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THOMAS HOBBES'S A PRIORI NOTION OF CONTRACT

Thomas Hobbes's theory of social contract has received much attention and commentary from scholars. Less attention has been given to his theory of contract as a theory of private law contracts. But it has not been noted by scholars that underlying Hobbes's treatment of social and private law contracts there is a theory of an a priori notion of contract, that abstracts from any instance of contract, including the social contract, and that therefore claims a universality social and private contracts theories don't do. In this paper we expose Hobbes's theory of an a priori notion of contract that serves to organize sense experience, and we show how Hobbes justifies the tenets of that theory.

Keywords: Thomas Hobbes, Contract Theory, Social Contract, Private Law, Common Law

I. *Introduction*

Thomas Hobbes is widely known as a political philosopher and, especially, as a premier social contract theorist. The fact that Hobbes be regarded mainly as a political thinker explains that most of the research on Hobbes has been done on his political and moral theory. Therefore, much of the study of his notion of social contract has been done from a moral or political philosophical point of view.

Less attention has been paid to his legal theory[1] and, what is more important, to his theory of contract. Certainly, plenty has been written on his *social* contract theory, but,

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[1] A fact recognized by Dyzenhaus and Poole in their introduction to their work on *Hobbes and Law*: «there is surprinsingly little engagement with Hobbes as a juristic and legal thinker, despite the fact that Hobbes devoted whole works to legal inquiry and gave law a prominent role in his works focused on politics» (D. Dyzenhaus - T. Poole [eds]., *Hobbes and the Law*, Cambridge University Press, New York 2012, p. 1). Granted, this «little engagement» has to be understood in the sense that, proportionally to the enormous bibliography on Hobbes, very little is dedicated to his legal thinking. However, a list of the works dedicated to his legal thinking or certain aspects of it is, in absolute terms, not short at all. It includes T.A. Balmer, *"Present Appreciation and Future Advantage": a Note on the Influence of Hobbes on Holmes*, «The American Journal of Legal History», 47 (2005), 4, pp. 412-434; B. Barret-Kriegel, *Réflections sur la doctrine des lois civiles chez Hobbes*, «Revue européenne des sciences sociales», 20 (1982), 61, pp. 57-61; N. Bobbio, *Thomas Hobbes*, Einaudi, Torino 2004 – a collection of articles previously published; J. Boyle, *Thomas Hobbes and the Invented Tradition of Positivism: Reflections on Language, Pow-*

surprisingly, very little on his contract theory[2]. And I say 'surprisingly', since in all of

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er and Essentialism, «University of Pennsylvania Law Review» 135 (1987), 2, pp. 383-426; M. Cattaneo, *Hobbes e il fondamento del diritto di punire*, in G. Sorgi (a cura di), *Politica e Diritto in Hobbes*, Giuffrè Editore, Milano 1995; E. Curran, H*obbes's Theory of Rights. A New Application*, in S.A. Lloyd (ed.) *Hobbes Today: Insights for the 21st Century*, Cambridge University Press New York 2013 (Kindle Edition), pp. 24-47; Dyzenhaus - Poole , *Hobbes and the Law* – a collection of 11 articles of different authors; D. Dyzenhaus, *Hobbes and the Legitimacy of Law*, «Law and Philosophy», 20 (2001), 5, pp. 461-498; Id., *Hobbes's Constitutional Theory*, in T. Hobbes, *Leviathan. Or the Matter, Forme, & Power of a Common-Wealth Ecclesiasticall and Civill*, ed. by I. Shapiro, Yale University Press, New Haven 2010 (Kindle Edition); C. Finkelstein (ed.), *Hobbes on Law*, Aldershot, Burlington 2005 – a collection of most of the relevant articles on the subject published in English up to 2005; Ead., *Hobbes and the Internal Point of View*, «Fordham Law Review», 75 (2006), pp. 1211-1228; Ead., *Hobbesian Legal Reasoning and the Problem of Wicked Laws*, in Lloyd *Hobbes Today,* pp. 48-74; T. Fuller, *Compatibilities on the Idea of Law in Thomas Aquinas and Thomas Hobbes*, «Hobbes Studies», 3 (1990), pp. 112-134; F. Gentile, *Hobbes et Kelsen. Eléments pour une lecture croisée*, «Revue européenne des sciences sociales», 61 (1982), pp. 379-392; M.M. Goldsmith, *Hobbes on Law*, in T. Sorell (ed.), *The Cambridge Companion to Hobbes*, Cambridge University Press, Cambridge 1996 (Kindle Edition), Chapt. 11; S. Goyard-Fabre, *Le Droit et la Loi dans la Philosophie de Thomas Hobbes*, Librairie C. Klincksieck, Paris 1975; M. Green, *Hobbes and Human Rights*, in Lloyd, *Hobbes Today*, pp. 319-332; C. Isler, *Las bases filosóficas de la doctrina penal de Thomas Hobbes*, «Revista de Estudios Histórico-Jurídicos», 35 (2013), pp. 681-706; M. Kriele, *Notes on the Controversy between Hobbes and English Jurists*, in R. Koselleck - R. Schnur (eds.), *Hobbes-Forschungen*, Duncker & Humblot, Berlin 1969, pp. 211-222; R. Ladenson, *In Defense of a Hobbesian Conception of Law*, «Philosophy & Public Affairs», 9 (1980), 2, pp. 134-159; K. Lee, *The Legal-Rational State. A comparison of Hobbes, Bentham and Kelsen*, Avebury Aldershot 1993; M.R. MacGuigan, *Law, Morals and Positivism*, «The University of Toronto Law Journal », 14 (1961), 1, pp. 1-28; L. May, *Hobbes on Fidelity to Law*, «Hobbes Studies», 5 (1992), pp. 77-89; M. Murphy, *Was Hobbes a Legal Positivist?*, «Ethics», 105 (1995), 4, pp. 846-873; A. Norrie, *Thomas Hobbes and the Philosophy of Punishment*, «Law and Philosophy», 3 (1984), 2, pp. 299-320; M. Piccinini, *'I speak generally of Law'. Legge, leggi e corti nel* Dialogue *di Thomas Hobbes*, «Scienza & Politica», 26 (2014), 51, pp. 119-163; J. Saada, *Hobbes et le sujet de droit. Contractualisme et consentment*, CNRS Éditions, Paris 2010; T. Schrock, *The Rights to Punish and Resist Punishment in Hobbes's Leviathan*, «The Western Political Quarterly», 44 (1991), 4, pp. 853-890; R.A. Shiner, *Hart and Hobbes*, «William and Mary Law Review», 22 (1980), 2, pp. 201-225; J. Stoner, *Common Law & Liberal Theory. Coke, Hobbes & the Origins of American Constitutionalism*, University Press of Kansas, Lawrence 1992; M. Villey, *Le Droit de l'Individu chez Hobbes*, in Koselleck - Schnur *Hobbes-Forschungen*, pp. 173-198; Id., *Les lieux communs des juristes contemporains et le 'De Cive'*, «Revue européenne des sciences sociales», 61 (1982), pp. 305-320 , and also the four texts mentioned in the following note. Of course, Hobbes receives also special attention in works on the history of legal thinking or in introductions to jurisprudence, but in this case they are not works dedicated strictly to Hobbesian legal theory. Good examples thereof are M. Villey, *La formation de la pensée juridique moderne*, Presses Universitaires de France, Paris 2006, pp. 559-618, or J.B. Murphy, *The Philosophy of Positive Law. Foundations of Jurisprudence*, Yale University Press, New Haven and London 2005 (Kindle Edition), Chapt. III. In the same vein, there are naturally references to his legal thinking in works that verse on his political thinking. Just as examples we can mention H. Warrender, *The Political Philosophy of Hobbes: His Theory of Obligation* (1957), Oxford University Press, New York 2000, pp. 30-47, or Y.C. Zarka, *Hobbes et la pensée politique moderne*, Presses Universitaires de France, Paris 2001, Chaps VII, VIII and X. And there are also many other notable works on the natural law according to Hobbes, but they treat principally with the Hobbesian natural law as a moral law.

[2] The sole papers more or less dedicated to this topic are M.T. Dalgarno, *Analysing Hobbes's Contract*, «Proceedings of the Aristotelian Society», 76 (1975-1976), pp. 209-226; R.A. Grover, *The Legal Origins of Thomas Hobbes's Doctrine of Contract*, «Journal of the History of Philosophy,» 18 (1980), 2, pp. 177-194; R. Holt, *Fear Prudence: Hobbes and Williamson on the Morality of Contracting*, «Journal of Economic Issues», 38 (2004), 4, pp. 1021-1036, and L. May, *Hobbes's Contract Theory*, «Journal of the History of Philosophy», 18 (1980), 2, pp. 195-207. But none of them treats the special subject-matter of the philosophical character of Hobbes' doctrine of contract as such, and they treat on Hobbes's contractual theory in order to

Thomas Hobbes' major works political works – *The Elements of Law*, *De Cive* and *Leviathan* – we find a theory of contract as such, namely, as contract. In these works Hobbes treats on the contract as such, their elements, their classifications, their interpretation, and their effects. And this theory is a philosophical theory, in a sense that will be explained below. To this effect, I will show that Hobbes develops a philosophical doctrine of contract as such (II), the way this theory is connected with his basic tenets in moral philosophy (III), and I will finally draw some consequences for the treatment of Hobbes in current philosophy of contract (IV).

II. *A philosophical doctrine of contract*

As mentioned, and as it is widely known, there has been a lot of research done on Thomas Hobbes's concept of social contract. And this attention on the social contract is certainly justified: Hobbes is, after all, a premier social contract theorist, and among Locke and Rousseau, one of the three most important modern contractarian thinkers. He owes his place in the history of political thinking especially to his treatment of the social contract.

However, before treating on the social contract, Thomas Hobbes develops a theory of contract as such, and this theory of contract has received much less attention from scholars. Hobbes treats on what are contracts, their classification[3] and their modes of termination[4]. What is really important to note is that this theory of contract does not

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analyze the social contract. For example, notwithstanding its title, DALGARNO, *Analysing Hobbes's Contract*, devotes the major part of the paper to analyze Hobbes's social contract. It explains in a very illuminating way the relation between covenant and contract, showing that covenants are not kinds of contracts, but elements in some of them, and analyses very clearly the rights that are transferred with the covenant (a relinquishing of liberty-rights), but then proceeds immediately to apply all of this to the analysis of the *social* contract, and how it can be at the same time a *pactum unionis* (between the subjects), and a *pactum subiectionis* (in relation to the sovereign). GROVER, *The Legal Origins of Thomas Hobbes's Doctrine of Contract* treats on the influence of Common Law thinking in Hobbes's contractual theory, and concludes its incompatibility with the functions Hobbes assigns to the *social* contract. Similarly, HOLT, *Fear Prudence*, treats briefly on the morality of contracting and its relation with institutional requirements, and then proceeds immediately to apply all of this to the making of the *social* contract and the creation of the Leviathan. MAY, *Hobbes's Contract Theory*, notwithstanding its title, treats mainly on Hobbes's *social* contract, which he divides in two: a first contract in order to create a political community and the sovereign and that requires unanimity between its makers, and a second contract that determines who is to be the sovereign, a contract which requires bare majority in order to be made. May recognizes that Hobbes's treatment of contract includes the treatment of private law contracts, which are indeed set as paradigms of contracts, but proceeds no further to analyze the implications thereof for Hobbesian contractual theory. It is possible to say, therefore, paraphrasing Dyzenhaus and Poole, that there is surprisingly little engagement with Hobbes as a thinker on contract, despite the fact that Hobbes devoted parts of all his three major works to the doctrine of contract as such. And, this time, «little engagement» has to be understood both in proportion to Hobbesian scholarship and in absolute terms.

[3] See the threefold classification of contracts in *The Elements of Law* I, XV, 84: «And in all contracts, either both parties presently perform, and put each other into a certainty and assurance of enjoying what they contract for: as when men buy or sell, or barter; or one party performeth presently, and the other promiseth, as when one selleth upon trust; or else neither party performeth presently but trust one another. And it is impossible there should be any kind of contract besides these three». When I cite *The Elements of Law*, I cite first which part of the book it is, then the chapter, and then the page of the edition of Oxford World's Classics (Oxford University Press, New York 2008), where the text quoted is found.

[4] See *Leviathan* XIV, 212: «Men are freed of their Covenants two wayes; by Performing; or by being Forgiven. For Performance, is the natural end of obligation; and Forgivenesse, the restitution of liberty; as being a retransferring of that Right, in which the obligation consisted». I cite the Clarendon critical edition of *Leviathan* (Clarendon Press, Oxford 2012, hereafter 'L'), quoting first the chapter

explain only the social contract, but also the private law contracts that are made in political society. In other words: the theory of contract that we find in his treatment of the second law of nature is a theory that pretends to explain the nature both of the social contract and of private law contracts. When he explains the nature of contracts, he cites as examples some private law contracts, and specially that paradigm of private law contract that is the sale of goods. But, these private law contracts cannot be made until political society is created via the social contract. And is the nature of this social contract that is explained recurring to examples of private law contracts. The social contract is a condition of possibility for any other private law contract – you cannot sell goods unless you live in a political society –, but this social contract is explained recurring to the contracts of ordinary private law. That can only mean that the treatment of contract as such abstracts from any contract, and «from any» means, «even from the social contract». Hobbes' theory of contract is not a theory of contracts in Common Law (because it applies to the social contract, which is a condition of possibility of private law contracts), neither a theory of social contracts (because it applies to private law contracts, and takes clearly the sale of goods as the central case of contract). It is a philosophical theory of contract as such.

In order to note that, we have to look at the place where Thomas Hobbes treats on contracts. It is always in a chapter dedicated to the natural laws, concretely, he treats on contracts between the second and third natural laws, and immediately after having described the state of nature. Certainly, Hobbes treats on contract in this place because he wants to show the way to get out of the state of nature, namely, via a social contract. But the fact is that he treats on contract as a universal requirement of natural law. «Contract», for Hobbes, is a natural law institution, not just an empirical one. Chapter XIV of *Leviathan* is entitled *Of the first and second Naturall Lawes, and of Contracts*. In *De Cive*, treats on contracts in chapter II, entitled *De lege naturae circa contractus*, and the chapter III is entitled *De legibus naturae reliquis*, that is, he devotes an entire chapter of his treatment of requirements of Natural Law to Natural Law and contracts, and another one to *the other Laws of Nature*.

Why treat on contracts when explaining natural laws? Thomas Hobbes defines natural law as «a Precept, or general Rule, found out by Reason, by which a man is forbidden to do, that, which is destructive of his life, or taketh away the means of preserving the same; and to omit, that, by which he thinketh it may best be preserved»[5]. Natural laws, according to the dominant interpretation, are moral laws[6], and as such they are immutable and eternal, and they are the opposite of the natural right, which is «the Liberty each man hath, to use his own power, as he will himselfe, for the preservation of his own Nature»[7], a right that knows no limits in the state of nature.

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and then the page of that edition where the text quoted is found.

[5] L XIV, 198.

[6] Hobbes himself called these Natural Laws «moral laws». Vid *The Elements of Law* I, XVIII, 99: «The laws mentioned in the former chapters, as they are called the laws of nature, for that they are the dictates of natural reason; and also moral laws, because they concern men's manners and conversation one towards another; so are they also divine laws in respect of the author thereof, God Almighty».

[7] L XIV, 198.

The first law of nature commands to «endeavor Peace»[8], and the second law of nature follows from the first and commands that «*a man be willing, when others are so too, as farre-forth, as for Peace, and defence of himselfe he shall think it necessary, to lay down his right to all things; and be contented with so much liberty against other men, as he would allow other men against himselfe*»[9]. This relinquishing of the general right to everything held in the state of nature is a condition of the attaining of peace.

What at first may seem astonishing is that, after explaining the second law of nature, Hobbes proceeds immediately, not to explain the following natural laws, but to explain what is contract and what is convenant, en element in contracts where one party does not perform his obligation at present. And the reason is that the way to relinquish the universal right whose exercise is incompatible with peace is, precisely, via the creation of a contract, the social contract for which Hobbes is so famous. The second law of nature implies the notion of contract, and therefore, contract is a natural law institution, and a universal requirement of practical reason. Practical reason tells every man that he ought, under certain circumstances, celebrate at least one contract: the so-called social contract. At the beginning of chapter XV, in a noteworthy move, he states that the second law of nature obliges «to transferre to another such Rights, as being retained, hinder the Peace of Mankind»[10]. And a contract has been previously defined, precisely, as «the mutuall transferring of Rights»[11].

One would expect that Hobbes explained in the following chapters only the social contract. On the contrary, he analyses contract in general, and clearly treating as the central case of contracts the central case of private law contracts: the sale of goods. So, for example, he states that «There is difference, between transferring of Right to the Thing; and transferring or tradition, that is, delivery of the Thing it selfe. For the thing may be delivered together with the Translation of the Right; as in buying and selling with ready mony; or exchange of goods, or lands: and it may be delivered some time after»[12]. Here Hobbes, in order to prepare the treatment of the social contract made in the state of nature, analyses the nature of contract recurring to a private law contract, a contract that is conceptually impossible to celebrate in the state of nature (there is no money in the state of nature).

Again, in the following passage, Hobbes treats successively on the social contract and a private law contract, *applying to both of them the same rule*: «He that transferreth any Right, transferreth the Means of enjoying it, as farre as lyeth in his power. As he that selleth Land, is understood to transferre the Herbage; and whatsoever growes upon it; Nor can he that sells a Mill turn away the Stream that drives it. And they that give to a man the Right of government in Soveraignty, are understood to give him the right of levying mony to maintain Souldiers; and of appointing Magistrates for the Administration of Justice»[13].

How can we explain the fact that Hobbes, treating of contracts as natural law institutions, that is, as universal requirements of practical reason, proceed to give an ana-

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[8] L XIV, 200.
[9] L XIV, 200.
[10] L XV, 220.
[11] L XIV, 204.
[12] L XIV, 204
[13] L XIV, 210.

lysis of contracts that pretends to apply both to private law contracts and to the social contract, whose making is a condition of possibility of the making of the formers?

Of course, one can coincide with Robinson Grover when he says that Hobbes «derived his concept of contract very strictly from an English legal source of the previous century»[14]. In his excellent article he shows that Hobbes had a good knowledge of the English legal system and thinking. Much of Hobbes's doctrine of contract coincides with English contractual thinking of the time: for example, Hobbes follows the rule, that in order to discern whether a promise is an enforceable contract, we need to look at the existence of a consideration or a detrimental reliance on the part of the promisee[15]. Like Christopher St. German, Hobbes thinks that there are rights that can never be transferred by contract, inalienable rights like the right to defend ourselves[16]. Both authors state that, in order to be valid, contractual obligations have to have a legally and physically possible object[17]. Moreover, in the social contract, the sovereign is clearly a third-party beneficiary, not a party to the contract, but has nonetheless a right to enforce the obligations of the contracting parties, and Larry May has shown that such a right to enforce had been recognized by English courts before Hobbes wrote Leviathan, the earliest case being *Lever v. Heys* (1599)[18]. Plenty of evidence can be found in support for the thesis that Hobbes got some legal concepts from Common Law[19].

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[14] GROVER, *The Legal Origins of Thomas Hobbes's Doctrine of Contract*, p. 177.

[15] Vid *ibi*, p. 181.

[16] Vid *ibi*, p. 183. Grover pretends also that Hobbes follows St. German when he states that a consideration is required in order to make a promise an enforceable one. See *ibi*, p. 182. However, even if it is true that Christopher St. German states that doctrine, and Hobbes too, it is doubtful that Hobbes asserts it because of being influenced by St. German: the doctrine of consideration was a common tenet in the Common Law tradition at his time, and had been firmly established long before St. German had written his *Dialogue*. See D. IBBETSON, *A Historical Introduction to the Law of Obligations*, Oxford University Press, Oxford 2006, pp. 141-145.

[17] Vid GROVER, *The Legal Origins of Thomas Hobbes's Doctrine of Contract*, p. 184.

[18] Vid MAY, *Hobbes's Contract Theory*, p. 196.

[19] It can be further asked whether Hobbes was influenced also by Roman Law, specially since there is a striking similitude between Hobbes's notion of contract and that of Roman Law: for both of them, donations are not contracts (on the legal status of donations in Roman Law, see A. GUZMÁN BRITO, *Derecho Privado Romano*, Editorial Jurídica de Chile, Santiago 1996, vol 2, pp. 582-599). Moreover, we know that Hobbes was well acquainted with Roman public law, since in *Leviathan* he cites many Roman laws, and treats on the Roman sources of law making even a passing reference to Justinian's *Institutes* (see L XXVI, 440). However, a number of reasons suggest otherwise. First, although we have evidence that Hobbes knew Roman public law, we have no direct evidence that he was acquainted with Roman private law. He never cites any Roman jurist, nor Roman private law texts or doctrines like that found in Justinian's *Digest,* nor any Roman contractual tenet. Even if it is true that he cites Justinian's *Institutes* in *Leviathan* – what may suggest some acquaintance with Roman private law –, he does only once, and only the part of the Institutes that verse on the Roman sources of law, a typical public law subject. Furthermore, we know that his knowledge of Common Law came specially from his readings of Edward Coke and Christopher St. German, and neither of both show in their works any sign of influence of Roman law or jurists, let alone cite them. There is another important reason: Roman contractual doctrine was never systematized; instead, Roman jurists preferred to treat on particular contracts rather than developing a general theory of contract, which is precisely what Hobbes does. As James Gordley says, «the Romans had no theory or general law of contract. They had a law of particular contracts such as sale, lease, pledge, and partnership, each with particular rules which they had worked out *ad hoc*» (J. GORDLEY, *The Philosophical Origins of Modern Contract Doctrine*, Oxford University Press, Oxford 1991, p. 30). That's why no commentator has suggested that Roman Law could have influenced Hobbesian doctrine, while there are many who have stressed Common Law's influence on Hobbes. In the same vein, Mario Piccinini says that «Il *Leviathan*

However, this fact can explain what we, after Kant, may call the *quaestio facti* of Hobbes doctrine of contract[20]: where does it come from? The fundamental legal concepts used by Hobbes were arguably imported from English legal theory. But it does not explain the *quaestio iuris*: what *justification* can be found for the fact that Hobbes uses these concepts when he analyses contracts in general? He certainly was aware of the psychological origins of his legal concepts, but he wanted to do more than to present an analysis of contracts of the Common Law. His analysis of contracts cannot be justified simply because it fits the Common Law. That would be an exercise in particular, not general, jurisprudence. Hobbes pretends that his analysis holds good for every contract in every jurisdiction in the world, and even to the social contract which has to have been made anywhere there is law.

That can only be explained if we assume that Hobbes was claiming that his analysis of contract abstracts from every empirical instance of contract, be it any private law contract, or be it the social contract itself. Hobbes was pretending to offer an analysis of contract as such, an a priori analysis of contract, whose justification does not consist in its capacity to fit to the empirical legal material of any particular jurisdiction, not even the Common Law, but that finds its justification via a deductive procedure from what Hobbes considered certain fundamental truths about human nature and human agency. Only an a priori doctrine of contract, whose justification is not obtained by induction from experience, but that prescribes how experience should be, can be, according to Hobbes, a natural law, a universal treatment of contract as such. Much of the contractual theory in such a way justified would certainly fit with the material given by Common Law. But their inclusion in Hobbes's work was justified by their character of deductive conclusions from more abstract anthropological premises held by Hobbes to be true. And it is this character that justifies also some tenets of Hobbes's contract theory that would clearly not cohere with any general contract theory obtained inductively from Common or Civil Law, notably his doctrine regarding duress.

II.2. *An a priori doctrine of contract*

In order to proceed, it is necessary to recall some fundamental tenets of Hobbesian anthropology, especially the role that, according to him, definitions play in the shaping of our experience. Thomas Hobbes has defined contract as a «mutual transfer of right». Has defined also covenant[21]. Has defined right as a liberty, and liberty as absence of external impediments to act. Well, what does it mean, for Hobbes, that something be defined in this or that way?

Much. Definitions, according to Hobbes, really matter, because they shape our experience. We know nothing of the world as it is, except that it is composed of bodies

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nel 1651 aveva decisamente innovato i tracciati delle due opera precedenti, non solo nella presentazione del sistema, ma anche nella trattazione di alcuni suoi gangli decisivi. In particolare la rideterminazione del tema "contrattuale" nei termini di autorizzazione e rappresentanza aveva ulteriormente sciolto i legami con un carico giurisprudenziale d'impronta romanistica» (PICCININI, *'I speak generally of Law'*, p. 131). He stresses the novelty of Hobbes's contractual doctrine regarding the Roman tradition.

[20] On the distinction between *quid facti* and *iuris* in Kant: see I. KANT, *Kritik der reinen Vernunft*, A84/B116. I use the edition of Felix Meiner, Hamburg 1998.

[21] L XIV, 204: «one of the Contractors, may deliver the Thing contracted for on his part, and leave the other to perform his part at some determinate time after, and in the mean time be trusted; and then the Contract on his part, is called PACT, or COVENANT».

in motion. These bodies immute our sensorial system, causing a sense perception, which is the basic element of our experience[22]. Decaying sense, on its side, is imagination[23]. However, our experience never is bare chaos of random sense experiences: it is organized. Organizers of experience are discourse[24] and, specially, speech. Only speech can provide universal rules to organize experience, since discourse, being a simple succession of imaginations, concludes never universally. On the contrary, speech implies the use of universal rules concerning words, their meanings, which are public, and the objects they denote. Hobbes is an extreme nominalist: for him, there is no universality in concepts, but only in words. Rules that organize experience can be found only in language. And that's why «the most noble and profitable invention of all other was that of SPEECH»[25]. Without speech, says Hobbes, «there had been amongst men, neither Common-wealth, nor Society, nor Contract, nor Peace, no more than amongst Lyons, Bears and Wolves». Contracts are linguistic items. They imply a priori rules for the organization of experience.

And the legal order is constituted by the knowing subject via definitions. That's why the subject can know it perfectly, what is not always the case with the natural order. In words that seem to anticipate Kant, Hobbes states that «Praeterea politica et ethica, id est, scientia *justi* et *injusti, aequi* et *iniqui*, demonstrari a priori potest; propterea quod principia, quibus *justum* et *aequum* et contra, *injustum* et *iniquum*, quid sint, cognoscitur, id est, justitiae causas, nimirum leges et pacta, ipsi fecimus»[26]. We are the makers of legal order, and we make it a priori, imposing order on experience via definitions, that, in this case, function as equivalent of the Kantian pure categories of intellect[27].

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[22] Vid L I.

[23] Vid L II.

[24] Vid L III.

[25] L IV, 48.

[26] *De Homine*, X, 5, 94. I use the edition of William Molesworth, John Bohm, London, 1839; Reprint: Scientia Verlag, Aalen 1966.

[27] As Martin Rhonheimer says, «Quel che per Kant sono le categorie intellettuali, per Hobbes sono i termini chiari del linguaggio scientifico» (M. Rhonheimer, *La filosofia politica di Thomas Hobbes: coerenza e contraddizioni di un paradigma*, Armando Editore, Roma 1997, p. 71). The subject of Hobbes's relation and comparison to Kant has been raised at least since Alfred Taylor's seminal paper of 1938 (see A.E. Taylor, *The Ethical Doctrine of Hobbes*, «Philosophy», 13 [1938], 52, pp. 406-424), in which he famously argued that Hobbesian moral theory was a strict deontology with similitude to that of Kant. Since then, much has been written on this relation, but little on the a priori character of moral law according to Hobbes and therefore, on the appropriateness of asserting a similitude in this subject between Kant and Hobbes. Moreover, two of the most recent papers on the relation between Kant and Hobbes explicitly deny the a priori nature of Hobbesian moral law. So, Sharon Anderson-Gold states that «while both philosophers view political principles as derived from practical reason, Kant's principles, given their a priori status, have a degree of (moral) certitude that transcends their institutionalization through consent. For Hobbes, because of their origin in consent, the authority structures that make practical life possible are fragile and must be carefully nurtured» (S. Anderson-Gold, *Philosophers of Peace: Hobbes and Kant on International Order*, «Hobbes Studies», 25 [2012], pp. 6-20, here p. 20). In the same vein, Howard Williams says that Kant «does not directly attribute many of the rights he deals with under these headings to our natural condition but rather derives a large part of them from what he describes as the a priori principles of reason. Whereas Hobbes transforms natural right by placing the rational individual bent on self-preservation at the centre of political philosophy, Kant transforms natural right by putting the metaphysical presuppositions of his critical philosophy at the heart of his reasoning on politics» (H. Williams, *Natural Right in Hobbes and Kant*, «Hobbes Studies», 25 [2012], pp. 66-90, here p. 67) However, there are two main reasons for

On the other side, Reason is «*Reckoning (*that is, Adding and Substracting) of the Consequences of generall names agreed upon, for the *marking* and *signifying* of our thoughts»[28]. Reason supposes speech, since it supposes public meanings assigned to words. These public meanings are definitions «agreed upon». Any reasoning that does not begin with settled and unambiguous definitions is prone to error. In this sense, any reasoning process has to follow the method of geometry, «the onely Science that it hath pleased God hitherto to bestow on mankind»[29]. Hobbes explicitly states that this deductive *more geometrico* reasoning has to be applied in ethics too: «When a man *Reasoneth*, hee does nothing else but conceive a summe total, from *Addition* of parcels; or conceive a Remainder, from *Sustraction* of one summe from another: which (if it be done by Words,) is conceiving of the consequences from the names of all the parts, to the name of the whole; or from the names of the whole and one part, to the name of the other part… Writers of Politiques, adde together *Pactions*, to find mens *duties*; and Lawyers, *Lawes*, and *facts*, to find what is *right* and *wrong* in the actions of private men»[30].

So, reason implies speech, and speech, definitions. Reason has to reckon deductively on the consequences of definitions. That's why Hobbes says that «the first cause of Absurd conclusions I ascribe to the want of Method; in that they begin not their Ratiocination from Definitions; that is, from settled significations of their words: as if they could cast account, without knowing the value of the numerall words, *one, two,* and *three*»[31].

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supporting the a priori character of moral law and, therefore, of Hobbesian contractual theory. The first one is textual: there is the much cited and very explicit text of *De Homine*, which not only states the a priori nature of ethics and politics, but in its fulness compares ethics and politics to geometry and not to physics. Secondly, from a theoretical point of view, only a priori laws can have the universal status Hobbes always ascribes to moral laws, since he repeatedly asserts that «experience concludeth nothing universally» (*The Elements of Law* IV, 33). Since universal knowledge does not come from experience, it has to be previous to experience and has to shape that experience. And only linguistics items have, according to Hobbes, universality. Therefore, as Rhonheimer states, language plays the systematic role in Hobbesian philosophy that pure categories of intellect play in Kantian philosophy. In this sense, it can be affirmed that there is an anticipation of Kantian doctrine. Of course, there are also many differences, specially that Hobbes does not differentiate between analytic and synthetic a priori knowledge, and secondly, that for Hobbes a priori knowledge has an intrinsic and essential relation to experience, the incorporeal being unthinkable (even God, he states, is a body), whereas for Kant a priori categories can be used at least to think incorporeal («intelligible») items like God or the immortal soul, even though not yielding true knowledge of them. That's why Jaakko Hintikka compares Kant's notion of the apriori with Hobbes's: «For Kant, it was the kind of knowledge he called synthetic knowledge a priori. An earlier proponent of the same basic idea was Hobbes, for whom this "higher" knowledge was demonstrative knowledge. Hobbes anticipated some salient aspects of Kant's philosophy of mathematics when he said that in geometry we can have demonstrative knowledge because geometrical demonstrations are about figures which we have ourselves drawn and constructed» (J. Hintikka, *Knowledge and the Known. Historical Perspectives in Epistemology*, Kluwer Academic Publishers, Dordrecht 1991, p. 127). And Bernard Gert recognizes that Hobbes assimilates the a priori status of moral knowledge to that of geometry: «it is quite clear that he [Hobbes] thought that he could demonstrate *a priori* certain truths in politics just as Euclid had demonstrated *a priori* certain truths in geometry» (B. Gert, *Hobbes*, Polity Press, Cambridge 2010, p. 21).

[28] L V, 64.

[29] L IV, 56.

[30] L V, 64.

[31] L V, 70.

But there is another requirement for sound reasoning, since definitions themselves may be wrong, and «the errours of Definitions multiply themselves, according as the reckoning proceeds»[32]. Therefore, one has to review that definitions themselves be rightly agreed upon. «So that in the right Definition of Names, lyes the first use of Speech; which is the Acquisition of Science; And in wrong, or no Definitions, lyes the first abuse; from which proceed all false and senslesse Tenets»[33]. Therefore, Hobbes's doctrine of the beginning of reasoning has not to be confused with an endorsement of any type of definitional arbitrariness. Hobbes's explicit assertion that there can be wrong definitions excludes any type of endorsement of definitions arbitrarily settled as the beginning of sound reasoning. There are definitions rightly and wrongly agreed upon. Therefore, there have to be criteria by which definitions can be judged as more or less sound. Although Hobbes never says explicitly what such criteria be, it seems that at least they include – if it is not the only one – the following: definitions have to be agreed in order that they permit the best possible involvement with the world. If it be involvement with non human objects, they have to permit the best possible manipulation of the world. And if it be involvement with our human fellows, the best possible dealing with them.

There are plenty of passages were Hobbes states that the end of knowledge – as he understands it – is an utilitarian one. One of the most clears is the following: «To conclude, The Light of humane minds is Perspicuous Words, but by exact definitions first snuffed, and purged from ambiguity; *Reason* is the *pace*; Encrease of *Science*, the *way*; and the Benefit of man-kind, the *end*»[34]. «Science» is «knowledge of all the Consequences of names appertaining to the subject in hand»[35], and it is arrived after deducing *more geometrico* all the consequences of names whose definitions have been *rightly* settled. Science needs, at its turn, not only the knowledge of the truth of the conclusions, but also the demonstration of the truth via the deduction of the conclusions from the right definitions. «Also in Reasoning of all other things, he that takes up conclusions on the trust of Authors, and doth not fetch them from the first Items in every Reckoning, (which are the significations of names settled by definitions), loses his labour; and does not know any thing; but onely beleeveth»[36]. Hobbes's epistemology is a clear instance of foundationalism.

So, if we have to adjudicate between competing scientific theories, we have to prefer that which, when applied to the world, yields better results. And we have to remember that for Hobbes, ethics is a science too and, if properly studied – what, he thinks, no one before him has done –, no less rigorous than geometry. Definitions of moral terms have to be settled so that they allow a praxis with better results. And Hobbes believes that, if «law of nature», «contract», «right», «covenant» or «justice» are defined the way he does, our practice will have better outcomes than one based on different understanding of what these names mean. Only as defined the way he does a practice that is guided by these rules – definitions are rules – will lead to «the benefit of man-kind» or, at least, to

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[32] L IV, 56.
[33] L IV, 56.
[34] L V, 74.
[35] L V, 72.
[36] L V, 66.

our felicity. That's why he criticizes so widely definitions settled by previous authors: a praxis based on them leads only to anarchy and revolt. Understanding, for example, by «justice» anything else than «keeping of covenants» will have disastrous results.

In a similar way, the content of natural laws is determined attending at the foreseeable consequences of a praxis guided by these rules[37]. That, for Hobbes, a praxis oriented by rules different than the second and third laws of nature, which concern contracts, would lead to bad outcomes, is plainly clear. He justifies the validity of these rules by pointing to the bad consequences of not following them: he justifies the content of the second Law of Nature saying that «For as long as every man holdeth his Right, of doing any thing he liketh; so long are all men in the Condition of Warre»[38]; and regarding the third Law of Nature, he states that «From that law of Nature, by which we are obliged to transferre to another, such Rights, as being retained, hinder the peace of Mankind, there followeth a Third; which is this, *That men performe their Covenants made*: without which, Covenants are in vain, and but Empty words; and the Right of all men to all things remaining, wee are still in the condition of Warre»[39].

II.3. *The moral character of contractual obligation*

Once we have understood why Hobbes defines «contract» the way he does, and that it is a natural law institution, we can understand that for Hobbes keeping the contractual

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[37] That does not necessarily mean that Hobbes be a metaethical naturalist. There are different interpretations regarding Hobbes's metaethical views. Some (as Taylor, *The Ethical Doctrine of Hobbes*), take him to be a deontologist and a Divine Command theorist. Other take him to be a Divine Command theorist (seeWarrender, *The Political Philosophy of Hobbes*, pp. 299-312; A. Martinich, *The Two Gods of Leviathan. Thomas Hobbes on Religion and Politics*, Cambridge University Press, Cambridge 1992, pp. 100-135, or F. Oakley, *Natural Law, Laws of Nature, Natural Rights. Continuity and Discontinuity in the History of Idea*s, Continuum, London 2005, pp. 92-94). Shannon Lloyd seems to take him to be a deontologist (see S.A. Lloyd, *Natural Law*, in A.P. Martinich - K. Hoekstra (eds.), *The Oxford Handbook of Hobbes*, Oxford University Press, New York 2016, pp. 264-289). And others take him to be a consequentialist that reduces morality to rational self-interest, for instance, J.W.N. Watkins (J.W.N. Watkins, *Hobbes's System of Ideas*, Hutchinson & Co., London 1973, pp. 55-57), Martin Rhonheimer (see Rhonheimer, *La filosofia politica di Thomas Hobbes*, pp. 212-127), or Arrigo Pacchi (see A. Pacchi *Introduzione a Hobbes* [1971], Laterza, Roma - Bari 2009, pp. 44-47). Hobbes never clearly states what «moral» or «morality» *mean*, and although he defined «law of nature» as «A Precept, or generall Rule, found out by Reason, by which a man is forbidden to do, that, which is destructive of his life, or taketh away the means of preserving the same; and to omit, that, by which he thinketh it may be best preserved» (L XIV, 198), he also says that «These dictates of Reason, men use to call by the name of Lawes; but improperly: for they are but Conclusions, or Theoremes concerning what conduceth to the conservation and defence of themselves; wheras Law, properly is the word of him, that by right has command over others. But yet if we consider the same Theoremes, as delivered in the word of God, that by right commandeth all things; then they are properly called Laws» (L, XV, 242). So, as regards the ultimate nature of morality according to Hobbes, there are diverse opinions among scholars, and there's no need to treat on the subject here. I claim only that the *content* that moral laws have has to be ascertained, according to Hobbes, attending to the foreseeable consequences of the practice based on those laws, without claiming that, according to Hobbes, moral properties be natural properties, or reducible to them, or that morality means «that which yields better results», or whatever.

[38] L XIV, 200.

[39] L XV, 220. It may seem surprising that Hobbes define the content of the third law of nature as prescribing the observance of pacts only, and not of contracts. In the same vein, the Latin editions says the third law of nature prescribes «*Praestanda esse Pacta*» (L XV, 221). However, we have to remind that in contracts that do not involve covenants there is no problem with the keeping of them, since they do not involve future performance. They are made and the obligations deriving from it are performed simultaneously.

obligation is a moral obligation. This moral obligation arises from the third law of nature, which commands «*That men performe their Covenants made*»[40].

As Grover says, «that practice of contracting is justified by expediency»[41]. But expediency itself is commanded by the law of nature, is a moral aim. Therefore, anything that promotes expediency is morally commanded. And contracting is a practice that promotes expediency in a twofold way: first, by making possible the institution of political society, and secondly, by making possible the advancement of human felicity in political society via the practice of selling and buying goods, loaning, etc. The law of nature commands, when it is possible, to make the social contract, which is a condition of possibility of the making of any other contract, and the making and consequent keeping of the following contracts is also commanded by practical reason.

That contractual obligation be an instance of moral obligations has another consequence: if performance becomes impossible after the contract has been made, the Covenant «is valid, and bindeth, (though not to the thing it selfe,) yet to the value; or, if that also be impossible, to the unfeigned endeavor of performing as much as is possible: for to more no man can be obliged»[42]. In the same vein, he asserts in *De Cive* that «Obligant igitur *pacta*, non ad ipsam rem pactam, sed ad summum conatum; hoc enim solo, non res ipsae in nostra potestate sunt»[43]. Moral law in general obliges us not to produce certain state of affairs, but only to the sincere effort to produce them[44]. If the state of affairs intended does not obtain, but our effort was sincere, then we have complied with our duty. That means that no one can be contractually obliged to effectively produce an effect in the world, not even to the value of the thing if one is unable to pay for it, but only to the sincere endeavor to produce it. Contractual liability is, then, limited to the financial situation of the debtor, because it is morally unjust to demand him more of what he can sincerely pay[45].

III.4. *A special case of relation between contractual doctrine and philosophical tenets: the case of duress*

Where the philosophical character of Thomas Hobbes's theory of contract can most clearly be ascertained is in his treatment of duress. Here he departs from his Common Law tradition, and even from the Civil Law tradition, because he does not think that duress makes a contract necessarily void. «Covenants entred into by fear, in the condition of meer Nature, are obligatory. For example, if I Covenant to pay a ransome, or service for my life, to an enemy; I am bound by it. For it is a Contract, wherein one receiveth the benefit of life; the other is to receive mony, or service for it; and consequently, where no other Law (as in the condition, of meer Nature) forbiddeth the performance, the Covenant is valid»[46]. The whole Western legal tradition had considered

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[40] L XV, 220.

[41] GROVER, *The Legal Origins of Thomas Hobbes's Doctrine of Contract*, p. 185.

[42] L XIV, 212.

[43] *De Cive* II, 14, 104. I use the Clarendon critical edition (Clarendon Press, Oxford 1983).

[44] See L XV, 240: «The same Lawes, because they oblige onely to a desire, and endeavour, I mean an unfeigned and constant endeavour, are easie to be observed».

[45] We find here a philosophical justification of the contemporary practice of recognizing non-seizable assets to debtors, a practice that is clearly based on moral considerations.

[46] L XIV, 212.

void, because of duress, the contracts entered into by fear, but Hobbes does not consider them necessarily so, but only where there is another law, different from the law of nature, that forbids them. Why does Hobbes defend a doctrine so clearly opposed to his whole legal tradition[47], a doctrine that would even seem to us and to his contemporaries very counterintuitive, namely, that in principle contracts made under duress are obligatory? The answer for such a radical departure from his and any legal tradition can only be found in his more general anthropology: a contract made under duress is as voluntary as a contract made under other conditions, since every human action is at least partly motivated by a passion, and fear is a passion. In this sense, there is no difference between a contract entered into by fear and another entered into by desire of something (a car, a house). In both cases, we have a voluntary action and, therefore, a voluntary undertaking of an obligation.

On the other side legal practice, then and now, treats contracts made under duress as void. But, according to Hobbes, that practice finds its justification in the positive law of political communities that makes them void. In absence of such laws, contracts made under duress would be legally valid even in a commonwealth[48]. Such contracts are equally free-made as those made under normal conditions, since they are free in the unique sense Hobbes recognizes to the term: that of absence of external impediments. Since Hobbes is a though determinist, and holds the notion of freedom of the will to be meaningless, it cannot be objected that contracts made under duress were not freely made. They were freely made in the Hobbesian sense of «freely». They can be made void by statute law, as statute law can restrict the domain of freedom of contract, but any pretention that they be intrinsically void or anulable would rest, according to Hobbes, in the meaningless notion of free will[49].

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[47] On the very restricted treatment of duress in Common Law at Hobbes's time, see IBBETSON, *A Historical Introduction to the Law of Obligations*, pp. 72-73, 208-209.

[48] Of course, Hobbes faces a problem here, since there was no positive law at his time prescribing the nullity of contracts made under duress, as it is the case in our modern legal systems, whose Civil Codes generally declare those contracts voyd. Hobbes clearly supposes that there was such a general legal prohibition in his time, when he says that «where no other Law (as in the condition, of meer Nature) forbiddeth the performance, the Covenant is valid», implying that in the political condition there was indeed such a prohibition. However, the Codes and statutes that regulate generally the conditions of validity of contracts are much more recent creations. For instance, the German Bürgerliches Gesetzbuch (1900) in paragraph 123 declares contracts made under duress to be anulable. The Chilean Código Civil (1855), which served as model for most of Latin American Codes and that therefore represents Latin American law in this area, and which follows closely in this matter the French Code Civil of 1804 (see A. GUZMÁN BRITO, *La codificación civil en Iberoamérica. Siglos XIX y XX*, Editorial Jurídica de Chile, Santiago 2000, pp. 374-424), states in articles 1445, 1451, 1456 and 1457 that duress makes legal acts, like contratcs, annullable. See especially article 1456 subsection 1: «la fuerza no vicia el consentimiento, sino cuando es capaz de producir una impresión fuerte en una persona de sano juicio, tomando en cuenta su edad, sexo y condición. Se mira como una fuerza de este género todo acto que infunde a una persona un justo temor de verse expuesta ella, su consorte o alguno de sus ascendientes o descendientes a un mal irreparable y grave». At Hobbes's time, however, the prohibition was held by courts on the basis of precedents or case law, not on the basis of statutes. Simply, there was no statute of the sovereign then that prescribed nullity as a legal consequence that Hobbes takes for granted in the political community for contracts made under duress, and Hobbes thinks that every positive law is posited by the sovereign. It's true that Hobbes thinks that case law is a tacit command of the sovereign; however, here he seems to think that such a general prohibition was established by statute law («where no other Law…»), what simply was not the case.

[49] Hobbes does not oppose the notion of freedom of the will only because of his materialism. His

III.5. *Some incoherences*

We have seen that, although the language Hobbes employs in developing his theory of contracts comes from Common Law, the justification of the elements of this theory can only come from a rigorous deduction from philosophical tenets. The practice of contracting, the obligation to keep covenants and to make at least one of them, the social contract, are universal requirements of practical reason. Duress does not make a contract void, because it does not make it involuntary. Key concepts of contractual law, like «contract», «justice», «covenant», and other, are defined the way they are because reason demands that definition in order to produce better results. And so on. If these doctrines and definitions cohere with Common Law theory and practice, the better, but if they don't, then it is Common Law that has to adjust itself to them.

However, it is important to note that there are some doctrines of Hobbes's theory of contract that do not seem to necessarily be required by some prior philosophical and anthropological tenets, even if Hobbes believed so. One of them is his doctrine of validity of contract. A noteworthy feature of Hobbes's doctrine of validity of contracts is that he only recognizes as sanction for a contract that does not satisfy all requirements established by natural or positive law, that it be void. He never mentions any other possibility. Current statutes normally make distinctions according to the character of the defect in the making of the contract, and differentiate between different various consequences that include the inexistence of the contract, that it be annullable at the request of the damaged party, and its void character. Why does not Hobbes recognize that there are multiple possible legal outcomes to defective contracts? Was it because legal practice, at his time, recognized only this legal outcome, or because of necessary implications of his philosophical system? It seems to be the former: if the justification of the practice of contracting is a consequentialist one, then nothing prevents that, if consequences are better, defective contracts may have another legal consequence as being void, for instance, being annullable at the request of the innocent party. We can say that, here, Hobbes may have thought that practical reason necessarily required that a contract that has some defects has to be void, even if, assuming his consequentialist method of justification of the content of Natural Law, we may think that reason allows other possibilities, as we find in contemporary contractual theory.

Secondly, and more important, it can be asked why Hobbes does not consider donations as a kind of contract, and requires a consideration in order to ascertain if a promise is a covenant, and enforceable as that, or just a mere donation, which cannot be enforced by the State[50]. In doing that, Hobbes follows closely again the Common Law tradition, for which donations are not contracts, and a promise is part of a contract if it has consid-

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strict determinism derives from his causal theory, specially from the identification of sufficient cause with necessary cause. See L. FOISNEAU, *Hobbes et la toute-puissance de Dieu*, Presses Universitaires de France, Paris 2000, pp. 97-123.

[50] See *The Elements of Law* I, XV, 84: «When a man transferreth his right, upon consideration of reciprocal benefit, this is not free gift, but mutual donation; and is called CONTRACT». And L XIV, 204: «When the transferring of Right is not mutuall; but one of the parties transferreth, in hope to gain thereby friendship, or service from another or from his friends; or in hope to gain the reputation of Charity, or Magnanimity; or to deliver his mind from the pain of compassion; or in hope of reward in heaven; This is not Contract, but GIFT, FREE-GIFT, GRACE: which words signifie one and the same thing».

eration, otherwise it is a mere donation and cannot be enforced by the law. This doctrine is really astonishing since nothing in Hobbes's anthropology or moral theory seems to preclude treating donations as contracts, as the Civil Law tradition does. At first sight, it could be thought that his psychological egoism require not treating donations as contracts[51]: if any action of an agent aims at some good for the agent himself, then it would seem that donations are irrational actions and should be treated by the state as such, namely, not enforcing them. However, a closer look shows that this reasoning is misleading: in donations the donor indeed aims, according to Hobbes, to a good for himself, for example, the reputation of charity. Therefore, if donation promises also aim at goods for the agent, if they are, consequently, beneficial to him, there is no reason why they cannot be enforced by the state if they are not performed and the agent has received the good he aimed at (for example, gratitude). It seems there is no reason why, according to Hobbes's own premises, they should have a different treatment than that of promises that involve a consideration and not be treated at possible contracts, as indeed Civil Law systems do. And so, it seems there is no reason to assert that Hobbesian anthropological or moral theory condemns Civil Law systems as contrary to sound reason – and, therefore, that have to be reformed –, even if, it seems, Hobbes thought so. We can say that, here and in his treatment of validity of contracts, Hobbes, pretending to develop a universal theory, merely follows, surely unconsciously, his own legal tradition, his conclusions on these particular subjects not being entailed by his own premises[52]. His philosophical and substantive contract theory does not always accord with his philosophical methodology.

What indeed is necessitated by his psychological egoism is his doctrine, stated at multiple places, that a condition of validity of contract that involves mutual covenants is the foreseeability that the other party will perform his part[53]. In effect, no good can be

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[51] In several occasions Hobbes states what seems to be a clear psychological egoism, for instance *The Elements of Law* XIV, 78-79: «necessity of nature maketh men to will and desire *bonum sibi*»; XVI, 90: «by necessity of nature every man doth in all his voluntary actions intend some good unto himself»; *De Cive* I, 7, 94: «Fertur enim vnusquisque ad appetitionem eius quod sibi Bonum, & ad Fugam eius quos sibi malum est»; I, 14, 96-97: «nam vnusquisque naturali necessitate bonum sibi appetit»; L XIV, 202: «of the voluntary acts of every man, the object is some *Good to himselfe*»; XV, 230: «of all Voluntary Acts, the Object is to every man his own Good». Although some of the commentators do not take him to be a psychological egoist, for instance P. Zagorin, *Hobbes and the Law of Nature*, Princeton University Press, Princeton 2009, p. 34; B. Gert, *Hobbes and Psychological Egoism*, «Journal of the History of Ideas», 28 (1967), 4, pp. 503-520; S.A. Lloyd, *Morality in the Philosophy of Thomas Hobbes. Cases in the Law of Nature*, Cambridge University Press, New York 2009 (Kindle Edition) and S. Sreedhar, *Hobbes on Resistance: Defying the Leviathan*, Cambridge University Press, New York 2010 (Kindle Edition) 2010, many others do. For example, A.E. Taylor, *Thomas Hobbes*, Reprint of The University of Michigan Library, London 1908, p. 65; Y.C. Zarka, *La Décision métaphysique de Hobbes. Conditions de la politique*, Vrin, Paris 1999, p. 228; Rhonheimer, *La filosofia politica di Thomas Hobbes*, p. 112 and M.L. Lukac de Stier, *El fundamento antropológico de la filosofía política y moral en Thomas Hobbe*s, Educa, Buenos Aires 1999, pp. 182-188. In my opinion, Yves Charles Zarka, in Zarka, *La Décision métaphysique de Hobbes*, has made an extraordinarily convincing case for Hobbes's psychological egoism to be derived from his more general epistemological tenets, and therefore I take Hobbes to be a psychological egoist.

[52] Therefore, I cannot agree with Robinson Grover when he states, after mentioning Hobbes's «individualistic metaphysics» and his vision of man as a rational egoist, that «A contract in St. German's sense of a voluntary binding promise made in exchange for good consideration or on a detrimental reliance exactly describes the sort of contract that Hobbes's metaphysics calls for» (Grover, *The Legal Origins of Thomas Hobbes's Doctrine of Contract*, p. 185).

[53] See, for instance, L XIV, 201: «If a covenant be made, wherein neither of the parties performe pres-

obtained if one performs his party, and the other party does not, and every rational action by a human agent intends some good to that agent. Therefore, to perform in the absence of a warrant that the other party will perform would be simply irrational. In the case of private law contracts, this warrant is always present in the form of the coactive power of the State: if the other party does not voluntarily perform, the promisee can – and, if one takes Hobbesian psychological egoism seriously, should and will, if the litigation cost is lower than the cost of the good object of the obligation of the other party – ask the state to impose coactively the performance on the other party[54]. In the case of the so-called social contract, this foreseeability of the performance by the other party is more uncertain, since there is no coactive power able to impose performance yet[55].

IV. *Implications for current discussion*

We have seen that Hobbes's doctrine of contract is philosophical in a twofold sense: that it abstracts from any empirical notion of contract, even the social contract, and therefore verses on a purely a priori notion of contract; and that, therefore, the doctrine finds its justification via deduction from purely philosophical premises.

All that being said, it is clear that there are important consequences of the philosophical nature of Hobbesian contractual theory to current discussions in philosophy of contract. Contemporary legal philosophers discuss topics such as what is a contract, if there are limits to contractual freedom, and what is the moral justification for the keeping of contracts and for the public enforcement of them. However, that discussion concerns only private law contracts. And in these discussion, sometimes Hobbes is mentioned as an early defender of this or that position[56]. However, it can be now seen that Hobbes was

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ently, but trust one another; in the condition of meer Nature, (which is a condition of Warre of every man against every man,) upon any reasonable suspition, it is Voyd: But if there be a common Power set over them both, with right and force sufficient to compel performance; it is not Voyd. For he that performeth first, has no assurance the other will perform after; because the bonds of words are too weak to bridle mens ambition, avarice, anger, and other Passions, without the feare of seome coërcive Power; which in the condition of meer Nature, where all men are equall, and judges of the justnesse of their own fears, cannot possibly de supposed. And therfore he which performeth first, does but betray himselfe to his enemy; contrary to the Right (he can never abandon) of defending his life, and means of living».

[54] Even if he treats on private law contracts, Hobbes never states what kind of enforcement should the state impose in case of non performance by one party. Common Law systems, then and now, only allow the State to impose compensation of damages. Civil Law systems, then and now, allow the promisee to ask for compensatory damages or, alternatively, enforcement of specific performance. It seems that none of both alternatives is necessitated by Hobbesian philosophical premises.

[55] Although this foreseeability can be grounded in the fear of God: see L XIV, 216: «So that before the time of Civill Society, or in the interruption thereof by Warre, there is nothing can strengthen a Covenant of Peace agreed on, against the temptations of Avarice, Ambition, Lust, or other strong desire, but the feare of that Invisible Power, which they every one Worship as God; and Feare as a Revenger of their perfidy».

[56] In P. Benson, *Contract*, in D. Patterson (ed.), *A Companion to Philosophy of Law and Legal Theory*, Blackwell, Oxford 1999, pp. 24-56, here p. 42, Hobbes is seen as a forerunner of Randy Barnett's theory of contract as a transfer of rights. On the other side, in R. Craswell, *Two Economic Theories of Enforcing Promises*, in P. Benson (ed.), *The Theory of Contract Law. New Essays*, Cambridge University Press, New York 2001, pp. 19-44, Hobbes is seen as a forerunner of current theories of economic analysis of enforcement of private law contracts. He even states that «the modern economist' treatment of reliance is really a generalization of Hobbes' concern» (*ibi*, p. 29). James Gordley, in his classic book on philosophy of contract treats on Hobbes' influence on modern authors, but exclusively as an author on private law

not discussing exactly the same topic as contemporary legal philosophers of contract law: he was discussing the a priori nature of contract as such, including therefore not only private law contracts, but also the so called social contract, which is condition of possibility of the making of private law contracts. Even when he exemplifies his doctrine recurring to private law contracts, he is clearly treating on a topic much broader than that covered by contemporary discussion. For Hobbes, certainly, contract is a Natural Law institution, a universal practical requirement of practical reason, but first and foremost because it makes possible the attainment of peace, without which any other good would be unattainable, be it welfare (as Law and Economics theorists tend to think as end of contractual practice), the flourishment of autonomy (Charles Fried), the realization of virtue (as in James Gordley's neoaristotelian theory of contract), or whatever[57].

Secondly, one has to be cautious when treating on the relation between Common Law and Hobbes. It can be stated that Hobbes derives much of his terminology from the Common Law tradition[58], and it can be stated also that Hobbes's theory of contract, on its turn, had a very strong influence on the subsequent authors on contract theory within that tradition[59], but one has to be always conscious that Hobbes's theory is not an exercise in that particular, but in general jurisprudence. In other words, Hobbes was not pretending to write a theory of contract in Common Law. Not even a theory of social contract. It was a theory of contract as such.

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contracts. See GORDLEY, *The Philosophical Origins of Modern Contract Doctrine*, pp. 111-117.

[57] This feature may difference Hobbes not only from current authors, but also, probably, from Kant. In Kant we find also a philosophical theory of contract, but, unlike Hobbes's case, it is not that clear that his treatment includes the social contract. On one side, when he treats on contracts, he makes a classification that pretends to be exhaustive of them in 12 types. See I. KANT, *Metaphysik der Sitten*, Rechtslehre, § 31. I use the edition of Suhrkamp, Frankfurt a.M. 1977. On the other side, however, it is not clear how the social contract would fit into any of the categories mentioned by Kant. This question is hard to ascertain not only because Kant's classification tend to clearly focus on private law contracts that include exchange of goods and/or money (for Kant, unlike Hobbes, money is a Natural Law institution, conceptually preceding the State: see *ibidem*), but also Kant, unlike Hobbes, never explicitly analyses the social contract, and that makes it much more difficult to tell whether it fits into any of the 12 categories. The most detailed exposition of his content is the following: «Der Akt, wodurch sich das Volk selbst zu einem Staat konstituiert, eigentlich aber nur die Idee desselben, nach der die Rechtmässigkeit desselben allein gedacht werden kann, ist der ursprüngliche Kontrakt, nach welchem alle (*omnis et singulis*) im Volk ihre äussere Freiheit aufgeben, um sie als Glieder eines gemeinen Wesens, d. i. des Volks als Staat betrachtet (*universis*), sofort wiedehr aufzunehmen» (*ibi*, § 47). He never explicitly explains with whom one contracts (in Hobbes, with every other member of the community), regarding whom is one obliged (in Hobbes, regarding both our fellow citizens and to the sovereign), and to what actions one is obliged (in Hobbes, not only to renounce rights, but also to consider as own the actions of the sovereign, and therefore always to obey him). Compare that with Hobbes's analysis of social contract: «every man should say to every man, *I Authorise and give up my Right of Governing my selfe, to this Man, or to this Assembly of men, on this condition, that thou give up thy Right to him, and Authorise all his Actions in like manner»* (L XVII; 260), a statement that follows the analysis of «Right», «giving up a Right», «Author» and «authorize». Moreover, the Kantian social contract lacks a feature all the other contracts have: that they be freely made. There is no contractual freedom regarding the social contract: practical reason requires me – in the hypothetical state of nature – to make it, and allows me to force others to contract with me.

[58] See GROVER, *The Legal Origins of Thomas Hobbes's Doctrine of Contract*.

[59] See IBBETSON, *A Historical Introduction to the Law of Obligations*, pp. 215-217, on the influence of Hobbes's theory of contract on later authors. According to Ibbetson, the first systematic treatise on contracts, by Sir Jeffrey Gilbert, was highly influenced by Hobbes, and he even states that «the central elements of the Hobbesian theory did not merely migrate into Gilbert's (unprinted) treatise; by the second half of the eighteenth century they were beginning to work their way into legal practice» (*ibi*, p. 217).