SOCIAL CONTRACT AS QUASI-CONTRACT: THOMAS REID VERSUS DAVID HUME

by Knud Haakonssen[1]

David Hume is a well-known name in the history of social contract theory. Thomas Reid, his contemporary and countryman, is not. Similarly, contract and consent, whether implied or express, are common concepts in the history of political thought, while the idea of quasi-contract is barely known ouside a narrow circle of legal historians. Yet the theory of social contract as quasi-contract developed by Thomas Reid in his lectures from the Glasgow chair of moral philosophy, which he had taken over from Adam Smith in 1764, is of interest from a philosophical as well as an historical point of view I intend to show this by situating Reid's theory within a chapter of the history of social contract theory, part of which is well known but not always well understood, while another part of it is barely known, although it once played a significant role.

As happened so often with Reid, it was David Hume who provoked him to develop his ideas on contract theory Hume's famous criticism of contract theory has sometimes been rendered complicated and obscure as to its content and intentions. It will therefore be necessary to review it in order to locate the points in dispute between Hume and Reid. When we consider all of Hume's writings on contract together, we can see that Hume addressed three major questions[2]. First, he asked the conjectural-historical question, whether or not contract must have been the origin of government as such in the human species. Second, he asked the empirical-historical question, whether contract was the origin of historically given governments such as the contemporary ones. Third, he asked the philosophical question, whether "contract" or its close ally "consent" could explain why allegiance should be paid to any given government. With a few

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2 In my account of Hume I mainly draw on A Treatise of Human Nature, (edited by L.A. Selby-Bigge; second edition with text revised by P.H. Nidditch, Oxford, 1978), Book III, Part 2, esp. Sections v, vii-x; "An Enquiry concerning the Principles of Morals", in Enquiries concerning Human Understanding and concerning the Principles of Morals, (edited by L A Selby-Bigge; third edition by P.H. Nidditch, Oxford. 1975), Section IV; "Of the Origin of Government", in Essays Moral, Political, and Literary (edited by T H Green and T H. Grose; 2 vols., London, 1898), vol. I, pp. 113-17; and "Of the Original Contract", ibid, pp. 443-60.

recent exceptions, scholars have taken it for granted that when Hume considered social contract theory, he was addressing himself to Locke. On this basis it has been a popular sport to show that Hume misunderstood Locke, that he criticised points Locke did not make, that he himself adopted points made by Locke and, indeed, that Lockean contract theory had so few adherents at the time Hume wrote that it seemed distinctly odd to pay so much attention to it[3].

Could a thinker of Hume's acumen really be so badly mistaken about a topic which he evidently considered to be of the first importance and which he returned to time and again during his life? The arguments to this effect do not impress me. First of all, there is no good reason to believe that Hume identified contract theory with Locke and saw him as his sole or even main antagonist. Locke is neither mentioned nor referred to in Book III of the Treatise or in the relevant parts of the second Enquiry. In the essays dealing with contract there is only one mention of and reference to Locke[4]. For the rest, Hume talks of contract theory in general or refers to it as the philosophical underpinning of Whig ideology. The reasonable assumption is that Hume picked out what he considered important contract-arguments from a variety of sources, including Locke. As we go through his treatment of the three leading questions mentioned above, we will in fact see that it is not hard to identify the sorts of writers he is likely to have had in mind[5].

The distinction between the conjectural-historical question concerning the first origins of government among mankind and the empirical-historical question of the origin of particular governments did not spring to Hume's mind without preparation in previous writers. It was, of course, common to distinguish between a general and a particular providence - both of which Hume savaged elsewhere - and to agree that political government of men

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3. Martyn P. Thompson, "Hume's Critique of Locke and the 'Original Contract'", (1977) Il pensiero politico, pp. 189-201 at p. 189, note 1, gives a representative list of scholars who have identified Locke as the target of Hume's criticism. Thompson's own standpoint is strangely ambiguous.
4. "Of the Original Contract", in Essays, supra n.2, vol 1, at p. 460. Thompson, supra n.3, at p. 189, note 1, allows himself to be misled by C.W. Hendel into believing that Hume also refers to Locke in "Of the First Principles of Government"; the reference is clearly to Harrington: see Essays, supra n.2, vol. I, p. 111.
5. The following account is not intended to be exhaustive in this regard It is clearly in need of the sort of supplementation it gets in Conal Condren's Commentary.

was part of God's general providence for the world The focus of dispute was the origin of specific governments and especially whether they were due to some kind of particular providential arrangement, or whether the general providential institution of government was particularised by some human means such as contract and consent. This latter view was maintained, for instance, by Whig Anglicans like Stillingfleet, Burnet, Hoadly, etc., and neatly summed up by Thomas Long: "The Ordinance of Government is from God and Nature, but the species of it, whether by one or more, is from Men; and the Rule for Administration, is by mutual Agreement of the Governor, and those that are govern'd"[6].

Turning now to the question of the first origins of government among men, we may notice that a distinctive feature of natural law theory, as formulated by both John Locke and Samuel Pufendorf, was to interpret also the general providence concerning government in contractual terms, so that God in the law of nature had prescribed the institution of government by means of contract. What Hume does, is, in effect, to naturalise or secularise this idea. First, he excises the divine origins of the laws of nature by deriving them from human nature and the natural, pre-political situation of man. Then, in a parallel fashion, he shows the rational necessity of a government to implement these laws in most, though not in all, societies. In the Treatise, Bk. III and in the early essay "Of the Original Contract" he characterises this rational necessity in general contractualist terms reminiscent of the natural lawyers:

> When we consider how nearly equal all men are in their bodily force, and even in their mental powers and faculties, till cultivated by education; we must necessarily allow, that nothing but their own consent could, at first, associate them together, and subject them to any authority. The people, if we trace government to its first origin in the woods and deserts, are the source of all power and jurisdiction, and voluntarily, for the sake of peace and order, abandoned their native liberty, and received laws from their equal and companion. The conditions, upon which they were willing to submit, were either expressed, or were so clear and obvious, that it might well be esteemed superfluous to express them

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6 Thomas Long, "A Resolution of Certain Queries concerning Submission to the Present Government", repr. in A Collection of State Tracts, Publish'd on Occasion of the Late Revolution in 1688 and during the Reign of King William III, 3 vols London, 1705-7, Vol. I, pp. 439-65, at p. 443. Cf Benjamin Hoadly, Original and Institution of Civil Government Discuss'd, Second edition, London, 1710, pp. 144-45

> If this, then, be meant by the original contract, it cannot be denied, that all government is, at first, founded on a contract, and that the most ancient rude combinations of mankind were formed chiefly by that principle[7].

Hume immediately adds a typical defence of this conjectural historical argument, a defence which we also find in Locke:

> In vain, are we asked in what records this charter of our liberties is registered. It was not written on parchment, nor yet on leaves or barks of trees. It preceeded the use of writing and all the other civilised arts of life. But we trace it plainly in the nature of man, and in the equality, or something approaching equality, which we find in all the individuals of that species[8].

In the essay "Of the Origin of Government" written at the end of his life[9], Hume eschews the contractualist interpretation of the original rational necessity of instituting government. Instead, he adopts an account reminiscent of the philosophical historians, such as Adam Smith, according to which government is a slow, gradual growth beginning with military leadership in tribal conflicts. In the present context we may disregard this otherwise most important point as merely a sophistication of Hume's secularised version of the natural law account of the first origins of all government.

So far things are fairly simple and uncontroversial. When we come to Hume's second question concerning the historical origin of specific governments simplicity remains, but controversy enters. Hume's point is straightforward, viz. that historically given legitimate governments rarely, if ever, have taken their beginning from or been continued by contract or consent. Most known governments have arisen from force and fraud and been continued and handed on by a variety of means not involving the general consent or participation of their subjects.

The controversial point is the identity of Hume's antagonist here. Locke clearly did not maintain that all legitimate governments arose from contract or consent. He not only saw violence as the historical origin of many governments, but also suggested that such regimes could become legitimate governments gradually through the

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7 "Of the Original Contract", in Essays, supra n.2, vol I, pp. 444-45.

8. Ibid., p. 445.

9 Similarly in late additions to the early essay "Of the Original Contract", Essays, supra n.2, vol I, pp. 445-46

fulfilment of the laws of nature and not necessarily through any particular act of consent from the subjects These circumstances have led to the suggestion that Hume was creating a straw man or that he at least was confused about the object of his criticism[10]. However, since there is no indication that Hume was particularly concerned with Locke in this part of his argument, this hardly follows. Furthermore, there are obvious contemporary objects for Hume's criticism of the idea that all presently legitimate governments have historical origins in a contract. First, as Martyn Thompson argues, in the early part of the 18th century this idea had gained great popularity through the convergence of two distinct traditions in political thought:

> One was a tradition of natural law, states of nature and social or original contracts. The other was a tradition of ... "constitutional contract theory". This theory had a distinctive vocabulary of fundamental rights, fundamental law, ancient constitutions and original contracts. The first tradition appealed to the evidence of reason and the moral law. The second tradition appealed to the evidence of history and constitutional law. Both traditions assumed their characteristic early eighteenth century formulations at the time of the 1688 Revolution: with Locke formulating social contract theory and a host of minor writers like Atwood, Ferguson and Johnson formulating constitutional contract theory .. [By the early eighteenth century] an uneasy association between constitutional and social contract ideas had been created through the popularity of works like Sidney's Discourses Concerning Government (1698) and Tyrrell's Bibliotheca Politica (1692-1702). It is in the terms of this historically (rather than logically) formed set of associations that the vulnerability of social contract theory to historical criticism must be ultimately explained[11].

With a view to our subsequent discussion we should add to this another obvious target for Hume's historical criticism of the idea of the contractual origin of all legitimate governments. Much of the discussion had already been conducted in connection with natural law theory. Natural lawyers like the all-important Samual Pufendorf apparently took it for granted - they paid no overt attention to the point - that the contractual basis for all the central social institutions and especially

10 See Thompson, "Hume's Critique of Locke .", supra n 3, pp. 193-94.

11 Thompson, supra n.10, pp 200-201

for government was to be understood not only logically but also historically Pierre Bayle had levelled against this a sceptical and historical criticism not unlike Hume's later one. Bayle, as James Moore and Michael Silverthorne have pointed out, "contended that neither human nature nor history afforded grounds for the belief that societies and governments had their beginnings in agreements or contracts: the origins of all societies were to be found in a perception of the utility or convenience of submission to the craft or force of ambitious men"[12]. This sparked off a reply from two Pufendorf-commentators, and that reply may well have been in Hume's mind when he formulated his historical criticism of the social contract.

The two commentators were Gottlieb Gerhard Titius and Jean Barbeyrac[13], who were amongst the many scholars who edited Pufendorf's central natural law texts and issued them with extensive notes. In their defence of the historicity of the original contract they exploited a distinction in Pufendorf's theory, which we must briefly mention. Pufendorf thought that there were three necessarily discernible steps in the contractual institution of civil society. First there was a contract between the heads of families who intended to establish a civil society. Then there was a decree from this collective concerning the form of government to be instituted; and Pufendorf thought about this in terms of the three classical forms, democracy, aristocracy, monarchy. Finally, the governed entered into a contract of submission or allegiance with this government[14].

Titius and Barbeyrac thought that Bayle's criticism of the historicity of the original contract had force against the first, so to speak "social", contract in Pufendorf's scheme. That criticism, however, could not - they believed - possibly hold against the final contract of submission or allegiance: in so far as any specific regime had or had gained legitimacy, this could only

12. James Moore and Michael Silverthorne, "Gershom Carmichael and natural jurisprudence", in I. Hont & M. Ignatieff, eds, Wealth and Virtue: The Shaping of Political Economy in the Scottish Enlightenment, Cambridge, 1983, pp. 73-87, at p. 84.
13. Cf also Moore and Silverthorne, supra n.12.
14. Samuel von Pufendorf, Of the Law of Nature and Nations (Done into English by Basil Kennett ... to which are ... added ... the notes of Mr. Barbeyrac translated from his last edition), London, 1749, Book VII, ch. 2, secs. vi-viii. Further, The Whole Duty of Man according to the Law of Nature (Now made English. The fifth edition with the notes of Mr Barbeyrac . . By Andrew Tooke), London, 1735, Book II, ch 6, secs. vii-ix.

derive from the intervention of an act of contracting[15] Here is an inference of the historical necessity of a contract from its alleged analytical necessity, and this seems an obvious target for one of the best known of Hume's criticisms, viz. that the history of governments which have all the marks of legitimacy provides no evidence whatsoever of the occurrence of any contractual or specifiable consensual deeds.

We may round off our consideration of Hume's two historical questions concerning the original or basic contract and amplify the general background against which he and Reid should be seen by pointing out that Titius and Barbeyrac's argument remained a live issue in Scottish moral thought. This was because of the answer which that argument in turn received from Gershom Carmichael and Francis Hutcheson. Carmichael, the predecessor of Hutcheson, Adam Smith and Thomas Reid in the Glasgow chair of moral philosophy, was in many ways the founder of the Scottish school of moral thought which formed the backbone of that flowering of Scottish culture in the 18th century now commonly known as the Scottish Enlightenment. In his important edition of Pufendorf's De officio Carmichael rejects Titius's and Barbeyrac's above-mentioned compromise between Pufendorf and Bayle concerning the historicity of the basic contract. While he concedes that the three steps specified by Pufendorf may not have been followed exactly in history, he insists that some sort of historical act with the logical implications of the three Pufendorfian steps must have preceded all life in civil society. For one thing, the "historical" examples of adoption into a social combination by violence - alleged by Titius and Barbeyrac - presuppose an already existing combination of individuals, in view of the basic equality of power between individuals: a well-known Hobbesian problem which Hume, as we have seen, met in the same way. Much more important, however, is the moral necessity, namely that God via the law of nature has commanded that contracts be entered into in order to realise the ends of natural law. This implies that any overlordship which is not based on contract is not over men as moral beings, as beings under natural law. In short, if civil society is based upon contract, it is perpetual and unbreakable because it exists by divine authority. The alternative seems to be that civil society is dependent upon the continuity of government - especially an unbroken succession of monarchs. Consequently, then, if this continuity is broken, as it was in Britain in 1649 and 1688, it is not readily understandable on what basis a

15 G.G. Titius, Observationes 547 and 550, esp. pp. 530-32 and 534 in Pufendorf, De officion hominis et civis juxta legem naturalem libri duo, observationibus ... locupletati .. Gottlieb Gerhard Titio, Lipsiae, 1715; Barbeyrac, note 2, pp. 625-27 in Pufendorf, Law of Nature, supra n.14, book VII, 1, vii

society could cohere and provide for its future government This, says Carmichael, clearly referring to 1688, was the true function of Pufendorf's first and basic contract. Here Carmichael is of course reformulating one of the most radical of Locke's theses, that "when the Government is dissolved, the People are at liberty to provide for themselves, by erecting a new Legislative ... For the Society can never, by the fault of another, lose the Native and Original Right it has to preserve it self ..."[16].

As will be evident from this sketch, Carmichael's argument is yet another case of the attempt to move, by implication, from moral-analytical necessity to historical reality - from what governmental authority presupposes, viz. the two Pufendorfian forms of consent and the intervening decree, to the historical occurrence of some act expressing or implying these. Although Carmichael's argument is presented as an attempt to rescue the historicity of the Pufendorfian contract, his concern is obviously with reaching a satisfactory formulation of the moral-analytical necessity of this contract. This could only tend to detract from the interest in the historical question of origins and to separate this from the question of the justification of government. Such tendency was further strengthened by a few remarks which Hutcheson added to his otherwise nearly verbatim repetition of Carmichael's argument, remarks which subsequently received their full development by Thomas Reid. In order to appreciate the significance of Reid's ideas we have to look briefly at Hume's consideration of the third of the questions mentioned at the outset, namely whether allegiance to government can be justified by reference to contract. This question has been with us all along, in as much as the contractarians generally assumed some inherent connection between it and the question of historical origins, and we will indeed pay brief attention to this connection below. Hume, however, addressed the question of justification in the abstract, so to speak.

The gist of his well-known argument is this[17]. Justifying allegiance to government in terms of contract seems to amount to a justification by means of the obligation to keep promises. This makes perfect sense if

16 John Locke, Two Treatises of Government (A critical edition by P. Laslett), Cambridge, 1960, The Second Treatise, sec. 220. For Carmichael, see his notes to Pufendorf, De officio hominis et civis juxta legem naturalem libri duo (Editio secunda... auctior ... supplementis & observationibus ... auxit ... G. Carmichael), Edinburgh, 1724, Book II, Ch. 5, sec. vii and II, 6, ix and xiv.

17. Hume, Treatise, supra n.2, pp. 543ff; "Of the Original Contract", in Essays, supra n 2, vol I, pp. 454ff.

promise-keeping is a natural virtue, i.e. an obligation imposed by a natural law of super-human authority. Hume, as he maintains, has shown that the laws of nature, including the law enjoining fidelity to promises, are not - or, at least, cannot be known to be - dependent upon a superhuman authority. They can, however, be shown to be dependent upon ordinary human interests, namely the ordinary self-interest of each individual (natural obligation) and the common or public interest of a given social group in which each individual participates through sympathy (moral obligation). Further, it can be shown that the natural and the moral obligations of allegiance to government are derived from similar private and public interests. It is, therefore, evident that this is a parallel obligation to that of fidelity to promises and that the former cannot be derived from the latter as from something more fundamental.

I do not believe that this argument is aimed at any particular contract theoretician. It is, rather, intended to highlight a tension inherent in contractualism generally. On the one hand the paying of allegiance, like fidelity to promises, seems to be a matter of each individual's will and thus of his own making. On the other hand these several individual wills can only be understood to come together to a common making if they are supposed to be guided by a higher authority. So, is it the individual will or the common authority which explains and justifies the common making? In Hume's view this becomes an insoluble dilemma because these two poles are misconceived and too far apart. The voluntaristic tendency in contractarianism makes the individual's will empirically inexplicable and morally unaccountable by insisting on its freedom - and, indeed, it makes it so ethereal that the person who does the willing is unaware of it, as in the case of a tacit promise or tacit consent. But, says Hume,

> A tacit promise is, where the will is signified by other more diffuse signs than those of speech; but a will there must certainly be in the case, and that can never escape the person's notice, who exerted it, however silent or tacit.[18]

On the other hand, in order to explain how such free wills can draw together and in order to find a justifying ground for their actions, contractarians have recourse to a natural law of super-human authority. However, the only ascertainable evidence for such a law is in the behaviour of men, and Hume has, as he maintains, shown that the emergence and function of natural law can be explained exclusively by reference to human nature and human behaviour. Instead of the metaphysical notion of a free will, he calls upon two features of human nature

18. Hume, Treatise, supra n.2, pp 547-48.

which, although they assume widely differing expressions, are basically universal in the species These are a limited or confined self-interest which leads to a self-interested or natural obligation to the laws of nature as well as to the paying of allegiance to government; and a general sympathy with the common or public good, which leads to a moral obligation to reinforce the natural. Further, instead of a superhuman authority for the laws of nature, Hume invokes the public good as this is, or tends to be, articulated in the basic precepts of justice which, because of their near-universality, he is happy to call laws of nature. Hume's whole account of the so-called artificial virtues, viz. justice - including fidelity to promises - and allegiance to government, thus presupposed a human community with a common interest. These virtues are not a matter of some inner, free will, but of overt behaviour. Such behaviour, by being presented in public, or to a public, functions as a sign-language expressing the actor's sympathy with the rules of the public good. It may be more or less under voluntary control. Thus promising is of a high degree of voluntariness, though by no means as free as is often supposed, since it is heavily regulated by the conventions for what counts as promising in a given society. By contrast the behaviour which counts as showing allegiance to government is of a very low degree of voluntariness. It is, in fact, for many people without any freedom at all, though there are limits to this, since not every de facto regime will be able to persuade its subjects that it serves the public good sufficiently well to warrant their allegiance.

Turning at last to Reid, we must now ask how a man of his intellectual make would see the discussion of contract theory which I have sketched above. My thesis is that Reid, from a philosophical standpoint radically different from that of Hume, was able to appreciate the dilemma or tension in contractarianism whose Humean dissolution I have just outlined; in his interesting attempt to avoid this dilemma and rescue contractarianism from Hume, Reid basically destroyed it - as Hume did.

In his general political outlook Reid had much in common with the Country opposition of the mid-eighteenth century and was obviously well disposed towards

contractarianism[19] He believed in an inherent connection between free moral agency and the quality of the political fabric. In this regard he was clearly influenced by James Harrington, though in the end he rejected the Harringtonian thesis that property in land was a precondition for moral freedom and political virtue. Nevertheless it is readily understandable that Reid should be worried about the voluntaristic side of contractarianism. In his philosophy Reid was above all a moral realist in metaphysics, a moral cognitivist in epistemology and an objectivist in his theory of moral judgement. This led him to his well-known out-right rejection of what he saw as Hume's conventionalism, relativism and sentimentalism[20]; and it obviously led him to worry so much about the whole idea of the voluntary institution of moral phenomena that he undertook to reconsider the most significant theory about this, viz. the contractual institution of civil society. In this undertaking Reid used two important and unusual tools, the jurisprudential notion of quasi-contract and his own original theory of language. We will look at these in turn.

The concept of rights and obligations which have a character as if they had arisen from a contract (quasi ex contractu), although no contract has in fact taken place, stems from Roman law and entered modern natural law from Justinian's Institutes[21]. In Grotius and Pufendorf the terminology is not very firm, but the substance is

19 For a general account of Reid's political theory, see K. Haakonssen,"Reid's Politics: A Natural Law Theory", (1986) 1 Reid Studies, where detailed references are given to the manuscripts which are the main source for Reid's political ideas. Many of these MSS are now to be found in Reid, Practical Ethics. Lectures and Papers on Natural Theology, Self-Government, Natural Jurisprudence and The Law of Nations. Edited from the Manuscripts with an Introduction and Commentary by K. Haakonssen (forthcoming). Reid's more "empirical" political science will be presented in a volume containing his "Lectures on Politicks", to be edited by J.C. Stewart-Robertson.

20 See Reid, "Essays on the Active Powers of the Human Mind", in his Philosophical Works. (With notes . by Sir William Hamilton), photographic reprint of eighth edition, 1895, with an introduction by H.M. Bracken, 2 vols in 1, Hildesheim, 1983, Essay V

21 The Institutes of Justinian. Text with translation and commentary by J A.C. Thomas, Amsterdam, 1975, Book III, title xxvii

there[22] In later commentators, such as Samuel Cocceius and Carmichael we see a sharper delineation of the topic as well as of its label[23]. In none of these sources do we find any application of the idea to interpret the basis for political institutions. In general, obligations were considered to arise quasi ex contractu in situations where one person took care of another's property or affairs, in relations between a guardian and his ward, between foster-parents and foster-children and, in exceptional circumstances, between parents and children.

Obligations quasi ex contractu are, so to speak, symmetrical in that they partly fall upon those who somehow benefit from what is another's (whether goods or services), partly upon those who benefit from the handling of what is theirs by others. Thus the person who is bona fide (without fraud, etc.) in possession of somebody else's property, has certain obligations to the real owner of this property, depending on the circumstances. Contrariwise the owner of something may have a variety of obligations to him who has taken care of his property: this is typically the well-known obligation negotium utile gestum - "(somebody else's) business usefully managed (for him)", for instance in his absence[24].

Hutcheson takes over the idea of obligations - and thus rights - arising quasi ex contractu and explains it in general terms as follows:

> Some rights arise, not from any contract, but from some other action either of him who has the right, or of the person obliged. These actions founding rights are either lawful, or unlawful; when the actions are lawful, the Civilians to avoid multiplying the sources of obligation ... call them obligationes quasi ex contractu ortae: feigning a contact obliging

22 Hugo Grotius, The Rights of War and Peace (Translated into English. To which are added ... the ... notes of J Barbeyrac), 3 vols., London, 1738, Book II, ch. 10; cf. ib., II, 4, iv-v; III, 1, viii and III, 24, i; Pufendorf, Law of Nature, supra n.14, IV, 13, and Duty of Man, supra n.14, I, 13.

23. Samuel von Cocceius, Introductio ad Henrici L.B. de Cocceji ... Grotium illustratum, continens dissertationes proemiales XII in quibus principia Grotiana circa ius naturae ... ad iustam methodum revocantur, Halae, 1748, pp. 117-18, 343-44 and 417-22; Carmichael, Supplementum IV, "De Quasi Contractibus" in his edition of Pufendorf, De officio, supra n.16, pp. 264-68.

24. Cf Corpus Juris Civilis, Editio ... altera, 3 vols, Berolini, 1877-99, vol. I, Digesta, III, v: "De negotiis gestis"

> men in these cases to whatever could reasonably have been demanded by the one party, and wisely promised by the other, had they been contracting about these matters ... When the action is unlawful, these are the rights arising from injury ...[25]

Ignoring the final topic, delict, we should further notice that the distinction between quasi-contract and tacit consent had been well established before Reid.[26] It was insisted on by Hutcheson but had been well put earlier by Barbeyrac:

> A tacit Consent properly arises from certain Things, which appear done, or omitted on Purpose; but yet, of themselves, do not imply directly an Approbation of the Thing that is doing. The Circumstances then may be reasonably supposed to explain the Will of him, who knowing them, also knows the Consequences which those concern'd may draw from them. But there is another Sort of Consent, which the Roman Lawyers, or their Interpreters, call'd sometimes tacit, or presumptive, tho' it be purely imaginary, as they own'd themselves. This is when a Person doth not think, nor, indeed, can think, of the Engagement he enters into, because he is ignorant on what it is founded; yet he is still supposed to acquiesce in it, because we presume, that if he knew the Thing, either he would, or should, consent to it, according to the Maxims of natural Equity; or, because the Laws, on Account of the publick Good, take it for granted, that every Man is bound to fulfil his Engagements ...[27].

To my knowledge, the first suggestion that all of this juridical apparatus might be used in a political context is due to Francis Hutcheson (followed, though hardly knowingly, by Christian Wolff a few years later)[28]. Hutcheson suggests in a brief passage that the original social contract, which he understands exactly like Pufendorf as interpreted by Carmichael, is continued

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25 Francis Hutcheson, A System of Moral Philosophy. Facsimile of first edition, 1755, prepared by Bernhard Fabian, 2 vols. (Collected Works, V, VI), Hildesheim, 1969, Vol. II, pp. 77-78.

26 Francis Hutcheson, A Short Introduction to Moral Philosophy (translated from the Latin). Facsimile of first edition, 1747. Prepared by Bernhard Fabian. (Collected Works, IV), Hildesheim, 1969, p. 223.

27 Barbeyrac, note 1, p. 274 in Pufendorf, Law of Nature, supra n.14.

28. Christian von Wolff, Institutiones juris naturae et gentium (Edidit ... M. Thomann) Gesammelte Werke, Bd 26, Hildesheim, 1969, II, 1, 836.

beyond the first generation as an obligation quasi ex contractu

> As to the transmitting of these civil obligations to posterity, the following observations will explain it. 1. Each citizen in subjecting himself to civil power stipulated protection from the whole body, with all the other advantages of a civilized life, not only for himself but for his posterity: and in this, tho' uncommissioned, did them a most important service. They are bound therefore, (note: "This is an obligation quasi ex contractu.") whether they consent or not, to perform to the body of the state, as far as their power goes, all that which could reasonably be demanded from persons adult for such important benefits received[29].

Reid had a close knowledge of Hutcheson's work. It can hardly be doubted that this passage influenced his own ideas of how allegiance to government might be seen as an obligation which has all the marks of a contactual tie, but where nevertheless there is not contract involved. More particularly Hutcheson is getting towards the idea that the willing or voluntary act involved, is not a specific will to be bound by the contract, if there had been one. It is, rather, a will to accept the implications of the specific actions we engage in, whatever these implications might turn out to be. This latter question concerning the implications of our individual actions can only be answered by an awareness of the situation in which we act. Reid wished to analyse such situations in what we may call linguistic terms - though the concept of language here is wide, as I will now show.

Behind Reid's idea of language lies his important distinction between "solitary" and "social" acts of mind[30]. The central point here is that, in contrast to the solitary, the social acts of the mind presuppose the existence and (in some sense) presence of another mind or other minds. Social acts are necessarily communicative and thus a matter of signs, while solitary acts may or may not be expressed. Examples of the latter are seeing, hearing, remembering, judging, reasoning, deliberating, deciding; while the former are questioning, testifying, commanding, promising, contracting and the like. For mental acts to be social there must therefore be a

29. Hutcheson, Short Introduction, supra n.26, pp. 286-87; cf. his System of Moral Philosophy, supra n.25, vol. II, p. 231.
30. See Reid, "Essays on the Intellectual Powers of Man", in his Philosophical Works, supra n 20, pp 244a-245b, and "Essays on the Active Powers", supra n.20, pp. 663b-666b

community of signs so that mutual understanding is possible, and nature has in fact provided such a community of signs. First, body language is highly communicative not only among humans but also, in rudimentary form, among animals and, indeed, between men and animals. "But there are two operations of the social kind, of which the brute-animals seem to be altogether incapable. They can neither plight their veracity by testimony, nor their fidelity by any engagement or promise."[31]

This parallel between veracity and fidelity is a good indication of the character of Reid's theory Contrary to the impression one might at first form, his idea of social acts of the mind is not a theory of language-game in the modern sense. Just as a descriptive account, whose veracity we may testify to, refers to some objective feature of the world, so "engagements", whose obligation we may pledge fidelity to, refer to something objective. Or, rather, such engagements, though established by us through the use of some sign or other, have objective features, such as obligatoriness, which are immediately perceived by all - which is the same as saying that the signs which establish engagements are the means for a language which is universal for mankind In other words, while the form of the social acts of the mind - or the behavioural signs - are more or less conventional, the moral facts they create in a given situation are not. This gives us the clue to some of Reid's background here, namely Wollaston, Hutcheson and Hume.

In his Illustrations upon the Moral Sense Hutcheson has a lengthy discussion of Wollaston which begins thus: "Mr. Wollaston (in his Religion of Nature Delineated) has introduced a new Explication of moral Virtue, viz. Significancy of Truth in Actions, supposing that in every Action there is some Significancy, like to that which Moralists and Civilians speak of in their Tacit Conventions, and Quasi Contractus!"[32]. After a number of criticisms, many of which anticipate Hume[33] he ends the section thus:

> It may perhaps not seem improper on this occasion to observe, that in the Quasi Contractus, the Civilians do not imagine any Act of the Mind of the Person obliged to be really signified, but by a sort of fiction juris supposing it, order him to act as if he

31 "Essays on the Active Powers", supra n.20, p. 665b.

32. Hutcheson, An Essay on the Nature and Conduct of the Passions and Affections. With Illustrations on the Moral Sense, Facsimile of first edition, 1728, prepared by Bernhard Fabian (Collected Works, II), Hildesheim, 1971, p 253.

33. Hume, Treatise, supra n 2, pp 461-62, note

> had contracted, even when they know that he had contrary Intensions. In the Tacit Conventions, 'tis not a Judgment which is signified, but an Act of the Will transferring Right, in which there is no Relation to Truth or Falsehood of itself. The Non-performance of Covenants is made penal, not because of their signifying Falsehoods, as if this were the Crime in them: But it is necessary, in order to preserve Commerce in any Society, to make effectual all Declarations of Consent to transfer Rights by any usual Signs, otherwise there could be no Certainty in Mens Transactions[34]

Hutcheson's discussion of Wollaston, along with the well-known one by Hume, should make it clear that what Reid wanted to avoid was the idea that the virtue of fidelity is (like) the truth-value of propositions (actions), but without making it dependent upon something - as he saw it - external to the action, such as utility. This was achieved by the idea that the action (of promising, etc.) immediately establishes a moral fact of universal validity which can be understood by our moral powers.

Now Reid seems to have thought that the objectivity of moral facts meant that they in general multiplied in a sort of chain-reaction. When person A in an interchange with person B establishes a moral fact, for instance by promising, it is there to be reckoned with by B, or others They, in relying upon it, may create further moral facts, upon which A, or others, may in turn rely, etc. etc. Such bundles of moral facts constitute the roles or, in the proper Ciceronian sense, the offices of human life. These offices will be known in their general character to any competent moral agent. Even though all the moral facts required by the role may not be foreseen by the agent, since these will depend upon the vicissitudes of social life, the office is prima facie binding once the agent has signalled its beginning through his behaviour. For once the agent has begun a role, the benefit he receives from the reliance of others upon his playing out this role, puts him under an obligation to do so, as if he had promised or contracted to do it. Not to do so, would amount to denying that the preceding behaviour was what it pretended to be. Reid illustrates his point by means of some homely examples:[35]

> The terms of a Contract are sometimes most minutely expressed so as to remove every doubt as far as is possible with regard to the obligations brought upon the several parties by

34. Hutcheson, supra n.32, pp. 273-74.
35. Reid, MS 2131/2/II/10, f. 2-3; Birkwood Collection, Aberdeen University Library. The signs inserted are to be understood as follows: s: superscribed; cr: conjectural; os: over-written; o: sic.

it; But the nature of human affairs will not always admit of this caution & precision. A treaty of Peace or Commerce often makes a Volume, while the Capitulation of a town consists onely of a few lines. Nay in most contracts there is no necessity to mention the terms, They are ... implyed in the very nature of the Transaction. Thus I send for a Taylor, I desire him to make me a suit of Cloaths of superiore Cloath of such Colour; he takes my Measure makes a bow and walks off, under the same obligation as if by ... an Indenture stamped paper we had been mutually bound to each other, he to chuse the cloath according to his best skill[,] to cut it according to the fashion and the rules of his Art[,] to fit it to my size and shape[,] to furnish and make it up workman like & to charge a reasonable price, & I on the other hand to take it off his hands & pay him for it. This is all implyed in the order I gave him though not a tittle of it be expressed. A Farmer asks of his Neighbur farmer the Use of an Ox for a week which is readily granted. If he feeds the beast properly and works him moderately & returns him at the time appointed, he fullfills his obligation, for this was the Use implyed in the transaction. But if he slays the Ox, makes a feast and eats him, he is guilty of a breach of contract no less than if it had been extended in the most formal manner. I apply to a man who professes the healing Art[.] I tell him that I labour under such an ailment, & desire his advice. He prescribes for me without any more ado. It is evident that he comes under an obligation to prescribe for me according to the best of his skill & I to pay him a reasonable fee though no such thing was expressed on the one hand or the other. The consent to this reciprocal obligation is implyed in the Nature of his Profession[,] my application to him & his prescription for my health. It is not solely The Physicians Oath taken at his inauguration that binds him to the faithfull discharge of the duty of a Physician; his taking upon him the Character virtually & implicitly binds him to this without Oath or Promise. He violates the contract implied in his profession, when he does not prescribe faithfully / and honestly. The same thing may be said of every profession and of every office in human Society; with this difference onely that the more important the office is to the well being and happiness of the human kind, so much the more sacred are the Obligations to the duties of it. But every office & every character has its obligations and every man

> who takes that office [s]or character[s] upon him takes upon him its obligations at the same time. He who claims the character of a man binds himself to the duty of a Man, he who enlists in the Army binds himself to the duty of a Soldier, & he who takes the office[s] of a General binds himself to do[s] the ... duty[s] of a General. It is so in every office in Society from the lowest to the highest. If in some offices it is the Custom, or enjoyned by Law to take an Oath de fidele administratione officij this custom, as common in Sovereigns as in any other office, brings a man under no new obligation. It is onely intended, as oaths usually are, to strengthen an obligation already contracted. The taking the office implys the contract to do the duty of it, no less than borrowing implys a contract to restore [s]or repay[s] at the time appointed.
>
> I conceive therefore that a King or Supreme Magistrate by taking that Office upon him voluntarily (and no man is forced into it) engages or contracts to do the duty of a king, that is to rule justly and equitably & to preserve the rights & promote the good and happiness of his people as far as lies in his power. Where the Laws have set limits to his power he is bound not to transgress those limits. If the Commonwealth has committed to him the whole Power Legislative executive & Judicial; he is not the less, but rather the more sacredly bound to the right Excercise of it. As a General or Admiral who is not limited by instructions but left to act according to his Discretion is not by that discretionary Power under the less obligation to use his best Skill & Diligence to answer the End of his Commission.

In other words, whenever a morally coherent chain of actions is begun with some degree of voluntariness, it constitutes an office in life, and every part of it is as obligatory <u>as if</u> it had been entered into by contract. Further, since the office of governing must always have been entered into voluntarily, it inevitably implies all the proper duties of a governor <u>as if</u> these had been contracted for, irrespective of how the office was originally achieved and irrespective of the forms under which it is being conducted - i.e. irrespective of the circumstance that there may never have been anything like a contract:

> It is of no consequence in the present Question in what way [a king] acquired his Kingly Authority whether by Conquest or Hereditary Succession or Election, whether by force or

> fraud or fair Means, whether his people obey him willingly & freely or through Necessity; still this Relation implys in the very nature of it an obligation to those prestations towards his people which belong to the kingly office. And as the Relation must be voluntary upon his part he is[s] obliged by entering into this Relation to those prestations. If therefore every obligation a Man voluntarly enters into is a Contract there must be a Contract between King & People[.] It is no less evident that this Contract may be broken or violated. The Relation between a King and People has been often compared to that between a husband and Wife & in this Respect they resemble each other that there is a contract necessarly implyed in both. It is of no consequen[ce[s]] how the Match was made up whether from mutual liking and inclination or by the authority of Parents, or even if it was begun by a Rape, as soon as the Relation is constituted the obligations necessarly follow and the parties are bound by contract to each other.
>
> If it should be asked when this Contract was made, the Answer was obvious, The Political Contract which Constitutes a State was made when the State began to[os] exist, & continues untill the State be dissolved, & this contract may continue firm under various Revolutions & Forms of Government[.] The contract between a Particular King or civil Magistrate & his People began when he began to be King or Magistrate & continues while he excercises that office. When he violates the essential Obligations of a King which he came under by taking that Office he breaks the Contract[36]

Given Reid's philosophical premises, this is obviously an argument of some force. As stated so far we can hardly accept it as a full alternative to Hume's line of argument, however, for it is obvious that Reid's success in part depends on the fact that he has shifted the ground of argument from the question of allegiance to government, to the question of the government's obligations to its subjects. Part of his point in doing this was undoubtedly to emphasise that the quasi-contractual relationship between rulers and ruled is symmetrical: it establishes rights and obligations on both sides. This, however, only serves to highlight one of Hume's central questions to the contractarians, namely, is voluntariness relevant to the obligation of allegiance? Reid considers the question of the freedom in subjection of the governed in two ways First he

36. Reid, op. cit., f. 7

maintains that they collectively have a high degree of freedom, since resistance by them as a whole is always possible. Secondly, and more importantly, he suggests that allegiance, when considered individually, is a matter of degree:

> There are different degrees of Subjection to a Prince. A Stranger that lives in Brittain is Subject in a certain Degree to the King of Brittain & to the British Laws which regard ... aliens. But a native Britton is subject in a Different Degree. Even of British People on[o] Man may be under very different Obligations from another. A Privy counsellor or a Man who has taken the Oath of Allegiance may have different Obligations from a Man who barely acquiesces in the Government submitting to the Laws and paying his taxes without binding himself to defend the King & to Support his Tittle.[37]

We may virtually say that the degree of allegiance depends upon how much is "contracted" for in the quasi-contractual relations between government and governed. At the same time these examples make it plain that there is no inherent connection between voluntariness and level of allegiance. The two persons who have the greatest freedom to choose their degree of commitment, the foreign visitor and the privy councillor, are the furthest apart in allegiance, while the ordinary Briton, who has hardly any choice, is somewhere in between. It is the purpose or content of the contractual relationship which determines the degree of obligation - not the freedom with which the over-all office is entered into. This is the general drift of Reid's argument and, if he had followed it consistently, he would not have insisted so strongly on the absolute freedom of the ruler in assuming his office. Instead he would have acknowledged more explicitly that, on his premises, the way in which an office - any office - is entered into, is not inherently relevant for the obligations it carries. In fact, he would have seen that the Ciceronian concept of offices with which he operates requires a much more nuanced view of voluntariness than the one his philosophy generally leads him to adopt. And this taken by itself as well as the heavily curtailed contractarianism which Reid derived from it, Hume would have found ironically agreeable conclusions to come from such disagreeable pemises.

Reid would, of course, have answered that even in the offices which in human terms are forced upon us by the circumstances of life, there is in religious terms an absolute freedom, namely the freedom to choose the moral fulfilment we cannot find in this life in an after-life. The denial that we can have any knowledge which renders

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37 Reid, op. cit., f. 8.

this prospect and this choice rational, was Hume's real provocation[38].

38 The final paragraph has been added in the light of Conal Condren's valuable remarks about this point