crucial contribution to the new economic-based outlook of political questions and to classical liberalism; that is to say, to the tradition associated with Berlin's concept of negative liberty: a private sphere of exemption from state interference or the freedom to pursue the economic and social life. Two of the elements that make Hume appear as endorsing a negative concept

⁵⁴ J. G. A. Pocock, *The Machiavellian Moment*

of freedom are his implicit distinction between *civil* liberty from *political* liberty, i.e. the positive freedom of a self governing community; and the apology of modern commercial civilization, his economic-base view of politics. Both aspects seem to place Hume inescapably in the world of so-called possessive individualism. Yet Hume's concept of liberty escapes any simple characterization. Neither of the two characteristics mentioned implies a renunciation of the republican understanding of liberty, but using Pettit terms, a conspicuous characteristic of 'the newer republicanism', a complex combination of jurisprudential language and civic republicanism.⁵⁵

What we find is that, despite Hume's radical revision of the civic aspect of the republican tradition, his concept of liberty remained republican. Liberty as rule of law does not coincide with Berlin's negative freedom as absence of interference, but with republican freedom: Liberty is inseparable from the institutional guarantees that sustain it. For Hume the political-constitutional consideration is a central concern and is precisely what explains the degree of liberty enjoyed in a given society. In the essay 'Of the Populousness of Ancient Nations' the political constitution determines not only the populousness of a nation but its manners and the degree of civilization.

In the first chapter I have examined in some detail why we should regard Hume's concept of liberty as republican despite that direct participatory liberty was subordinated to an instrumental role and despite Hume's argument that civilized monarchies may enjoy liberty too: on the one hand, liberty depends on a number of institutions not exclusively republican but most fully realized in free governments, and on the other hand, liberty can have degrees. Now, in order to support my further claim that Hume's rejection of Lockean contractualism and the notion of natural rights does not mean a renunciation of the republican understanding of liberty it is necessary to examine Hume's general moral and political theory and his historical account of the development of British institutions, in particular. In the next chapter I will look first at how Hume develops a doctrine about 'civil liberty' in the third book of the *Treatise* and in the *Enquiry Concerning the Principles of Morals*. Secondly, I will analyse Hume's position on the nature and conditions of modern British liberty as it stems particularly from his account of the two volumes on the Stuarts in the *History of England*.

⁵⁵ Cf. Pettit, *Republicanism*, p. 21.

CHAPTER III

The background of Hume's concept of liberty in the moral and political theories

1. Regularity in human nature as the basis of justice and law: Moral necessity and political liberty

Hume's ideal of liberty does not stand on its own in the project of the science of human nature but stems from it. In the account of the artificial virtue of justice we are presented with the basics for his methodological approach to liberty, namely, that the guiding impulse in the institution of justice and the domestication of our passions is the need for human interaction to become stable and predictable; the end of justice being the permanent interest of society. Now, there is a certain idea of causality peculiar to human affairs without which the *necessary* emergence of rules of justice –given the conditions– cannot be explained: the gradual spontaneous emergence of social order in general, as well as that of the rules of justice in particular, is based on this uniformity in human nature. Natural regularity (the working of our faculties), thus, explains how that *artificial* kind of regularity emerges. The human capacity for creating such artificial order or regularity, though always limited, is the basis of Hume's notion of liberty as absence of arbitrariness. The need for a regular execution of justice explains the institution of government in general but is the deliberate object only of a free government. If such regular execution of justice develops into what we call a rule of law then we have a free government, i.e. 'the perfection of civil society', where there is the greatest enjoyment of liberty compatible with government.

The idea that a system of liberty (rule of law and mechanisms of control of political power) provides greater stability than that which depends on the particular, contingent character of men (direct democracies and unchecked monarchies) requires a view of liberty as absence of arbitrariness. The urge towards regularity in human affairs provides both the limits (stability and authority) and the context (government) where liberty may flourish. Though all 'civilized' governments, including modern monarchies, enjoy some of the benefits of liberty, modern commercial republics constitute the embodiment of the ideal of liberty, and they are described as 'well-tempered Aristocracies'.¹

The main link between, on the one hand the psychological-anthropological aspect of the 'science of man' and the moral and political theory is Hume's account of the formation of beliefs, which constitute 'artifices'. The subordinate role that reason plays in the process of self-correction of the passions and towards social stability determines a less political, a more social and economic centered notion of liberty.

First justice and then government emerge as social rules and can ultimately be understood in terms of beliefs. Both are conventions, the difference being that justice is the requirement of any society while government is only the requirement of an economically and technologically complex civil society. Hence the idea that government is founded on opinion.² In this respect then, Hume's speculative politics is rooted in his moral theory. In the moral system, the enlargement of the scope of our natural sympathy follows increased complexity and needs in human relations beyond the family: man's natural 'bias' towards their own immediate concerns is gradually and incrementally corrected not by design or reason but by a combination of 'the least reflection' and necessity, giving rise to the 'artificial' notion of justice.

The idea, that institutions –the rules of justice in this case- are shaped by the situation and circumstances, by the necessity that mankind encounters, is valid throughout Hume's moral philosophy. Social rules are just stable solutions to such necessity that men come up with in the process of building as well as adapting to wider

¹ *EMPL*, p.416

² *EMPL*, p.32

and more complex social relationships.³ The quasi-moral duty to allegiance (to government in general) that results from Hume's system stems from this idea, that institutions are shaped by necessity and not by design and that therefore our consent is not involved in the question.

The limited reflection involved in the emergence of rule creation is thus a short sighted subordinate reason which operates within narrow limits and with what is already available in experience. The family is naturally the first experience of human cooperation. Though justice is itself artificial the process that brings it about is natural in the sense that it can be accounted for from simple beginnings, i.e. original principles of human nature. The 'reflection' involved can thus be understood as opposed to foresighted plans and deliberative reason. But this non-teleological and unguided process of rule creation through incremental correction of our natural inclinations does not stop there. Opinion appears in its three forms as the basis of government: as a shared sense of interest in government in general (i.e. as opposed to no government at all), as the 'sanction of antiquity' bestowed on particular institutions, persons or dynasties, and as the attendant of property.⁴ The background for the concept of political freedom is therefore the application of general rules, first at the moral level, as justice, and secondly at the more complex and contingent political level, as government by 'general and inflexible' laws.

In order to illustrate the idea that the rules of justice, property and government seek to create an artificial regularity and the consequence this has on the notion of liberty I shall turn now to a topical example from the second book of the *Treatise*, where the transition from epistemology and psychology to moral and political philosophy is most clear, namely, the necessary effects of motives in human action as the basis of justice and law.⁵ Just as the rules of justice constitute new motives that may become entrenched as second nature, so allegiance to government creates a new motive when

³ Cf. Dudley Knowles, 'Conservative Utilitarianism', in *Utilitas*, vol. 12, n. 2, July 2002, pp.155-75

⁴ *EMPL*, p.33

⁵ *THN*, book II, part 1, § X

perfect observance of the rules of justice can no longer be relied upon, which is what happens in all except the more 'contracted societies'.⁶

When we evaluate other people's powers of acting or forbearing, Hume argues, we assume motives, even though they might be unknown to us. Now we can only form an idea of such power by past experience. In other words, we attribute such power to someone when we are led by the probability and possibility that she might or might not have such and such motives. But, given the uncertainty of human motives, we attribute the power of harming us to someone in circumstances in which that person could find no motive that impels them *not* to harm us, even though such power might not actually be exercised. This is not because, as the scholastic argue, there is a real difference between power and its exercise, but because the idea of power over others is itself formed by past experience and necessary expectations. Knowledge of human affairs and of the world is sufficient to inform us that the civil law is as powerful a constraint on human actions as a sword to a lonely traveller and that this constraint is the basis of my security. Predictability that the laws are a constraint on others constitutes my liberty, that is, my sense of not being vulnerable to arbitrary power. There is a necessary effect in there being established an authority to execute laws. Hume's words are worth quoting.

I do not think I have fallen into my enemy's power, when I see him pass me in the streets with a sword by his side, while I am unprovided of any weapon. I know that the fear of the civil magistrate is as strong a restraint as any of iron, and that I am in as perfect safety as if he were chain'd or imprison'd. But when a person acquires such an authority over me, that not only there is no external obstacle to his actions; but also that he may punish or reward me as he pleases, without any dread of punishment in his turn, I then attribute a full power to him, and consider myself as his subject or vassal.⁷

The comparison between chains and the sword of the magistrates (the force of the law) makes it clear that Hume does not conceive liberty as mere absence of interference: I don't need to wear a sword or that the other person be *really* in chains to perceive my own liberty. Given the impossibility of relying on men's natural benevolence, the only great motive that can prevent one person from harming another is 'the fear of the civil magistrate'. I consider myself free in the politically relevant sense

⁶ See below, p.73

⁷ *THN*, p. 203.

not when I happen to be exempted from suffering violence but when I can conclude, thanks to past experience and general knowledge of human affairs, that I am not under the arbitrary power of, or dependent upon, anyone else. On the other hand, the lack of fear of the civil magistrate leads me by similar social expectations to think that I could be assaulted with impunity and thus that I am rendered effectively unfree. Dependence on someone's power of coercion with impunity is identified with servitude and security from such power with liberty. The point Hume is making is grounded in his epistemology: the analysis of the situation described, as such and independently of our past perceptions, cannot make me discover any power in the armed man to harm me. Only those past perceptions of similar situations can and must necessarily give me the sense of the armed man's power and of my vulnerability. Therefore, there is no need that violence be actually exerted or power exercised, it is sufficient that there be vulnerability to someone's arbitrary will, in which case we would be *effectively* in servitude.

Now, in suggesting that a person's vulnerability to another's arbitrary power makes one subject to it, although this power may not in fact be exercised, Hume clearly anticipates Pettit's republican theory of freedom: 'What constitutes domination is the fact that in some respect the power-bearer has the capacity to interfere arbitrarily, even if they are never going to do so'⁸. In Pettit's description, the republican notion of freedom as non-domination, retrieved from a tempered or modernised version of the liberty of the classical *polis*, is overshadowed by a less demanding conceptualization, the first 'landmark' of which is Hobbes before culminating with Bentham.⁹

However, Hume's affinity with the republican understanding of liberty appears to sit at odds with the usual classification of Hume among those who brought about the negative concept of freedom. The same development in the history of ideas described by Pettit in the first pages of his book *Republicanism* has been extensively examined by Quentin Skinner. Having observed that Hobbes's case for a redefinition of freedom in opposition to exercise and not power of interference, constituted a challenge to

⁸ Pettit, *Republicanism*, p. 63.

⁹ Pettit, 'Freedom with honor: a republican ideal - The Decent Society', *Social Research*, Vol. 64 (1997), 52-76 (pp. 68-70).

seventeenth-century parliamentary ideas, Skinner approvingly quotes Berlin's inclusion of Hume within the group political thinkers who followed that very challenge:

Hobbes' counter-revolutionary challenge eventually won the day. To cite Berlin's own litany, we find his basic line of arguments taken up by David Hume, Jeremy Bentham, to some degree by John Stuart Mill.¹⁰

If the basic line of argument refers to the criticism of classical politics and a revision of the moral and economic requirements of liberty as the classical republicans understood it, then it seems right to identify Hume with it, but if it is to be assumed that Hume adopts Hobbes' repudiation of the neo-Roman or republican understanding of freedom as non-dependence adopting the latter's redefinition of freedom as non-interference, then I claim that Hume never took this line. I shall argue this in more detail.

How the kind of stability and regularity that is the basis of liberty as rule of law comes about is, I shall argue, the central issue at stake in Hume's account of the emergence of justice.

2. The emergence of justice and the theory of unguided social order

I have given some preliminary explanation as to why Hume's concept of liberty is complex and neither reducible to the ideal of non-interference nor to that of the status of economically independent citizens exercising an active public life. I shall examine now how Hume's account of the emergence of social institutions serves to explain the part that civil liberty plays in his political system. It is in the moral theory where Hume describes the mechanism by which social rules are established. To understand the rationale for the institution of justice is also to understand the rationale for further more complex institutions, in particular, that on which civil liberty flourishes, namely, the rule

¹⁰ Skinner, 'A third...', p.247. Hume's little sympathy with the Interregnum experience is not at all unique or rare among Whigs. Most eighteenth-century Commonwealthmen, despite their admiration for Harrington, Milton and the other major figures of that age, rejected any wish to credit that regime or any approval of the democratic principles of the levellers and the other *enthusiasts*. Cf. Caroline Robbins, *The Eighteenth-century Commonwealthman* (Cambridge, M.: Harvard University Press, 1961).

of law. The process of unguided non-teleological rule creation, arguably Hume's greatest sociological insight, is the key to understanding in what sense the duty of justice is artificial. This is explained by the peculiar nature of *utility* in Hume's system, as neither a function of reason nor of nature, as neither deliberation nor instinct, but something between both, and as the guiding principle that sets such process in motion: Utility is not prescriptive but explanatory.

I shall argue that this peculiar utilitarian explanation of moral rules, social institutions and conventions constitutes a systematic criticism principally to the moralist and teleological systems and to the associated civic humanist understanding of liberty.¹¹ Secondly, it is also a response to the methodological individualism associated with the self-interest school of thought. This begets a peculiar conception of liberty which does not rely on *contractualist* deliberation or *civic* 'regard for the public good'¹² but on constitutional *negative* controls of the government by the governed – that is, by at least *some* of the governed, the affluent propertied population that represent a permanent interest in the nation.

For the purpose of this essay, I shall disregard differences between the argument in Book Three of the *Treatise* and the argument of the *Enquiry Concerning the Principles of Morals*, (e.g. the uniformity of human nature and the role of sympathy in the former, the greater emphasis on utility in the latter). Hume begins by analysing the notion of justice into its component elements.¹³ He finds that far from being a simple and original idea of reason, it is entirely dependent on a moral sense, which is nothing but a sentiment or feeling of approbation and disapprobation. Moral distinctions, he argues, arise not from reason but from a natural sentiment. To subject morality to scientific explanation is to identify the first *natural* active principle involved, and this Hume finds to be an original

¹¹ I do not suggest that the moralist view that Hume targets along with rationalism and objective relations, the assumption that morals derive entirely and immediately from a moral sense or a 'regard to publick interest' (THN, p.309), is the same as the civic humanist ideal, but claim rather that the teleological view of social harmony of the former is naturally congenial to the latter.

¹² THN, p. 339

¹³ Cf. Ernst Cassirer, *The philosophy of the Enlightenment*; (trans.) F. Koelln and J. P. Pettegrove. (Princeton, NJ: Princ. University Press, 1951) , pp. 10-11, for a discussion of this common (typically Galilean and Paduan) methodological aspect of the Enlightenment, of abstraction and analysis into basic elements in science, a paradigmatic example being the movement of a planet around the Sun, as composed of two vectors, inertia and weight.

sentiment. Two ethical systems are at stake here: on one hand, the 'selfish system', the theory of morality associated with Hobbes and Mandeville, that reduces explanation of moral behaviour to self-interest; and on the other, the moralist school, best represented by Hutcheson. The argument is conveyed in full naturalistic terms, so that the process from simplicity to complexity, from a natural sense to the institution of an artificial duty (justice), constitutes a criticism of both. Hume's proposal can be regarded as a *via media*, where on one hand self-interested passion is the predominant but not unique principle, and on the other hand, the utilitarian account of the origin of social institutions is distinguished from their normative force. The former aspect is shared with the selfish school, the latter is not.

Hume's argument against rationalism in morals follows this pattern of analysis of complexity into first principles: What the rationalist understands as a faculty, reason, is rather a complex accumulation of experiences -crystallized as conventions- and thus it cannot explain but must itself *be* explained. The idea is to expose the philosophical error implicit in systems of morals construed on the basis of 'eternal fitness and unfitness of things'.¹⁴ The target of this criticism is any rationalistic ethics which equates moral standards with geometry and makes rules of morality deductively discoverable as if they occupied a realm of reality of their own to which we have access through our higher faculties. The error of the rationalist is to conceive reason as a semi-divine faculty by which we have access to certain *a priori* ideas, including eternal and immutable moral standards. It is in this context, the idea that reason is a purely instrumental faculty, that Hume argues for a fundamental difference between judgements about 'is' -morally neutral- and judgements about 'ought'.¹⁵ Reason is 'inert' and completely incapable of producing moral approbation or blame: 'a mistake of *fact*' cannot provoke moral blame because it is involuntary.¹⁶ Thus, 'pure *reason*'¹⁷ must be ruled out altogether as the source of moral distinctions.

¹⁴ THN, p. 294

¹⁵ These two spheres, however, are not totally unconnected. Cf. Anthony Flew, 'On the Interpretation of Hume', in *Philosophy*, Vol. 38, No. 144. (Apr., 1963), pp. 178-182. On the contrary, Hume's naturalism consists in showing that moral judgements can be accounted for by general principles of human nature.

¹⁶ THN, p. 296

¹⁷ EHUM, p. 171

If passion not reason is the driving impulse of human action, then the central concern from the point of view of speculative politics is the basic fact of the limitation of human nature, without which no human institution, from the rules of justice and property to government by laws, can be explained. Hume shows in book II of the *Treatise* that reason is entirely subordinate to the active faculties, the passions; and therefore that it is incapable by itself of producing motivation. Now, since morality is concerned with motivation, it is clear that reason, being inert and incapable alone of producing motivation, cannot be the source of morality.¹⁸ 'Reflection', used almost interchangeably with 'reason', plays a secondary role in the explanation of morality; its function being predominately passive, it is the slave of the passions. However, its role is crucial: though an original, natural, and unenlightened sentiment is the active principle, moral judgements cannot take place without the 'corrections' ¹⁹ of reflection: '[S]elf-love, when it acts at its liberty, instead of engaging us to honest actions, is the source of all injustice and violence; nor can a man ever correct those vices, without correcting and restraining the *natural* movements of that appetite'.²⁰ Such correction is thus circumscribed merely to diverting the natural and immediate satisfaction of the passions but not opposing them.

Daily experience teaches that moral approbation and blame do not emerge directly from our nature, in the sense that they are effortless and spontaneous, but require education through the enlargement of our sympathy (closely related to the imagination). It is in this sense that justice is said to be *artificial*: not because it is the product of rational deliberation on a mental model of society or a social instinct, but because, in seeking to advance our own unenlightened impulses in a social situation, one in which they cannot be immediately satisfied, by their indirect satisfaction we establish a precedent for cooperation and social rules: In seeking to obliquely²¹ satisfy the passions we insensibly give rise to a new enlightened motive and it is this motive

¹⁸ The insight that moral beliefs have an irreducible element of non-rationality is found in Hutcheson and in Shaftesbury'. Alexander Broadie, *The Tradition of Scottish Philosophy* (Edinburgh: Polygon, 1990), p. 95. Hume attributes this idea to Shaftesbury (*EHUM*, p. 171) and drives it to its utmost consequence.

¹⁹ *THN*, p. 36: 'We frequently correct our first opinion by a review and reflection; and pronounce those objects to be equal, which at first we esteem'd unequal'

²⁰ *THN*, p.309

²¹ *THN*, p.319

that constitute our sense of justice. Now since the basis of morality does not consist in certain properties of external objects or in any objective relation, it follows that they must be internal and mere mental projections. Moral attributions are made from a sentiment: It is 'the object of feeling, not of reason. It lies in yourself, not in the object'.²² These are internal in the sense that they are based on relations that are apparent only to rational beings, but since these occur *necessarily* in an intersubjective environment and not in *Robinsonian* individuals, they might be said, in this other sense, to be external.

The role of reflection in the moral system, crucial for Hume's criticism of the contractualist conception of liberty, requires one further conceptual clarification. Hume's preference for the expression 'the least reflection'²³ instead of 'reason' has to do – presumably – with the fact that it appears less charged with metaphysical connotations. In any case, the contrast is between a short term problem-solving faculty, attached to what already exists, and a full faculty of deliberation and plan. The concept of reason held by the rationalist moral philosophers is untenable because it is impossible to derive morals deductively or empirically; neither connection of ideas nor matters of fact can deliver moral principles alone. The meaning of 'reflection' gives us a clue to understanding the notion of undersigned social order.

Although Hume always seeks to avoid mere verbal scholastic dispute, he finds it necessary to clarify certain ambiguities in the language of moral philosophy. The word nature has been subject of philosophical controversy since the Sophists in the *physis-nomos* debate²⁴, and in a sense Hume is re-evaluating the old conventionalist and naturalist positions, and making a synthesis of the two.²⁵ Hume asks whether we should look for the source of moral distinctions in nature, and he answers that we might do so if we understood it as 'opposed to rare and unusual', but 'if nature be oppos'd to miracles', Hume continues, 'not only the distinction betwixt vice and virtue is natural,

²² THN, p.301

²³ EHUM, p.236.

²⁴ For the view that the ancient Greek nature-convention controversy started by the Sophists outlines most of the issues at stake, cf. W.K.C. Guthrie, *A History of Greek Philosophy*, (Cambridge: Cambridge University Press, 1969), vol. 3, chapter IV.

²⁵ I rely here on Haakonssen's suggestion that Hume was close to a revision of this distinction, 'see[ing] that there is a third category between natural and artificial, which shares certain characteristics with both' (*The science of a legislator*, p.24).

but also every event, which has ever happen'd in the world, excepting those miracles, on which our religion is founded'.²⁶ Hume is here seeking to close the gap between the natural and the artificial, which is directly linked with one conspicuous feature of this moral theory: that it does not require an appeal to external non-natural principles, in particular it has no need of the divine sanction.²⁷ To subject morality to the 'experimental method of reasoning' requires starting *only* from observed principles of human nature.

The sense of the term 'natural' is further clarified when Hume writes that the principles that account for justice are 'as necessary in their operation as heat and cold, moist and dry'.²⁸ Justice is natural in the sense that it takes place universally, necessary and that, given certain conditions (social interaction), it is inseparable from human nature: It is in this sense that Hume can say that justice is artificial but not arbitrary since it arises 'necessary from education, and human conventions'.²⁹ As seen in the previous section, this regularity in the operation of our faculties³⁰ is the basis for the concept of moral and legal responsibility on which liberty is founded and –incidentally- what makes 'politics a science':³¹ We cannot hold someone responsible for his actions unless we presume them to be caused by motives even if they are unknown. In a third sense, that is, natural as opposed to artificial, justice can also be said to be artificial without being arbitrary because it is an elaborate response to *exclusive* human ends and needs: Given men's limited human nature and their increasing needs, it invariably and universally takes place.

Since there are natural as well as artificial virtues, the boundaries between virtue and vice cannot coincide with those between natural and artificial. Without the natural ones there could not be any moral approbation and blame, since these must be

²⁶ *THN*, p.304

²⁷ Regarding the economy principle in use here, Forbes refers to the question of Hume's religious belief and quotes C. W. Hendel for the idea that Strato's atheism inspired Hume's naturalism: 'Hume caught a glimpse of a very real alternative: order coming into things without the deliberate construction of some mind'. Cf. Forbes, p. 61.

²⁸ *THN*, p.305

²⁹ *THN*, p.311

³⁰ See above for the idea of 'moral necessity', p.10

³¹ See essay of the same title and also the first *Enquiry*: 'How could *politics* be a science, if laws and forms of government had not a uniform influence upon society?' (*EHU*, § VIII, part I, p.90).

understood with reference to actions derived from natural motives. To illustrate the difference between the natural motive of our actions and the moral duty of justice, Hume presents the example of the parents who takes care of his offspring out of an instinctive parental regard but who might do the same out of a sense of duty, that is to say, out of a regard for moral rules and for what they are expected to do. The latter moral sense, of compliance to moral rules, may and does eventually become independent of that natural benevolence but would not exist without it. In other words, there would not be a moral duty without a natural though extremely restricted regard for others.

Hume's explanation of justice from purely natural principles requires identifying what makes the process begin. The first circumstance that breaks the solipsistic circle and takes us out of our narrow selfishness is the 'affection betwixt the sexes':³² It provides the first rudiments of human cooperation. However, at this stage when sympathy is 'confined to a few persons',³³ it is rather a form of partiality totally incompatible with the larger interest of society. The key for enlarging our views and expanding this partiality is a limited 'reflection'. It is only through reflection that a regard for others can be extended. The bridge between natural sympathy and the artificial invention of justice is man's spontaneous capacity for inventiveness:

Man is an inventive species; and where an invention is obvious and absolutely necessary, it may as properly be said to be natural as anything that proceeds immediately from original principles, without the intervention of thought and reflection.³⁴

Such spontaneity of invention resembles a mindless physical force in that it is not perfect rational foresight, but an extremely constrained 'reflection'. This is all that is needed for a momentary detachment from the immediacy of our instincts. It is in effect a synthesis of natural and artificial: If our limited sympathy, our partiality, is contrary to society, '[t]he remedy, is not deriv'd from nature, but from *artifice*; or more properly speaking, nature provides a remedy in the judgment and understanding, for what is

³² *THN*, p.309

³³ *THN*, p.309

³⁴ *THN*, p.311

irregular and incommodious in the affections'.³⁵ In other words, we might say that man is naturally sociable but not naturally social.

Although Hume has already clarified his position on the meaning of nature he still finds it useful to consider the matter from both angles: justice can be said to be natural in that it is explainable through human nature, that it can reconstruct morality from the observed psychology of the passions. Bridging the gap between an instrumental, subordinate reflection and the passions as an original active principle, requires thus one further step, which is the process of self restriction of the passions:

There is no passion, therefore, capable of controlling the interested affection, but the very affection itself, by an alteration of its direction. Now this alteration must necessarily take place upon the least reflection; since 'tis evident, that the passion is much better satisfy'd by its restraint, than by its liberty'.³⁶

In other places Hume calls this faculty a 'calm passion',³⁷ 'vulgar sense and slight experience'.³⁸ Hume's criticism of the full faculty reason is apparent in the *Dialogues*: having rejected the argument from design, Philo says: 'What peculiar privilege has this little agitation of the brain which we call *thought*, that we must thus make it the model of the whole universe?'.³⁹ There is no 'pure reason', that is, speculative unempirical reflection that could be made the basis of the rules of justice. 'Least reflection' is constrained to what is immediate and practical given certain situation. Since the process of acquiring habit and experience is accumulative so reflection in Hume's sense can be conceived as evolving increasingly complex applications at the same pace as the needs of society. The unintended outcome of this momentary restraint of the passions for their better satisfaction through social cooperation given the least reflection is the establishment of a rule for more complex social and long term social cooperation.

It follows from this view of the artificial virtues that Hume's position cannot be characterized as individualist in a simple sense: Hume's unorthodox individualism – from the point of view of classical liberalism- may in part account for the lack of a

³⁵ THN, p.314

³⁶ THN, p.316

³⁷ EHUM, p.239

³⁸ EHUM, p.195

³⁹ D, p. 40. It is 'most likely that Philo is Hume's mouthpiece', cf. Broadie (ed.) *The Scottish Enlightenment. An Anthology*, p. 356.

developed modern language of rights.⁴⁰ It is apparent from Hume's account of the origin of justice that there is no place for pre-political rights in his system: liberty is therefore the result of human statutes and not an innate endowment. In this sense, Hume stops short of endorsing what Jean-Fabien Spitz calls the 'liberal synthesis', the idea of politics as the product (and protector of) rather than the producer of rights.⁴¹ For Hume *civil* liberty does not result from the protection of *natural* rights through a social contract but from the gradual development of political institutions and especially from corrections on the abuses of authority, that is, by the institution of negative constitutional controls. Public interest, that is, the concurrence of what Hume might otherwise call rights, is the *end* of justice as well as government but, as I shall explain in the next section, the rules that they establish become independent sources of morality and legitimacy (respectively) and are not subordinate to public interest. The account of allegiance only develops further this fundamental idea from the moral theory.

This naturalistic account of the process by which we acquire the artificial virtues is opposed both to a resolution of morality into self interest and into natural benevolence, be that a regard for particular persons or for the public good. The theory of unguided or unplanned social order thus challenges two models or ideals of political freedom: the civic humanist and the contractualist. However, one further element is essential in this picture, namely, the idea that the moral authority attached to justice becomes independent from the interest and utility that creates it in the first place.

3. Utility as the origin of justice, habit as its moral authority

In the account of justice Hume introduces a distinction, which dominates the rest of the investigation on morals and politics. In the *Treatise* he divides his task between, on the one hand, the experimental reconstruction of the elements that give rise to justice, and on the other, the analysis of the moral authority we attach to it. The first is the explanation of the origin of justice treated above; the second is an explanation of its

⁴⁰ David Miller, *Philosophy and Ideology in Hume's Political Thought* (Oxford: Clarendon Press, 1981) p. 107

⁴¹ J.F. Spitz, *La liberté politique*, p.50

moral basis, that is, the artificial motive of just actions. Having restrained the passions from their immediate satisfaction, we establish a new motive: '[t]he *general rule* reaches beyond those instances from which it arouse'.⁴²

If the first part of Hume's moral theory consisted in pointing out that the rules of justice could not have arisen if they were simply opposed to self-interest and if we were destitute of a natural and limited benevolence; the focus of the second part is about the grounds on which justice, once established, can be maintained. A regard for the interest of society is necessary in the first place to give rise to the rules of justice but they cannot be permanently sustained by such concern: 'A single act of justice is frequently contrary to *public interest*' and it is only the general plan that promotes public interest.⁴³

Therefore, neither self-interest alone nor natural benevolence could be the source of the moral obligation attached to the general rules of justice. Reflection assists the affections by an accommodation of our interest with that of others in particular instances, but once such accommodation becomes rule, the 'general plan or system of actions'⁴⁴ that promotes social peace acquires its own force independent of those instances. Neither the person involved nor the public might necessarily be a gainer by abiding to the rules of justice; e.g. when a poor man is obliged to pay a debt, or when a 'seditious bigot'⁴⁵ receives his due debt. The end that justice promotes is the long term interest of social peace and stability, which only the inflexible and general execution of rules can make possible. Public interest is thus promoted in an indirect manner and only through our commitment to the rules independent of the kind of utility that produced them.

The contrast with the contract theory of government is conspicuous right from the very foundations of Hume's moral theory: The rules of government just as those of justice are not subordinated or answerable to the immediate interest of the community or particular persons, but carry an independent moral authority. Without such independence from immediate utility society cannot subsist. The end for which general rules of justice are created is public interest, but once in place, public interest ceases to be the motive for observing them. Now, though exceptions to the fundamental rules of

⁴² *THN*, p.320

⁴³ *THN*, p. 319

⁴⁴ *EHUM*, p. 306

⁴⁵ *THN*, p. 319

stability of justice, property and government should be admitted 'when public ruin would evidently attend obedience' ⁴⁶, these are by definition impossible to specify: The moment an exception is specified or codified it ceases to be an exception and becomes a new rule. However, the exceptions have the quality of rules only when they are sufficiently numerous to make it necessary for social stability. This explains the origin of republics out of the abuses of monarchy and as a refinement in politics, a purposefully contrived system of government in which abuses are systematically checked and prevented.⁴⁷ It also explains Hume's criticism of the absolute right of resistance alleged by contractualists: Following Hume's argument, the expression 'right of resistance' would be an oxymoron because right is a statue produced by the establishment of social and political institutions and resistance implies the natural and necessary suspension of those very political institutions when they cease to answer their ends.

In establishing the terms of the fundamental rules concerning property -as opposed to forms of governments, which I shall treat in more detail further on- there is a universal mechanism at work: the effect of habit, which is a natural conservative instinct,⁴⁸ in sanctioning the legitimacy of social institutions: Once property is perceived to be attached to the immediate or present possessors, habit gives force to the rule of stability -at first only imperfectly observed- until it becomes a socially internalized rule. If property is at first assigned according to public interest or the imagination, it is only habit that gives its force, regardless of how imperfect that origin may be. However difficult to completely determine the precedence and hierarchy of the various rules of property (accession or present possession, occupation or first possession, prescription or

⁴⁶ *EMPL*, p. 489.

⁴⁷ Though some Greek city states underwent a similar development, the paradigmatic example, the one which Hume probably has in mind, is the emergence of the Roman republic out of its fall of her monarchy. The idea that monarchy is naturally the first form of government is accurately captured by Gibbon when, referring to its concluding phase, he writes: 'The fine theory of a republic insensibly vanished, and made way for the more natural and substantial feelings of monarchy'. Cf. *The History of the Decline and Fall of the Roman Empire* (London: Ward, Lock and co., 1840?), vol. 1, p.86.

⁴⁸ Cf. Hugh Cecil, p. 14: describing natural conservatism argues that 'human beings are so adaptable that what they are used to is, for that reason and no other, pleasant to them'. Compare with Hume: 'Such is the effect of custom, that it not only reconciles us to any thing we have long enjoy'd, but even gives us an affection for it, and makes us prefer it to other objects, which may be more valuable, but are less known to us' (*THN*, p.323).

long possession, and succession), habit is the great legitimating agency for all of them.⁴⁹ Next in importance are the rules that specify the modes of transference of property, whose essential accompaniment is the division of labour and the development of promise keeping or consent as the basis of such transference. Justice and property go hand and hand because in seeking protection in the establishment of the rules of justice mankind's prevailing impulse is the security of 'external goods'⁵⁰ and their exchange. This protection is made the basis of the institution of government when such security cannot be guaranteed by compliance to the rules of justice.

Now, if it is habit rather than consent that creates the moral authority of the rules of justice and property, then civil liberty cannot be conceived as the product of the concurrence of wills in a social contract but as the product of gradual development of complex social arrangements. Hume's distinction between the utility that creates social institutions (the end) and their moral force undermines the contractualist conception of liberty.

4. Property and the invention of promise keeping

The main obstacle to social peace and human progress is instability of possessions. Reflection corrects our natural partiality by extending the benefits of cooperation and giving rise to a sense of the advantage of society. For Hume liberty consists principally in this stability of property.

The progress towards socialization could be understood as a dialectic development, that is, as an accumulative succession of conflict-resolution experiences. Given scarcity of external goods and the 'infirmity' of humankind, experience of cooperation on a reduced scale is naturally extended. The model for this spontaneous agreement is that of two men taking it in turns to row a boat, which practice is achieved without any 'promise', language 'gradually established by human convention' and gold and silver acquiring their exchange value.⁵¹ Hume conveys the emphasis on the

⁴⁹ *THN*, p.326

⁵⁰ *THN*, p.315. Rights (i.e. rules) regarding external goods are just the extension of rights regarding body and life, but Hume does not mention the latter ones. Cf. Stewart, pp. 184-187.

⁵¹ *THN*, p. 315

gradualness and accumulateness of this process in expressions such as 'slow progression'⁵² and 'by slow degrees'. Given that custom and habit are the products of human interaction, then clearly society cannot exist prior to individuals in some abstract or mental realm as a model, which we may have rational access to; nor does society arise out of the voluntary concurrence of ready made individuals with rights and obligations.

Hume is at pains to show, against the individualistic theories of the origins of civil society from consent that the nature of the convention that gives rise to justice is radically different from the one described by such theories. Justice and property as well as rights and obligations are convention. Now, what kind of convention is that which establishes rules of justice and property without need for a theory of consent?

This convention is not of the nature of a *promise*: For even promises themselves [...] arise from human conventions. It is only a general sense of common interest; which sense all the members of the society express to one another, and which induces them to regulate their conduct by certain rules⁵³.

The account of the undersigned emergence of unplanned social order, including the institution of promise keeping convention, can only be supported if there can be a consistent distinction between 'agreement' and 'promise' and that the former can take place without the latter. Now if Hume is trying to distinguish between a promise and an agreement that men 'express to one another', then the only way to interpret this without falling into a contradiction is to say that every act of cooperation accompanied by signs or communication of mutual interest does not necessarily constitute a *promise*, that is, a deliberate and self-conscious formula of words invented to sanction a mutual obligation. The difference is that the act of expressing to one another which Hume refers must occur more or less spontaneously and simultaneously with the awareness of the utility of the convention in question (justice) rather than being a condition for it.

Utility is the central explanatory principle for the variety of conventions in this respect and their common end: Because certain transactions may be elapsed by time or mediated by space, 'men have invented a *symbolic* delivery, to satisfy the fancy, where the real one is impracticable'.⁵⁴ Promises arise when people need to signify a mutual

⁵² *THN*, p. 315

⁵³ *THN*, pp.314-315

⁵⁴ *THN*, p.331

interest that is mediated by certain laps of time. The moral authority attached to a promise is thus not derived from an idea of rights but from habit and opinion. The will cannot by itself produce an inclination towards the performance of a promise, unless by a deliberate change upon the object concerned and by inventing a new relation among the persons concerned and the actions to be performed: Signs are thus invented to supply the lack of a natural inclination; they constitute an external symbolic sanction.

The oath and the promise are only complex elaborations and formalizations of the more spontaneous and natural agreements which establish the rules of justice and property. Although Hume does not make this explicit, it would seem that the difference between promise and agreement is only of degree not of kind. Because there can be agreement without promise, there can be society without rules of stability of possession and even more so without rules for the transference of property: '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'.⁵⁵ In societies with limited economic, technical and cultural development that is, in 'more contracted societies',⁵⁶ where all needs are fairly easily satisfied and there is no substantial inequality of possessions these conventions would not be needed and therefore would not arise.

Promise keeping, along with the rules of property, emerge only when transactions become complex. Like all other conventions, it results from man's natural inventiveness when prompted by particular needs. Such inventiveness, what Hume sometimes calls 'reflection', is not a creation *ex nihilo*, but the ability to elevate a case into a permanent rule and organize thus similar experiences: the idea is that 'men are mightily addicted to general rules, and that we often carry our maxims beyond those reasons, which first induc'd us to establish them'.⁵⁷ The convention of promise keeping results then from such rule-making faculty in situations of complex cooperation where spontaneous agreement ceases to be effective enough, that is, when the satisfaction of the shared interest of the parties concerned is no longer immediate. It is a symbolic act,

⁵⁵ *THN*, p.346

⁵⁶ *EMPL*, p. 203 and *THN*, p.320

⁵⁷ *THN*, p.353

in which a mutual resolution is usually assisted by a certain words which create the willing of an obligation. The first function of promises is to regulate the transference of property. Between spontaneous agreement of the type of two men pulling the oars of a boat and a fully formal promise the less immediate type of agreement 'your corn is ripe to-day; mine will be so tomorrow'⁵⁸ may constitute a middle phase. The more time is elapsed the more complex the requirements for promise-like conventions become.

As the obligation of promises is an invention for the interest of society, 'tis warp'd into as many different forms as that interest requires, and even runs into direct contradictions, rather than lose sight of its object.'⁵⁹ Religious sanctions make the moral obligation seem as natural as an original sense and therefore securely grounded.⁶⁰ The oath as the vehicle of religious sanction is conspicuously absent from Hume's account of promise keeping as a convention. Indeed, Hume compares the symbols invented by humans for easing their civil transactions to the '*Roman catholic* superstitions in religion', in which the imagination is assisted by various external devices to recreate the divine presence, that is, to *represent* the thing in question. What we represent in promises is the mediate interest shared by the parties concerned and our compliance to its future realization. This is a direct challenge to Protestant natural law, and to Locke in particular, that is, the idea that promises are constitutive of our god-given nature. If the kind of process that brings about the rules of justice and property are not the result of promises and consent, then the concept of civil liberty is here divorced from any conventional modern idea of natural rights. Just as the rules of justice and property are not preceded by a natural inclination towards promise keeping, also government is not the result of the exercise of liberty but its necessary requirement.

5. Interest, utility, and the centrality of luxury and the passions

The distinction between the origin and the moral force of justice is the basis of Hume's rejection of contractualism. It serves not only to rule out the doctrine of morality

⁵⁸ *THN*, p.334

⁵⁹ *THN*, p.336

⁶⁰ *THN*, p.337

that make justice derive immediately from man's natural sociability, but also to confront the objections of the selfish system: 'self-interest', says Hume, 'is the original motive to the establishment of justice: but a sympathy with public interest is the source of the moral approbation, which attends that virtue'.⁶¹ Mandeville's contention 'that the first Rudiments of Morality, [were] broach'd by skilful politicians, to render Men useful to each other as well as tractable'⁶² is directly addressed by Hume's distinction between the origin of justice in self interest and its moral basis on a new motive or sense: It is impossible that there could be something to educate or correct if there were not an original sense of approbation capable of being extended and made into a rule. Self-interest alone, without an original though constrained sympathy, is incapable of establishing moral distinctions. Thus, the 'selfish' theory cannot explain moral behaviour on the basis of pleasure: 'The virtuous sentiment or passion produces the pleasure, and does not arise from it'.⁶³

The spontaneous knowledge of the remedy to partiality, which is informed by the first experience of human interaction, is sufficient to explain the first principles of morality: men could not have an awareness of such remedy 'in their wild uncultivated state'.⁶⁴ An original instinct is needed to place mankind in a situation where the advantages of the institution of justice appear most immediately obvious: the first rudimentary experience of something close to a society is the family. Now, it is only the concurrence of this experience with the 'outward' circumstance of extremely unstable and scarce resources available that makes the enlargement of our very limited generosity possible, indeed necessary given those circumstances.

Hume's view of the promise keeping convention undermines the 'selfish system' as well as the associated theory of the social contract. The contrast that Hume makes with this doctrine becomes even clearer when he engages in the very same terms, admitting into his own system the crucial role of self-interest within the naturalist background. Although the passions might in general be corrected by reflection making

⁶¹ *THN*, pp.320-321

⁶² Bernard Mandeville, *The Fable of the Bees* (Oxford: Clarendon Press, 1924); p. 47. The phrase quoted is not however entirely representative of Mandeville's theory, which also displays elements of gradualness.

⁶³ *EMPL*, p.85

⁶⁴ *THN*, p.313

them compatible to society, there is one passion in particular that is socially destructive: 'This avidity alone, of acquiring goods and possessions for ourselves and our nearest friends, is insatiable, perpetual, universal, and directly destructive of society'⁶⁵. It is a passion that can only be restrained by itself. Now, having self-restrained, far from being an obstacle to socialization, this passion is the main driving force of mutual social interdependence and the polishing of our manners. It is only by observing the rules for the stability of possession that man can effectively though obliquely satisfy this tendency to acquisitiveness. There is in this theory a substantial common ground with Mandeville, but again, the first experience of cooperation would simply not arise without a natural sympathy. Hume's view of luxury as socially useful is directly connected with the working of this passion avarice in this unintended and undersigned furthering of the interest of society, and it undermines the basis of the civic humanist view of luxury as disintegrating the moral fabric of the political community by introducing corruption.

While the basic assumption of civic humanism is a natural regard for the public good, the state of nature of self-interested individuals is the basic contractualist assumption. Now, both the state of nature and the poetic fiction of the fictional Golden Age alluded to by poets,⁶⁶ are mere 'philosophical fictions'⁶⁷ that are only useful as far as they present the two extreme impossible situations in which the rules of justice and property (simultaneously established) would be unnecessary or useless. To make the origin of society intelligible it is necessary that external circumstances do not fall into either of these extremes, and it is necessary that men do not lack a moderate amount of reflection and a natural sympathy. The other extreme, perfect equality, is rejected on a similar argument from human nature: The radical democratic policies proposed by certain 'political fanatics'⁶⁸ would require the utmost despotism and would only be practicable in a perfect theocracy.⁶⁹ In rejecting seventeenth century political experiments Hume is also rejecting the egalitarian policies of the ancients: The relative equality of possessions of the ancients is explicable in that the necessary military

⁶⁵ *THN*, p.316

⁶⁶ I.e. the levellers, *EHUM*, p.221.

⁶⁷ *EHUM*, p.221

⁶⁸ *EHUM*, p. 193. Perfect equality dissolves subordination and thus all civil and ecclesiastical authority (*HE*, VI, p. 3).

⁶⁹ *EHUM*, § III 'Of Justice', part II.

disposition that small independent republics were obliged to live in maintained a perpetual despotism over the more natural inclinations, the acquisitive passions being satisfied exclusively through war and a share in the public. But, as fully explained in the longest of the essays 'Of the Populousness of Ancient Nations', such way of satisfying the passions is barbaric and detrimental to population, industry and the arts. The modern policy of commitment to commerce is overall more congenial to the natural inclination of mankind: 'Government makes a distinction of property, and establishes the different ranks of men'.⁷⁰ Providing there is material inequality, political inequality will necessarily follow, for 'poverty and hard labour debase the minds of the common people, and render them unfit for any science and ingenious [noble or liberal] profession'.⁷¹

Inequality takes place with the first progress of society and is thus central to the general theory of allegiance, which I shall discuss in the following section. Inequality is as necessary for our subordination to the rules of justice as for our subordination to government. In the essay 'Of Interest' the idea is put thus: 'When a people have emerged ever so little from a savage state, and their numbers have encreased beyond the original multitude, there must immediately arise an inequality of property'.⁷² Such inequality of property produced by increasing social complexity (specialization and division of labour) is followed by a necessary distinction between governments and governed in a process towards social stability. The rules that establish property, occupation, prescription, accession, and succession,⁷³ are applied, with some modifications, to the rules that establish government.

A society dominated by relations of exchange based on self-interest and luxury is at the same time more stable, prosperous *and* free. It is free not because there is no domination but because there is predictability and security under the rule of law. Luxury and commerce introduces moderation in politics as well as polishing our private manners by the dynamics of mutual interdependence that it generates:

⁷⁰ *THN*, p.259

⁷¹ 'Of National Characters', *EMPL*, p.198

⁷² *EMPL*, p.297

⁷³ *THN*, p. 324

Those, who prove, or attempt to prove that such refinements rather tend to the increase of industry, civility, and arts regulate anew our *moral* as well as *political* sentiments, and represent, as laudable or innocent, what had formerly been regarded as pernicious and blameable.⁷⁴

In the essay 'Of the rise of arts and sciences', in contrast with the other passions, notably the love of learning, avarice is a universal principle, present in all ages, places and people⁷⁵. The moderating influence of luxury is thus a direct challenge to the moralism imbedded in the language of civic humanism and at the same time the theory of sympathy is a rejection of the more individualistic doctrines associated with Hobbes and Mandeville.⁷⁶

6. The theory of political obligation and the origin of republics

With respect to allegiance Hume's distinction between natural obligation and moral obligation is especially conspicuous: Though the end for which government is established is to secure the 'three fundamental laws of nature' invented by men (stability of possession, its transference by consent and the performance of promises), the authority that it carries cannot depend on them and must give rise to a 'separate interest': The general interest of social peace requires a source of obligation independent from that which established it in the first place: 'Tho' the object of our civil duties be the enforcing of our natural, yet the *first* motive of the invention, as well as the performance of both, is nothing but self-interest'.⁷⁷ In particular, the duty to allegiance has an independent force from promises since the 'exact observance' of the latter is an effect of the establishment of government.

The transition from 'natural society' to the first rudimentary political institutions is a smooth process dominated by the need to secure property: 'A regard to property is no more necessary to natural society, than obedience is to civil society or government; nor is the former society more necessary to the being of mankind, than the latter to their

⁷⁴ *EHUM*, p.181

⁷⁵ *EMPL*, p.113

⁷⁶ Cf. Forbes, ch. VII and Kramnick, p. 46.

⁷⁷ *THN*, p.348

well-being and happiness'.⁷⁸ The process by which government is established runs parallel to the conventions that establishes the rules of property. With respect to property, when the first possessor could not be ascertained, then long possession or present possession would naturally prevail. Now since present possession is obviously a weaker principle on which to found government, which by its nature is more exposed to encroachment than property and needs greater stability, then the fundamental principle in this case, is long possession. Next to present possession the third source of authority is conquest. In the gradual process towards increasing stability of the settled government two events are crucial: the establishment of hereditary rule and of revenue in the magistrate. Thus the right of succession, the fourth source of authority, is established. The fifth and last source of authority is positive laws, 'when the legislature establishes a certain form of government and succession of princes'.⁷⁹ It is the last and most abstract form of authority, for it ceases to depend on the present disposition of the persons in power or on any institution; indeed it is the only one that ceases to have any direct connection with succession. In effect, it creates a rule of its own. The principle at work is one already seen: 'the general rule carries us beyond the original principle'.⁸⁰ Long possession is especially emphasised as the first principle ('that which gives authority to all the most established governments of the world without exception'⁸¹) to make it clear that the origin of government – in the sense we have used – is really of no consequence to the question of legitimacy. Indeed, the real historical origin, as opposed to our conjectural reconstruction, of governments is always a mixture of force and consent.⁸²

The expression 'contracted society' appears to convey the idea of an intermediate state between 'natural society' (i.e. society without government) and the establishment of government with the institution of rulers (magistrates). An economically underdeveloped society is more egalitarian and simple. Only the increasing division of labour prompted by specialization can establish government in any permanent

⁷⁸ *THN*, p.349

⁷⁹ *THN*, p.359

⁸⁰ *THN*, p.366

⁸¹ *THN*, p.356

⁸² 'Of the origin of government', *EMPL*, p.40

recognizable form. Hume is not particularly interested in examining the details and exact phases between 'natural society' and civil society. In book three of the *Treatise*,⁸³ the first form is roughly a monarchical and is the result of the authority naturally acquired by warlike leaders and extended for the more permanent interests of society, republics being only the result of the abuses of monarchy. Government is still not securely grounded when the authority of magistrates is only imperfect and intermittently exercised, that is the authority of military 'chieftains', at first only a *primus inter pares*.⁸⁴ In any case the process towards a more settled authority in the magistrates (and thus to greater political inequality) is the same with that towards a more regular observance of the rules of justice, which is the end of all government: A more regular execution of justice in a given society comes only with greater 'refinement in their municipal laws', especially those that regulate the transference of property.⁸⁵

In the 'Arts and Sciences' essay republics are the first to give rise to legal institutions, which is the second crucial landmark in the development towards the rule of law, the basis of liberty. Republics, although barbarous and simpler in their 'infant state', in time are naturally the first to give rise to general laws:⁸⁶ 'in the first ages of the world, when men are as yet barbarous and ignorant, they seek no farther security against mutual violence and injustice, than the choice of some rulers, few or many, in whom they place an implicit confidence, without providing any security, by laws or political institutions, against the violence and injustice of these rulers'.⁸⁷ Though the remedy to such abuse appears first with the institution of republics -the first rudiments of the rule of law- once legal institutions are established they might be adopted by monarchies, emerging thus as civilized monarchies. This is the first landmark towards a regular and more secured modern liberty.

If we take contracted societies to mean a phase in which there is not need for the institution of magistrates, it clear that it refers to the early stages in the division of

⁸³ *THN*, p.346

⁸⁴ This idea is illustrated by the government of the first Saxon settlers in volume 1 of Hume's *History of England* (appendix I): 'The king, so far from being invested with arbitrary power, was only considered as the first among the citizens', *HI*, p. 160.

⁸⁵ *EMPL*, p.116

⁸⁶ *EMPL*, p.117

⁸⁷ *EMPL*, p.115

labour: 'An *Indian* is but little tempted to dispossess another of his jut, or to steal his bow, as being already provided of the same advantages'.⁸⁸ But when population and social needs increase, the interest in maintaining the rules of justice becomes more remote, so it is necessary to establish another convention. The least reflection is sufficient to check temporarily our tendency to 'prefer contiguous to remote'.⁸⁹ However, again we cannot change our nature. Thus we must change our circumstances by which we make our immediate interest coincide with the interest of justice. For Hume this can only happen when some persons are instituted with the status of magistrate who, 'being satisfied with their present condition [...] have an immediate interest in every execution of justice'.⁹⁰ It can be seen that the very first institution of government inevitably carries a stark division between ruled and rulers; indeed it is this change of circumstance the only one that can make men's particular passions concur with their *real* interest, the regular execution of justice. Hume argues that:

This great weakness is incurable in human nature. Men must, therefore, endeavour to palliate what they cannot cure. They must institute some persons, under the appellation of magistrates, whose peculiar office it is, to point out the decrees of equity, to punish transgressors, to correct fraud and violence, and to oblige men, however reluctant, to consult their own *real and permanent interest*.⁹¹

Only an independent magistrate, a person who does not have any particular interest linked with any member of society, and in particular, someone who does not necessarily consult anyone else, is capable of performing this function. The psychological explanation is thus complemented by the socio-economic one. Besides the least reflection, two circumstances are needed: increasing diversity (and presumably population) and the experience of conflict. The first circumstance that instructs men of the benefits of subjecting to government is, like in Hobbes, conflict, but unlike him, it is 'not among men of the same society, but among those of different societies',⁹² where the necessity for authority is more immediately felt and more easily remediable. Once the

⁸⁸ *THN*, p.346

⁸⁹ *THN*, p.344

⁹⁰ *THN*, p.344

⁹¹ 'Of the origin of government' [my italics], *EMPL*, p. 38.

⁹² *THN*, p.346. See Duncan Forbes, *Hume's Philosophical Politics*, (Cambridge: Cambridge University Press, 1975), p. 160

benefits derived from government have been felt in times of war they naturally have recourse to it in times of peace.

By its very nature, allegiance to magistrates is not absolute –as it appears to be in Hobbes- but it is not conditional either, as in Locke’s executive as trustee of the people. There is no need for natural pre-political rights either conditioning the establishment or the permanent authority of government on which subject’s protection is based. Consequently, civil liberty is the result of but not the condition for the establishment of civil society.

The invention of the duty of allegiance depends on and derives its force from the more ‘natural’ duties of justice: stability of possession, transference by consent and promise keeping. This is because the driving force in this process is the need for stability and security in social transactions. The relation between promise keeping and the origin of allegiance is the inverse of the one implied in the doctrine of the original contract, ‘the fashionable system’, where consent is a prerequisite of the establishment of civil society: Consent and government are both ‘on the same footing’ in the sense that they are conventions, but the exact observance of consent is the effect of government rather than the cause of it.

Hume seems to be in an intermediate position between considering the contract theory only as a relatively useful methodological device and considering it as a valid conjectural-historical reconstruction of the real origin of government but with no consequences for its legitimacy: ‘though the duty of allegiance be at first grafted on the obligation of a promise, and be for some time supported by that obligation, yet it quickly takes root of itself, and has an original obligation and authority, independent of all contract’.⁹³ Whether government originates in consent or whether it arises gradually, the duty of allegiance attached to is based on habit.

The difficulty in ascertaining the nature of such convention is even more conspicuous in the essay ‘Of the Original Contract’ (1742).⁹⁴ Here Hume tries to reach a

⁹³ *THN*, p.347

⁹⁴ Forbes has observed that in the essay ‘Of the original contract’ there is an inconsistency between the general theory of allegiance and the theory of allegiance to limited or free governments. Cf. Forbes, p. 76.

compromise between Tory absolutism and Whig contractualism: the end of government is the interest of society but it cannot be accounted for by a contract, since the exact observance of contracts presupposes an established functioning government. The institution of government seems to require an intermediate category between the relatively spontaneous agreement of the two men pulling the oars of a boat and an expressed promise. However, Hume does not make any suggestion in this direction.

In order to explain the fact that a regular and stable government cannot be absolute or unlimited it is not necessary to appeal to the notion of rights and a contract between people and magistrate making allegiance conditional to the performance of the said contract for the protection of pre-political rights.⁹⁵ The main objection raised against contractualism is that it would be inconsistent to build a general theory of political obligation upon particular instances of disobedience. It is absurd to make rebellion, being a remedy to misgovernment, the foundation of allegiance to government. On the other hand, the old doctrine of passive obedience is thought to be equally indefensible.

However, Hume's alternative to the doctrine of resistance is philosophically problematic. A tyrannical exercise of political power might undermine the sovereign's authority to the point of making rebellion the only necessary recourse, but though in this case the 'natural' obligation ceases, our 'moral' obligation is not supposed to end. As seen, the duty of justice does not depend on particular instances immediately favouring the interest of society but on a more general long term sense of utility. It seems paradoxical to conclude that 'men may be bound by *conscience* to submit to a tyrannical government, against their own interest and against public interest'⁹⁶ even though *in fact* they have dissolved that government. However, we find that even the duty of allegiance has limits: 'we seldom make any exception to them [the general rules], unless the exception have the qualities of a general rule, and be founded on very numerous and common instances'.⁹⁷ As seen at the start of this section, the first example of an exception becoming a rule was the institution of a republic out of the abuses of monarchy.

⁹⁵ Spitz points out at the contradiction (committed by an 'exacerbated juridicism' linked to the liberal paradigm) of claiming rights before the duties own to the very community that is supposed to produce them and protect them. Cf. Spitz, *La liberté politique*, p. 50. See also, Charles Taylor 'What's wrong with negative liberty', *Philosophical Papers*, c.7 Cambridge (1985).

⁹⁶ THN, p.353

⁹⁷ THN, p.353

Experience teaches men that the independent condition of rulers on the first establishment of government, cannot perfectly secure them against rulers who disregard their long term interest in maintaining justice. It is worth looking at Hume's argument:

But besides that this interest [of the rulers] is only more immediate in the execution of justice among their subjects; besides this, I say, we may often expect, from the irregularity of human nature, that they will neglect even this immediate interest, and be transported by their passions into all the excesses of cruelty and ambition. Our general knowledge of human nature, our observation of the past history of mankind, our experience of present times; all these causes must induce us to open the door to exceptions, and must make us conclude, that we may resist the more violent effects of supreme power, without any crime or injustice'⁹⁸.

The capacity for acquiring new rules and institution does not arise from a single isolated instance but from repeated experiences: republics acquire a *rule* of their own through remedies to necessity. The observation made in the *Enquiry* with respect to the laws of nations having less force than the civil ones; that 'the *moral* obligation holds proportion with the usefulness'⁹⁹ is equally applicable to the subject's allegiance to government. In the cases of tyranny, immediate public interest and even private interest (or 'utility' if we follow the *Enquiry*) resume not only their influence but their moral authority.

In suggesting that republics arise as remedies to the abuses of monarchy, Hume places the foundation of free government in an essentially negative principle: all the various mechanisms (checks and balances) of a free government seek chiefly the prevention of misgovernment. The remedy consists then in a partition of government into different branches, by virtue of which power is checked by power.¹⁰⁰

7. The criticism of civic humanism and self-interest contractualism

The theory of the artificiality of justice can be understood as a response to those who derive the rules of justice immediately from a 'regard to public interest' or out of

⁹⁸ *THN*, p.353 [my italics]

⁹⁹ *THN*, p.206

¹⁰⁰ *EMPL*, pp.40-41: 'The government, which [...] receives the appellation of free, is that which admits of a partition of power among several members, whose united authority is no less, or is commonly greater than that of any monarch; but who in the usual course of administration, must act by general and equal laws, that are previously known to all their subjects.'

‘private benevolence’.¹⁰¹ Both these two explanatory sources of virtuous behaviour are closely associated in the moralist systems that Hume targets, but it is the first one the one that corresponds most neatly to what it is called at the time ‘public spirit’ or, in the more modern term, ‘patriotism’, that is, the commitment that a citizen has towards the wellbeing of the political community in which one belongs. Behind the criticism of the moralist system we find both a criticism of the humanist assumption that citizens have a complete moral obligation to the military and political defence of the city, and of the religious hypothesis as the basis of morality.

If private benevolence is the only motive of moral action, it would need to be a regard to particular persons indistinctively and in every occasion, but this is impossible given the fact of our limited sympathy. Therefore, the motive of moral action should be secondary, a convention. Since justice does not immediately produce a sentiment of approbation but only through the intercession of an ‘artifice or contrivance, which arises from the circumstances and necessity of mankind’,¹⁰² it must be considered an artificial virtue, not an original one. Looking at the elements involved in such process one finds that virtuous actions are not considered in themselves but only as ‘signs’ of a motive, which is the real object of our moral approbation. In other words, the sense of duty cannot be the original motive of virtuous action, since such sense of duty implies that there is antecedently an original sense of moral merit independent from it.

This has a crucial political implication: Hume’s rejection of public commitment and civic patriotism as the basis of society advances his criticism of the liberty of the ancients. The public spirit on which such form of liberty is based is not virtue but necessity:

Freedom naturally begets public spirit, especially in small states; and this public spirit, this *amor patriae*, must encrease, when the public is almost in continual alarm, and men are obliged, every moment, to expose themselves to the greatest dangers for its defence¹⁰³.

Instead of polishing men’s manners by the self-restraining passions and by commerce, such as the passion for acquiring goods, it diverts men’s natural inclination

¹⁰¹ THN, p. 309

¹⁰² THN, p.307

¹⁰³ EMPL, p.256

towards a perpetual hostility to neighbouring states, and thus to a stagnated and rude state of social and material development, but –Hume argues referring to the policy of the ancient republics- ‘that policy is violent, which aggrandizes the public by the poverty of the individuals’.¹⁰⁴ The military power of ancient republics was due to ‘their want of commerce’.¹⁰⁵ Although, in the opposition between self-interest and public spirit as the basis of civil society Hume advances extensive arguments for the former, more natural and less violent, he is particularly interested –especially in the essay ‘Of Commerce’- in showing that the cultivation of mechanical arts and commerce are both advantageous to the individuals *and* to the public. The reason is because they increase the stock of labour, which can be used in times of national emergency.¹⁰⁶

However predominant our selfish passions may be, Hume thinks that they must give room to a regard for or sympathy with the public when they clash. Tacitly distancing himself from Mandeville, Hume writes: ‘When a man denies the sincerity of all public spirit or affection to a country and community, I am at a loss what to think of him.’¹⁰⁷ Nevertheless the most important part of the argument is weighted against the civic humanist assumption that luxury weakens public spirit and inevitably brings corruption: on the contrary –says Hume- refinement and ease does not weaken men’s ‘martial spirit’ but makes it stand on a more secure foundation, for by this policy men become industrious, gain a sense of honour and only loose a barbarous ‘ferocity’.¹⁰⁸ Besides luxury being a spur to industry, the military and economic strength of a modern nation depends on the stock of labour which is produced by it (‘Of Commerce’ essay). The pros and cons of luxury are analyzed in the essay ‘Of refinement in the arts’ (entitled as ‘Of luxury’ in the 1752 edition): Hume identifies those ‘sever moralists’ who decry luxury. Luxury when not indulged at the expense of other virtues, is in fact

¹⁰⁴ EMPL, p.260

¹⁰⁵ EMPL, p.258

¹⁰⁶ EMPL, p. 362

¹⁰⁷ Cf. EMPL, p. 84: ‘Of the Dignity or Meanness of Human Nature’

¹⁰⁸ EMPL, p.274. There is an echo of Pericles’ funeral speech: ‘Our love of what is beautiful does not lead to extravagance; our love of the things of the mind does no make us soft’. Cf. Thucydides, *The Peloponnesian War* (Penguin, 1954), p. 147. Hume tries to argue that the ‘mechanical arts’ not only improve *private* happiness but the *public* one as well.

entirely innocent.¹⁰⁹ Moreover, it encourages industry, the improvement or the 'mechanical' as well as 'liberal' arts.¹¹⁰ By spreading the 'spirit of the age' to all fields, intellectual as well as material, luxury also indirectly rises men as 'rational creatures', it makes men 'sociable': '[I]ndustry, knowledge, and humanity, are linked together by an indissoluble chain, and are found, from experience as well as reason, to be peculiar to the more polished, and what are commonly denominated, the more luxurious ages'.¹¹¹ The link between commerce and liberty (or the improvement of government) is not however a necessary one. The development of free governments depends on a complexity of historical circumstances which are not entirely reducible to that of commerce, but it nevertheless remains the essential part of modern liberty because it provides the element of regularity and predictability that is the basis of moderation in politics and of the rule of law. For Hume the modern understanding of liberty is inseparable from commerce.

The other doctrine against which Hume's theory of the artificiality of justice is directed is the so-called 'selfish system'.¹¹² That is, the moral doctrine that exposes all virtues as disguised self-interest. In particular, it is meant to answer Mandeville's challenge by disproving his contention that morality is the contrivance of politicians who deliberately intervene to make men's selfishness socially useful and govern them by their passions. Self-interest, important though it is, cannot alone explain how the artifice of justice arises. Without a natural sentiment, even though extremely precarious and limited, there could be no basis for education and for a development of the moral sense. For Hume, self-interest should rather be understood as a limited sympathy, which, though naturally partial and contrary to society, it is capable of being corrected and enlarged by reflection. The idea that men are able to enlighten themselves not against the passions but through them is crucial and has repercussions in the theory of political obedience as well as on the concept of liberty as rule of law. Hume agrees with the 'selfish school' that the sense of duty is artificial, but denies that this could take place

¹⁰⁹ *EMPL*, p.275

¹¹⁰ *EMPL*, p.270

¹¹¹ *EMPL*, p.271

¹¹² *EHUM*, Appendix II 'Of Self-love', p.296.

without an 'antecedent principle of humanity, which is meritorious and laudable' in itself;¹¹³ 'We can never have a regard to the virtue of an action, unless the action be antecedently virtuous'.¹¹⁴ We fix our attention predominantly on the sign so that the motive which it signifies becomes almost invisible to us, but it is obvious that the motive precedes the sign. This natural motive is first extremely defective and precarious, but it is sufficient to put moral judgements in motion once we allow reflection to enlarge our views.

There is no natural 'social' instinct, Hume argues; experience sufficiently proves the all-pervasive influence of self-interest and the inexistence of any immediate self-evident sense of justice: 'There is no such passion in human minds, as the love of mankind, merely as such, independent of personal qualities, of services, or of relation to ourself'.¹¹⁵ We are only capable of acquiring a concern for others through sympathy, the fundamental principle in the *Treatise*, related to the faculty of imagination. It is sympathy that allows the passions to become socially constructive: 'No quality of human nature is more remarkable, both in itself and in its consequences (...) To this principle we ought to ascribe the great uniformity we may observe in the humours and turn of thinking of those of the same nation; [rather than] to any influence of the soil and climate'.¹¹⁶ As will be seen, sympathy is closely linked with the politically crucial phenomenon of contagion of sentiments and beliefs and in the essay 'Of the First Principles of Government', Hume argues that opinion is the source of political obligation.

The consequence is that a fully developed faculty of deliberation is not the condition for the institution of justice. Given that rational deliberation is not needed in order to explain either justice or, as we shall see, government, it follows that consent – the main principle in contractualism – is ruled out as a basis of government. Furthermore, the distinction between natural liberty and civil liberty is strictly speaking inadequate: there is no such as thing as liberty outside society because it is a statue produced by social institutions.

¹¹³ *THN*, p.308

¹¹⁴ *THN*, p.309

¹¹⁵ *THN*, p.309

¹¹⁶ *THN*, Book II, pr. 1, § XI, p.206

9. Conclusion

From Hume's evolutionary account of the artificial virtues it can be seen that the distinction between natural and civil liberty is not, strictly speaking, a valid one for describing the process by which liberty as security under a regular law is established. The term 'natural liberty' in the 'Polygamy and divorces' essay and in the *Enquiries*, is nothing but a rhetorical device, and it does not have any crucial function. The settlement of government and its solid foundation are thus prerequisites of the benefits for which it was instituted, the regular execution of justice.

Such stability, as we have seen, necessarily and spontaneously requires that there be an independent magistrate. Apart from the fact that the type of convention that gives rise to the independent magistrate in Hume's theory of government cannot be properly described as a contract since it does not presuppose deliberation and forethought, it resembles Hobbes' 'sovereign' in that there is no distinction between a compact of union, by which a people is formed, and a compact of subjection, by which they elect and submit to a sovereign: 'the same convention that established government, will also determine the persons who are to govern, and will remove all doubt and ambiguity in this particular'.¹¹⁷ This is founded on considerations of expediency.

One obvious consequence that stems from this initial division between ruled and rulers is that liberty is predominantly passive, since it consists in protection under the rule of law. The active aspect of liberty, particularly that associated with participation of citizens in the public good, is merely instrumental. Political liberty is only a remedy to tyrannical exercise of political power and therefore peculiar to specifically republican governments.

We have already dealt with Hume's criticism of civic patriotism and the 'active life'¹¹⁸ in the first section of this chapter. It is sufficient here to note that in Hume's political theory, as it stems from the *Treatise* and the *Enquiries Concerning Morals*, political

¹¹⁷ *THN*, p.354

¹¹⁸ *EHUM*, p.220

liberty is a mere 'refinement in politics'¹¹⁹ for the preservation of the really central concern and the sole end of the institution of any government, civil liberty. Hume is quite clear that ancient democracies were too unstable and anarchic to secure property and life and provide for the needs of modern commercial society.

Though Hume's 'liberty' has thus a predominant private and social aspect, Hume does not share Mandeville's rejection of public spirit as utterly chimerical. Political participation and republican institutions in general are crucially important for the stability of free governments.

* * *

I shall now explain how Hume's criticism of the practice of liberty of the ancients affects his understanding of the concept. The view that Hume repudiates the republican understanding of liberty and follows Hobbes's redefinition might seem plausible for various reasons. We find in Hume's work a decisive criticism of the contemporary representatives of the republican tradition of liberty, namely, the neo-Harringtonian politics of Bolingbroke and the country opposition to Walpole's Whig administration. Secondly, there is an affinity with the ideology associated with Defoe and what he calls the 'age of projects',¹²⁰ that is to say, the modern commercial world of possessive individualism identified with the development of a negative concept of freedom.

The same idea is thoroughly treated by Jean-Fabien Spitz's in his magisterial work *La liberté politique* -the chapter on 'the apology of the modern epoch' - identifying Montesquieu, Bordes, Mandeville and Hume himself with the 'liberal paradigm' and its associated modern understanding of liberty.¹²¹ In particular, Spitz endorses the usual association of both Adam Smith and Hume with the doctrine of the minimal state: 'a society of maximal independence with respect to the law',¹²² that is to say, a society in

¹¹⁹ THN, p.358

¹²⁰ Quoted from Isaac Kramnick's *Bolingbroke and His Circle* (London: Oxford University Press, 1968), p. 45. However, see also pp. 82-83, for the observation that Hume shared Bolingbroke's aristocratic anxiety about 'public credit'. See Hume's essay of the same title. Despite major differences, both Augustan writers seemed to have shared a similar aristocratic republicanism.

¹²¹ *La Liberté politique*, Ch. VII, pp. 273-310.

¹²² *La Liberté politique*, p.138. Spitz refers to Ignatieff's work *La liberté d'être humain*.

which the limits *on* the laws, laws being entirely subordinated to social and economic needs, make the analysis of freedom indifferent to the discussion on forms of government, thereby totally abandoning the classical republican preoccupation with balanced government. Furthermore, if we follow Berlin's observation that negative freedom 'was what the classical liberal writers meant when they used the term', there might be some truth in the inclusion of Hume in the group of political thinkers that contributed to the redefinition of freedom in private and social terms: Hume's thorough criticism of republicanism seems to place him in the alternative 'camp'.

There are two reasons why this assumption should be abandoned. First, the language of commercial modernity does not exclude, in eighteenth century discourse, the language of classical republicanism and civic humanism. The historiography on which Berlin bases his classification of authors (which Skinner seems tacitly to approve of), one that sees the hegemony of the 'classical liberal' understanding of freedom as established in the epoch of Hobbes and Locke and as reigning unmolested until the arrival of Marxism has been widely contested, notably by Pocock and John Dunn.¹²³ But secondly and more importantly, the tensions between classical republican practice and the requirements of modernity, which Hume embraces, are not resolved into a fixed and permanent solution but are left open. In particular, such tensions are not resolved into the total exclusion of politics and its replacement by commerce and purely private and social relations.

Unlike Hobbes, who proposes a thoroughly analytic theory of freedom unconnected with forms of government, Hume is quite clear that liberty in its full sense can only be accounted for in republican terms. But, unlike Locke, for Hume the republican one is not the only legitimate or civil form of government: civilized monarchies have a share in most of its advantages: 'It must be owned', Hume writes following his definition of free government, 'that *liberty is the perfection of civil society*; but still authority must be acknowledged essential to its very existence: and in those contests, which so often take place between the one and the other, the latter may, on that account, challenge the preference'.¹²⁴ Hume does not share the utopian apologists' view

¹²³ For a good synthesis of the 'revisionist' case see Spitz, pp. 78-82 and ch. VI.

¹²⁴ *EMPL*, p. 41 (my italics)

that a republic is the only civil government; he is quite conscious that not all modern commercial societies are capable of attaining liberty, and that it represents an ideal difficult to fulfil completely even in republics. This does not mean that the model of a republic is entirely chimerical and has no function to play.

Republican institutions are for Hume a 'refinement in politics'¹²⁵ peculiar only to special historical circumstances. This is what makes the model of a republic of the essay 'Idea of a Perfect Commonwealth' explanatory but not normative: It does not recommend itself for its adoption because it does not prescribe legitimacy, but attempts to reconstruct an archetype of modern commercial republic out of existing institutions, practices and situation (in particular those of Britain). While a regular execution of justice is the end of all government that aspires to stability -and it is legitimate to that extent-, only a republican form of government can guarantee the rule of law. It does that by established checks and controls, mechanisms that seek to prevent misgovernment and make stability less dependent on the particular character of the 'magistrates'. However, the problem of political stability and the optimum balance is not entirely institutional: Hume is aware that in order to maintain these institutional mechanisms, in order to keep the wheels of government running, certain 'zeal' for the common institutions is necessary:¹²⁶ As discussed in the first chapter, liberty, particularly in the form of liberty of the press, constitutes this essential but precarious source of control and stability peculiar to this form of government. In other words, the problem of good government cannot be entirely institutional and to that extent it depends on the human commitment to maintaining them.

Liberty is thus ultimately, in its full sense as rule of law, the result of historical contingency, but it is also, in its more general aspect, the necessary attendant of all mild civilized governments. It is this latter sense that I have explored in this chapter by looking at how Hume's theory of government in general and that of republics in particular can be explained from his original account of justice, the end of government being the regular execution of justice. The idea is that the institution of justice establishes

¹²⁵ *THN*, p.358

¹²⁶ See above p. 21 for Hume's use of the expression 'wheels of government'. For the limited role of *public zeal*, e.g. p. 27.

a pattern of explanation that is valid, with modifications, for the account of government, and that this determines in turn the part that liberty plays in the process towards stability and moderate government.

The concept of liberty that Hume holds is as follows. Firstly, the most general aspect of liberty results from the development of an authority to execute justice. But, secondly, the aspect of liberty peculiar *only* to free governments, which is to say, liberty in its more restrictive sense, results from the various institutional arrangements that are principally intended to regulate as well as guarantee the regular execution of justice. 'Legislators', says Hume regarding the importance of forms of government, 'ought not to trust the future government of a state entirely to chance, but ought to provide a system of laws to regulate the administration of public affairs to the latest posterity. Effects will always correspond to causes; and wise regulations in any commonwealth are the most valuable legacy that can be left to future ages.'¹²⁷ It is only in such form of government, republican in a broad sense,¹²⁸ that liberty can flourish to its fullest extent without being incompatible with stable government. And the reason is that liberty depends principally on the regularity of legal forms and political institutions rather than the good will or wisdom of particular men, and where the centrality of 'public zeal' of classical republicanism is reduced to a minimum.

¹²⁷ *EMPL*, p.24

¹²⁸ A sense that excludes what Madison in Federalist 10 calls 'pure democracy', that is, direct democracy (i.e. without a representative), and above all includes a 'well-tempered [non-feudal] Aristocracy' (*EMPL*, p.416), which constitutes a 'middle power' between magistrates and people.

CHAPTER IV

Hume's view of liberty in the *History of Great Britain*

Governments too steady and uniform, as they are seldom free, so they are, in the judgement of some, attended with another sensible inconvenience: They abate the active powers of man; depress courage, invention, and genius; and produce an universal lethargy in the people.¹

1. The ideological context of Hume's revisionism

The view of liberty that I have tried to bring forward so far is based on the two main philosophical works and the *Essays*. Though the concept of liberty is already developed in the philosophical works, it is especially informed by Hume's observation of liberty in the *modern* British mixed constitution, a central concern even in the purely philosophical works.

Hume's conception of British liberty as a modern conquest stems from his criticism of two associated and typically Whig tenets: on the one hand, the notion of an ancient constitution allegedly free and balanced and on the other hand, the notion of a contract between king and people, renovated in every crisis and implicit in the last settlement. Two consequences follow from these criticisms: firstly, that the degree of liberty enjoyed in Britain is a genuinely modern outcome of the 1689 Revolution rather than an immemorial native privilege² and secondly, that the said revolution cannot be described as a contract of government. Hume undertakes a thorough revision of the

¹ *HE*, p.530

² The idea that liberty was the product of rather than the condition for the Revolution was anticipated by Lord Hervey's pamphlet 'Ancient and Modern Liberty' in which he defends the Whig administration². What was new was Hume's more systematic approach. Cf. *Ancient and Modern Liberty Stated and Compar'd* (Los Angeles: The Castle Press, 1989) [1734]. It was addressed to Bolingbroke and the Old Whig opposition, who appealed to the ancient constitution to denounce the new system of government introduced in Walpole's regime for the management of Parliament by influence and corruption.

traditional Whig reading of history. In doing so, Hume decisively adopts the Tory cannon of British historiography (developed notably by Brady and Spelman) and incorporates them into his own sceptic Whiggism. My aim is to show that, despite Hume's criticism of typically Whig assumptions, the underlying concept of liberty remains firmly republican and not negative, particularly not negative in the Hobbesian sense of exemption from the law.

In order to do this I argue that it is possible to separate the complaisant Whig reading of English history as the continuation of an immemorial free constitution, which Hume systematically rejects, from the basic Whig tenant regarding the nature of a free government. In spite of Hume's criticism of traditional Whig historiography and even though he cannot endorse the actions of those who introduced the radical innovations that brought the modern British constitution in 1689, he nevertheless endorses the basic Whig understanding of the intimate connection between constitution and liberty as settled after the Revolution, that is: Limited monarchy, parliamentary representation and the checks and controls that maintain *habeas corpus* and civil liberties. This fundamental Whig assumption coincides in this respect with what we have called the republican understanding of liberty: Liberty is not only endangered by actual interference but by the mere vulnerability to arbitrary interference. For Hume such vulnerability occurs when the balanced constitution ceases to function correctly, either because it relapses into faction and anarchy or because the monarchical part of the constitution takes over the republican one. Frequent parliament and free press are essential to the maintenance of liberty in a limited monarchy.

The first two volumes, covering the Stuart monarchy and entitled *History of Great Britain*, appeared between 1754 and 1756, and are part of a self-conscious attack on the prevailing notions of parliamentary history and its attendant Manichean classification of patriotic and tyrannical monarchs. The Whig distortions on history and the romanticised view of the constitution were thought by Hume to go even further back in time than the Stuarts, so Hume engaged in the rest of English history from the Roman invasion to the Tudors. Hume's interest in history, and specifically in the history of the English

constitution, is not isolated but the realization of a long time concern with history which is also reflected in his philosophical production.³

The bulk of Hume's work was produced during a period (George II's reign) in which Whig ideas concerning the constitution were dominant: History had been self-consciously used as part of the polemic in the conflicts of the seventeenth century by both absolutists and parliamentarian. According to the prevailing Whig interpretation of the events leading to the Revolution, the settlement in the protestant line merely restored pre-existing liberties, which in turn were part of an ancient and perfectly balanced constitution that was supposedly subverted by the late Stuarts by breaking the original contract between king and people. Ancient constitutionalism was linked with the belief in a contract of government which the constitution was supposed to embody and the oaths of allegiance to renovate.⁴ The combination of such rejection of Whig history with the endorsement of basic Whig principles regarding liberty is captured in the last chapter of the second Stuart volume and is worth quoting: 'To decry with such violence, as is affected by some, the whole line of Stuart; to maintain, that their administration was one continued encroachment on the *incontestable* rights of the people; is not giving due honour to that great event, which not only put a period to their hereditary succession, but made a new settlement of the whole constitution'.⁵

Hume sought to challenge the reading of history in Whig contractualist terms, not only for the sake of historical truth but also because it was a dangerously weak foundation for the instituted form of government, and because such distorted view would establish a precedent and a potential pretext for rebellion. But Hume cannot give a coherent justification for the events leading up to the revolution that he prizes as the true foundation of modern liberties. As Forbes writes, the violent innovations 'could only be justified retrospectively'.⁶ It might nevertheless be possible to justify them if Hume is implying that the leaders of the Revolution adopted temporal dictatorial

³ Cf. Victor Wexler, *David Hume and The History of England* (Philadelphia: The American Philosophical Society, 1979).

⁴ Cf. J. G. A. Pocock, *The Ancient Constitution and the Feudal Law. A study of English historical thought in the seventeenth century* (Cambridge: Cambridge University Press, 1987).

⁵ *HE*, vol. VI, p. 531 [original italics]

⁶ p. 265 For Hume's *History* as essentially pro-Whig regime, 'an establishment history', cf. Forbes, p. 264. Forbes notes however, a difficulty:

powers to put the constitution on a new foundation, even though they affected to recover an ancient one. Given that to govern is to make believe, what was important was to maintain what was perceived at the time to be the ancient external forms and practices, what Max Weber calls 'the authority of the 'eternal yesterday'. That is, the 'right to power' or 'sanction of antiquity' described in the essay 'Of the First Principles of Government'.

The idea of legitimacy does not derive from the imagined origins that contractualists presume. The stability and authority of the modern British constitution, Hume argues, cannot be grounded on a supposedly popular contract: Far from being the case that liberty was restored, it is rather the result of the increasing ability to guarantee the rule of law thanks to the unprecedented new powers acquired by Parliament. Those who brought the Revolution about were not the bulk of the people but a much reduced minority acting as quasi-legislators.

Hume concludes the second volume of the Stuart monarchy, which culminates with the events of 1688 and a reflection on its political and social implications, suggesting that the 'gross falsehoods' extend further back in time than the Stuarts, in particular to the so called Gothic constitution. Hume continued thus the history down to more 'rude and barbarous times',⁷ to the Saxon Heptarchy and to the Roman invasion. I will focus on those aspects of the second volume where Hume discusses the nature of the modern constitution and the implications it has for the concept of liberty as absence of arbitrariness.

2. Tory history, Whig principles of liberty

I shall explain now how I think Hume's criticism of Whig historiography and its effect on the concept of liberty should be understood. The lesson of moderation that Hume seeks to emphasise in his adoption of essentially Tory history is that, though the modern Whig foundation of mixed government is to be praised, the pretences of that

⁷ HE, vol. VI, p.474

party during the conflicts with the Stuarts can no longer be maintained for the present form of government because it is not founded in a contract. Hume takes a dialectical approach to the struggle, emphasising the unintended consequences of the partiality and ignorance in the pretences of the actors involved in the events leading up to the 1689 establishment.

Hume argues that the form the constitution began to take in favour of a new 'plan of liberty'⁸ was the effect of the struggle between parliamentarians and royalists. The uncertainty of the legal nature of the constitution was settled then not by deliberate reform but by an appeal to an imaginary ancient constitution and a contract allegedly broken.

In general, Hume attempts to accommodate a compromise between Whig and Tory principles in their controversies. Seeing the events in retrospective detachment helps Hume understand the role that principles and interests played in the actions of the leading actors of the conflicts without identifying himself with any of them in particular. The key event that determined the nature of the constitution after the restoration was the exclusion crisis.

In the conflicts between Charles II and parliamentarians neither party was right because they held partial views of the constitution, a constitution that was neither perfectly free and balanced so that any encroachment on the part of kings was illegal, as the parliamentarians pretended, nor an absolute monarchy, as the Stuart kings fancy themselves to be in the manner of other European monarchs. The truth was that the limits to royal prerogative were very imperfectly defined in the constitution and the two parties were ignorant of the significance of this. A 'secret revolution' had occurred before the actual one: the opinions of right and of interest, that is, the ideas of legitimacy, had changed due in part to revolutions in religion.⁹ This change of opinion had preceded every increase of privilege that the commons had acquired by affecting a defence of ancient rights. The disposition of the parliament and the nation in general was, according to Hume, clearly of distrust of monarchy and zeal for their privileges:

⁸ *HE*, vol. VI, p.474

⁹ Religion is a source of historic change and unpredictably; it is an 'intractable principle'. Cf. *EMPL*, p. 40.

they 'retained a considerable jealousy of the crown, even before they had received any just ground of suspicion'.¹⁰

The standard from which to judge the actions of parliamentarians and royalists under normal circumstances is established practice but, because the legal basis of such a practice was being contested, only the clash of opinion stirred by the civil conflict could decide the question. The uncertainties and ambiguities of the laws are then exploited in order to further opposite claims. The observation that the constitution was for the first time settled in favour of a more precise system liberty in this way does not make Hume abandon his view on legitimacy.

This idea is most conspicuous when Hume's accounts for the parliamentary proceedings for settling the government during the restoration of Charles II. The point was whether it was possible or not to determine legally if there was a right of resistance of subjects against tyrannical government; and this assembly decided it was not. Here Hume makes it quite clear in the Whig manner that government ceases to be limited as soon as 'the power of the sword', the capacity to rise an army, is expressly –as opposed to merely implicitly as in previous practice– left to the crown, and since in such a case subjects are exposed to the arbitrary power of kings, liberties also cease to be protected. Referring to the enactments of the members of this parliament Hume writes:

Were these terms taken in their full literal sense, they imply a total renunciation of limitations to monarchy, and of all privileges in the subjects, independent of the will of the sovereign. For as no right can subsist without a remedy, still less rights exposed to so much invasion from tyranny, or even from ambition; if subjects must never resist, it follows, that every prince, without any effort, policy or violence, is at once rendered absolute and uncontrollable: The sovereign needs only issue an edict, abolishing every authority but his own; and all liberty, from that moment, is in effect annihilated.¹¹

Judged from the point of view of the standard that the commons were trying to bring about, the principles of which Hume shared, liberty is undermined not only by the actual exertion of tyrannical power but by the mere absence of *expressed* legal protections (rights) against such power. However, Hume's reluctance to accept this as the right standard from which to judge events is manifest immediately after. Here, Hume

¹⁰ *HE*, vol. VI, p. 285

¹¹ *HE*, vol. VI, p. 174.

sympathises with the reasons the members of this parliament held for expressly ruling out the 'remedy' against royal encroachment on liberties, that is, resistance. Their reason was that they would leave the government exposed to rebellions, such as the one that had in the recent past subverted the monarchy:

They thought, *perhaps erroneously*, that it was no longer possible, after such public and such exorbitant pretensions [the rebellion of parliamentarians in the civil war] to persevere in that prudent silence, hitherto maintained by the laws; and that it was necessary, by some positive declaration, to bar the return of like inconveniencies.¹²

It turns out that both Tories and Whigs (for these parties emerged in these conflicts) were attempting to introduce novelties upon established legal practice, in order to prevent two different and only apparently opposite evils: royal encroachment on the constitution and rebellion, respectively. In fact for Hume both evils were real and legitimate concerns but neither of them could ever be eliminated from any constitution by legal means. The conflict was thus the necessary result of the tenor of the events: at this point the limits of every branch of the constitution could not be kept in 'that prudent silence, hitherto maintained by the laws.' However when it was obvious that such silence was impossible in the conflict between what was rightly perceived as a usurper king and the sentiments of the nation, as it finally happened with James II, then Hume is quite clear that the prevailing 'opinion', that of the parliamentarians, should be the standard and take the precedence over established legal practice. To legislate, as both Charles II and James II pretended, in total disregard for popular opinion was equivalent to 'the most recent and the most flagrant usurpation'.¹³ The controversy over the test, which effectively ruled out the right of resistance, renovated the problem of how to ascertain the standard when the legal practice itself is disputed. Seeking a middle ground between Whig and Tory in this respect, Hume reconstructs the two aspects of his position on allegiance to such government as follows: (a) authority has naturally the preference but, (b) it is not rational to eliminate the remedy to its abuse.

Hume's purpose in the history can be understood as tracing the changes of expectations, the changes of perceptions of the English constitution in both parties, in order to explain the successive conflicts between parliamentarians and royalists. Since

¹² *HE*, vol. VI, p. 174 [my italics]

¹³ *HE*, vol. VI, p. 476

perception of the legal nature of the constitution and principles on legitimacy are inseparable, once the parliamentary cause triumphed it was inevitable that also their view of the constitution become dominant, with its attendants of encroachment, tyranny and lawful rebellion.

The key to the change of opinion that had taken place is visible in the following section, where it is clear that legal uncertainty undermines liberty. Referring to the mild response that the parliament gave to Charles II's desire to repeal the Triennial act, Hume writes:

As the English parliament had now raised itself to be a regular check and controul upon royal power; it is evident, that they ought still to have preserved a regular security for their meeting, and not have trusted entirely to the good-will of the king, who, if ambitious or enterprising, had so little reason to be pleased with these assemblies. Before the end of Charles's reign the nation had occasion to feel very sensibly the effects of this repeal.¹⁴

Frequent parliament, Hume thinks, is in the present established form of government inseparable from a regular liberty. The role of the parliament was beginning to be predominant. All subsequent controversies after the first parliament of the restoration can partly be understood as the effect of an insufficiently defined function of parliament as a regular check on royal power. The structural changes that the constitution had gone through (clearly towards a limited monarchy) had not been expressly, that is, legally established. The consequence was that the king, having lost the ancient revenues normally granted to the monarchs,¹⁵ maintained a dangerous economic dependence on the consent of parliament, which in turn was all too jealous to preserve what perceived as immemorial privileges. They thus maintained 'that dependence, which was become, in some degree, essential to the constitution'.¹⁶ This meant that the king, in the absence of the modern regular means of venial influence (patronage) to influence some members among the commons, had an unnatural dependence on a parliament that was increasingly asserting its predominant role within the constitution. Furthermore, economic and religious causes converged in bringing about a new constitutional conflict.

¹⁴ *HE*, vol. VI, p. 192

¹⁵ *HE*, vol. VI, p. 234

¹⁶ *HE*, vol. VI, p. 307

The controversy with regard to dependence had revived the two parties in which the nation had been divided during the civil war -but crucially, without the discredited religious fanaticism of the latter-; this was the origin of the modern Tory-Whig distinction.¹⁷ The controversy over dependence had reappeared in Hume's times (1730's), now in the context of the Country opposition to Walpole. These eighteenth-century debates explain much of Hume's focus for his account of the seventeenth-century conflicts. The financial factor was, in Hume's analysis, crucial since it is what eventually made the conflict between James II and the commons unsustainable. The key was the absence of an indirect way of influencing the parliament, the management of the commons by corruption, necessary in the modern limited mixed government.¹⁸ 'The character of Charles was ill fitted to remedy those defects of the constitution [...] His expences too, (...) while they increased his dependence on the parliament, they were not calculated fully to satisfy either the interested or disinterested part of that assembly.'¹⁹ To the incompatibility of interests between parliament and king was added the clash of opinions on the nature of the constitution, which became even more evident in the 1679 exclusion crises. Neither the liberties of the nation nor the boundaries of royal prerogative could be fixed as the stability of a limited monarchy would require, because James II's blatant ambition had alienated even the royalists and had forced parliament into a defensive position. Hume seems to lament the fact that (in both the civil war and the constitutional crisis of the 80's) there could not be a moderate position, that parliamentarians resorted to extreme solutions forced by circumstances and the usurpations of the late Stuarts.

The king perceived himself in the manner of an absolute monarch, while the nation was becoming firmly convinced of their inalienable civil and religious liberties. Referring to Charles's designs to establish a more extensive authority by means of a war against the Low Countries motivated by the 'great jealousy of his subjects', Hume writes: 'These suggestions happened fatally to concur with all the inclination and prejudices of the king' and concludes commenting that 'so early as 1664' he had shown

¹⁷ *HE*, vol. VI, p. 293

¹⁸ *EMPL*, 'Of the Independence of Parliament', p. 45

¹⁹ *HE*, vol. VI, p. 235

‘what opinion Charles had conceived of the factious disposition of his people’.²⁰ In the essay ‘Of the liberty of the press’ Hume explains in what circumstances jealousy of the prevailing social power is disastrous to the stability of a mixed government, that is, precisely in those transitions of traditional authority when the perceptions of authority are being challenged but its alternative had not been positively and legally determined yet. The inevitable result was crises and conflict.

Crucially, Hume offers in a long footnote documented evidence that proved, in his own words, ‘that a formal plan was laid for changing the religion, and subverting the constitution, of England, and that the king and his ministers were in reality conspirators against the people.’²¹ It was taken from an account of the treaty with France in James II’s Memoirs which he had access to in Paris. For Hume it was not so much that Charles sought to subvert a supposedly free constitution than the fact that he completely disregarded the opinion of right and of interest of his subjects, ‘the disposition of the nation’²² which had irremediably changed and could not be restored but with great violence: ‘it required ages to change the genius and sentiments of a people’.²³ Charles could not be more imprudent for attempting such a revolutionary step. Not only had the ‘opinion of right’ changed, to use the terms that appear in one of the essays abovementioned, but also the ‘opinion of property’ had changed. In England, in stark contrast with France, there had been what Harrington had rightly described, a change in the balance of property: ‘In England a great part of the landed property belonged either to the yeomanry or middling gentry; the king had few offices to bestow; and could not himself even subsist, much less maintain an army, except by the voluntary supplies of his parliament’.²⁴ However, Harrington’s idea that the balance of power follows that of property needs, in Hume’s view, to be corrected: such change requires at least a minimum share of authority in those who held property. The form of government is not directly affected by an increase of property in some class of men unless by such share.²⁵

²⁰ *HE*, vol. VI, p. 243

²¹ *HE*, vol. VI, p. 287

²² *HE*, vol. VI, p. 293

²³ *HE*, vol. VI, p. 289

²⁴ *HE*, vol. VI, pp. 289-90

²⁵ *EMPL*, ‘Of the First Principles of Government’, p. 35.

In their clash with Charles II, the commons acquired new privileges and powers. They claimed these innovations under pretences that were only partially justified given established practice. This was the case with the election of the speaker and the standing army, but the most important innovation was the extension of the *habeas corpus*, the basis of contemporary liberties. What the parliamentarians could not see was that the conflicts were due to the very innovations they themselves had lately introduced in the government, which had limited the authority of the crown in many respects.

Referring to the controversy over Test and Corporation acts, and particularly to the dispensing power (a royal prerogative for dispensing from the test, the only protection for the national religion) Hume writes: 'There needs no proof of the irregular nature of the old English government, than the existence of such prerogative, always exercised and never questioned, till the acquisition of real liberty discovered, at last the danger of it'. The crux for such discovery was, as he had explained, the change of public opinion, now clearly inclined towards 'popular' notions of government.

The key event in the building up of a national consensus prior to the revolution was the acquiescence of the Tories in the Whig measures to confront the king's usurpations, as they decided to 'drop for the present all over-strained doctrines of submission, and attend the great and powerful dictates of nature'.²⁶ By this latter expression Hume suggests the idea of the *Treatise* that the laws of nature (i.e. the rules of justice and property) might resume their moral authority in exceptional circumstances. For Hume the terms of the debates that took place to decide the terms on which their actions were justified resembled more 'the verbal disputes of the schools than the solid reasonings of statesmen and legislators'.²⁷ For Hume, plain reason and prudence simply recommended expediency: 'the greater security for allegiance being merely opinion, any scheme of settlement should be adopted, in which, it was most probable, the people would acquiesce and persevere'.²⁸ In any case, Hume's point was that the whole affair was conducted by the political establishment, a considerably small elite, not by the people as a whole, so that it could hardly be understood as a contract of government.

²⁶ *HE*, vol. VI, p. 503

²⁷ *HE*, vol. VI, p. 526

²⁸ *HE*, vol. VI, p. 527

From the reading of Hume's *History* we are led to conclude that it was precisely the excesses of the monarch that united the nation against him and prepared for the foundations of the consensus on which the 1689 constitution would eventually be established and modern liberty secured for the first time in Britain.

Retrospectively, even Charles inveterate arrogance and blindness had a positive unintended outcome, since Parliament would not have had pretence for reforming the constitution and defining its limits without the crisis that he provoked. To a great extent it was thus the conflict itself and not only the outcome that established liberty on a solid foundation. In a far more moderate and regular way, this struggle of opposite interests between the two parts of the constitution, monarch and parliament, continues in the modern established one.²⁹ Hume might have in mind here Machiavelli's insight that the struggle between senate and people far from deserving blame was the source of its liberties.³⁰ As explained in the essay *Of the liberty of the press*, it is precisely such controlled struggle the reason for the extensive freedom of the press in Britain. Hume is conscious that the balance is not however perfectly secured and is indeed precarious precisely because of the uncertainty that such struggle introduces. In this context, the purpose of the essay 'Idea of a Perfect Commonwealth' is to devise a system of free government that is more regular and stable and thus more long lasting than the British constitutional fabric as he perceived it, which requires irregular and precarious remedies like royal patronage in parliament. Hume's own comparison with the mixed constitution of Rome in the essay treated in the first chapter already suggests that the balance might not last for very long and Britain might end in an absolute monarchy, even though at that moment it seems clear that the republican part of the constitution prevails.

Though Hume consistently argues that the modern concept of liberty absolutely requires a regular and stable form of government for the execution of justice, he is conscious that there is inevitably in all systems of liberty a strong element of uncertainty that is impossible to eliminate. Far from being the absolute condition for civil society in general it is the result of delicate balances and precarious historical developments. This is the reason why for Hume the institutions on which it is sustained should be cherished

²⁹ *HE*, vol. VI, p. 530

³⁰ *The Discourses*, vol. 1, p.277

but also the reason for his later pessimism with respect to the British constitution, that absolute monarchy is preferable to the serious instability that its abuse could eventually bring about. Hume's concept of liberty is thus deeply entrenched on the classical republican discussion of constitutional forms but also (though not without tensions) on his realization that there is a limited place for exercise of political liberty, the 'active life' or the 'tribunitian arts'³¹ in a modern commercial world.

³¹ *H*, v. VI, p.533

Conclusion

Hume's clear-cut idea that liberty cannot subsist without authority, that is, without a reasonable regard to established political power, gives us a good understanding of Hume's project. It entails that liberty exists only when there is in place a constitutionally limited authority. For a subject to be free in this sense two conditions are required: in the first place, that such limited authority does not arbitrarily interfere with her and secondly, that it has the capacity to stop others from interfering arbitrarily with her. Such constitutionally limited authority requires broadly republican institutions. Although there are both negative and positive elements in this concept of freedom, Hume's concept of liberty can best be fitted within the republican tradition, in particular as described by Philip Pettit.

The analysis of the essay 'Of the Liberty of the Press' showed –I hope– the significance of the observation that the link between liberty and free government can no longer be as unproblematic and straightforward as the republican authors assume: The phenomenon of mild government, that is, the capacity that non-republican governments have of acquiring some of the characteristics of republics, notably the intercession of general laws between the executive and the people, proved that there was in modern times a fundamentally new understanding of politics. The excessively rigid republican view of liberty obscured a distinction between the private and the public aspects of it: Subjects under a civilized monarchies may enjoy the former but not the latter and in that sense they may also be regarded as free individuals. Nevertheless Hume did not carry his criticism to the point of denying the connection between these two aspects and the essentially republican understanding of the concept, which in Berlin's inaugural lecture 'Two concepts of liberty' eventually become conceptually separated. Liberty in its full sense requires republican institutions that guarantee that there is no subjection to arbitrary power. In the second chapter I developed the implications that such dichotomy could have in bringing about more clearly Hume's ideas on the subject given that Berlin's distinction was implicit in Hume's argument.

The third chapter analysed Hume's criticism of civic humanism and contractualist Whiggism in his moral theory and the implications for the concept of liberty as rule of law. The development of liberty is not a necessary result of economic progress but requires special circumstances, which to some extent are owed to contingent circumstances. It is a 'refinement' in politics, an improvement upon primitive monarchy. It therefore contrasts both with Lockean notions of liberty as based on natural rights and the common Whig notion of immemorial rights. The civic ideal of independent citizens engaged in direct public participation, gathering in assemblies and defending their military independence is de-emphasised. Instead, the view of modern liberty that Hume favours is that of a more stable form of liberty based on the rule of law. The improvements upon ancient political practice that Hume wants to emphasise are as follows: a division of powers, a representative system, the mechanisms of check and balances, liberty of the press, and the possibility of a republican government in a large territory by means of a federal structure, developed in the essay 'Idea of a Perfect Commonwealth'.

The fourth chapter sought to suggest that despite the thoroughly neutral perspective that Hume adopts in giving account of the events leading up to 1689, he remains intellectually sympathetic to the Whig (and republican) understanding of liberty as a condition of non-dependence –to use Pettit's phrase.

One of the important differences between Hume and some of the figures of the republican tradition is the special prominence that Hume argues for the instrumental value of the political aspect of liberty and free institutions, e.g. on the instrumental value of the liberty of the press, and the subordination of liberty itself to a negative and more private or passive (i.e. more social and less political) role. From this we can conclude that Hume's concept of liberty is fundamentally republican but with important features of what arguably may become part of the liberal tradition associated with negative freedom.

Besides, Hume's concept of liberty is secular and evolutionary. It does not depend on any absolute and rationalistic moral standard and it does not presuppose a pre-political form of liberty. It is predominantly the product of time and experience (circumstances plus 'the least reflection'). Liberty is not exclusively attached to free

governments or republics but is part of that development. In this respect the private and social aspect of liberty (i.e. civil liberty) is the predominant one. But liberty is fundamentally a republican value because it cannot be fully realized without an equitable non-arbitrary government of laws. As I hope I have shown, Hume's argument for modern liberty and modern conditions, or his criticism of civic patriotism, cannot be equated with the adoption of a negative concept of political freedom in the Hobbesian or Berlinian sense as non-interference. Furthermore, there is not in Hume a complete rejection of the civic republican ideal of freedom. Hume's theoretical solution to the controversy between ancient and modern liberty appears as the last attempt to reconcile the old and the new conception.



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