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Perspectives in Social Contract Theory

Edited by
Edwin E. Etieyibo

The Council for Research in Values and Philosophy

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Foreword

JOHN A. KROMKOWSKI

The chapters in this volume entitled *Perspectives in Social Contract Theory* enter a wide range of discussions designed to promote the process of articulating various philosophical traditions, especially African, in a new and applicable context. African contributions made by such African scholars as Oritsegbubemi Anthony Oyowe, Edwin Etieyibo, Emmanuel Ifeanyi Ani and Sirkku Hellsten contextualize the general social contract tradition and address issues of social contract theory from an African perspective. As an exceptional example this volume weaves the strains of the intellectual tradition of social contract theories into not only an intersection of international scholars who are engaged with political philosophy but also texts that bring attention to the specific intellectual and lived-local cultures. This can be seen from the set of contributors from such countries as South Africa, Ireland, The United Kingdom, Ghana, Italy, Spain, Nigeria, Japan, Tanzania, and Sweden. The work of these fourteen papers is a remarkable fit for the publication series entitled "Cultural Heritage and Contemporary Change" of The Council for Research in Values and Philosophy (RVP).

The RVP has published 300 scholarly books, which include vetted treatments of topics and subjects that are either originally presented at international scientific conferences across the world or the annual seminars held in Washington DC, co-sponsored by the RVP and the McLean Center for the Study of Culture and Values (MCSCV) at the Catholic University of America.

Research in political theory and its relationship to culture and values affirms a commonplace, that is, the existence of social realities is prior to both social theorists and social theories. Societies do not wait for social theorists to explain their existential reality nor their self-articulated relationships among persons. Philosophical efforts are activities of critical clarification and are better done when rooted in specific cultures and values.

The RVP endorses international efforts and cross-cultural approaches which integrate the broader understanding of humanities, socio-economic and philosophical sciences. The hope is that this

collaborative effort can guide the reinterpretation of choices and options for human development. On the other hand, the RVP also promotes the intersection of the historical discourse of philosophical texts and the givenness of specific cultural contexts as a norm for the growing interaction of intellectual cultures in our time as well as the attendant interrelationships driven by globalization in its various forms.

The RVP mission is to facilitate research that can sustain the understanding of particular cultural origins, foundations of values and specific social realities which constitute an interdependent complex network of global forces and local circumstances. On the one hand, the volumes in the RVP publication series are not only accounts or discussions of current issues and the crises of the moment, but more importantly, the search for what is essential and particular to cultural changes. Thus, it addresses the urgently pressing issues in this complex and globalized world. On the other hand, the RVP publication series assesses fundamental values embedded in traditions. It explores choices and activities that drive cultural developments and shapes the meaning as well as the consequence of human development in these intensive global times. In this light, the findings in this volume on social contract theory engage the search for a proper understanding of problems that may well be at the root of some of our current crises.

Research teams and cross-cultural conferences can be rich resources for scholars in clarifying their findings. Publishing their research results can bring scholars and readers together in the ongoing process of critical clarifications and articulations of remedies for the challenges of today. These activities are designed to inform and guide choices which can advance understandings from which trust, justice and honest dedication to the search of convergence can occur. The hope is that mutual concerns can emerge from the relationships of various cultures and civilizations in order to recover wisdom and insight as well as our common personhood and shared humanity.

Preface

EDWIN ETIEYIBO

Discussions on having this volume started a number of years ago. It began as a collection of papers presented at an international conference on social contract theory that took place in Lisbon (Social Contract Theory: Past, Present, and Future) from the 15th to 17th of May, 2014. It was Peter Stone who initially floated the idea of the importance of having the papers published. Following his suggestion, which a number of the conference presenters saw as a good idea, we decided to explore the possibility of getting the essays to press and the best way of doing so. I volunteered to take on the project, the task of contacting publishers, and seeing to it that we find an appropriate outlet to publish the papers. A volume rather than having the articles in a special issue of a journal was eventually settled for and the Council for Research and Values in Philosophy (RVP), as the publisher.

In this regard, many appreciations are due. First, the conference from which most of the contributions in this volume come from (of this I will say more shortly). This volume would not have seen the light of day were it not for the conference and for this we are grateful to the conference organizers. Second, Peter Stone for starting the idea and a number of the conference presenters and contributors to this volume regarding how to take this idea further; I thank all of you both for your suggestions, contributions to the volume and for working with me on it. Third, I owe much gratitude to the reviewers for painstakingly reading through the drafts of the essays and for the useful feedback that they provided, which I believe have improved the volume. Finally (and very importantly), I thank the RVP for agreeing to take this volume to press.

I said that most of the contributions or chapters in this volume come from the conference. Initially, the idea was to publish only papers from the conference. But given that part of the publishing and editorial focus of the RVP is on issues of cultural heritage and contemporary change it was decided that a number of contributions that contextualize the social contract tradition and address issues of social contract theory from an African perspective be added. We will see

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these additions in the contributions by Oritsegbubemi Anthony Oyowe, Emmanuel Ifeanyi Ani, Sirkku Hellsten and myself.

Introduction

EDWIN ETIEYIBO

The title of this book “Perspectives in Social Contract Theory” is appropriate because it is a collection of different approaches to the social contract tradition. This is a rich and long tradition that stretches as far back as Thomas Hobbes, which he developed in a number of his works in political philosophy.¹

The chapters in this book – fourteen of them – engage with, develop and advance various ideas of this tradition. The fourteen chapters are divided into five parts: PART I: What is Contractualism and Contractarianism?; PART II: Contract, Consent and Equality; PART III: Contractualism of Rawls and Jean-Jacques Rousseau; PART IV: Contractarianism – Moral and Dynamic; and PART V: Social Contract Theory and African Tradition. While some of the papers raise and discuss issues in connection with specific aspects of contractarianism and contractualism, namely, Hegel’s and Rawls’ contractualism, the contractarianism of Jean-Jacques Rousseau and David Gauthier, others discuss general issues concerning social contract theory, such as contractarianism as dynamic, the status of consent, equality, and obligations in the social contract tradition. In addition, some papers extend social contract theory to include an African perspective, for example, African social contract in the context of human rights, Ubuntu and social contract theory, social contract and traditional African consensual democracy.

¹ Hobbes major work in political philosophy, *Leviathan* was published in 1651 (with revised Latin edition in 1668). Although the *Leviathan* is his *magnum, opus* he has other works that deal with political philosophy. This include: *The Elements of Law, Natural and Politic* (or *Human Nature* and *De Corpore Politico*), which was published in 1650, *De Cive*, which was published in 1642 (but published in 1651 in English under the title, *Philosophical Rudiments Concerning Government and Society*). Beside these works in political philosophy there are other writings of Hobbes that shed light on his political philosophy, among which are: *Behemoth*, which was published in 1679, *De Corpore* (published in 1655), *De Homine* (published in 1658), *Dialogue Between a Philosopher and a Student of the Common Laws of England* (published in 1681), and *The Questions Concerning Liberty, Necessity, and Chance* (published in 1656).

The first chapter by Edwin Etieyibo, "Between Contractarianism and Contractualism" aims to contextualize social contract by picking out two of its strands: contractarianism and contractualism. His primary focus is to answer a number of questions that can be raised in connection with both strands – questions such as: What are the differences and connections between them? How do they attempt to justify the emergence of moral and political norms? "What are some of the problems that confront either."

Regarding the general issues, Peter Stone in "Consent, Contract, and Autonomy" in the second chapter examines at least three distinct ways that the term "consent," has been employed by social contract theorists, namely, *actual* consent, *nonideal* consent, and *hypothetical* consent. In his view, the term is often used by social contract theorists in highly ambiguous ways. Using the question of *autonomy*, as an example, to tease out this ambiguity he argues that it "is difficult to specify the terms of a social contract that are both defensible and rely upon a single distinct understanding of "consent."

The issue of consent emerges again in the fourth chapter, Carl Fox's "Hypothetical Consent and the Bindingness of Obligations," where he discusses (a) why actual consent cannot ground a social contract argument for the obligation to obey the state and (b) the problems for a theory that relies on hypothetical consent. After dismissing the idea that actual consent can ground the social contract, Fox turns to hypothetical consent to see if it can play a useful role. He cites Roland Dworkin as arguing that it is not consent at all. As Dworkin puts it, hypothetical consent "is not worth the paper it is written on." Fox's motivation in this chapter is to confront Dworkin's challenge by engaging with the question as to whether a concern for voluntariness is really central to the social contract tradition. He goes on to show how hypothetical consent could perform a substantive function in a contract approach without sacrificing the aim of making everyone party to an agreement. The nub of the rehabilitation strategy he proposes is the idea that establishing the hypothetical consent of representative parties who model our commitments deploys the characteristic binding force of obligation. To reject the outcome of a sound hypothetical contract is to weaken and undermine one's own identity, which can be voluntarily constructed or endorsed. Hypothe-

tical consent could thus generate a weighty sanction through which we tie ourselves in a tangible way to the conclusions of a contract argument.

Still on the general issues of social contract theory we have the issues of equality that are discussed by Nikolas Kirby. In the third chapter, “Basic Equality and Social Contract Theory,” Kirby argues that while the idea that all humans are one another’s equals is popular and features prominently in political theories, and may well be taken by many philosophers to mean “equal worth” this notion “is *not* what social contract theorists – past and present – usually have in mind when they say that all humans are one another’s equals.” According to Kirby, social contract theorists have always taken basic equality to mean “equal authority.” This, Kirby argues, does not mean that social contract theorists necessarily reject the concept of equal worth. Rather, they “take equal authority to be more ‘basic’ than equal worth, in the sense that the former, and not the latter, is treated as the ultimate ground for our political rights and obligations.”

I noted above that some of the chapters raise and discuss issues in connection with specific aspects of contractarianism and contractualism. One of such chapter – the ninth one and with regard to contractarianism – is “Moral Contractarianism, Moral Skepticism, and Agreement” by Edwin Etieyibo, which examines reasons for engaging with the moral skeptic regarding what Gauthier calls the foundational crisis of morality and why we should take contractarianism seriously, in particular moral contractarianism. The crux of the argument for taking contractarianism seriously is that the problem of the foundational crisis of morality is a grave one and when compared to the dominant moral theories, i.e. Utilitarianism, Kantianism it alone gives us a way of resolving it. In addition to examining this issue, Etieyibo also examines some worries for Gauthier’s moral contractarian account, which, he argues, appear to put Gauthier in the camp of liberal egalitarianism rather than that of libertarianism.

Still on contractarianism, Vangelis Chiotis (in the tenth chapter), “Dynamic Contractarianism” argues that the social contract is a fluid and “dynamic process, which follows from the Humean rationale of contract by convention.” In Chiotis’ view, the dynamic approach to contractarianism is a constructivist approach, which considers social

structures as well as individual agency. By defending the position that the social contract is a dynamic process, Chiotis distances himself from conventional social contract theory, which holds that “once the contract terms are agreed upon, it is assumed that the contract is a stable construct, provided its terms are met.” This view, Chiotis, claims “ignores changing preferences, information availability and the social environment.” One important aspect in the paper is the argument put forward by Chiotis that construing contractarianism as dynamic has at least three distinct advantages: non-dependence on compliance; dispensing with the need for a third party enforcer; and avoiding criticisms related to hypothetical consent and the bargaining process.

On contractualism, there are four chapters that discuss specific aspects of it or issues relating to it. These are Anna Romani’s, “Jean-Jacques Rousseau’s Civil Education and the Formation of the Political Subject;” “On The (Historical) Grounds of Rawls’s Original Position” by Michele Bocchiola; “Rawlsian Contractualism and the Cognitive Disabilities” (Akira Inoue); and “Beyond Rawls’s Basic Structure of Society” by Juan Antonio Fernández Manzano. While Romani discusses the contractualist account of Rousseau, the discussions of Bocchiola, Inoue and Manzano focus on the social contract account of John Rawls.

In the eight chapter, “Jean-Jacques Rousseau’s Civil Education and the Formation of the Political Subject,” Romani engages with the problem of the construction of the political subject in Rousseau’s social contract theory. The problem, as she puts it, is the distance between one’s own will and the general will, which according to Romani, arises because Rousseau seeks to present the general will as a true promotion of the individual’s freedom. The general will is a true promotion of the individual’s freedom when the expression of the general will is unequivocally direct, without the mediation of any delegate. The problem, according to Romani, is that humans as they seem are not fit for the role of citizen as Rousseau understands it, because they value their personal interests more than the common good. And it is because Rousseau recognizes this problem that he seeks to create through civic education a particular kind of political subject, namely, “a particular

will which will adjust itself to the general one without conflicts or residuals.”

Is Rawls’s social contract theory the same as its later constructivist reinterpretation? Michele Bocchiola in the fifth chapter, “On the (Historical) Grounds of Rawls’s Original Position,” notes that there is a general consensus in the social contract literature that they are not completely different and irreconcilable. He however, disagrees. In this chapter, he argues that contractualism and constructivism are two different methods of justification, and are therefore hardly reconcilable. Stated differently, his claim is that while it is the case that contractualists and constructivists share the same notion of procedural test for the validity of principles of justice, they substantially differ in the claims they make. Two of the most important differences that Bocchiola examines are as follows: (a) whereas constructivist theories address metaethical questions about what count as moral facts, reasons and principles of justice, social contract accounts generally address normative questions about the content of political morality and the motivations to endorse normative principles; (b) constructivist approaches typically make stronger claims about the justification of principles of justice, while the original position (as a contractualist device) makes weaker claims about the justification of principles of justice.

In the seventh chapter, “Rawlsian Contractualism and the Cognitive Disabilities” Inoue tries to meet one of the challenges often posed for Rawlsian contractualism, namely, that because the account idealizes moral agents or citizens as being capable of engaging in a scheme of social cooperation for reciprocal advantage it inevitably excludes those with severe disabilities “especially people with cognitive impairments.” Inoue argues that the criticism that Rawls’s arguments for reciprocity preclude those with cognitive disabilities and so cannot guarantee special care for them could be met if one employs the idea of domain division, anchored both on reciprocity and morality. On his view, the ideal of justice as reciprocity obtains when in a fair scheme of social cooperation citizens are willing to share burdens as well as benefits, and the principle of basic needs plays a salient role in the domain of morality. The principle of basic needs plays this role insofar as we treat it as an “independent moral

principle, which provides a morally compelling reason for satisfying the specific needs” of those with cognitive impairment.

Inoue’s idea of extending Rawls’ contractualism to those that are taken to be excluded from the account of justice (namely, persons with cognitive disabilities) re-emerges in the sixth chapter, “Beyond Rawls’s Basic Structure of Society” by Juan Manzano. In this paper, Manzano presents a set of reasons that he thinks Rawls employs in respect of the role that the concept of “basic structure of society” plays in his social contract account. These reasons, he notes, help us to understand the reasons as to why the notion of basic structure of society cannot be confined to the boundaries of nation states. Along this line, Manzano analyses and defends the theoretical possibility and the practical need to expand Rawls’s domestic institutional framework to the international arena or global space.

The diversity of the chapters in the book can be seen from the four chapters that try to extend social contract theory to include an African perspective. The first chapter attempt to make the case for the possibility of a contextualized African social contract is that of Christopher Allsobrook. In “Universal Human Rights from an African Social Contract” (the twelfth chapter) Allsobrook argues that a contextualized social contract is important if we are to properly respond “to the paradox of interdependent consent and authority in social contract theory” and if we are to avoid “naturalising political conditions under which consent and authority are derived.” The main point of Allsobrook’s argument is that given that “classical social contract theory of the Enlightenment was often abused to justify the extension of imperial dominion by European powers, to derive supposedly universal rights, which are in fact expressive of European culture and by which other cultures are bound to fall short” it will be important for social contract theory not to “deny the particular political culture, which informs” it. One way of doing this is to show “how members of different communities may arrive, independently, at some fundamental conception of just interaction, by reflecting on the normative principles, to which anyone would consent, which belong to their traditional beliefs and practices.” And that is part of the task he sets for himself in the chapter, which is to show and argue for how to think of and how a normative basis for human rights regime that better

accords with an African political culture or uniquely African heritage and which may be said to follow from a distinctively African social contract will look like.

The two other chapters that extend social contract theory to include an African perspective are the ones by Emmanuel Ifeanyi Ani and Oritsegbubemi Anthony Oyowe and Etieyibo. In "Ubuntu and Social Contract Theory" (fourteenth chapter) and "Traditional African Consensual Democracy and the Three Notions of Consent in Social Contract Theory" (eleventh chapter) Oyowe, Etieyibo and Ani pursue further the thought proposed by Allsobrook, namely, the idea of thinking about how members of different communities can consent to normative principles that are embedded in their traditional beliefs and practices.

In "Ubuntu and Social Contract Theory," Oyowe and Etieyibo examine Ubuntu and social contract theory within the features of mutual advantage, consent, agreement and negotiation. The novelty of their approach is the attempt to show the connection that exists between social contract theory and Ubuntu in these areas. Their approach relies on the twin claim that Ubuntu and social contract theory are "two important normative theories in ethics and political philosophy," and that as "normative accounts, they prescribe obligations and certain norms of actions as well as attempt to justify them."

In "Traditional African Consensual Democracy and the Three Notions of Consent in Social Contract Theory," Ani argues that the notion of consent is implicated in traditional African consensual practices and that the form of consent required is fulfilled by the descriptive requirements of democratic tacit consent. Ani does not only attempt to show that democratic tacit consent is implicated in traditional African consensual practices. He goes as far as to argue that this form of consent does not suffer from the objection of partisan limitation, which in general states that one cannot consent to a government that one did not vote for or simply that "a democratic government is illegitimate for a large number of citizens who did not vote it into power." The nub of Ani's riposte to this objection is that the criticism can be avoided if one distinguishes between political and contractual consent, and show that "it is only political consent in a majoritarian democracy that merits" the criticism.

The last chapter that brings an African perspective to bear on social contract theory is that of Sirkku Hellsten, "Afro-Libertarianism and the Social Contract Framework in Post-Colonial Africa: The Case of Post-2007 Elections Kenya" (thirteenth paper). This chapter, which was first published in 2009 in *Thought and Practice: A Journal of the Philosophical Association of Kenya* (June 1(1):.127-146), "examines the shortcomings and possibilities of the social contract approach in relation to the Kenyan post 2007 elections political crisis." In focusing on an Afro-libertarian politico-economic framework, the author looks at the mixture of communitarian and communal traditions, egoistic and profit-making individualist libertarian market rationality, fragile and patrimonial state, and strong sub-national loyalties in Kenya and highlight how these undermine the "building of a united nation and a strong state." The central claim that Hellsten advances is that in order to achieve and realize "sustainable peace, social reconstruction and national unity" an adequate grasp and "understanding of the moral dimensions of the concept of 'social justice'" is important.

Part I
What is Contractualism and
Contractarianism?

1.

Between Contractualism and Contractarianism

EDWIN ETIEYIBO

Introduction

It is undeniable that in the history of the contemporary West, and within moral and political theory, social contract theory is one of a handful of truly prominent and most influential theories.¹ In broad terms, one speaks of social contract theory when one speaks of a group of theories that take the idea of contract to be central to our understanding of morality and politics. In other words, for social contract theory and accounts of social contract theory what justifies morality or politics and moral and political norms is that such norms could (hypothetically) be “agreed to,” or could reasonably be “justified” to every rational agent or could not be reasonably be “rejected” by them.

In this paper, I am interested in looking at this description of social contract theory but doing so in the context of the two strands of the theory: contractarianism and contractualism. The focus of my

¹ One might say that the award of the 2016 Noble Laureate (the Sveriges Riksbank) Prize in Economic Sciences in Memory of Alfred Nobel by the Royal Swedish Academy of Science to Oliver Hart (from Harvard University and Bengt Holmström (from Massachusetts Institute of Technology) for their *contributions to contract theory is a further testament to the importance and influence of social contract theory*. Royal Swedish Academy of Science, “The Sveriges Riksbank Prize in Economic Sciences in Memory of Alfred Nobel 2016,” *Nobelprize.org*, <https://www.nobelprize.org/nobelprizes/economic-sciences/laureates/2016/>. (Accessed January 18, 2017). Of course, their work is in contract theory in economics and not in social contract theory as a broad theory in moral, social and political philosophy. However, although contract theory in economics is concerned with more specific and actual type contract (fiduciary contractual relationships or relationships between shareholders and top executive management, employer and employees, an insurance company and automobile owners, a seller and buyer of commodities and products, a company and its suppliers, etc.) the model and ideal of the contract is similar to that which we find in social and political theory and philosophy.

exploration is to highlight the distinctive take in both strands in terms of what the idea of the contract, rational agency and moral and political norms entail. In particular, my investigation will situate one of the major differences between contractarianism and contractualism in the ideas of the maximization or optimization of self-interest (for contractarianism) and the constrained on self-interest by the principle of reasonable justification or rejection (for contractualism).

This is how I will proceed in this paper. I will begin by briefly looking at the nature and substance of social contract theory, doing so in the context of its historical milieu. Following this, I shall then examine the differences between contractarianism and contractualism. Finally, I will raise one worry for each of the strand of social contract theory.

Social Contract Theory and its Long History

Social contract theory and the tradition that it entails is a very great one. This tradition goes as far back as Thomas Hobbes. Of course, some may point to strands of social contract thought and ideas in medieval times as well as in early Greek society and in Plato's *Republic*. For example, David G. Ritchie makes the point that social contract theory beyond being anticipated by the Greek Sophists has its roots in the consciousness of medieval society.²

However, even though one may speak of the consciousness of social contract thought predating Hobbes it is important to point out that it was Hobbes that first gave a substantive exegesis and defense of social contract theory. From the point that he did this and through to many of the other thinkers in the modern and enlightenment period, social contract theory established a prominent position in social and political philosophy. Nevertheless, it experienced a lull during most parts of the intervening period following the modern and enlightenment period.

In the 1970s and the decades after it the theory was resurrected. This was on the heels of the publication, in 1971, of John Rawls' highly

² David G. Ritchie, "Contributions to the History of the Social Contract Theory," *Political Science Quarterly* (1891), 6(4): 656-676.

influential book, *A Theory of Justice*.³ Rawls' views in this book generated renewed philosophical interest in moral and political philosophy in general and in the social contract thoughts of Hobbes, John Locke, Jean-Jacques Rousseau and Immanuel Kant in particular.

What I have done above is to provide a brief snapshot of the historical emergence of social contract theory.⁴ What substantively is social contract theory? I should be pointed out that social contract theory is grounded in individual interest. In general, it describes a broad class of theories that try to explain and justify morality or politics. Simply put, it is the view that moral or political obligations⁵ are derived from the contract or agreement made between rational persons to form societies.⁶ The central idea underlying a social contract view is that morality, social and political practices and institutions or principles of social relationships are acceptable to fully rational persons if and only if they either satisfy the utility or interests

³ John Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, 1999).

⁴ For further reading on the history and context of the social contract tradition see Ritchie, *Ibid.*; Patrick Riley "How Coherent is the Social Contract Tradition?" *Journal of the History of Ideas* (1973), 34(4) 543–62; David Braybrooke, "The Insoluble Problem of the Social Contract," *Dialogue* (1976), 15(1):3-37; Michael Lessnoff, *Social Contract* (London: MacMillan, 1986); David Boucher and Paul Kelly, eds. *The Social Contract from Hobbes to Rawls* (New York: Routledge, 1994); Jean Hampton, *Hobbes and the Social Contract Tradition* (New York: Cambridge University Press, 1986); David Gauthier, *Morals by Agreement* (Oxford: Oxford University Press, 1986); David Boucher and Paul Kelly, eds., *The Social Contract from Hobbes to Rawls* (New York: Routledge, 1994).

⁵ I take morality to refer primarily to moral norms or principles that regulate moral behavior among individuals, and politics to refer primarily to principles that govern the relationship between individuals and civil or political society, i.e. the state or government. I shall sometimes be using the term "principles of social relationships" to refer to both morality or moral obligations or principles and politics or political obligations.

⁶ It is important to emphasize that although contract theorists specify the social contract in terms of agreement made between rational persons to form societies they specify the content of this agreement or what it is about differently. For example, Rousseau specifies it as a policy that works equally to the interest of all; Rawls, as principles that shape the basic structure or institutions of society for the purpose of achieving equality and fairness; Hobbes and Locke, as the commitment to give up some or all of one's rights to a political government; Gauthier, as the adoption of a rational disposition to cooperation or to be moral.

of rational agents, or they *could theoretically* or *in principle* agree to them, or just in case they could be *rationally justified* to everyone.

Contractualism and Contractarianism

Having briefly spelt out the nature of social contract theory let me now discuss the difference between the two distinct strands of social contract thought: contractarianism and contractualism.⁷ The question that I seek to answer indirectly is: what is the nature of contractarianism and what makes it different from contractualism. In making the distinction between these two distinct strands of social contract thought I will explain the ideas of some social contract theorists as part of a way of highlighting the difference that I try and seek to draw.

Whereas contractualism is grounded on the idea of the equal moral status of persons, contractarianism is founded on the idea that persons are primarily self-interested, and that a rational assessment of the best strategy that can be employed to maximize their self-interest will lead them to act morally. Furthermore, contractualism has its origin in Rousseau and Kant and contractarianism has its roots in Hobbes. While contractarianism can be said to apply to social contract accounts that focus on rational self-interest and the pursuit of it thereof, contractualism can be taken to refer to theories that emphasize reasonableness or justifiability of reasons to other rational agents.

Furthermore, in terms of justification for civil society or social arrangements or principles of social relationships contractarianism

⁷ Because I am giving a brief description of the difference between contractarians and contractualism I will only concern myself with some more general description of both strands of social contract theory. In this sense, I will, in my consideration of contractualism, not engage critically with the difference between contractualism as used in the narrow sense and in the broad sense. In the narrow sense, contractualism is taken to indicate a particular view of morality or moral norms and principles being acceptable to other moral agents if they could not reasonably reject the reasons offered for them. This view is partly associated with Thomas Michael Scanlon, which he particularly developed in his book *What We Owe to Each Other* (Cambridge, MA: Harvard University Press, 1998). And when contractualism is generally used in the broad sense it is employed to mainly refer to the view that morality or moral principle and norms are based on some contract or agreement among moral/rational agents who are of equal moral status.

would attempt to show that it in interest of every rational agent to bargain and cooperate with others. As for contractualism, the justification that is made usually proceeds along the line of what each reasonable person will endorse. That is, civil society or social arrangements or principles of social relationships are justified if they could be endorsed and accepted by all reasonable persons. Although rational self-interest plays a role in both contractarianism and contractualism, it is constrained by the notion of *reasonable justification* in the latter. In other words, for contractualism one is permitted to act in ways that are consistent with one's self-interests insofar as such actions do not violate the principle of *reasonable justification*, whereas for contractarianism, the only constraint on rational self-interest (if there is any in the non-abstract sense) is what is provided for in the contract in the context of rational bargain with other rational agents. What is provided for in the contract and what other rational agent allow to be included in it may be reasonable, but it may not always be so. That is, for contractarianism, and unlike contractualism, what is specified as part of the contract may be consistent with what is or will be endorsed and accepted by all reasonable persons, however, this is not a requirement for contractarianism in order for the contract to be justified or legitimated.

*Contractarianism*⁸

Contractarianism, one must note, is a broad term that refers either to a political theory of the legitimacy of political authority or to a moral theory about the origin of principles of social relationships.

⁸ For some of the scholarship that deal with the nature, substance and elements of contractarianism see the literature in footnote 3 as well as the following: Anita Superson, *The Moral Skeptic* (New York: Oxford University Press, 2009); Edwin Etieyibo, *David Gauthier's Moral Contractarianism and the Problem of Secession*, PhD Dissertation (Edmonton: University of Alberta, 2009); Edwin Etieyibo, "Bargaining and Agreement in Gauthier's Moral Contractarianism," *South African Journal of Philosophy*, 2013 32(3): 221-233; John Thrasher, "Uniqueness and Symmetry in Bargaining Theories of Justice," *Philosophical Studies*, 2014 167: 683-699; Peter Vallentyne, ed., *Contractarianism and Rational Choice* (Cambridge: Cambridge University Press, 1991); David Gauthier, "Twenty-Five On," *Ethics*, 2013 123(4):601-624.

When it refers to the first contractarianism claims that state power must come from the consent of the governed, where the form and content of this consent derives from the idea of the contract. When it refers to the second contractarianism holds that the normative force of moral principles is derived from the idea of the contract. The most well-known advocate of this view is Gauthier, who calls his brand of contractarianism “Morals by Agreement.”

Important for contractarianism (and as we see in Hobbes’ contractarian account) is the notion of mutual self-interest and the maximization of individual self-interest. It is generally the case that under contractarianism, individuals seek to maximize their own interests in a rational bargain with other individuals. As Hobbes puts it in the *Leviathan*, natural human interactions, namely, life in the state of nature (or a state of non-cooperation) is not beneficial.⁹ This is because both marginal and total costs exceed marginal and total benefits and the only way to rectify this and to ensure that marginal and total benefits exceed marginal and total costs is for rational agents to agree to a system of rational cooperation. It is such cooperation that gives rise to the commonwealth such that they now being free from the need for constant vigilance against threats to their lives and property, they are able to pursue their interests and happiness that benefit them and the commonwealth.

The contractarian idea (which Hobbes first articulated in the *Leviathan*) that morality and politics consist in certain types of cooperative behavior: those types of behavior that are mutually beneficial for self-interested agents to participate in was pursued vigorously by Gauthier. In *Morals by Agreement* Gauthier takes cooperation to be underpinned by rational self-interest. For him, the process of social cooperation is one that starts with some kind of bargaining. In the bargain stage, rational agents or bargainers negotiate or bargain among themselves for the principles or moral rules/norms that will help them maximize expected utility or realize optimal utility.¹⁰

I have mentioned that mutual self-interest or the maximization of individual self-interest is important for contractarianism. What this

⁹ Thomas Hobbes, *Leviathan* (1651), Richard Tuck, ed. (Cambridge: Cambridge University Press, 1996).

¹⁰ See Gauthier, *Ibid.*, Chapter 5, pp. 113-156.

means is that central to contractarianism is the notion that individuals are imbued with all kinds of desires and interests and they are the best judges of their interests and the means to satisfy their desires. Embedded in this notion are two main ideas that are fundamental to contractarian social contract theory. The first idea is that rational agents are primarily self-interested. The second is that a rational evaluation of the best strategy for maximizing their self-interest will lead rational agents to accept the authority of political government or to act morally.

*Contractualism*¹¹

Contractualism has its origin in Rousseau and Kant. Rousseau's social contract theory is based on the notion of the "general will." Rousseau takes the general will as an expression of freedom, i.e. a policy that actualizes the individual's rational freedom. To claim that the general will is an expression of freedom is to claim that it is a policy that works in the interest of everyone or equally well for all concerned and which is adopted jointly by free and equal citizens. Like Rousseau, Kant's account of the social contract is founded on the idea of rational freedom. The aim of the social contract, he claims, is to seek principles that all rational persons would agree or subscribe to, under certain idealized conditions. In order to arrive at these principles and to reach agreement, Kant abstracts away from many concrete and determinate features of the moral lives of rational beings.

In contrast to contractarianism, contractualism does not claim that individuals seek to maximize their own interests in a rational bargain with other individuals. Rather, it claims that individuals seek to pursue their own interests in ways that they can justify to others

¹¹ For some of the literature that discuss the nature, substance and elements of contractualism see Gerald Dworkin, "Contractualism and the Normativity of Principles," *Ethics*, 2002 112(3): 471-482; Gary Watson, "Contractualism and the Boundaries of Morality," *Social Theory and Practice*, 2002 28(2): 221-241; Richard W. Miller, "Moral Contractualism and Moral Sensitivity," *Social Theory and Practice*, 2002 28(2): 193-220; Stephen Darwall, "Contractualism, Root and Branch," *Philosophy and Public Affairs*, 2006 34(2): 193-214; Nicholas Southwood, "Moral Contractualism," *Philosophy Compass*, 2009 4(6): 926-937.

who also have their own interests to pursue. The notion of justification, more precisely *reasonable justification* in the satisfaction of one's rational self-interest is significant for contractualism. Pursuing further this idea of *reasonable justification* Scanlon provides us what it might look like in the context of determining which acts are right and wrong, and in the process presents us some sort of principle of moral action, which he states as follows:

An act is wrong if its performance under the circumstances would be disallowed by any set of principles for the general regulation of behaviour that no one could reasonably reject as a basis for informed, unforced, general agreement.¹²

This way of expressing contractualism takes contractualism as a distinctive account of moral reasoning. There are two important insights that Scanlon provides in his version of contractualism. Firstly, he takes contractualism to be about determining which acts are right and wrong. Secondly, the idea that contractualism has to concern itself with what reasons and forms of reasoning are justifiable.

Without pursuing the distinctive take on contractualism that Scanlon provides let me point out that there are two related theses underlying a contractualist view: firstly, that rationality requires that we respect the equal moral status of persons and secondly, that rationality requires that morality or state power (politics) be rationally justified to each person. It is important to point out that contractualism cashes out the equal moral status of persons in terms of rational autonomous agency. Morality and politics, it claims, consist in what would result if we were to create obligatory agreements from a point of view that respects everyone as rational autonomous persons. The most prominent exponent of this view is Rawls who, like Kant, holds

¹² Scanlon, *Ibid.*, p. 153. Scanlon has earlier stated this principle in a 1982 article, "Contractualism and Utilitarianism," Amartya Kumar Sen and Bernard Williams, eds., *Utilitarianism and Beyond* (Cambridge: Cambridge University Press, 1982). In this article Scanlon stated the principle as: "An act is wrong if its performance under the circumstances would be disallowed by any system of rules for the general regulation of behaviour which no one could reasonably reject as a basis for informed, unforced general agreement," p. 110.

that the purpose of the contract is to seek principles to which representative members would agree under appropriately specified initial conditions.

Rawls' contractualism is mostly political in the sense that it seeks to set the general social framework for a liberal society. Like Kant, Rawls abstracts away from many concrete and determinate features of our moral lives. In order to choose the principles that will govern the basic institutions of society, Rawls screens out many characteristics of his agents by placing them behind a "veil of ignorance" in the "original position."¹³ According to Rawls, we ought to comply with the principles of justice that would be rational for every person to choose, if we have to choose those principles without knowing anything about our particular characteristics and social and economic circumstances.

Worries for Contractarianism and Contractualism

There are a number of worries that have been raised for contractarian and contractualist theories. A number of these criticisms either target broad problems associated with these accounts in terms of their framework, namely, their normative framework about justice or morality or specific aspects of the theories in respect of the principles of social relationships that they appeal to and their justification. In what follows I lay out one worry for each of contractarianism¹⁴ and

¹³ Rawls takes the "original position" to be identical with the state of nature in the sense that it is a pre-political state. The state of nature is a state that lacks moral principles or political authority. The original position is a fair and impartial point of view; the point of view that allows agents to hypothetically reason impartially about fundamental principles of justice. The "veil of ignorance" is a device that Rawls employs in the original position to ensure impartiality of judgment about the principles of justice. In the original position, agents placed behind the veil of ignorance are deprived of all knowledge of their personal characteristics, social and economic circumstances.

¹⁴ For other worries for contractarianism other than the one that I consider here see Jean Hampton, *Hobbes and the Social Contract Tradition* (New York: Cambridge University Press, 1986); Patricia Williams, "On Being the Object of Property," *The Alchemy of Race and Rights* (Cambridge, MA: Harvard University Press, 1991); Allen Buchanan, "The Morality of Inclusion," *Social Philosophy and Policy*, 1993 10:

contractualism¹⁵ and along the way provide a brief possible route that could be followed by the contractarian and contractualist that wish to respond to the objections.

One Contractarianism Worry

In her book, *Hobbes and the Social Contract Tradition* Hampton objects to the contractarian assumption which takes interaction and cooperation to be merely instrumentally valuable. Her argument is that if interaction and cooperation were only valuable because they satisfy or maximize rational self-interest, then it is difficult to see how it is possible for rational agents *qua* cooperators to successfully respond to the moral skeptic or solve the compliance problem. Simply put, her claim is that if interaction and cooperation are to be construed as merely instrumentally valuable, then rational agents *qua* cooperators are unlikely to stimulate the moral norms or morality in themselves without they already having some prior commitment to morality or natural inclination to morality.¹⁶ In a nutshell, Hampton's point seem to be that contractarian framework is incapable of solving the compliance problem because it requires cooperators to do something (cooperate with others) but to do so they need some prior

233-257; Eva Feder Kittay, *Love's Labor* (New York: Routledge, 1999); Nicholas Southwood, *Contractualism and the Foundations of Morality* (New York: Oxford University Press, 2010).

¹⁵ For other worries for contractualism beside the one that I discuss here see Thomas Nagel, *Equality and Partiality* (New York: Oxford University Press, 1991); Thomas Nagel, "One-to-One," *London Review of Books*, 4 February 1999; Elizabeth Ashford, "The Demandingness of Scanlon's Contractualism," *Ethics*, 2003 113(2): 273-302; Brad Hooker, "Scanlon's Contractualism, the Spare Wheel Objection, and Aggregation," Matt Matravers, ed., *Scanlon's Contractualism: Readings and Responses* (London: Frank Cass Publishers, 2003); Alistair Norcross, "Contractualism and Aggregation," *Social Theory and Practice*, 2002 28: 303-14; Derek Parfit, "Justifiability to Each Person," *Ratio*, 2003 16: 368-370; Derek Parfit, *On What Matters* (Oxford: Oxford University Press, 2011); Allison Hills, "Contractualism and Demandingness," *Philosophical Quarterly*, 2010 60: 225-242; Nicholas Southwood, *Contractualism and the Foundations of Morality* (New York: Oxford University Press, 2010); Akira Inoue, "Rawlsian Contractualism and Cognitive Disabilities," paper 7 in this volume.

¹⁶ Hampton, *Ibid.*

moral commitment which they either do not have or if they have it renders the point about generating the principles of social relationships from the contract moot and otiose. I take this worry to be a version of the question-begging criticism often leveled against contractarianism, particularly Gauthier's version of contractarianism.¹⁷

One response to the worry raised by Hampton that can be considered by contractarians is to deny Hampton's claim that the motivation for rational agents *qua* cooperators to act morally require some prior commitment to morality or natural inclination to morality. They can simply say that what motivates rational agents to act morally is simply the thought that doing so is maximally and optimally beneficial, that is agreeing to participate in interactive activities and cooperation maximizes the utilities of cooperators considered as a group and in virtue of this benefit the individual rational agent. The argument here is that an agent or cooperator does not need any natural inclination to morality in order for him or her to cooperate with other agents or to follow through on the moral rules that arise from the contract. Sufficient for cooperators to act morally is that the principles of social relationships that are generate from the contract insofar as they are utility maximizing or optimizing have sufficient moral force to move them to act morally since (following Gauthier) to act rationally is to act morally.

Even if we grant that cooperators need some natural inclination to morality to act morally one must point out that it does not therefore follow that the contractarian solution to the problem of compliance underpinned in virtue of it being question begging This is because there is clearly a distinction between natural inclination and the content or object of that inclination. It is general the case that people have a natural inclination for all kinds of things, for example to self-

¹⁷ For discussions of the scope and nature of variants of question-begging assumptions and criticisms in Gauthier's moral contractarianism see Holly Smith, "Deriving Morality from Rationality," Peter Vallentyne, ed. *Contractarianism and Rational Choice: Essays on David Gauthier's Morals by Agreement* (New York: Cambridge University Press, 1991), pp. 229-253; Jan Narveson, "Gauthier on Distributive Justice and the Natural Baseline," Peter Vallentyne, ed. *Contractarianism and Rational Choice: Essays on David Gauthier's Morals by Agreement* (New York: Cambridge University Press, 1991), pp. 127-148, Etieyibo, 2013, *Ibid.*

presentation and to form beliefs. However, although they have these inclinations it does not follow that the inclinations is the same with the content of self-preservation. In other words, the contractarian may simply argue that the natural inclination to morality as are other inclinations simply refer to a natural template like the natural ability to learn a language which is triggered in the right and appropriate circumstances such as when agents encounter or engage with certain raw data (e.g. the principles of social relationships of the contract, belief forming evidence and so on).

One Contractualism Worry

One general worry that has been raised for contractualism is in respect of its logical structure. That is, the claim that the contractualist account of moral wrongness is either circular or incomplete. A specie of this general worry is the worry of redundancy. Recall Scanlon's principle: "An act is wrong if its performance under the circumstances would be disallowed by any set of principles for the general regulation of behaviour that no one could *reasonably reject* as a basis for informed, unforced, general agreement."¹⁸

The objection is that the contractualist notion of justification in terms of *reasonable rejection* is redundant. Contractualism, as we see with Scanlon's principle, takes something, an action, norm, social arrangement (let us call it A) to be morally wrong just in case it is forbidden by principles that no one can *reasonably reject*. Given the possibility that any rational agent can *reasonably reject* a principle on the ground that such a principle permits actions that are morally wrong we would have to take the principle that no one can *reasonably reject* to be a principle that does not permit any actions that are morally wrong. Here is the problem, call it dilemma. We either already do not know which actions are morally wrong or we do already know which actions are morally wrong. Regarding the former, for if we do not already know which actions are morally wrong, then we cannot employ the contractualist mechanism. Regarding the latter, for if we do already know which actions are morally wrong, then we do not

¹⁸ Emphasis added.

need to employ the contractualist mechanism. In other words, we need to know which actions are morally wrong if we are to use the contractualist mechanism, but if we already know which actions are morally wrong, then there is no point in using it.¹⁹

One way that the contractualist can get away from this dilemma is to try and explain what makes A morally wrong. In explaining what it is that is constitutive of morally wrong actions they will have to do so without appealing to morally laden reason or reasons. That is, what makes a morally wrong has to be explained in terms of non-moral reasons. In this way they can specify the reasons as those that justify the principle of *reasonable rejection*.

Conclusion

Social contract theory, which has a long history, is one of the most prominent traditions in morality and political theory and philosophy. Even though it is broadly concerned with the explanation and justification of morality or politics it is not a monolithic standpoint. In this paper, I have identified and examined two strands in the social contract tradition, which I have linked to various social contract theorists. The first is contractarianism, which takes as its point of departure the idea of rational self-interest and the maximization or optimization of such interest in virtue of bargaining and cooperation. As we see in the works Hobbes and Gauthier, the nub of the argument for contractarianism is that given that persons are predominantly moved by self-interest a cooperative scheme that furthers this interest will get their consent and the content of such consent more or else gives us the rules of morality and politics. The second strand is contractualism, which as we see in Rawls (and to an extent in Scanlon) takes the idea of *reasonable justification* to play an important role in terms of legitimizing principles of social relationships. On this conception, norms or principles of right and wrong are determined by

¹⁹ For discussion of this worry see David McNaughton and Piers Rawling, "Can Scanlon Avoid Redundancy by Passing the Buck?," *Analysis*, 2003 63(4):328-331; Michael Ridge, "Contractualism and the New and Improved Redundancy Objection," *Analysis*, 2003 63(4): 337-342; Jussi Suikkanen, "Contractualist Replies to the Redundancy Objections," *Theoria*, 2005 71(1): 38-58.

moral agents, and the reasons justifying these norms and principles are those that they could not *reasonably reject*.

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Part II
Contract, Consent, Equality and Autonomy

Consent, Contract, and Autonomy*

PETER STONE

Introduction

At the heart of social contract theory rests the idea that government should be based upon the consent of the governed. The distinction between political institutions (usually states)¹ that enjoy this consent and those that do not is, according to the social contract theorist, critical. The significance of this distinction can be cashed out in various ways. It could be that a state must receive consent before it can be considered *just* or *democratic*. Or it could be that a state requires consent in order to be *legitimate*. This legitimacy, in turn, grants a state the unique right to issue commands to its subjects, and/or places its subjects under a unique obligation to obey its dictates. There are surely other ways in which consent can prove morally significant in distinguishing between states. All of these approaches assume that it is critically important for political institutions to obtain the consent of those subject to them.

It is easy to understand why this should be the case. Political institutions, after all, regularly tell us to do things we would not otherwise do. People do not particularly like being told what to do. It may be the case that the state demands that you do something with which you agree. Sooner or later virtually all of us will get asked to do

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¹ I will use terms like "state," "government," and "political institution" more-or-less interchangeably throughout this paper unless otherwise indicated. The distinctions between these entities, while important, do not matter for the purposes of my argument.

something to which we object.² This poses the problem of why we should perform this act, whether there is a reason to obey the state more morally compelling than the desire to stay out of prison.

Government by consent solves this problem. If one consents to a state, then as Thomas Hobbes (perhaps the first great social contract theorist) pointed out, in obeying the state one is simply obeying oneself. The social contract captures this idea of consent. It is hardly unreasonable to ask you to live up to the terms of a contract which you, of your own free will, signed. As John Rawls put it, if society can be understood as the result of a social contract, then that society “comes as close as a society can to being a voluntary scheme.”³

Social contract theory thus employs the idea of consent in order to provide a – indeed, *the* – source for political legitimacy, justice, etc.⁴ But consent is an extremely ambiguous concept. It has been used by social contract theorists in at least three different ways. Moreover, social contract theorists have failed to keep these three uses distinct, whether by accident or design. They have helped themselves to multiple different meanings one could assign to the word “consent,” sometimes in the course of the same argument, often without acknowledging that they are doing so. This is problematic for social contract theory, and not simply because unnecessary ambiguity is a bad thing. For the practical implications of social contract theory, with its organizing idea of government based upon consent, look very different when consent is understood in different ways.

² “It seems plain that standard justifications of the state are offered not to happy participants in states but to those moved by certain kinds of objections” (A. John Simmons, “Justification and Legitimacy,” *Ethics* (1999) 109:4: 742).

³ John Rawls, *A Theory of Justice*, Revised Edition (Cambridge, MA: Belknap Press, 2011), p. 12.

⁴ Sometimes, social contract theorists suggest that consent is insufficient for political legitimacy. A. John Simmons, for example, reads Locke as arguing that governments must *both* protect political rights *and* receive consent from the governed. “We cannot,” Simmons writes, “bind ourselves by consent to immoral arrangements.” Simmons, “Justification and Legitimacy,” 746, n. 18. See also A. John Simmons, *At the Edge of Anarchy: Locke, Consent, and the Limits of Society* (Princeton, NJ: Princeton University Press, 1995), ch. 5. But while social contract theorists may not regard consent as a *sufficient* condition for governments to be legitimate and/or just, they typically regard it as a *necessary* one.

This paper will explore the ambiguous meaning of consent in social contract theory, as well as the practical problems this ambiguity generates. Section 2 of the paper demonstrates the existence of three different understandings of consent within the social contract theory tradition, which I will call *actual* consent, *nonideal* consent, and *hypothetical* consent. The paper then examines the problem that this ambiguity poses when social contract theory confronts a critically important question – what conditions of *autonomy* must subjects enjoy before they can meaningfully consent to political arrangements? The paper employs Nicole Hassoun’s *Globalization and Global Justice*, which offers a novel contractualist⁵ argument connecting consent to autonomy, to illustrate the point. Section 3 outlines Hassoun’s argument, while section 4 examines the relationship between consent and autonomy – a relationship that is considerably complicated by the ambiguous nature of the former. Section 5 concludes by reflecting upon the implications of the ambiguous meaning of consent both for social contract theory and for the concept formation process in political theory more generally.

Three Understandings of Consent

What does it mean to say that a subject *consents* to a political institution, such as a state? Social contract theorists have offered three distinct answers to this question, albeit without always acknowledging the differences between these answers. All three have (sometimes under different names) been part of the social contract theory tradition from the very start. The first answer is to understand consent literally. Consent means explicit agreement, nothing more and nothing less. I refer to this understanding as *actual consent*. This understanding of consent leads naturally to an extremely demanding version of social contract theory. The legitimacy of political arrangements depends upon a literal contract, and nobody can be bound by its terms unless they sign on the dotted line. The problem with this

⁵ I use the term “contractualist” here in the broadest possible sense. See Elizabeth Ashford and Tim Mulgan, “Contractualism,” *Stanford Encyclopedia of Philosophy*, Fall 2012 Edition, <http://plato.stanford.edu/archives/fall2012/entries/contractualism/>.

answer is that by the standard it yields, no government in history has ever been legitimate. This may not be a problem for an anarchist⁶ or a so-close-to-anarchist-that-the-distinction-doesn't-matter-much.⁷ Most social contract theorists believe that our political institutions *could* realistically be legitimate; indeed, the entire purpose of the enterprise, for most of them, is to distinguish between legitimate and illegitimate political institutions. The more demanding the form of consent required by social contract theory, the less likely will the fulfilment of this purpose be.

The unrealistic nature of the form of consent demanded by the first answer leads naturally to the second. If government cannot depend upon literal consent, perhaps it can depend upon something much less demanding, something more realistic that nevertheless resembles consent in some way. This lesser form of consent I shall call *nonideal consent*. Consent can be indicated, not just by signing on the dotted line, but by paying taxes, owning property, using public facilities like roads, etc. Tacit consent, as famously discussed by Locke, falls into this category. While the first understanding of consent renders virtually all governments illegitimate – by making consent almost impossible to attain – the second understanding risks rendering virtually all governments legitimate – by making consent an entirely trivial affair. In Mussolini's Italy, after all, most people paid taxes, obeyed the law, and rode the trains (which, of course, ran on time). Every reasonably stable government rests upon the consent of the governed if one is willing to relax the indications of consent far enough.

Moreover, tacit consent lacks many of the critically important properties of actual consent. It is difficult to describe the payment of taxes, or taking a walk down a public street, as voluntary actions, unless one counts any action performed by a human being with free will as "voluntary." It is hard to see why turning over one's wallet to an armed robber is less "voluntary" than most acts of tacit consent. (For this reason, Hobbes *did* count cooperation with an armed robber as "consensual.")

⁶ Robert Paul Wolff, *In Defense of Anarchism*, New Edition (Berkeley: University of California Press, 1998).

⁷ Simmons, *At the Edge of Anarchy*.

Tacit consent, of course, is only one possible way of signaling consent without giving express agreement, only one possible form of nonideal consent. An alternative would be to distinguish democratic from non-democratic societies, and argue that the first type enjoy a form of consent that the latter do not – namely, political participation. Democracies offer citizens the chance to express their opinions through voting and other forms of political engagement, and this engagement may count as a form of consent. Historically, it has indeed been so counted; as Bernard Manin has persuasively argued, representative elections have gained their hold upon the modern democratic imagination largely because of their connection to consent.⁸

Treating political participation as a form of consent might solve the first problem facing tacit consent: it does not render the consent requirement trivial for stable governments to satisfy. It does not address the second problem. Voting is not the same as actual consent, even if at first glance they appear similar. Declaring “I vote for X” may look suspiciously like “I authorize X to act for me,” but elections are never that simple. What if I vote for somebody other than X, and X wins? What if I do not vote at all, and X wins? What if I vote for X, and X wins, but X’s party fails to gain control of the government? In light of these problems, democratic theorists must either count as consent acts that are radically unlike actual consent, or else admit that even in a democracy large numbers of citizens have not granted consent.⁹

⁸ Bernard Manin, *The Principles of Representative Government* (New York: Cambridge University Press, 1997).

⁹ Tussman, for example, treats voting as an act of consent – regardless of whether the votes are cast for winning or losing candidates – but concedes that non-voters cannot be said to have consented to the government. Joseph Tussman, *Obligation and the Body Politic* (New York: Oxford University Press, 1960). One could argue, of course, that Tussman has a point; after all, most voters in well-functioning democracies accept as legitimate the outcomes of elections even when the candidates they favor lose. This argument runs into two objections. First, it may be true that in “well-functioning democracies” voters are reconciled to election outcomes in this manner. There are many electoral democracies that are not well-functioning in this manner, and in such democracies voters often reject unfavorable election results – a strange position to take if participation in the election counted as a clear form of consent. Second, in well-functioning democracies, many non-voters regard election outcomes as legitimate just as voters do, a position that would make no sense if voting was the act that conveyed consent.

The third answer is to understand legitimacy as resting, not upon actual or nonideal consent, but upon *hypothetical consent*. This is the strategy adopted by John Rawls, who argues that a society governed by justice as fairness “meets the principles which free and equal persons would assent to under circumstances that are fair. *In this sense* its members are autonomous and the obligations they recognize self-imposed.”¹⁰ This answer avoids the serious problems confronting the first two, but generates three problems of its own.

The first problem facing hypothetical consent theory is indeterminacy. Political philosophers have articulated numerous principles to which they believe people would give hypothetical consent,¹¹ and it is difficult to say which ones are correct. This objection is far from fatal; there are many unresolved controversies within the realm of ethical and political philosophy, but this does not prove that those participating in the controversies are on the wrong track.

Even if the problem of indeterminacy can be overcome, there is a second, and deeper, objection to hypothetical consent theory. Why is hypothetical consent of any normative significance? The obvious answer is that it somehow serves as a substitute for actual consent. How does this substitution work? After all, the fact that I might have signed a contract under suitable hypothetical circumstances does not normally bind me to the terms of that contract in any way. The hypothetical consent theorist must either link hypothetical and actual consent theory together, or else offer an alternative reason for caring about hypothetical consent.

The third problem facing hypothetical consent theory is more subtle. If a person grants actual consent to a social contract, then there is no need to investigate why the person does this. The person could have many possible motivations for giving agreement, but the exact motivation simply does not matter. All that matters is that the conditions of consent were met. (The consent was given freely, by a person in her right mind, etc.) These are *second-order* considerations,

¹⁰ Rawls, *A Theory of Justice*, p. 12, Emphasis added.

¹¹ See, e.g., J.C. Harsanyi, “Cardinal Welfare, Individualistic Ethics, and Interpersonal Comparisons of Utility,” *Journal of Political Economy* 63:4 (1955): 309-321; Rawls, *A Theory of Justice*; T.M. Scanlon, *What We Owe to Each Other* (Cambridge, MA: Belknap Press, 1998).

not *first-order* ones, in favor of the social contract. The hypothetical consent theorist does not have this option. The theorist cannot say, everyone has granted their consent, and this is all that matters. Rather, the theorist must of necessity ask *why* everyone would grant consent in the hypothetical scenario in question. The theorist must see what first-order reasons might be given that would motivate people to consent to a social contract. If the theorist does this, then the legitimacy of the political institution seems to depend on those first-order reasons, and not upon the hypothetical consent. Suppose, for example, citizens would grant their hypothetical consent to a state because that state protects their rights. Why should such a state be regarded as legitimate? I could say that it is because hypothetical consent would be given, but it seems easier just to say that it is because protecting rights is important, and the state accomplishes this worthy task.¹² The challenge for the hypothetical consent theorist, then, is to specify the (first-order) reasons why agents would grant their hypothetical consent in such a way that the hypothetical consent, and not the reasons, carries the argumentative burden.

These three different understandings of consent lead to three different understandings as to the nature and value of the social contract. Upon which of these understandings should social contract theory rely? Unfortunately, social contract theorists have at times been either unclear as to the distinction between the three or else unwilling to make a choice. They have instead appealed to multiple understandings of consent, often without acknowledging this fact.

A good example of this mistake can be found in Immanuel Kant's famous essay on "Theory and Practice." "The basic law," Kant writes,

¹² This is essentially Brian Barry's critique of John Rawls' *A Theory of Justice*. Barry contends that Rawls offers two arguments for accepting his preferred conception of justice, justice as fairness. This conception should be accepted, according to Barry's account of Rawls' argument, both because it distributes goods without regard to arbitrary differences between persons, and because it would be accepted by all citizens behind the veil of ignorance. Barry further contends that it is the first argument, and not the second (as Rawls believes), that is doing all the work. Brian Barry, *The Liberal Theory of Justice: A Critical Examination of the Principal Doctrines in A Theory of Justice by John Rawls* (Oxford: Clarendon Press, 1973).. Note that Rawls himself rejected this interpretation of his argument.

“which can only come from the general, united will of the people, is called the *original contract*.”¹³ The fundamental terms of political cooperation require consent – but not from everyone, even though consent is supposed to come from the “united will of the people.” Only property-owners need give consent, even though others “are nonetheless obliged, as members of the commonwealth, to comply with these laws.”¹⁴ While his entire argument points towards the demand for unanimity – for every (property-owning) citizen to grant consent to the social contract – he is willing, on the flimsiest of arguments, to settle for majority rule:

Those who possess the right to vote must agree *unanimously* to the law of public justice, or else a legal contention would arise between those who agree and those who disagree, and it would require yet another higher legal principle to resolve it. An entire people cannot, however, be expected to reach unanimity, but only to show a majority of votes (and not even of direct votes, but simply of the votes of those delegated in a large nation to represent the people). Thus the actual principle of being content with majority decisions must be accepted unanimously and embodied in a contract; and this itself must be the ultimate basis on which a civil constitution is established.¹⁵

Kant thus takes majority rule via representative democracy (a form of nonideal consent) as a substitute for unanimous agreement (actual consent). He does so in a way that completely neglects the obvious conflicts between the two. (What happens, for example, if the people do *not* unanimously accept majority rule?) Given the extreme difference between rule by unanimous consent and majority rule, it is

¹³ Immanuel Kant, “On the Common Saying: ‘This May Be True in Theory, but It Does Not Apply in Practice,’” *Political Writings* (Cambridge, MA: Cambridge University Press, 1991), p. 77. Emphasis in original.

¹⁴ *Ibid.*, pp. 77-78.

¹⁵ *Ibid.*, pp. 78-79. Emphasis in original.

shocking that Kant feels the need to offer no further argument than this.

Having blithely run together the first two understandings of consent, Kant quickly jumps, without any explanation, into use of the third. In the very next paragraph, Kant writes,

This, then, is an *original contract* by means of which a civil and thus completely lawful constitution and commonwealth can alone be established. But we need by no means assume that this contract ... actually exists as a *fact*, for it cannot possibly be so ... It is merely an *idea* of reason, which nonetheless has practical reality; for it can oblige every legislator to frame his laws in such a way that they could have been produced by the unified will of the whole nation, and to regard each subject, in so far as he can claim citizenship, as if he had consented within the general will.¹⁶

The consent of which Kant now speaks is purely hypothetical consent. If he did not have hypothetical consent in mind all along, then his argument at this point simply changes the subject. If he did have it in mind, then his argument makes no sense. If consent is simply an idea of reason to be employed by the legislator, then why bother with majority rule? Why not seek laws which would receive hypothetical unanimous consent – and not just from property-owners, but from peasants, workers, women, children, etc.? Kant's argument in "Theory and Practice" thus stitches together three very distinct understandings of consent, and the seams holding the ensemble together are all-too-visible.

The social contract tradition thus offers three distinct conceptions of consent. Each has its attractions as well as its limitations. Social contract theorists face the difficult choice of defending one conception, while trying to overcome its shortcomings, or making use of multiple conceptions at once. This latter option offers the prospect of obtaining the advantages of different conceptions without their respective disadvantages. The obvious danger is that it will accomplish all of this

¹⁶ *Ibid.*, p. 79. Emphasis in original.

only at the cost of introducing ambiguity into social contract theory at a deep level (as in the case of Kant). This would not pose a problem, of course, if the ambiguity did not matter, if the understanding of consent employed made no difference for the purposes of social contract theory. This is clearly not the case. To illustrate this point, I shall next consider a recent consent-based argument, an argument that connects consent to *autonomy*.

Consent and Autonomy in the Global Context

If political legitimacy depends upon consent, then the conditions under which the consent is granted matter. Normally, a person cannot sign a legally-binding contract if under a certain age, or suffering from a serious mental illness. She also cannot sign with a gun to her head. In each of these cases, she might undertake an action (i.e., signing on a dotted line) that might count as consent under the right conditions. Under the conditions that actually obtain, she lacks the meaningful capacity to consent to the terms of a contract. Social contract theory, then, must concern itself, not just with specifying an understanding of consent, but also with specifying the conditions under which people can be said to offer consent of this form.

In a recent book entitled *Globalization and Global Justice: Shrinking Distance, Expanding Obligations*, Nicole Hassoun attempts to specify the conditions necessary for meaningful consent in the political context. In doing so, she makes a novel argument connecting consent to *autonomy*. This connection, in turn, generates positive rights for the world's poor, rights that must be honored if political legitimacy is to be assured. This argumentative strategy depends critically upon the claim that subjects must enjoy autonomy in order to give meaningful political consent. The validity of this claim must surely depend upon the understanding of consent offered. Different understandings of consent will require different forms of autonomy, some very robust, some minimal or even nonexistent. In this section, I will briefly lay out Hassoun's argument, situating it within a particularly interesting corner of contemporary political theory, before examining the problematic connection it draws between consent and autonomy.

Social contract theorists place value upon the consent granted to political institutions by those subject to them. In most contractualist arguments, the institutions under consideration are states. This focus upon states has (for obvious reasons) decreased in recent times. Political theorists have begun to extend social contract theory to the international stage, employing it to identify principles suitable for governing the global order. The idea of a global social contract goes back at least to Kant's "Perpetual Peace,"¹⁷ but it has only become prominent in the wake of the revival of social contract theory generated by the publication of John Rawls' *A Theory of Justice* in 1971. Examples of social contract theory employed in the global context include Charles Beitz's *Political Theory and International Relations*¹⁸ and Rawls' own *The Law of Peoples*.¹⁹

Nicole Hassoun's *Globalization and Global Justice* offers just such an attempt to extend social contract theory to the international stage. It does so, however, in a novel way. The primary philosophical argument in her book is called the *Autonomy Argument*.²⁰ It proceeds as follows:²¹

(1) Coercive institutions must be legitimate.

(2) For a coercive institution to be legitimate it must ensure that its subjects secure sufficient autonomy to autonomously consent to, or dissent from, its rules (henceforth, *sufficient autonomy*).

¹⁷ Immanuel Kant, "Perpetual Peace: A Philosophical Sketch," *Political Writings* (Cambridge, MA: Cambridge University Press, 1991).

¹⁸ Charles R. Beitz, *Political Theory and International Relations* (New. Ed., Princeton, NJ: Princeton University Press, 1999).

¹⁹ John Rawls, *The Law of Peoples* (Cambridge, MA: Cambridge University Press, 1999).

²⁰ Nicole Hassoun, *Globalization and Global Justice: Shrinking Distance, Expanding Obligations* (New York: Cambridge University Press, 2012), p. 45. Later in the book, Hassoun refers to this argument, with minor changes of wording, as the *Legitimacy Argument*. *Ibid.*, p. 92. Whatever differences there may be between these two arguments – and the significance of the differences is not obvious – do not matter for my purposes here.

²¹ I conduct a more detailed examination of Hassoun's book in Peter Stone, Review of *Globalization and Global Justice* by Nicole Hassoun, *Ethical Theory and Moral Practice* 18:2 (2015):417-419.

(3) Everyone, to secure this autonomy, must secure some food and water, and most require some shelter, education, health care, social support, and emotional goods.

(4) There are many coercive international institutions.

(5) So, these institutions must ensure that their subjects secure food, water, and whatever else they need for sufficient autonomy.

Together, steps (1-2) establish that a coercive institution “must ensure that its subjects secure sufficient autonomy to autonomously consent to, or dissent from, its rules (henceforth, *sufficient autonomy*)” in order to be legitimate. Coercion is illegitimate without consent, subjects cannot consent if they lack autonomy, and therefore coercive institutions must make sure that they have autonomy. Step (3) spells out (though not completely) what must be done to ensure that subjects have autonomy. Step (4) adds to the claim that “There are many coercive international institutions”.²² Together, these steps establish that international institutions must ensure their subjects sufficient autonomy in order to be legitimate.

Hassoun focuses her attention upon international political institutions, such as the International Monetary Fund (IMF) and the World Trade Organisation (WTO). Her argument applies equally to domestic political institutions, including (of course) states. All of these institutions, for Hassoun at least, are coercive. Coercion generates the demand of legitimacy, a demand that consent is uniquely capable of satisfying.²³ Her argument is that all coercive political institutions have obligations of a certain sort towards those they coerce – obligations to ensure that those coerced possess sufficient autonomy. Those who are unable to ensure this level of autonomy themselves therefore enjoy corresponding (positive) rights to what they need to attain this level.

“Because coercive institutions subject people who cannot secure sufficient autonomy to coercive rules,” Hassoun writes, “they are

Hassoun, *Globalization*, p. 45.²² Emphasis in original.

²³ Hassoun’s argument concerns legitimacy, even though the book is entitled *Globalization and Global Justice*. Hassoun believes that justice and legitimacy are connected but not equivalent. The exact nature of the connection is not relevant for the discussion here.

illegitimate. This is because coercive institutions are not justified in exercising coercive force over those who could be, but are not, sufficiently autonomous."²⁴ Hassoun justifies this claim by reference to the need for subjects to be able to consent to coercive institutions. Admittedly, she does not make this connection completely explicit. Helena de Bres, in a review of *Globalization and Global Justice*, notes that "The ability to consent per se does not confer legitimacy: if anything, it's actual or hypothetical consent that does so".²⁵ It is clear from the context that the line from autonomy to legitimacy runs through consent; autonomy makes meaningful consent possible, and legitimacy requires meaningful consent wherever it can be achieved.

Hassoun's argument depends critically upon both her understanding of autonomy and her understanding of consent. Different understandings of the form of consent necessary for legitimacy will entail different understandings of the form of autonomy necessary for consent. Different forms of consent may require radically different forms of autonomy.

Hassoun understands that the social contract tradition makes use of different understandings of consent. In fact, she identifies three distinct types of social contract theory.²⁶ Each holds that "the *actual* relationship between the rulers and *each person* who is ruled must be voluntary in some way." These types disagree "about what makes this relationship voluntary." The three types are *hypothetical consent theory*, *democratic theory*, and *actual consent theory*. Hassoun distinguishes between these three types of social contract theory as follows:

On hypothetical consent theories ... the relationship between rulers and ruled is only voluntary if (reasonable) people *would* agree to be subject to the rulers' dictates *were*

²⁴ *Ibid.*, p. 64.

²⁵ Helena de Bres, "Review of *Globalization and Global Justice*," by Nicole Hassoun, *Ethics* 123:1 (2012):158-162.

²⁶ Technically, Hassoun speaks not of social contract theories, but of "liberal theories" that "make consent central to legitimacy." Hassoun, *Globalization*, p. 58. While I could try to draw a meaningful distinction between contractualist and consent-based theories, any such distinction would be unimportant for my purposes here.

they asked. Democratic theory requires more. On democratic theory, legitimacy arises through the democratic process where the majority must actually consent to the institutions to which they are subject. Perhaps the most demanding theory of this type is actual consent theory. On actual consent theory, coercive institutions are legitimate only if they secure their subjects' actual consent.²⁷

These three types of social contract theory correspond to the three understandings of consent identified earlier in the paper. People can indicate consent through a clear indication of agreement; through participation in democratic institutions;²⁸ or through "agreement" under appropriate hypothetical conditions. Each form of consent leads to a different interpretation of the idea of the social contract.

While Hassoun draws a clear distinction between these three understandings of consent, she does not select one type of understanding as the appropriate one, and then use this understanding as the basis for her Autonomy Argument. Instead, she contends that the validity of her Autonomy Argument does not depend upon any particular understanding of consent. Social contract theorists may talk of consent in different ways, Hassoun believes, but regardless of their take on the concept, they can agree that coercive institutions must provide those subject to them with sufficient autonomy for consent. Her motivations for this move are practical in nature. The global poor have enormous unmet needs; many of those needs, Hassoun believes, would be met if the international political order met the obligations that the Autonomy Argument attributes to it. Her explicit goal is to extend the consensus recognizing the existence of these obligations. This requires her to make the foundations of her Autonomy Argument appealing to as many perspectives, within the liberal family, as

²⁷ *Ibid.*, p. 58. Emphasis in original. Hassoun also mentions "liberal communitarian theories" as a non-consent-based approach to establishing a voluntary relationship between rulers and ruled. She devotes little attention to this alternative, and I shall not discuss it further here.

²⁸ Hassoun also invokes the idea of tacit consent (another form of nonideal consent) in passing, but does nothing further with it. *Ibid.*, p. 58, n. 44.

she can, avoiding any controversial commitments that could sidetrack efforts to help those in desperate need.²⁹

Hassoun's argumentative strategy, however, generates a number of problems. In effect, it means that the Autonomy Argument is not one argument, but (at least) three. This is because the word "consent" in the argument could mean at least three different things. The demand that political institutions receive consent in order to qualify as legitimate has at least three different meanings. What political institutions must do to achieve legitimacy might therefore look very different under one meaning of consent than under another. Even if the demands placed upon political institutions under different meanings of consent are the same, the arguments for them may look very different.³⁰ When Hassoun writes that "democratic, hypothetical, and actual consent theorists have to agree to this much: Legitimacy requires that subjects be free to determine their actions and shape the nature of their relationships to coercive institutions,"³¹ she is appealing to an agreement that is not really there. These three types of contractualists might all agree that legitimacy requires consent, but only because each defines "consent" in its own particular way.

Consider, for example, the case of political rights, such as the right to vote. Must political institutions protect these rights in order to enjoy legitimacy? Hassoun clearly thinks so. More specifically, she clearly believes that political institutions cannot be said to enjoy consent if people cannot effectively express their political opinions. It is not at all clear why an actual consent theorist should believe this. Actual consent theory demands that people agree to be governed by political institutions before those institutions can legitimately coerce them. This demand says nothing at all about the nature of those institutions in question. What matters is whether people sign the social contract, not what the terms of the contract involve. If people

²⁹ I raise questions about this argumentative strategy in Peter Stone, "The Pursuit of Consensus in Global Political Theory," *Public Affairs Quarterly* 28:3 (2014): 215-230.

³⁰ For a more extensive analysis and critique of Hassoun's use of these three understandings of consent, see Stone, "Social Contract Theory in the Global Context," *Law, Ethics and Philosophy* 2 (2014): 177-189.

³¹ Hassoun, *Globalization*, p. 59.

agree to be governed by oligarchical or aristocratic political arrangements, so be it. One can, of course, stipulate that people can only grant actual consent to political institutions of a particular type, but by all appearances, such a stipulation would be an artificial graft onto actual consent theory, not a demand generated by it.

Obviously, democratic theorists would require political institutions to be democratic in order to receive the consent of those governed by them. For such theorists, the democratic arrangements are (by definition) what *generates* the consent. Hassoun recognizes this. “At least insofar as democracy can be required to legitimize coercion,” she writes, “people must be able to decide whether or not to abide by, dissent from, or consent to their coercive institutions to be able to participate in the democratic process.”³² Hypothetical consent theorists might also require democratic political arrangements, but for different reasons. “On hypothetical consent theory,” Hassoun notes, “legitimacy requires that coercive institutions be organized according to those principles that would be chosen in an appropriately specified original position. Reasonable people in a liberally construed original position would only agree to be subject to coercive institutions if they are able to abide by, dissent from, or consent to their rule.”³³ This claim may be true – Hassoun does not argue for it – but it overlooks the fact that the locus of consent is different for hypothetical consent theorists than for democratic theorists. For democratic theorists, consent requires democracy because democracy is how people express their consent. For hypothetical consent theorists, consent requires democracy because people would not (hypothetically) consent to non-democracy. The second locates the act of consent in the (again,

³² *Ibid.*, p. 62. At the same time, Hassoun dodges the problem of citizens who vote against existing authorities, or who refuse to participate in the political process at all. It is unclear how such citizens offer any form of consent. “Although individuals,” Hassoun writes, “may not get to decide whether or not they are subject to coercive institutions, they must be able to control the way they react to their subjection.” *Ibid.*, p. 58. I would think that under any political system – even Mussolini’s Italy – any citizen with free will would be able to control her reaction to her subjection, so long as she possessed free will. Addressing this problem would require a more detailed engagement with democratic theory than Hassoun wishes to provide.

³³ *Ibid.*, p. 61.

hypothetical) act of demanding a democratic process; the first locates it in the democratic process itself. As noted before, the actual consent theorist locates the act of consent in a place that bears no apparent relationship to the democratic process at all.

From Consent to Autonomy

The relationship between democracy and consent is a problem for social contract theory because different understandings of consent lead to different arguments for democracy (assuming they generate such arguments at all). This problem arises from the fact that what counts as consent under one understanding need not count as consent under another. Hassoun might respond that problems like these do not pose a threat to her Autonomy Argument. Whatever the differences between different forms of consent, perhaps those differences do not challenge the relationship between legitimacy and autonomy. If legitimacy requires consent (however specified), and consent (however specified) requires autonomy, then legitimacy requires autonomy. Political institutions must still ensure their subjects enjoy sufficient autonomy if they wish to qualify as legitimate. This argument might succeed even in the face of disagreement as to the nature of consent required.³⁴ Indeed, one of the strengths of Hassoun's argument, she claims, is that it derives "the sub-conclusion that, to be legitimate, coercive institutions must ensure their subjects secure sufficient autonomy from several different ways of understanding a basic commitment to individual freedom."³⁵ This is no small advantage, given the pressing need to defend commitments to help the world's poor.

³⁴ Fernando Tesón summarizes Hassoun's position as follows: "It is very hard to decide between actual, hypothetical ... or democratic consent. For this reason, Professor Hassoun identifies a point toward which every consent theory must converge: whatever the standard of consent, it will still be true that the subjects need sufficient autonomy, precisely to be able to consent to, or dissent from, the institutions. In other words: whatever your theory of consent, you must agree that persons need sufficient autonomy; therefore, they have a right to the goods that secure that autonomy." See Fernando R. Tesón, "When Philosophers Misdiagnose," *Analysis* 74:1 (2014): 109.

³⁵ Hassoun, *Globalization*, p. 89.

Unfortunately, this argumentative move is unlikely to succeed. For autonomy, like consent, can be understood in different ways. Each understanding of autonomy generates its own set of conditions for sustainability. Different understandings of autonomy, in other words, lead to different sets of conditions that must be satisfied before an agent can be considered autonomous. This is important for Hassoun's Autonomy Argument. Hassoun seeks to establish that political institutions have certain obligations to those subject to them – obligations to ensure that people have what is necessary for autonomy. Those institutions bear those obligations, Hassoun contends, because they must receive the consent of their subjects in order to qualify as legitimate. If two social contract theorists disagree as to what counts as consent, they will very likely disagree as to the form of autonomy necessary for consent. This, in turn, will lead them to disagree as to the conditions that political institutions must provide in order for their subjects to enjoy autonomy.

Different understandings of consent, then, naturally lead to different understandings of autonomy, which lead to different understandings of the conditions necessary for autonomy. The remainder of this section will consider Hassoun's treatment of autonomy, and how the different understandings of consent she considers fit, or fail to fit, with that treatment.

Hassoun offers what she describes as a "minimal" conception of autonomy.³⁶ According to this conception, autonomy requires only that people "need to be able to reason about, make, and carry out significant plans on the basis of their commitments."³⁷ This requirement, as stated, has two parts. The first part is all about being able to "reason, make, and carry out plans." It is comprised simply of means-ends reasoning ability. "For one to reason on the basis of one's commitments, one just needs basic instrumental reasoning ability."³⁸ This does not involve any ability to reason about one's commitments. Hassoun is wary here of critics of liberalism who reject the importance

³⁶ *Ibid.*, p. 56.

³⁷ *Ibid.*, p. 26.

³⁸ *Ibid.*, p. 27.

of critical reflection upon one's life commitments.³⁹ Theoretically, this requirement is clearly quite minimal, although in principle its demands might prove difficult to honor, as will become clear shortly.

The second part of Hassoun's conception of autonomy is about being able to carry out, not just plans in general, but *significant* plans. For "to carry out significant plans one must have some external as well as internal freedom. External freedom – or liberty – is roughly freedom from interference in one's pursuit of a worthwhile life. One must have enough freedom from coercion and constraint to carry out those actions necessary to bring significant plans to fruition." "*Autonomy*," she continues, "requires basic internal *and* external freedoms." The freedoms required are meant to be minimal; there are "other freedoms autonomy does not require."⁴⁰ Hassoun is not clear as to just how minimal this requirement is. Contra Joseph Raz, for example, she denies that "a man trapped in a pit with enough food and water to survive" lacks autonomy,⁴¹ but claims on the very next page that those who "are enslaved or jailed" lack autonomy.⁴² I am unclear on the difference between being jailed and being stuck in a pit – if anything, the former sounds like it would offer *more* ability to engage in significant plans. All that is clear is that the "conception of autonomy at issue does not even require that people have good options from which to choose" – so long as their options are meaningful enough for the agent to engage in significant planning.⁴³ The condition is not meant to be completely negligible; "it should be clear that autonomous consent requires some freedom and competence."⁴⁴

Hassoun is much more comfortable making use of the first part of her conception of autonomy than she is making use of the second. She expresses concern for those lacking autonomy, a category that "includes very young children and people who are ill or mentally disabled to such a degree that *their ability to reason and plan is com-*

³⁹ See, e.g., Michael J. Sandel, *Liberalism and the Limits of Justice*, 2nd edition. (New York: Cambridge University Press, 1998).

⁴⁰ Hassoun, *Globalization*, pp. 27-28. Emphasis in original.

⁴¹ *Ibid.*, p. 102, n. 37.

⁴² *Ibid.*, p. 103.

⁴³ *Ibid.*, p. 103.

⁴⁴ *Ibid.*, p. 93.

promised."⁴⁵ In formulating her argument, Hassoun tries to rely upon the need for basic instrumental reasoning capacity, and not the need to be able to make significant plans. To be sure, the need for instrumental rationality does generate demands in its own right. The irreducible minimum requirement for autonomy, Hassoun contends, is food and water. "It should be obvious that everyone needs some food and water to secure sufficient autonomy. Without food and water no one can survive. Even those with some food and water are likely to suffer from autonomy-undermining disabilities if they do not have enough."⁴⁶ She reiterates that food and water (occasionally joined by shelter) are absolute indispensable prerequisites for autonomy.⁴⁷

Hassoun sees the first half of her conception of autonomy as sufficient to generate the demand for food and water. Starvation and dehydration may impair an agent's ability to reason instrumentally, possibly for good. Hassoun opens the book with the example of an impoverished Filipino woman named "Tamil" whose "eldest daughter probably suffered from iodine deficiency which caused severe hypothyroidism." The daughter "has the distorted facial features of cretinism. Her physical development was quite slow and she may not ever be competent to live on her own."⁴⁸ Tamil's daughter clearly lacks autonomy due to malnutrition-related deficiencies; no institution may legitimately coerce someone like her if it permits her autonomy to fail in this manner.⁴⁹

Hassoun is more reluctant to derive demands using the second half of her conception of autonomy. For example, she notes that "those without basic education, emotional and social goods may suffer from autonomy-undermining disabilities."⁵⁰ Elsewhere, Hassoun omits the qualifier "may." "To reason and plan," she asserts, "everyone needs some food and water and most require some shelter, education, health

⁴⁵ *Ibid.*, p. 30. Emphasis added.

⁴⁶ *Ibid.*, p. 32.

⁴⁷ *Ibid.*, pp. 11, 31, 45.

⁴⁸ *Ibid.*, p. 4.

⁴⁹ *Ibid.*, p. 30.

⁵⁰ *Ibid.*, p. 32.

care, social support, and emotional goods.”⁵¹ A lack of education – even basic literacy – need not undermine the ability to engage in basic instrumental reasoning. If a lack of education, emotional goods, and social goods threatens anything related to autonomy, it is likely to be the range of available options. The illiterate can surely formulate plans in the modern world, but it is very difficult for them to formulate *significant* plans.

One could, of course, deny this, and claim that even the typical illiterate person possesses a sufficient (even if not great) range of options to enjoy autonomy. In that case, one would risk rendering the second part of Hassoun’s conception of autonomy almost trivial to satisfy. At times, Hassoun appears tempted by this option. “On the conditions for autonomy defended here,” she writes, “most people can secure sufficient autonomy as long as their minds do not become clouded.”⁵² This appears to render instrumental rationality almost sufficient for the attainment of autonomy.⁵³ Elsewhere, however, Hassoun goes so far as to assert that “Poverty is incompatible with the legislative exercise of coercive power.”⁵⁴ This would seem to require an extremely broad reading of both parts of Hassoun’s conception of autonomy. Moreover, it would have some disquieting implications if true. (If the poor lack basic autonomy, that might be construed as authorizing paternalism towards the poor a la John Stuart Mill.)

Even if only the first half of Hassoun’s conception of autonomy is considered, the resulting demands are likely to be very serious in the contemporary world. To be sure, food and water are certainly pre-requisites for the development and maintenance of instrumental reasoning capabilities, but so is medical care. Hassoun acknowledges this; the Filipino woman “Tamil,” whose life Hassoun uses as an example, suffers from “malaria-induced delusions” which may result in her lacking “the necessary reasoning and planning capacities for

⁵¹ *Ibid.*, p. 9.

⁵² *Ibid.*, p. 33.

⁵³ Hassoun apparently hopes that a minimally demanding conception of autonomy might prove appealing to libertarians. *Ibid.*, pp. 33-34. I address this particular argumentative strategy by Hassoun in Stone, “The Pursuit of Consensus.”

⁵⁴ Hassoun, *Globalization*, p. 47.

autonomy.”⁵⁵ Recognition of this fact will surely generate very demanding positive rights in a poverty-stricken world. Hassoun recognizes this fact. “If coercive institutions must literally avoid coercing all rights-respecting individuals ... such institutions must literally do all they can to ensure that their rights-respecting subjects secure sufficient autonomy. Coercive institutions will have to provide extremely expensive health care for those who cannot otherwise secure this care but need it to secure autonomy.”⁵⁶

Hassoun’s conception of autonomy, then, consists of two parts. She generally relies upon the first part whenever possible. The demandingness of this conception is an open question. As Hassoun is at pains to stress, her argument is not a defense of autonomy *per se*. Political institutions do not have obligations to promote autonomy because autonomy is a good thing, or because people have intrinsic rights to it. Instead, they have obligations to promote it because people cannot consent to political institutions without sufficient autonomy, and those institutions can enjoy no political legitimacy without this consent. Hassoun occasionally forgets this fact. On the one hand, she claims that the autonomous agent must “be able to reason about, make, and carry out significant plans in one’s pursuit of a worthwhile life.” On the other hand, she also claims that the subjects of political institutions “must have the reasoning and planning capacities they need to determine their actions and shape the nature of their relationships with the coercive institutions to which they are subject.”⁵⁷ The autonomy sufficient for planning a worthwhile life need not be the same as the autonomy needed to consent to political institutions. To the extent there is any divergence between them, it is the latter, and not the former, that must define “sufficient autonomy” for purposes of Hassoun’s Autonomy Argument.

⁵⁵ *Ibid.*, p. 30.

⁵⁶ *Ibid.*, pp. 110-111. Hassoun adds here that coercive institutions may have to “violate rights to ensure that some of their rights-respecting subjects secure sufficient autonomy. It may just turn out, for instance, that the only way to secure the necessary resources is via illegitimate coercive taxation, or, worse yet, terrible violence.” This claim seems unmotivated and, to be blunt, rather histrionic.

⁵⁷ *Ibid.*, p. 28.

The question then becomes whether this conception of autonomy is adequate for grounding Hassoun's argument that autonomy is necessary for consent. Or, to put the point another way, is what Hassoun calls "sufficient autonomy" really sufficient – sufficient, that is, for subjects to be rendered capable of granting consent to coercive institutions? The answer depends, of course, upon the understanding of consent adopted.

Suppose, for example, that consent is understood as democratic consent. In that case, subjects would need whatever autonomy is required to exercise their democratic rights effectively. They would need all of that for their entire adult lives. This understanding of autonomy looks like what Hassoun has in mind. She claims, for example, that people have sufficient autonomy if and only if they "have sufficient good reasoning and planning ability to consent to, *or dissent from*, the rule of their coercive institutions."⁵⁸ It is impossible to understand the right of dissent except in terms of the need for democratic consent. Both actual consent and hypothetical consent leave little room for the right to say no; if people say no on either understanding, then they simply have not granted consent. The demand for autonomy sufficient for democratic consent thus generates moderately-strong entitlements for all citizens, entitlements they enjoy all of their lives.

Suppose, however, that consent is understood as actual consent. In this case, subjects need the ability to "sign on the dotted line" or the equivalent, to authorize the coercive institutions. In principle, this could be a once-and-done deal; it is unclear why actual consent would have to be renewed every so often. At the very least, there are no reasons *internal to the ideal of actual consent* for requiring renewed authorization; if one signs a contract, after all, one does not normally have to indicate a continued willingness to abide by its terms (unless such a provision is included in the contract itself).⁵⁹ But this means

⁵⁸ Emphasis in original. *Ibid.*, p. 28. For a similar argument to this effect, see Klaus Dingwerth, "Global Democracy and the Democratic Minimum: Why a Procedural Account Alone Is Insufficient," *European Journal of International Relations* 20:4 (2014):1124-1147.

⁵⁹ Some political theorists deny this. Michael Walzer, for example, writes that

that people must have autonomy sufficient for granting coercive institutions, on at least one occasion, their authorization. This condition is very demanding at any moment of authorization and completely undemanding at any other time.⁶⁰ The decision to grant actual consent to a political system is surely a momentous one. At the moment of authorization, people plainly need both enormous amounts of information and ample time to deliberate about the possible consequences. In Hassoun's words,

Presumably, competence to consent to a coercive institutional structure requires ... that people be able to understand the general features of the institutions to which they are consenting or from which they are dissenting. They must also understand the major consequences of consenting or refusing to do so. They must be able to appreciate, for instance, that these institutions affect their basic life prospects. They must also be able to understand what rights and

"Perpetuity is an awkward notion when introduced into a consensual universe, for the possibility of reconsideration is inherent if not in the idea of consent itself, then in the idea of government by consent. In the latter phrase both terms refer, I think, to a series of acts over time ... and the two together do not suggest an agreement made at some single moment or for all time. A theorist may reasonably want to make reconsideration a similar series of acts, prescribing some lengthy "due process" for terminating consent and so making the bonds established by consent as firm as he can. But he cannot bar the possibility of political divorce." Michael Walzer, "Political Alienation and Military Service," *Political and Legal Obligation*, ed. J. Roland Pennock and John W. Chapman (New Ed., New Brunswick, NJ: Aldine Transaction, 2007). Walzer may be right about how the idea of government by consent has historically been understood, at least by many, but this simply highlights how far this understanding diverges from actual consent theory.

⁶⁰ In Sunstein and Ullmann-Margalit's terms, actual consent functions as a "high-low" second-order decision. The decision to accept the decisions of the political system is an extremely important one, deserving much effort, but after it is made, there need not be any further decision-making efforts required. See Cass Sunstein and Edna Ullmann-Margalit, "Second-Order Decisions," *Ethics* 110:1 (1999): 5-31.

obligations consenting entails and what penalties dissenting carries with it.⁶¹

Hassoun does not understate the requirements necessary in order for actual consent to a social contract to take place. Indeed, a decision of this magnitude seems capable of justifying almost any effort put into it, to the point where it is reasonable to wonder whether a normal human being could rationally make such a decision in real time. (One could compare it to Sartre's hypothetical decision whether to join a resistance movement or care for an invalid mother.)⁶² But once authorization is granted, there is no more work for autonomy to do, and therefore no more demands placed upon coercive institutions (or rather, no demands placed upon those institutions by the requirement to obtain actual consent.)

Hassoun seems to recognize that actual consent theory does not generate demands for continuous autonomy throughout the lives of those subject to coercive institutions. She admits, for example, the possibility that an agent might voluntarily forfeit autonomy. Coercive institutions, argues Hassoun, must do everything possible to ensure their subjects "secure sufficient autonomy *unless and until these people*

⁶¹ Hassoun, *Globalization*, p. 29. Hassoun immediately makes a partial retraction of this claim by suggesting that the deliberative and informational requirements necessary for consent need not be all that high. "Subjects," she writes, "may need to be able to process some information for autonomy, but they do not have to be able to agree to every single coercive rule to which they are subject. Subjects may only need to be able to autonomously agree to the general principles underlying their coercive institutions. Alternately, consent may require only that individuals autonomously agree to the general structure of coercive rules to which they are subject, not every subsidiary rule." But I am not sure that this partial retraction accomplishes much. I would think that the deliberative demands placed upon a single, once-and-done act of authorization for a "general structure of coercive rules" would be orders of magnitude higher than those placed upon individual acts of authorization for specific rules.

⁶² Edna Ullmann-Margalit coined the term "opting" to refer to decisions of this type. She thought that decisions of such extreme, life-changing importance, together with decisions of no significance at all, defined the limits of the canonical model of rational choice. See Edna Ullmann-Margalit, "Opting: The Case of 'Big' Decisions," *Jahrbuch of the Wissenschaftskolleg zu Berlin* (1985): 441-454.

freely consent or give up their right to do so."⁶³ This passage certainly seems to suggest that a subject need only consent once, and that once free consent is given, the coercive institution need not ensure that the subject enjoys autonomy any longer. This could only make sense if consent is understood as something like authorization, or actual consent. If consent is understood as democratic consent, then there is no single moment at which consent is given. If consent is understood as hypothetical consent, whatever autonomy is required at one point in time must surely be required at all others. (Whether hypothetical consent theory generates *any* demands for autonomy is another matter, as will be discussed shortly.) While it is admittedly implausible that any subject *would* consent to a coercive institution which refused to guarantee her continued autonomy, actual consent theory offers no obstacles to a subject doing so.⁶⁴ If this is correct, then Hassoun is wrong to write that "an individual's capacity to reason and plan must remain intact *over the course of a normal or healthy life*" in order to enjoy sufficient autonomy.⁶⁵ For the actual consent theorist, any capacity to reason or plan need only remain intact long enough for the contract to be signed.

Finally, there is hypothetical consent. This form of consent does not, in and of itself, generate any demands for autonomy. The subjects granting consent are imaginary subjects, not real subjects, and so there is no reason why the decisions of the former should require the latter to enjoy any ability to reason, plan, make decisions, etc. Again, it is easy to argue that hypothetical subjects would not grant their consent to any institutions that did not ensure that their real-world counterparts enjoy a significant degree of autonomy, just as they would most likely insist upon a democratic political system. The case for autonomy would not go through Hassoun's Autonomy Argument. That argument supports the demand for sufficient autonomy by reference to what agents need in order to give consent. Any argument for auto-

⁶³ Hassoun, *Globalization*, p. 111. Emphasis added.

⁶⁴ Actual consent theorists, following Robert Nozick, seem perfectly willing to allow people to consent to slavery. Hassoun acknowledges this. *Ibid.*, p. 103. Given this fact, it is hard to see how they could object to oppressive political arrangements that receive actual consent.

⁶⁵ *Ibid.*, p. 28. Emphasis added.

nomy using hypothetical consent must make its case by reference to what agents *would demand of any system before granting their consent*. Moreover, there is no reason to assume that the autonomy that a hypothetical subject would demand of a coercive institution is the same as the autonomy that real subjects would need in order to participate in the democratic process. People use autonomy for more than just political decision-making, after all, and Hassoun knows it. This is why she speaks of autonomy being necessary in order to pursue a worthwhile life. A hypothetical subject may well demand a stronger form of autonomy than the democratic process strictly requires. (Again, this demand does not imply that the hypothetical agent needs any real-world conditions to be met in order to exercise autonomous choice.)⁶⁶

Hassoun hopes that the Autonomy Argument will strengthen the case for meeting the needs of the world's poor. She defends this argument without committing herself to any particular understanding of consent. She thereby hopes to avoid entanglement with any controversial philosophical positions, thus making her argument appealing to as wide a range of liberal opinion as possible. The analysis offered here suggests that Hassoun cannot make her case while avoiding controversy. To whatever extent the Autonomy Argument is valid, it establishes a need for coercive institutions to ensure that those they rule have autonomy sufficient for consent. But what counts as sufficient autonomy may vary dramatically depending upon the type

⁶⁶ One could argue, of course, that hypothetical agents would not insist upon autonomy above and beyond what is needed for the democratic process. Rather, they would simply insist upon a well-structured democratic political system, and then rely upon that system to do the rest. If they did want to enjoy higher levels of autonomy than is strictly necessary for purposes of democracy, they would employ the democratic political process to ensure themselves this extra autonomy. Such a reply to my argument places a great deal of weight upon the democratic process. I find it implausible that a hypothetical agent would be as willing as this to trust entirely to the democratic process and "let the chips fall where they may." A hypothetical agent who highly valued autonomy would surely insist upon safeguards against anti-autonomy abuses of the democratic process (judicial review, for example). Most political theorists working with the idea of hypothetical consent (Rawls, for example) do believe that hypothetical agents would not consent to a completely unrestricted democratic process.

of consent required. There may indeed be a contractualist case for a global social order that protects the world's poor, but that case, like any contractualist argument, will only be as strong as the understanding of consent upon which it rests.

Conclusion

The analysis of Hassoun's *Globalization and Global Justice* offered here provides lessons for both social contract theory and the analysis of political concepts more generally. With regard to the former, Hassoun offers her contractualist case for obligations to the world's poor against a backdrop of ongoing ambiguity regarding the nature of consent – what it is, and what is necessary to obtain it. Many contractualists (such as Rawls) select one understanding of consent and stake their arguments upon it. In doing so, they must accept all of the shortcomings that plague the selected understanding of consent. Other contractualists (such as Kant) seem content with the ambiguity surrounding the term “consent” (whether wittingly or not). As a result, their arguments tend to oscillate between different understandings of the term, in a manner that renders their arguments inconsistent. Hassoun provides an example of a third possible strategy – specify an argument that does not depend upon committing to a single understanding of consent. If the line of criticism developed in this paper is valid, this strategy is unlikely to be successful; there are likely very few conclusions regarding consent that can be sustained regardless of how consent is understood. The best hope for contractualism likely remains the first option – select a single understanding of consent, and defend it against the many telling objections offered to it over the years.

With regard to the latter, the social contract theory's relationship to the term “consent” should be of great interest to anyone concerned with the way that concepts function in political discourse. On the one hand, the concept has retained a high degree of ambiguity from the earliest days of the tradition up to the present. On the other hand, this ambiguity has not diminished the appeal of the term, either to political theorists or to ordinary citizens. Almost everybody believes in government by the consent of the governed, even though nobody

agrees what this consent involves, or what implications it has for either political institutions or the principles that justify them. This combination of strong agreement at the level of concepts but strong disagreement at the level of the meaning of those concepts surely applies to many other concepts as well besides consent – to freedom, democracy, and equality, for example. A proper understanding of how this combination persists over time could illuminate the conditions that obstruct the rational resolution of disputes regarding political concepts.⁶⁷

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⁶⁷ One potentially useful theory regarding the evolution of concepts is Daniel Dennett's idea of "belief in belief." In his book *Breaking the Spell: Religion as a Natural Phenomenon* Dennett argued that there was no essential unity underlying competing understandings of terms like "God." People profess belief in "God" in large numbers, but without any agreement as to what the word means. In Dennett's terms, they "believe in belief" in God. See Daniel Dennett, *Breaking the Spell: Religion as Natural Phenomenon* (New York: Penguin, 2006). Perhaps they also "believe in belief" in government by consent?

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Basic Equality and Social Contract Theory

NIKOLAS KIRBY

Introduction

Over the last few decades it has become very popular to claim that all plausible political theories, past and present, share the same fundamental premise: that all humans are one another's equals, and by "equals" it is meant that all humans are of "equal worth."¹ Equal worth is put forward as a concept capable of many conceptions each attributing equal worth (*qua* "value," "concern," "consideration" or "weight") either to the *interests* (*qua* 'individual good', 'utility' or 'welfare') of each person or to the *persons* (*qua* "physical person" or "soul") themselves. However, no matter what conception is adopted, the claim remains at heart that, in any *theory of the good*, humans and their interests are included as objects of worth in the world, and that their worth is equal.

"Equal worth" may well be what many philosophers mean by the claim that all human beings are one another's equals,² but in this paper

¹ Louis Pojman and Robert Westmoreland, *Equality* (New York: Oxford University Press, 1997), p. 1: "It is one of the basic tenets of almost all contemporary moral and political theories that all humans are essentially equal, of equal worth, and should have this ideal reflected in the economic, social, and political structures of society." See also, Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* (Cambridge: Harvard University Press, 2000), p. 11; William Kymlicka, *Contemporary Political Philosophy: An Introduction*, 2nd Ed (Oxford: Oxford University Press, 1990), p. 4; Thomas Scanlon, "When Does Equality Matter?" (unpublished manuscript, http://www.law.yale.edu/documents/pdf/Intellectual_Life/lw-Scanlon.pdf, 2004), p. 2; Amartya Sen, *The Ideal of Justice* (Cambridge: Harvard University Press, 2009), p. 291; Nicholas Smith, *Basic Equality and Discrimination: Reconciling Law and Practice* (Farnham: Ashgate, 2011), p. 1; Ian Carter, "Respect and the Basis of Equality," *Ethics*. Vol. 121, No. 3, p. 540.

² It is undoubtedly the concept of classical utilitarians, for example: Jeremy Bentham, *The Works of Jeremy Bentham*, eds., F. Rosen and J.H. Burns (Oxford: Clarendon Press, 1983), p. 107; John S. Mill, *Utilitarianism, Liberty, and Representative Government* (London: J.M. Dent & Sons Ltd. 1910), p. 58. See also, Richard M. Hare, *Moral Thinking: Its Levels, Methods and Point* (Oxford: Clarendon Press, 1981),

I shall establish that it is *not* what social contract theorists – past and present – have meant. From the very beginnings of social contract theory, amongst Hobbes and the Levellers, through Locke, Rousseau and Kant and into contemporary political philosophy, social contract theory has been united by a very different concept of basic equality. This concept is ‘equal authority’. It attributes equal authority (*qua* “jurisdiction,” “dominion,” “right to rule” or “sovereignty”) to each human being to determine their obligations with respect to one another and the state. Thus, where equal worth presupposes a theory of the good; equal authority determines whose theory of the good, if any, shall be presupposed.

Social contract theorists do not necessarily reject the concept of equal worth. However, the social contract theorists do take equal authority to be more “basic” than equal worth, in the sense that the former, and not the latter is treated as the ultimate ground of our political rights and obligations. I shall conclude by arguing that, given this claim, the question of the *basis* of basic equality (that is, the property that determines *who is a member of the set of equals?*) may be a very different and more soluble question for social contract theorists compared with those who prioritise equal worth.

Fundamental, Practical, De Jure, Self-Reflexive) Authority

Authority is traditionally defined as the “right to rule.” Let us say, more precisely:

Authority: the ability to create an overriding reason for an individual to act by determining that such an individual should so act.

p. 26; Harsanyi, “Morality and the Theory of Rational Behaviour,” Amartya Sen and Bernard Williams, eds., *Utilitarianism and Beyond* (Cambridge: Cambridge University Press, 1982), p. 47; Peter Singer, *Animal Liberation* (Frogmore: Granada Publishing, 1990), p. 22; Dworkin, “Is there a Right to Pornography?,” *Oxford Journal of Legal Studies* (1981), Vol. 1, No. 2, p. 201; Amartya Sen, *Inequality Reexamined* (Oxford: Oxford University Press, 1992), p. 14.

The concept we are addressing, therefore, is *practical* rather than *theoretical* (or “epistemic”). It concerns an individual providing to a subject reasons to act, rather than reasons to believe. The reasons provided are *overriding* in the sense that they override any lower-order reasons to the contrary.³ In general, such reasons can be taken to create a “duty” or “obligation” to so act. Such authority is *de jure* rather than *de facto*, meaning that its command by itself, creates an overriding reason for a subject to so act. Such a reason does not arise because of extrinsic factors such as the threat of punishment, although such factors may create additional reasons to so act.

Authority can be either *derivative* or *fundamental* relative to a set of individuals. Authority is *derivative* relative to a set of individuals when its basis is a previous exercise authority between them (for example, by delegation, investiture or agency contract). By contrast, authority is *fundamental* (‘original’ or ‘natural’) relative to a set of individuals when its basis is not a previous exercise of authority between them (for example, God outside the set of human beings), or perhaps not a previous exercise of authority at all. “Equal authority” as a concept of basic equality is implicitly equal *fundamental* authority.

Finally, on my definition, ‘authority’ can be self-reflexive. One can have authority (fundamental or otherwise) “over oneself.” Some philosophers have dismissed this extension because they believe it entails some deeply mysterious metaphysical splitting of self, where a higher rational self rules over the lower part.⁴ I mean nothing so metaphysically extravagant. All that I mean by ‘authority over oneself’ *one* has ability to create an overriding reason for *one* to act by determining that *one* should so act. The most obvious examples of

³ I qualify the types of reasons that can be overridden as ‘lower order’, in order to allow for the fact that in hierarchies, an inferior authority-agent have their determinations overridden by a superior, and also that two equal authority-agents may give conflicting reasons of the same order. I have abstracted from the precise account of *how* a ruling by an authority comes to be overriding. Cf. Joseph Raz (2006), “The Problem of Authority: Revisiting the Service Conception,” *Minnesota La Review* (1990), Vol. 90, pp. 1012; Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986), p. 23.

⁴ McLaughlin (2007), 45; Sadurski (2008), 169.

such exercises of authority over oneself are the undertaking of voluntary obligations *via* consent, promise, agreement etc.⁵

The Great Chain(s) of Being

The distribution of fundamental authority amongst human beings has always been one of, if not *the*, foundational question of political philosophy (and theology). However, until the 17th Century the project was, almost universally, to justify its very *unequal* distribution, that is, the unreciprocated ability of some sub-set of human beings to obligate others to act in certain ways.⁶ Whilst, as I shall argue, this project falters with the emergence of the social contract theorists in the 17th Century, it has continued, sometimes in less obvious forms, until today.⁷

Some theories of basic inequality distribute fundamental authority unequally in a very “heterogeneous” manner. They claim that there are a range of differing ‘chains’ of fundamental authority of differing lengths, with respect to different domains, based on different properties, and connected or unconnected in differing ways, all existing simultaneously. They imagine multiple different relations (husband-wife, parent-child, freeman-slave, king-noble-commoner, bishop-priest-parishioner, white-black, ignorant-wise) with multiple different bases (gender, age, slavery, nobility, ecclesiastical rank, race, intelligence) operating in multiple differing domains (the private sphere, family, civil society, the state, religious matters). How these

⁵ Note, Raz also appears to reject such “authority over oneself” as a degenerate case. However, I take my difference with Raz to be largely terminological. Raz simply uses a different term – “normative power” – for the concept that denotes both the ability to create overriding reasons (*qua* ‘protected reasons’) for others and for oneself. See Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford: Clarendon Press), p. 18.

⁶ By “unreciprocated” I mean that an authority-agent’s subject does not have the same or equivalent ability over them. See my discussion of Rousseau, below.

⁷ One obvious example is Mill’s attempts to qualify the franchise in *On Representative Government*, in John Stuart Mill, *Collected Works of John Stuart Mill*, 33 volumes, ed., J. Robson (Toronto: University of Toronto Press, 1965-91), Vol. XI. Another, perhaps, less obvious is Raz’s Service Conception. See Raz, *The Morality of Freedom*; Raz, “The Problem of Authority.”

differing chains relate to one another becomes an incredibly complex question for the theorist of such a heterogeneously unequal society. They often lead to undefined, incomplete and/or contradictory points in the structure.⁸

However, many theorists claim that fundamental authority is distributed unequally in a very homogenous manner. All chains of authority coherently relate to one another to create one “great chain of being,” a complete “natural hierarchy.” For example, the Medieval Neo-Platonists placed God at the very pinnacle with absolute authority over all other beings; and beneath him, archangels over all other beings, then other angels, then monarchs, other ranks of nobility in order, commoners, serfs, and even down to the animals. The absolute authority of each being was conceived as being related and transitive in one direction downwards. Each being was set, thereby, in a vertical relation of superiority and/or inferiority with respect to at least one another being, from the most supreme (God) to the most inferior (‘the lowliest beast’). Finally, given the coherence of the structure, each being was not merely set in a clear *vertical* relation of superiority and inferiority, but also a clear horizontal relation of shared “rank.” These ranks grouped beings who either shared a superior, or shared superiors who shared a superior, or so on, until one reaches God.⁹

By the 17th Century, this Neo-Platonic hierarchy was somewhat complemented or replaced by a patriarchal hierarchy, with the explicit aim of justifying the legitimacy of kings, husbands and fathers. Adam was placed at the historical apex of this structure, his absolute authority descending down to sons in order of birth, extending over wives and children, throughout the ages.

Whilst such homogenous Neo-Platonic and patriarchal structures are hierarchies of fundamental unequal authority, at their point of historical prominence, they still defined what it meant to be ‘equals’ within them, that is, to have the same rank relative to one another in the hierarchical society. This was opposed to being ‘unequals’ relative

⁸ Examples include debates about the clash between powers “spiritual” and “temporal,” anxieties about having female heads of state and regency, and intermarriage between ranks.

⁹ Cf. P.E. Sigmund, “Hierarchy, Equality, and Consent,” J.R. Pennock and J.W. Chapman, eds., *Equality* (New York: Atherton Press, 1967), pp. 135-7.

to others, that is, to be a superior and an inferior.¹⁰ It was within this conceptual space, therefore, that the social contract theorists picked up the former concept and denied the instantiation of the other. They made the radical claim that *all* human beings were equals, that is, of the “same species and rank.”¹¹

Equal Authority and Classical Social Contract Theory

We often characterise the foundation of social contract theory as primarily a claim about state authority. This claim is that a state can only have legitimate authority over its subjects, if they have consented *via* some (actual, hypothetical, constructive) contract. However, the actual foundation of social contract theory is deeper. It is a claim about the authority of individuals. This claim is that each individual has *fundamental* authority over herself, and no one has such authority over anyone else.¹² Let us call this claim, “the basic proposition.” Elaborated, given the definitions provided above, the basic proposition involves two clauses – positive and negative:

Basic proposition, elaborated:

1. Each individual has the same ability, fundamental relative to each other, to create an overriding reason for her herself to act by determining that she herself should so act. [Positive Clause]

¹⁰ Cf. Hugo Grotius, *Rights of War and Peace* (Indianapolis: Liberty Fund Inc, 2005), Vol. I, pp. 136-7: But as in Societies, some are equal, as those of Brothers, Citizens, Friends and Allies. And others unequal, by Preeminence, as Aristotle terms it; as that of Parents and Children, Masters and Servants, King and Subject, God and Man: So that which is just takes Place either among Equals, or amongst People whereof some are Governors and others governed, considered as such. The latter, in my Opinion, may be called (a) Right of Superiority, and the former, (b) Right of Equality. Whereas (a) is *Jus Rectorium*, (b) is *Jus Equatorium*.

¹¹ John Locke, *Two Treatises in Government and A Letter Concerning Toleration*, ed., Ian Shapiro (New Haven: Yale University Press. 2003), p. 101.

¹² I put aside the fact that some social contract theorist found contorted *ad hoc* ways of excluding women and other races from the set of equals. I also put aside the *sui generis* situations of wards such children and the severely mentally disabled.

2. No individual has any ability, fundamental relative to each other, to create an overriding reason for an individual not herself to act by determining that such an individual should so act. [Negative Clause]

The two clauses of the basic proposition define a state of equal authority. Each individual has precisely the same fundamental authority (that is, over themselves, and themselves alone). They also entail a state of natural, basic or fundamental “freedom,” that is, a freedom *from* fundamental authority of anyone else; and a freedom *to* exercise fundamental authority over oneself.

The basic proposition does not begin with the classical social contract theorists. It is foreshadowed a few centuries earlier by theologian-philosophers who sought to resolve the justification and coherence of the powers temporal and spiritual.¹³ In *Defensor Pacis*, Marsilius of Padua (1270-1342) sought to legitimate the authority of the elected Holy Roman Emperor, Louis of Bavaria, over John XXII. He developed the theory that all authority, spiritual and temporal, ultimately derived from the fundamental authority of the citizens:

The authority to make the law belongs only to those men whose making of it will cause the law to be better observed or observed at all. Only the whole body of the citizens are such men. To them, therefore, belongs the authority to make the law.¹⁴

Nicholas of Cusa (1401-1464) continued this doctrine in advocating reform of the Holy Roman Empire nearly a century later:

¹³ See also, Aristotle, *The Ethics of Aristotle: The Nicomachean Ethics* (London: Penguin Books, 1976), p. 174 [1131a20-1]; Plato, “The Laws,” *The Dialogues of Plato*, Vol V, ed. and tr., B. Jowett (Oxford: Clarendon Press, 1892c), p. 137, [VI 757c1-7]. On the development of equal authority by Cicero and Seneca see, John McIlwain, *Constitutionalism: Ancient and Modern*, rev. ed. (Ithaca: Cornell University Press, 1958), pp. 71-89.

¹⁴ Marsilius of Padua, *The Defender of Peace*, Vol II, ed. and tr., A. Gewirth (New York: Columbia University Press, 1956), pp. 47-8.

For if by nature men are equally powerful and equally free, the valid and ordained authority of one man naturally equal in power with the others cannot be established except by the choice and consent of the others, even as law also is established by consent.¹⁵

Furthermore, the idea of state authority being legitimated by contract is prefigured in classical thought. Crito argues that the Athenian, having enjoyed the privileges of security, is bound by practical agreement to obey the laws of Athens, even if they are unjust.¹⁶ Aristotle speaks of Lycophron, the Sophist, who argued that law obliges only because it is a 'contract'.¹⁷ And in what would become a very important theological precedent for social contract theorists, in the Old Testament, David is made King by the covenant of the elders of Israel.¹⁸ However, it is only in the 17th Century that the social contract is explicitly put forward as a necessary condition of state legitimacy because of the truth of the basic proposition.

Whilst Grotius may have some claim to being a social contract theorist,¹⁹ Hobbes clearly is its father figure. It is clear that Hobbes holds the negative clause of the basic proposition. In the State of Nature, no one naturally (that is, *fundamentally*) has authority over anyone else: ... "[M]en live without a common power to keep them in awe, they are in that condition which is called war; and such a war, as is of every man, against every man."²⁰ Individuals each have the

¹⁵ Nicholas of Cusa, *De Concordantia Catholica*, in E. Lewis, *Medieval Political Ideas* (New York: Alfred A Knopf, Inc. 1956), Vol. II. Section 14.

¹⁶ Plato, "Crito," *The Dialogues of Plato*, Vol V, B. Jowett, ed. and tr. (Oxford: Clarendon Press, 1892a), pp. 50-1.

¹⁷ Aristotle, *Aristotle's Politics*, B. Jowett and M. Lerner, eds. (Oxford: Clarendon Press, 1905), III 9 §8.

¹⁸ *English Standard Version Bible: Containing the Old and New Testaments with Apocrypha* (Oxford: Oxford University Press, 2009), II Sam. 5:3.

¹⁹ Grotius arguably endows the social contract tradition with the proper understanding of the concepts of natural law, obligation and right that are ultimately necessary to articulate the basic proposition and the social contract view. See, Stephen Darwall, *Honor, History, and Relationship: Essays in Second-Personal Ethics II* (Oxford: Oxford University Press, 2013), ch. 8.

²⁰ Thomas Hobbes, *Leviathan* (London: William Collins Sons & Co, 1962), p. 144.

“right” to do anything and everything in accordance with their own reason. However, it is only a permission rather than a claim-right that would give rise to duties upon others.

However, Hobbes does also hold the positive clause of the basic proposition. This is because individuals in the State of Nature do have fundamental authority over themselves. They have the ability to create overriding reasons for themselves to act by determining that they herself should so act. This is precisely the ability that they exercise when contracting with one another that they will have a duty to obey the sovereign.²¹

Whilst Hobbes grounds his social contract on the basic proposition and thus the equal authority it contains, strictly speaking, it is not what he means when he calls human beings “equals.” Instead, he denotes their physical capacities: “Nature hath made men so equal, in the faculties of the body and mind.” This is to define basic equality by reference to the *basis* of equal authority, rather than equal authority itself. He leaves the latter move to Pufendorf and Locke.

Pufendorf explicitly rejects Hobbes’ claim that we are one another’s ‘equals’ in our physical capacities, both as a fact and as a proper account of what the claim should mean. Instead, he articulates a complex and multifaceted concept. The root of this concept is the claim that all human beings are equal in having the same obligation to cultivate a social life, and thus owe it to one another to obey natural law.²² In this way, ‘equal authority’ is admittedly not the most basic sense in which we are equals according to Pufendorf. However, it is its most important corollary, particularly with respect to establishing the legitimacy of the state.

According to Pufendorf, natural slavery, and any other form of unequal fundamental authority, “clashes head on with the natural equality of men.” It would be “most absurd ... to believe that nature herself has actually and directly given the more prudent sovereignty over the more dull.” Both the negative and positive clauses of the basic proposition are evident in his claim that:

²¹ *Ibid.*, p. 176.

²² Samuel Pufendorf, *Political Writings of Samuel Pufendorf* (Oxford: Oxford University Press, 1994), III.2.2.

[T]he actual establishment of sovereignty requires some antecedent human deed, and a natural ability to rule by no means gives anyone sovereignty over those whom nature has given a character fit for servitude. Nor does the fact that something is useful to another immediately allow me to impose it on him by force. For men enjoy natural freedom to an equal degree, and they cannot allow it to be diminished without their express, tacit, or interpretive consent, or without some other deed of theirs by which others have acquired a right to seize it from them even against their will.²³

Locke is the first of the social contract theorists to assert not only the equal authority of human beings, but to take the concept of basic equality to denote this relation alone. Having dismantled the patriarchal theory of unequal fundamental authority put forward by Robert Filmer in the *First Treatise*, Locke states in the *Second Treatise*.

“That all men by nature are equal,” I cannot be supposed to understand all sorts of equality ... [instead, I mean] the equality which all men are in, in respect of jurisdiction or dominion one over another; which was the equality I there spoke of, as the proper business in hand, being that equal right every man hath to his natural freedom, without being subject to the will or authority of any other man.²⁴

That “natural freedom” includes not merely the negative clause of the basic proposition as made clear here, but also the positive

²³ *Ibid.*, III.2.8: “He continues: This could also have been expressed as follows: Since nature has made all men equal, and since slavery cannot be understood apart from inequality (for to be a slave surely implies acknowledging a superior; freedom, however, does not require one to have an inferior, as it suffices not to be subject to a superior), it is understood that naturally, or apart from any antecedent deed, all men are free. A natural aptitude or the presence of qualities required for a certain state does not immediately place someone into that state. Thus, someone who is worthy to rule or fit to lead an army is not right away a king or a general....”

²⁴ Locke, *Two Treatises*, p. 54.

clause. Each individual has a right to rule over himself.²⁵ Like Hobbes it includes the right to contract and thus bind oneself. However, unlike Hobbes it also includes the same right to acquire and rule over one's property, in a manner that creates obligations upon others to respect such property. Each individual is, "absolute lord of his own person and possessions, equal to the greatest, and subject to nobody [else]."²⁶

Unlike Locke, Rousseau's rhetorical emphasis in *Du Contrat Social* is undoubtedly on our natural freedom, rather than our equality. However, this natural freedom, just as with Locke, is defined both by the conjunction of the negative and positive clauses of the basic proposition. Each individual is 'born free and equal' in precisely the sense that each person is *equally* 'his own master' free of the authority of others, and *equally* has the positive right to bind themselves through the social contract.²⁷ Rousseau argues, however, *contra* Hobbes, Pufendorf and Locke, that in the State of Nature individuals would not exercise their equal fundamental authority to vest the few with unequal derivative authority. Instead, those individuals would exercise their equal fundamental authority over themselves severally to vest one another with equal derivative authority over themselves collectively and reciprocally.²⁸

By moving from equal self-reflexive to equal reciprocal rule, each individual moves from being able to only legislate for themselves alone to all being able to legislate for all. However, since the latter

²⁵ *Ibid.*, p. 4: "[W]e must consider, what State all Men are naturally in, and that is, a State of perfect Freedom to order their Actions, and dispose of their Possessions and Persons, as they think fit, within the bounds of the Law of Nature, without asking leave, or depending upon the will of any other Man."

²⁶ *Ibid.*, p. 123. Further, when one consents *via* contract, "the only way whereby any one divests himself of his natural liberty," every individual explicitly exercises their right to put themselves under a duty. He "puts himself under an obligation to every one of that society to submit to the determination of the majority, and to be concluded by it." *Ibid.*, pp. 95, 97.

²⁷ Jean-Jacques Rousseau, *The Social Contract*, tr., M. Cranston (London: Penguin Books, 2004), I.2.2-3. Cf. also, I.2.1; I. 9.8.

²⁸ *Ibid.*, I.7.1: "[T]he action of association consists of a reciprocal commitment between society and the individual, so that each person, in making a contract, as it were, with himself, finds himself doubly committed, first as member of the sovereign body in relation to individuals and secondly as a member of the state in relation to the sovereign."

form of (derivative) authority arises from an exercise of the former (fundamental) authority, one achieves something, at first, seemingly paradoxical: in being an equal member within a state of reciprocal rule *whereby everyone rules over everyone*, one continues to be ruled *only by oneself*.²⁹ This sense of paradox is quickly dissipated, however, if we remind ourselves that the reciprocal rule is only a form of *derivative* authority and the self-reflexive rule, *fundamental*.

Finally, it is the cornerstone of Kant's *Groundwork* that all human beings – as rational beings – have fundamental authority over themselves and themselves alone. In fact, he argues:

If we look back upon all previous efforts that have ever been made to discover the principle of morality, we need not wonder now why all of them had to fail. It was seen that the human being is bound to laws by his duty, but it never occurred to them that he is subject *only to laws given by himself but still universal* and that he is bound only to act in conformity with his own will, which, however, in accordance with nature's end is a will giving universal law.³⁰

An explicit statement of basic equality as equal authority follows in Kant's *Doctrine of Right*, whereby we all have 'innate equality, that is, independence from being bound by others no more than one can in turn bind them; hence a human being's quality is being *his own master (sui juris)*'.³¹

Equal Authority and Equal Worth

The classical social contract theorists may hold that all individuals have equal authority and furthermore, with the qualifications

²⁹ *Ibid.*, I.6.4: "A form of association which will defend the person and goods of each member with the collective force of all, and under which each individual, while uniting himself with the others, obeys no one but himself, and *remains* as free as before." Cf. *Ibid.*, II.4.9.

³⁰ Immanuel Kant, *Practical Philosophy*, tr. and ed., M.J. Gregor (Cambridge: Cambridge University Press, 1996), 4:432.

³¹ *Ibid.*, 6:238

above, mean precisely this by the claim that “all human beings are one another’s equals.” However, how does this claim stand in relation to the proposition that all human beings are equals in the alternative sense of “equal worth”?

Equal authority and equal worth are logically consistent predicates. One is a claim about the distribution of fundamental authority. The other is a claim about the distribution of the good. However, one might posit that behind each classical social contract theorist’s assertion of equal authority could be the claim that it is ultimately justified by equal worth. On this view, fundamental authority over oneself and only oneself would presumably be construed *either* as a fundamental good, interest, or component of our welfare, which is of equal worth *or* as a necessary instrument to such an end.

Putting aside Kant for one moment, there is no evidence amongst the other social contract theorists for such a view. The concept of basic equality as equal worth, in Christianised form, was readily available to them within contemporary thought.³² However, none of them make any use of such a claim, either explicitly or implicitly when justifying each individual’s equal authority. Furthermore, none of them argue for anything akin to the contemporary liberal perfectionists’ claim that it is of immense value to be a ‘part creator ... of [one’s] own moral world.’³³ None argues that it is an end in itself to make one’s own decisions for better or for worse. Any reference to equal worth is simply missing in classical social contract theory.

³² G. Morgan, “Human Equality,” *Ethics*. Vol. 53. p. 115; H. Spiegelberg, “A Defense of Human Equality,” *The Philosophical Review*, 1944, Vol. 53. p. 101; Pojman (1991), 496. L.E. Goodman, “Equality and Human Rights: The Lockean and the Judaic Views,” *Judaism*, 1976. Vol. 23, pp. 357-262. It argues that the doctrine is foreshadowed in the Old Testament, for example, Malachi 2:10. See also, Friedrich Nietzsche, *The Twilight of the Idols and the Antichrist* (London: Penguin, 1968), p. 186: “[I]t was only the Church which enriched mankind with this state of distress! – ‘Equality of souls before God,’ this falsehood, this pretext for the rancune of all base-minded, this explosive concept which finally became revolution, modern idea and the principle decline of the entire social order – is Christian dynamite.”

³³ Raz, *The Morality of Freedom*, pp. 154-5; Raz, “The Problem of Authority,” pp. 1013-4.

Kant is the *prima facie* exception. He states that the “lawgiving itself, [that’s authority over oneself] which determines all worth must for that very reason have a dignity [*würde*], that is, an uncondition, incomparable worth [*Werth*].”³⁴ He then notes that the ‘dignity’ of each human being is, properly speaking, merely the dignity of this self-lawgiving capacity. Kant, therefore, is often taken to hold something akin to an Equal Worth concept, rather than Equal Authority.

There are a number of complications regarding the proper translation of “*würde*.” However, we can put these aside. This is because, no matter its meaning, if we follow Kant closely, each person’s authority over herself grounds her *würde*; not *vice versa*. Kant argues for the proposition that one has authority over oneself without any reference to *würde*, (or *Werth* or any possible claim about the nature of the good). Further, once such authority is established, *by definition*, its exercise gives one an overriding reason to follow the laws one gives oneself, and excludes the authority of others. No reference to *würde* is required to establish this. The fact that this capacity also happens, putatively, to have *würde* (whatever its precise meaning) is just supervenient.³⁵ It plays no role in justifying either one’s authority over

³⁴ “For, nothing can have a worth other than that which the law determines for it. But the lawgiving itself, which determines all worth, must for that very reason have a dignity, that is, an unconditional, incomparable worth; and the word respect alone provides a becoming expression for the estimate of it that a rational being must give. Autonomy is therefore the ground of the dignity of human nature and of every rational nature.” Kant, *Practical Philosophy*, 4:436.

³⁵ As Kant states in the *Second Critique*, “[G]ood and evil always signifies a reference to the *will* insofar as it is determined by the *law of reason* to make something its object; for it is never determined directly by the object and the representation of it, but is instead a faculty of making a role of reason the motive of an action (by which an object can become real).” *Ibid.*, 5:60. I follow Schneewind in taking seeing Kant’s account of the good in general and *würde* in particular to be supervenient upon the rational action defined by autonomy, rather than *vice versa*: Jerome B. Schneewind, *Essays on the History of Moral Philosophy* (Oxford: Oxford University Press, 2009), p. 278. See also, Thomas Hill, *Respect, Pluralism and Justice: Kantian Perspectives* (Oxford: Oxford University Press, 2000), p. 150. “To treat reason (or rational willing) in each as of unconditional and in comparable worth is not merely or primarily to protect and treasure it like a valued object but to respect the principles or ‘laws’ that (in our best judgment) it prescribes.”

oneself or the binding quality of the duties it can create. In this way, Equal Authority remains Kant's most basic equality, even if he takes that basic equality to ground a further, supervening and derivative 'equality of *würde*'.³⁶

Contemporary Social Contract Theory

John Rawls states in the Introduction to *A Theory of Justice*:

My aim is to present a conception of justice which generalises and carries to a higher level of abstraction the familiar theory of the social contract as found, say, in Locke, Rousseau, and Kant. In order to do this we are not to think of the original contract as one to enter a particular society or to set up a particular form of government. Rather, the guiding idea is that the principles of justice for the basic structure of society are the object of the original agreement. They are the principles that free and rational persons concerned to further their own interests would accept in an initial position of *equality* as defining the fundamental terms of their association [that is, the 'veil of ignorance']. These principles are to regulate all further agreements; they specify the kinds of social cooperation that can be entered into and the forms of government that can be established.³⁷

Rawls' debt to the social contract theorists and his commitment to the liberal conception of *equal authority* in *A Theory of Justice* could not be more clear. What Rawls takes to be their most defining claim is precisely that the principles of a just society must ultimately be the

³⁶ I take this to be consistent with the interpretations put forward by Schneewind, *Essays*; Hill, *Respect*, pp. 119-151; Christine Korsgaard, *Creating the Kingdom of Ends* (Cambridge: Cambridge University Press, 1996), Ch. 4; Allen Wood, *Kant's Ethical Thought* (Cambridge: Cambridge University Press 1999), Ch. 4. Contrary to Paul Guyer, *Kant and the Experience of Freedom: Essays on Aesthetics and Morality* (Cambridge: Cambridge University Press, 1993), Ch. 4.

³⁷ John Rawls, *A Theory of Justice* (Oxford: Oxford University Press, 1971), p. 11.

outcome of each individuals' exercise of her fundamental authority over herself, that is, their "acceptance."

In his later work, Rawls does develop a different "political not metaphysical" conception of justice. This development can be understood as driven by the need to explain how, given the incredible diversity of opinions about the good, each individual could possibly accept the equal authority of others. This forces Rawls to recognise that *A Theory of Justice* is ambiguous between affirming such equal authority independent of any conception of the good (and thus, basic equality as equal worth), and affirming equal fundamental authority on the basis of a controversial metaphysical claim about the good.

However, the upshot of Rawls' revision is not to drop equal authority, under the liberal conception, in favour of a perfectionism, implicitly incorporating a reliance upon equal worth. Rather, his whole aim is to remove the ambiguity and articulate its alternative, anti-perfectionist, "political" justification.

It is also true in his later work that Rawls does subsume the idea of the original contract itself within the more abstract concept of "public reason." The former is recast merely as a particular but not unique device for effecting the latter.³⁸ However, in so doing, public reason does not thereby demote the liberal conception of equal authority to being merely a derivative, non-basic, concept. Instead, public reason is simply the most abstract statement of the reasoning appropriate to those *with* fundamental authority over themselves, and themselves alone.³⁹ Public reasoning is the form of reasoning *for an individual* that respects their equal authority, in this sense, with *others*.⁴⁰

³⁸ Rawls (2001a), 141.

³⁹ John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993), p. 214. "To begin: in a democratic society public reason is the reason of equal citizens who, as a collective body, exercise final political and coercive power over one another in enacting laws and in amending their constitution."

⁴⁰ John Rawls, *The Law of Peoples; with, The Idea of Public Reason Revisited* (London: Harvard University Press, 2001), p. 172: "A citizen engages in public reason, then, when he or she deliberates within a framework of what he or she sincerely regards as the most reasonable political conception of justice, a conception that expresses political values that others, as free and equal citizens might also reasonably be expected to endorse."

The purpose of public reason is that, by being the reasoning of an equal amongst equals, it ensures that its conclusions, if any, can be the object of the exercise of their equal fundamental authority in the form of an “overlapping consensus.”⁴¹ Such an overlapping consensus, and the basic equality it aims to respect, is the ultimate test of any conception of justice for the later Rawls.

As with his social contract predecessors, Rawls also emphasises the basic freedom of individuals too, perhaps more than their equality. However, once again, for Rawls such freedom is defined in terms of fundamental authority,⁴² and thus follows from the particular (equal) distribution of fundamental authority he holds.

No matter the differences between Rawls and the other anti-perfectionists that come in his wake, they all share this social contract inheritance: (a) the affirmation of basic equality as equal authority at the very foundation of their theories; and, (b) the recognition that the justification of such basic equality cannot, in turn, be grounded upon any deeper perfectionist claim about the good, including therefore the claim that the individual good of all individuals is of “equal worth.”

Charles Larmore, for example, (a) places the concept of “equal respect” at the foundation of his theory, that is, the requirement that “coercive and political principles be justifiable to [each] person.”⁴³ And, (b) recognises that such basic equality’s justification cannot be grounded upon its “value.” If, thereby, we lack *any* justification, then Larmore is “inclined to regard the difficulty... as less a philosophical defect than a sign that this ideal has come to belong to our very sense

⁴¹ *Ibid.*, pp. 172-175.

⁴² Rawls holds that to be free involves three elements. The first is having a “conception of the good” which, in our terms, means having reasons for action. The second is being a “self-authenticating source of valid claims”, which, in our terms, means citizens own fundamental authority may ground claims that they ‘regard as founded on duties and obligations based on their conception of the good.’ The third is being “capable of taking responsibility for [one’s] ends,” Rawls, *Political Liberalism*, pp. 30-5. See also, John Rawls, *Justice as Fairness: A Restatement*, ed. E. Kelly (Cambridge, MA: The Belknap Press of Harvard University Press, 2001), pp. 19-24.

⁴³ Charles Larmore, *The Morals of Modernity* (Cambridge: Cambridge University Press, 1996), p. 137.

of what we are as moral beings ... it defines the framework of what we understand moral argument to be."⁴⁴

Similarly, Thomas Nagel (a) takes his "political liberalism" to simply be an interpretation of "impartiality" itself *qua* some form "equality."⁴⁵ Whilst Nagel does not clearly differentiate the different concepts of equality,⁴⁶ when it comes to defining the concept of equality that is truly *basic*, in the sense defined above, Nagel clearly affirms:

[T]he fundamental moral idea ... that we should not impose arrangements, institutions, or requirements on other people on grounds that they could reasonably reject (where reasonableness is not simply a function of the independent rightness or wrongness of the arrangements in question, but genuinely depends on the point of view of the individual to some extent).⁴⁷

He also expressly holds that (b) the justification of such basic equality cannot "depend on a commitment to comprehensive moral ideals of autonomy and individuality ... The question is whether its claim to be something else has any foundation."⁴⁸

Finally, incorporating both (a) and (b), Jonathon Quong simply states political justification *begins* with our common belief that:

We ... think of ourselves as free and equal from the moral point of view. We all have the same moral status as free persons – as people who are not naturally under the authority of someone else.⁴⁹

⁴⁴ *Ibid.*, p. 150.

⁴⁵ Thomas Nagel, "Moral Conflict and Political Legitimacy." *Philosophy and Public Affairs*. 1987. Vol. 16. pp. 224-215.

⁴⁶ *Ibid.*, p. 215.

⁴⁷ *Ibid.*, p. 221.

⁴⁸ *Ibid.*, p. 222.

⁴⁹ Jonathon Quong, *Liberalism without Perfection* (Oxford: Oxford University Press, 2010), p. 3.

The *Basis* of Basic Equality

So if our equal worth does not justify our equal authority, what does? This is a hard question. However, it is essentially parallel to the problem that proponents of equal worth have been facing for a long time. After all, in their case we might simply ask, if equal authority does not justify our equal worth, what does? The problem in both cases, at heart, is to explain in virtue of *what* particular empirical characteristic do certain beings qualify as equals (and others not) and *why*?

Recent attempts to answer this question in contemporary political philosophy have simply assumed (a) that all political theories share one concept of basic equality; and (b) that this concept is one of 'equal worth'. Hence, they have only really been seeking the basis of equal worth, not equal authority. Finding any plausible answer to this question has proven to be outstandingly elusive. The crux of why is quite simple. Any putatively plausible empirical characteristic that human beings have, they inevitably have to different degrees. It follows, therefore, that if having such a characteristic grounds our worth, then surely having more (or less) of such a characteristic relative to others would justify having more (or less) moral worth relative to others.

Rawls, Jeremy Waldron and others, have argued that this means that we need to define a "range property," that is, a property which draws a line at some level of the property as a qualification for equal worth, but which gives us reason to ignore any differences beyond that level. However, the problem that constantly reoccurs is the failure to define this qualification line in anything but the most arbitrary manner.

I suspect the project of finding the basis of equal worth is bankrupt. However, I will not argue for that here. All I want to suggest is that, looking at the parallel question with respect to equal authority there is reason to be far more optimistic.

First, unlike moral worth (of any level), authority cannot be held by any being that is incapable of giving itself an overriding reason to act by determining that it should so act. Such an ability requires having a "will" as Kant calls it, that is, having "a capacity to determine [oneself] to acting in conformity with the *representation of certain laws*."

And such a capacity can be found only in rational beings.”⁵⁰ Only human beings, as far as we know, have “wills” in this sense.⁵¹ We already have limited the set of *possible* equals to human beings. Animals are no longer possible members of that set.⁵²

Secondly, even if this point is conceded, it may be suggested that amongst those beings who do have the ability to give themselves overriding reasons for action, some are much better than others at so doing. In particular, some individuals may tend to form true beliefs about what they should do, and others not. Undoubtedly, this is true. However, who exactly tends to form true beliefs, and who does not is controversial. Arguably, by definition, those who make “bad decisions” will not believe that they are bad, and reject the claim of anyone else that they are. Finally, no one occupies any neutral, objective point of view, from which to make an *epistemically* authoritative claim. These observations an argument doth not make. However, they at least suggest that different elements would be at play in any attempt to answer the question of the basis of equal authority, as opposed to that of the basis of equal worth. It offers a far more a promising line of inquiry.

Conclusion

To conclude let me quote John Lilburne, the famous English Leveller, and contemporary of Hobbes:

All and every particular and individual man and woman ...
are and were, by nature all equal and alike in power, dignity,
authority, and majesty, none of them having by nature any

⁵⁰ Kant, *Practical Philosophy*, 4:427.

⁵¹ *Ibid.*, 4:412.

⁵² Obviously, as with any putative there will be hard cases. Here, arguably children and those with severe cognitive mental disabilities will not qualify as equals. Whilst rhetorically this may be inconvenient in advocating their cause, it does provide a clear way of understanding our relationship to them. They are not our equals, instead they are our wards and we are their guardians. It is a relationship of responsibility.

authority, dominion, or magisterial power one over or above another.⁵³

Lilburne efficiently sums up the concept of basic equality that became the foundation stone of the social contract tradition. Human beings have equal fundamental authority: each individual has fundamental authority over herself, and herself alone. This basic proposition, given our inevitable disagreements about what to do in society, creates what might be thought of as the basic problem of politics, which is how to act given the clash of such equal authority. Social contract theory, therefore, can be clearly characterised as one plausible answer to that question. Democracy, for example, could be cast as another.

The most important point, however, is that equal authority is a concept of *basic* equality for social contract theorists because they do not claim it is either a conception nor a consequence of equal worth. They do not necessarily deny that all human beings are of equal worth, but rather simply do not rely upon that premise in establishing the basic proposition or in attempting to answer it. It follows that equal worth is not a concept of basic equality that 'unites' all political theories. If anything, equal worth and equal authority mark the stark division between those political theories that begin with a theory of the good and those that begin with a theory of authority. Further, if it turns out that a plausible basis for the latter can be found, and not for the former, then a new strong argument has been found for such political theories.

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⁵³ John Lilburne, "The Free-man's Freedom Vindicated," A.S.P. Woodhouse, ed., *Puritanism and Liberty* (London: J.M. Dent & Sons Ltd., 1938), pp. 317-8.

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Hypothetical Consent and the Bindingness of Obligations

CARL FOX

Introduction

Nobody has ever signed the social contract. It has never been a serious suggestion that any significant number of us even could. It cannot, therefore, ground an obligation to obey the state in actual consent. There is an alternative approach. We can appeal to hypothetical consent, to the consent that people would give under carefully specified circumstances. However, there is a problem. Hypothetical consent does not appear to be consent at all. To borrow G. A. Cohen's neat phrase, it is not worth the paper it is not written on.¹

So where does that leave contract theorists? What is the point of hypothetical consent? Is it merely an attractive way of packaging arguments that stand and fall independently of whether or not we would agree to their conclusions? If that is the case and the ideal of voluntary agreement is not doing any heavy lifting, then is there anything distinctive about a social contract approach at all? In this paper I want to do three things. First, I want to confront Ronald Dworkin's challenge and explain just how grave a threat it poses to the contract tradition.² Second, I will examine Cynthia Stark's solution to the puzzle of what to do with hypothetical consent, which is to understand it, when properly idealised, as the justificatory standard of legitimacy for moral principles.³ If justification is taken as the whole picture it has the perverse effect of undermining the centrality of voluntariness to the social contract. Further, it runs into Elizabeth

¹ G.A. Cohen and Jonathan Wolff, ed., *Lectures on the History of Moral and Political Philosophy* (Princeton, NJ: Princeton University Press, 2014), p. 89.

² Ronald Dworkin, "The Original Position," Norman Daniels, ed., *Reading Rawls* (New York, NY: Basic Books, 1975).

³ Cynthia Stark, "Hypothetical Consent & Justification," *The Journal of Philosophy*, 97, 6 (2000), pp. 313–334.

Anscombe's worry about the bindingness of obligations generally.⁴ We come to my third aim, which is to complete the rehabilitation of hypothetical consent without losing the aim of making everyone party to an agreement, which is, after all, what makes the social contract tradition special.

My suggestion, which I will only be able to sketch here, is that establishing the hypothetical consent of representative parties who model our commitments generates the characteristic binding force of obligation. To reject the conclusions of a contract argument is to reject a picture of how we should think about and understand ourselves. If the picture is accurate then rejecting it comes with a sanction that is sufficient to tie us to the conclusions of the argument and deploys its force in an appropriate way. That sanction is making oneself unintelligible to oneself. Moreover, since this sanction relies on our original commitment to the values and principles that together constitute our identities, it can be voluntarily imposed by the individual agent herself. By focusing on the issue of bindingness, and not just the question of justification, hypothetical consent and voluntariness can be restored to a central role in a contract theory and the theory itself can be shown to be distinctive.

I will begin, in Section II, by discussing Dworkin's "standard indictment" and the problems it poses for the social contract approach.⁵ Section III will explain Stark's solution, while Sections IV and V will outline the two major worries arising from it. In Section VI I will begin to sketch my proposal, which borrows some important elements from the work of Christine Korsgaard.⁶ Section VII will then tie these threads together and argue that hypothetical consent can play a crucial role in a contract argument that cannot be reduced to either illustration or justification. Rather, it can make our own commitments transparent to us and serve, therefore, to deploy the binding force of obligation. A concern for voluntariness should remain a key part of any contract approach because it matters to us that our practical

⁴ G.E.M. Anscombe, "Modern Moral Philosophy," *Philosophy*, 33, 124 (1958), pp. 1-19.

⁵ Stark, "Hypothetical Consent & Justification," p. 317.

⁶ Christine M. Korsgaard, "The Sources of Normativity," Onora O'Neill, ed., *The Sources of Normativity* (Cambridge: Cambridge University Press, 1996).

identities are formed as a response to reasons. These two points will support my contention that there is life in the social contract yet.

The Standard Indictment

As I write this, I need a haircut.⁷ Inertia and the passage of time have, once again, conspired against me. The mop needs to be chopped. Now, let's say that I'm prepared to pay €10 to get it cut. If a proactive barber were to seek me out and offer to cut my hair for €10 I would happily agree. However, just because this is an agreement that I would have made, it does not license a philosophically-minded guerrilla barber to strap me down, do the job, and then demand my €10 afterwards. Regardless of whether it could be established that anybody *would* give their consent to some potential contract or agreement, Dworkin maintains that in the absence of their actual consent, we simply have no permission to enforce such a contract.⁸ Hypothetical consent is no consent at all and, therefore, cannot be used as a substitute for actual consent.

If we accept this, as seems right, then there are two options. One is to accept that hypothetical consent offers nothing more than a useful rhetorical device. It brings home to us in a particularly effective way the persuasiveness of arguments built on premises that we have independent reason to accept, but that is all it does. On this line, John Rawls' original position is the philosophical equivalent of some nice window-dressing.⁹ Its function is to engage the imagination. Once you have drawn down the veil of ignorance, how can you seriously contemplate raising it to allow the excluded considerations back in to deliberations about our fundamental principles of justice?

⁷ By the time you are reading this I may well need another one.

⁸ Dworkin, "The Original Position," pp. 17-21.

⁹ For an account of his idea of the original position see John Rawls, *Justice as Fairness: A Restatement* (Cambridge, MA: Harvard University Press, 2003), pp. 14-18. For some discussion of Rawls' social contract credentials see Jean Hampton, "Contracts and Choices: Does Rawls Have a Social Contract Theory?" *Journal of Philosophy*, LXXVII, 6 (1980), pp. 315-338. Hampton's major objection is that the parties do not agree anything with each other. Here I am more concerned with the question of whether the agreement of the representative parties to the terms of the contract plays any role in our commitment to those same terms.

It is important to appreciate just how disposable hypothetical consent becomes on this picture. It adds precisely nothing to the justification of any principle. A principle of obedience to a suitably just state, for instance, might be supported by arguments from fairness,¹⁰ gratitude,¹¹ samaritanism,¹² or by a pluralistic argument that combines a number of different principles.¹³ That the fiction of our idealised selves or, more correctly, that carefully constructed abstract entities that serve as our representatives would endorse any of these arguments lends no extra weight to the considerations that already count in their favour. Each argument is either compelling on its merits or it is not.

However hard-nosed and sensible this route may seem, it appears to be catastrophic for the social contract tradition. If there never was an agreement, never can be an agreement, and what we would agree to is irrelevant anyway, then it becomes very difficult indeed to see what would make a contract approach distinctive. The conclusions, or indeed the presuppositions, of any argument whatsoever can be presented as a contract to which it would be sensible to assent. Indeed, Rawls suggests this when he discusses utilitarianism as an alternative to justice as fairness.¹⁴ If a contract approach is to offer something of substantive value to political philosophy then I suggest that the ideal of voluntary agreement to the terms of the contract must

¹⁰ See H.L.A. Hart, "Are There Any Natural Rights?" *Philosophical Review*, 64, 2 (1955), pp. 175-191, and John Rawls, "Legal Obligation and the Duty of Fair Play," Sidney Hook, ed., *Law and Philosophy: A Symposium* (New York, NY: New York University Press, 1964).

¹¹ See Plato, "Crito," Edith Hamilton and Huntington Cairns, eds., *Plato: The Collected Dialogues* (Princeton, NJ: Princeton University Press, 2005), and George Klosko, "Political Obligation and Gratitude," *Philosophy and Public Affairs*, 18, 4 (1989), pp. 352-358.

¹² See Christopher H. Wellman, "Liberalism, Samaritanism, and Political Legitimacy," *Philosophy & Public Affairs*, 25 (1996), pp. 211-237, and "Samaritanism and the Duty to Obey the Law," Christopher H. Wellman and A.J. Simmons, eds., *Is There a Duty to Obey the Law?* (Cambridge: Cambridge University Press, 2005).

¹³ See Jonathan Wolff, "Pluralistic Models of Political Obligation," *Philosophica*, 56, 2 (1995), pp. 7-27, and Klosko, *Political Obligations* (Oxford: Oxford University Press, 2010), esp. Ch.5.

¹⁴ See John Rawls, *A Theory of Justice: Revised Edition* (Cambridge, MA: Harvard University Press, 1999), pp. 25-26 & 105-109.

play an ineliminable role in either the justification of principles or in the explanation of their bindingness, the characteristic force of moral obligation.

Another way to understand Dworkin's challenge, then, is to see it as the denial that hypothetical consent can play a role in justifying obligations in the way that actual consent can. When I eventually sign my first contract as a professional footballer with Liverpool, my actual consent will be a necessary part of the justification grounding my obligation to turn up to training every morning. My hypothetical consent cannot do this and so it cannot serve as a substitute for actual consent when actual consent is too difficult to secure. Later, I will explore the idea of bindingness and suggest that this provides a more promising way to understand the significance of hypothetical consent and, by extension, the distinctiveness of a contract approach, but first I must turn to consider how Stark evades Dworkin's standard indictment on the justification route.

Stark's Solution

Stark makes a vital move, and it points the way towards a sophisticated account of the significance of hypothetical consent. She starts by noting that "critics of hypothetical-consent theories are not concerned with the problem of the bindingness of moral rules generally, but rather with the bindingness of those principles to which one might think consent is especially relevant."¹⁵ What she means here is that we think that our actual consent is important for the generation of certain types of obligations, but not others. My agreement is required if I am to be bound to proof-read my friend's paper, but not to my obligation to refrain from murdering people. Critics of hypothetical consent theories generally address their concerns to obligations where it seems that actual consent is particularly relevant and they accuse their opponents of trying to bind people in these instances with no consent at all.

Stark goes on to draw an intriguing distinction between political and moral legitimacy. She contends that contract theories can be

¹⁵ Stark, "Hypothetical Consent & Justification," p. 318.

divided into two categories based on a corresponding division of labour. The position that she calls 'moral contractarianism' is concerned with the justification of our basic moral principles.¹⁶ It is employed to identify our commitment to principles that have nothing to do with our actual consent. As such, the use of hypothetical consent in their justification is not intended to mimic the operation of actual consent and so these theories are not troubled by the standard indictment.

She makes the case that the use of hypothetical consent in moral contractarianism is intended to give us reasons for abiding by moral rules, such as the principle that murder is wrong, and it is inappropriate to adopt the same approach for properly political principles. Good reasons do not bind us when consent is especially relevant because in these situations the agent possesses the normative power required to establish an obligation. It is only by giving my actual consent that I can generate an obligation to proof read a friend's paper or pick her up from the airport. If my actual agreement is what is required to ground an obligation to pay taxes towards the upkeep of my state, then the fact that I would agree to pay those taxes cannot generate an obligation to cough up the cash. Political contractarianism, Stark argues, tries to accomplish an impossible task by grounding obligations to which consent is relevant in hypothetical consent and is subsequently defeated by the standard indictment.

Stark groups Rawls and Thomas Nagel under the moral contractarian banner and then makes a neat move on their behalf to establish the coercive authority that eludes the political contractarian.¹⁷ Her solution is that they justify the enforcement of apparently political principles by virtue of a higher-order moral principle. The natural

¹⁶ Stark intends to cover contract theories based on self-interest as well as the 'contractualist' theories that introduce some moral content from the start. For a discussion of the applicability and utility of the 'contractarian' and 'contractualist' labels see Onora O'Neill, "Constructivism vs. Contractualism," *Ratio (new series)* XVI, 4 (2003b), pp. 319-331. For a helpful discussion of how contract theory intersects with 'constructivism' in all of its many forms, i.e. political, moral, and metaethical, see Mark Timmons, "The Limits of Moral Constructivism," *Ratio (new series)*, XIV, 4 (2003), pp. 391-423.

¹⁷ Stark, "Hypothetical Consent & Justification," p. 333.

duty of justice to obey and support just states that Rawls¹⁸ identifies is backed up by his claim that it “would be chosen in the original position; it is a moral principle, as opposed to a political principle, justified by means of hypothetical consent.”¹⁹ What this means is that Rawls does not need any actual consent to justify a duty for individuals to obey and support just states.²⁰ Thus, political obligations turn out to be more like our obligation to refrain from murder than our obligations to pick up our friends from the airport. Even though we tend to think that our participation is relevant to our political obligations, our moral duties in fact supersede any requirement for actual consent so establishing hypothetical consent can ground the authority of just states to tell us what to do. If there was no duty to obey just states then political authority would depend on consent, but this is precisely why Rawls sets the natural duty of justice over the duty of fair play. The latter cannot adequately support just political authorities because it is ultimately grounded in the free actions of individuals.²¹

Since hypothetical consent is not intended to replace actual consent it does not operate like a normative power that brings an obligation into an existence like a speech-act might do with a promise. Rather, the idea is that what it is for something to be a basic moral obligation just is for it to be a principle that suitably described representative parties would agree to in the initial choice situation. Stark sidesteps Dworkin’s standard indictment by arguing that hypothetical consent provides the appropriate standard of justification for fundamental moral principles, to which actual consent is not relevant. I do not wish to take issue with this argument.²² The problems that I will raise in the next sections arise if we take this to be the whole story

¹⁸ Rawls, *A Theory of Justice*, p.99.

¹⁹ Stark, “Hypothetical Consent & Justification,” p. 331.

²⁰ In this paper I will use ‘duty’ and ‘obligation’ interchangeably. Rawls, of course, does not but I believe that Richard B. Brandt, “The Concepts of Obligation and Duty,” *Mind*, 73 (1964), pp. 374-93, It was right when he argued that almost everyone else treats them as synonyms. See also Peter M.S. Hacker, “Sanction Theories of Duty,” A.W.B. Simpson, ed., *Oxford Essays in Jurisprudence* (Oxford: Clarendon Press, 1973), pp. 131-170, who traces this trend as far back as Bentham.

²¹ See Rawls, *A Theory of Justice*, pp. 330-331.

²² For a contrary perspective on how we can ground political obligations see A.J. Simmons, “Justification & Legitimacy,” *Ethics*, 109 (1999), pp. 739-771.

about hypothetical consent and if we think, as Stark apparently does, that we need say nothing more about what makes our moral principles binding upon us.

Voluntariness

Justifying principles by showing that idealised negotiators under certain, carefully specified, conditions would agree to them shows that they are legitimate in the sense that we have sufficient reason to comply with them. As a method it also restores hypothetical consent to a prominent role in a certain kind of contract theory, which is to say one that adopts this view about the construction of moral principles. So far, so good we might think. However, this turns out to be a costly move for a contract theorist. For one thing, it looks like Stark is right to insist that the traditional deference paid to the ideal of voluntariness should be dropped: “the fact that the source of authority of political principles is, in hypothetical-consent theory, located in citizens’ rational willing does not make citizens’ compliance to those principles voluntary, if those citizens are not in fact willing to obey and are, moreover, forced to obey by an external authority.”²³ Rawls himself appears to admit as much when he says that “each is bound irrespective of his voluntary acts, performative or otherwise.”²⁴

It is still important that individuals retain control over many aspects of their lives but on this scheme “questions of actual consent arise only as internal questions of liberty, that is, as questions about what options acceptable institutions must leave open to those living under them.”²⁵ The question is whether it still makes sense for Nagel to insist that “the search for legitimacy can be thought of as an attempt to realize some of the values of voluntary participation, in a system of institutions that is unavoidably compulsory.”²⁶

²³ Stark, “Hypothetical Consent & Justification,” p. 334.

²⁴ Rawls, *A Theory of Justice*, p. 294.

²⁵ T. M. Scanlon, “Nozick on Rights, Liberty, and Property,” *Philosophy & Public Affairs*, 6, 1 (1976), Autumn, p. 17.

²⁶ Thomas Nagel, *Equality and Partiality* (Oxford: Oxford University Press, 1991), p. 36. For a discussion of the veracity of Nagel’s commitment to ‘voluntariness’

Serena Olsaretti argues that a choice is voluntary “if and only if it is not made *because* there is no acceptable alternative to it.”²⁷ The core of Olsaretti’s account is the idea that we must look to an agent’s motivations to understand the nature of her relationship to her choices: “it is agents’ attitudes towards the options they face – rather than the objective nature of those options, independently of the agents’ attitudes – that determine whether or not they act voluntarily.”²⁸ I think this is right. Although I cannot fully defend Olsaretti’s account here, it suggests that Stark is correct to ditch the rhetoric of voluntariness since her moral contractarianism does not rely on the attitudes and choices of individuals, focusing instead on justifying principles to the appropriate standard.

Since nobody ever actually agrees to the principles established via hypothetical consent, why are Rawls and Nagel so keen to push the notion that their theories come close to realising some of the values of voluntary participation? I think this can be explained partly by the residual pull of the old actual consent model. It is an elegant model and it would be very nice if our political obligations were not forced upon us, but instead the object of a voluntary choice. However, it is mostly their way of explaining a broadly Kantian picture of the relationship between freedom and obligation on which it is our own rational natures that bind us to our obligations. For instance, Rawls states that: “a society satisfying the principles of justice comes as close as a society can to being a voluntary scheme, for it meets the principles which free and equal persons would assent to under circumstances that are fair. In this sense its members are autonomous and the obligations they recognize are self-imposed.”²⁹ We have seen that actual consent cannot be approximated in any significant way when it

see Simmons, “Liberal Impartiality and Political Legitimacy,” *Philosophical Books*, 34, 4 (1993), pp. 220-222.

²⁷ Serena Olsaretti, *Liberty, Desert, and the Market* (Cambridge: Cambridge University Press, 2004), p. 139.

²⁸ *Ibid.*, p.154. Of course, “an account of voluntariness must avoid both rendering claims of force and of voluntariness completely subjective.” *Ibid.*, p. 153. Olsaretti holds that unacceptability can be determined by using an objective standard of well-being, but that is for ordinary choices rather than the issues to be decided by hypothetical consent.

²⁹ Rawls, *A Theory of Justice*, p.12.

is required. What might it mean to imply that it matters that we could come closer to realising a voluntary ideal? Sections VI and VII will argue that there can be a genuinely voluntary element in a contract theory. The next section, however, will take a step sideways to explore a serious objection to a Kantian theory of the force of obligation.

Bindingness

Stark claims that “[i]t is self-contradictory to claim that we are not bound to abide by legitimate moral principles. The very fact of their legitimacy binds us.”³⁰ Insofar as she is picking up the baton from Rawls and Nagel, and it seems clear that she is, then things are a little bit more complicated. She is, in fact, tacitly relying on a Kantian story about what makes it the case that we *have* to perform certain actions and forego others. This concerns, if you like, the ‘moral must’, the insistent nature of obligation. And there is a problem here because the Kantian story has its detractors, including Anscombe’s influential objection to a Kantian theory of moral obligation.

Anscombe flatly rejects the idea that an idealised account of a rational self can stand in the appropriate relationship to the whole person to explain how that person is under an obligation to do or to refrain from doing something. This is because you cannot plausibly serve as your own commander. If I decide to abstain from alcohol for the month of January then even though I might insist to myself that I will follow through on my solemn vow it is always within my power to change my mind and let myself off the hook. How, then, can it be said that I am bound to stick to the rule that I have made for myself? There is no rational self, distinct from the lazy, selfish, sensual self. There is only the whole person, and she can surely not command herself.

There is a glimmer of hope for the contract theorist here because, on the Rawlsian scheme anyway, the representative parties are not special parts of ourselves. Rawls takes great pains to clarify that the representative parties are theoretical constructs.³¹ However it is, in the end, only a glimmer because although Anscombe’s particular object-

³⁰ Stark, “Hypothetical Consent & Justification,” p. 324.

³¹ See Rawls, *Justice as Fairness: A Restatement*, p. 80.

tion to self-legislation does not directly apply, it is devastating nonetheless. If the binding force of obligation is not generated by the relationship between our two selves, i.e. nobody serves as commander, then where does it come from? In what sense do we *have* to conform to the decisions of the representative parties?

In the next section I will begin to develop a sanction theory of obligation that explains the binding force of obligation in terms of a very particular cost. This cost will turn out to be the unravelling of an individual's conception of herself. On my account this leads to an important role for hypothetical consent in a social contract argument. It can be used to extend and expand a practical identity from certain core principles. If an agent is committed to the core principles underpinning the argument, and would indeed have consented to the more complete picture that the theory builds up, then the sanction of unintelligibility ties that agent to the conclusion of the argument as well. In response to Anscombe, I will argue that although an agent cannot serve as her own commander, she can police her commitments and exact a penalty in the event of a breach.

Sanctions and Practical Identity

On the subject of what makes our obligations stick, John Stuart Mill said that "we do not call anything wrong, unless we mean to imply that a person ought to be punished in some way or other for doing it; if not by law, by the opinion of his fellow-creatures; if not by opinion, by the reproaches of his own conscience ... Duty is a thing which may be *exacted* from a person as one exacts a debt."³² Mill, therefore, relies on a sanction to explain the bindingness of our moral commitments. My aim in this section is to establish that we can be tied to the hypothetical commitments made by the representative parties via a very particular sanction. The suggestion is that we police the conclusions of a distinctive contract argument ourselves, on pain of unravelling our self-image as reason-responsive agents committed to a hierarchy of principles

³² John Stuart Mill, *Utilitarianism* (Glasgow: Collins, 1979), pp. 303-304.

We understand and value ourselves under certain descriptions. I am, for example, an Irishman, a son, a philosopher, and so on. I am also a fan of Liverpool Football Club. Being a Liverpool fan means following their results, cheering them on when they play, slagging off rivals such as Everton and Manchester United, and getting reluctantly drawn into the ill-advised excitement around increasingly fanciful transfer gossip. Failing to acknowledge that I have reasons to behave in these ways would be to fail to be a fan. It would be to shut the door on one particular way of being that can give meaning to a person's life.

To borrow another phrase, this time from Korsgaard, these descriptions are particular 'practical identities'. To be self-conscious is, for Korsgaard, to be aware of yourself as something which is not reducible to your desires or impressions. "When you deliberate, it is as if there were something over and above all of your desires, something which is *you*, and which *chooses* which desire to act on."³³ To act on a principle is, therefore, to define this thing that is you. As we act under principles we gradually form identities, coming to think of ourselves in terms of those principles. Identities can be more or less complex. National identity, for example, is much messier than identifying as the kind of person who helps the elderly across the road. Regardless, each identity comes with its own set of ends and reasons, and thus, crucially for our purposes, commitments. "The conception of one's identity ... is better understood as a description under which you value yourself, a description under which you find your life to be worth living and your actions to be worth undertaking."³⁴ But even if we buy this story about what it is to have a reason as a bearer of a particular identity, how are we to understand the generation of bindingness via this notion of practical identity? Rather than endorsement, Korsgaard points us to rejection, in the sense that we are bound to do something when to do anything else would be abandon your identity and that, she tells us, "is to be for all practical purposes dead or worse than dead."³⁵ This is a pretty severe cost to bear, which is why we *must* reject actions that will prompt it.

³³ Korsgaard, "The Sources of Normativity," p. 100.

³⁴ *Ibid.*, p. 101.

³⁵ *Ibid.*, p. 102.

Now, this may seem hyperbolic. How could a loss of identity be as bad as, or even worse than, death? Except in cases where one comes to see that some description no longer fits, as we transition from childhood to adulthood for instance, or is misguided, as a cult member might feel after rejoining the wider community, it is a very serious thing to lose one's identity because it threatens one's integrity. It is a sundering from the self and the possibility of living a life that coheres with what one takes to matter. Such a life would be devoid of direction and, for that reason, lasting satisfaction. Faced with a choice between integrity and death many of us might hope to have the courage to choose the former.³⁶

Some parts of our identities are deeper than others so I am obliged to save the drowning child, even if he is wearing a United jersey. Regulative priority is distinct from how much a particular identity may matter to a person. A hardcore fan might identify much more intensely with their responsibilities under that description but insofar as they also self-identify as a moral agent then that identity can play an administrative role.³⁷

On this line, the characteristic binding force of obligation comes from our attachment to our practical identities and the cost that follows for us when those identities are undermined or even shattered. Some actions have unacceptable consequences and that explains the sense in which we *must* reject them. However, Korsgaard thinks that in order to get characteristically moral obligations you need to add some necessity to the mix so that, in order to be bound to do or to

³⁶ For a helpful discussion of the virtue of integrity see John Cottingham, "Integrity and Fragmentation," *Journal of Applied Philosophy*, 27, 1 (2009), pp. 2-14, where he argues for the importance of self-awareness and self-discovery to the living of a worthwhile life.

³⁷ Although limitations of space prevent me from exploring this avenue here, a helpful way to explain this is by using Raz's notion of exclusionary reasons. That a die-hard fan will be late for kick-off is excluded as a relevant consideration when there is a child drowning nearby. However, a fan's moral reasons are not silenced by the demands of following a team. Someone can care an awful lot about football and not all that much about morality, but if she still identifies as a moral person then this identity will play a regulative role. See Joseph Raz, *Practical Reasons and Norms* (Princeton, NJ: Princeton University Press, 1990), p. 38, for his own exposition of the idea of exclusionary reasons.

refrain from doing anything at all, you have to first value yourself as a special kind of rational agent and that is something that we cannot help but value. Now, rather than pursuing necessity in order to ground a categorical morality, I am going to stick with sanctions and focus on the unacceptability of a life in which we do not order our actions by forming and identifying with a hierarchy of principles. I submit that there is an interest that most of us have in living what I shall call an intelligible life. This is something that matters profoundly to most of us, and it would be a very different mode of existence in which I did not care about being able to tell a story about why I have done the things that I have done.³⁸ On my view, a will that determines itself in individual, disconnected choices is not necessarily an irrational one. It is, however, an unintelligible one. It is not a will about which you can tell a unifying story. It is not, in short, a will that has an identity. Even a will that has decided to live according to a principle of making disconnected choices has determined itself by that principle.

This is a more modest version of the Kantian claim that free agents must formulate maxims for action.³⁹ An agent is not intelligible to us as a character if he does not deal with like cases in a like fashion. Put another way, although it is possible to act for reasons without acting in a consistent or coherent way, this is incompatible with being any particular sort of person. In order to forge an identity that persists over time you must commit not only to some particular principles, but to acting under principles in general. This may not be the principle that we care about the most strongly, or spend the most time thinking about, but it is a deep part of our identities in the sense that it takes regulative priority over the other principles that define us.

³⁸ It is not impossible to imagine a character who does not care about such things as having plans or organising her life around certain principles, projects, and ends. However, if such a person did exist, she would be unreliable in the extreme and, it is worth pointing out, would be unable to form the kinds of lasting interpersonal relationships that contribute so profoundly to the value of most of our lives.

³⁹ My view owes much to Kant but is not a Kantian view. For the perils of carelessly appropriating Kant's ideas and legacy see O'Neill, "Autonomy: The Emperor's New Clothes," *Aristotelian Society Supplementary Volume*, 77, 1 (2003a), pp. 1-20.

My account of the bindingness of obligations, therefore, does not capture everyone unconditionally and it relies on the importance that individuals themselves place on living a certain kind of life. It relies, therefore, on an element of self-interest. What may seem at first to be a source of weakness turns out to be a source of flexibility and strength. A small dose of self-interest emerges as the key to understanding how we can do the right thing for the right reasons even though the weight of duty presses down upon us, and it recedes into the background when we do our duty cheerfully, when we achieve a state of grace.

The concern to preserve one's identity takes a very particular form, which can be described in terms of attention-directedness.⁴⁰ Even if we accept that some principles can be empowered to exclude various considerations as legitimate reasons for action, moral deliberation is often a messy process and all manner of possible motivations may flit in and out. It is too much to expect that the existence of a duty precludes contemplation of either inappropriate considerations or impermissible courses of action. What really matters is that the content of an obligation typically dominates the thinking of the bearer of that obligation. Her attention is directed insistently towards the right thing to do.

Is this not exactly what it feels like to be under an obligation? Wouldn't it be easy to skive off work, or keep the wallet you found, or generally make an exception of yourself if it was not for the little voice that leads you back, time and again, to the straight and narrow? If you are like me then you will be familiar with the power of

⁴⁰ This is a term that Scanlon introduces to explain his thought that desires are really a particular species of reason. I do not want to go anywhere near that territory here, but the term perfectly captures what I want to communicate so permit me a very brief digression. Scanlon, *What We Owe to Each Other* (Cambridge, MA: Harvard University Press, 1998), p. 39, says: "A person has a desire in the directed-attention sense that P if the thought of P keeps occurring to him in a favorable light, that is to say, if the person's attention is directed insistently toward considerations that present themselves as counting in favour of P." A desire, for Scanlon, is really just the feeling of being preoccupied with certain reasons that count in favour of a particular action. The pleasing taste of a cold beer on a sunny day for example, or how it would relax you from the mental stress of philosophising.

rationalisation when a bad, but tempting, course of action presents itself. Didn't you work extra hard yesterday? The owner of the wallet would be lucky even to get just his cards back, and wouldn't it be fair to get a reward anyway? But generally this is when what we call conscience digs in its heels and we are led again and again to the 'right' action and the reasons that support it.

The prospect of losing one's identity, of being nobody is a frightening one, but it is not fear that motivates us to preserve and strengthen our identities. That fear is only the negative side of the positive drive to be somebody, and what it primarily does is sharpen our focus on the identities that we want to have for the sake of the reasons that count in their favour. The choice to not be nobody is the very same as the choice to *be* somebody. But that choice can only have meaningful content because of the myriad choices involved in selecting and endorsing the more particular principles that coalesce into a substantial identity. Were I to violate my obligations then I would most likely suffer the consequences, but that is not to say that I will act only out of fear of bearing that cost. Since the question that arises concerns not only what I should do, but also how I will understand myself, the possibility of unspooling my identity leads me to attend to the things that I believe and the features of the kind of person that I want to be. Now, the question is how this can be deployed to assist the contract tradition.

Voluntariness and Hypothetical Consent

Voluntary agency, in the form of actual consent, is relevant to some of our obligations because it is important to us to have the normative power to assume various kinds of responsibilities in our personal relationships. It is relevant to others because we think that agents should sometimes be insulated from the possibility of external control. It is a mistake to think that actual consent is relevant to the generation of a duty of obedience to a suitably just state in either of these ways. There are compelling reasons for most of us to obey just states. On my view, however, our commitments to our practical identities can be voluntary and this is how the concern for voluntariness that permeates the social contract tradition can be preserved.

The bindingness of our political obligations can, therefore, bottom out in voluntary commitment. It is a further question why it matters that these commitments are voluntary. I will argue that it is because identifying with principles is an important method of responding to reasons that it matters that we voluntarily bind ourselves to our political obligations. The significance of hypothetical consent will be located in the connection it establishes between the conclusions of a contract argument and our own practical identities. This moves hypothetical consent back to centre-stage because arguments that deploy hypothetical consent invite us to impose a sanction if we reject their conclusions.

If I am right that the binding force of obligation is constituted by a sanction, then we must accept that for a principle to manifest as an obligation it must be, at least in a local sense, unacceptable not to honour it. What may be voluntary, though, is one's original commitment to the principle under which the particular obligation falls. That principle can be endorsed because of the considerations that count in its favour; because of the reasons as they appear to you. This explains something quite familiar about our responses to situations in which people do what they ought to do. It is more natural to compliment someone on what a good person they are after they do the right thing than it is to compliment them on doing a good thing.⁴¹ Perhaps we may do both, but it is much higher praise to laud someone's character than to extol an act that they really ought to have performed anyway.

Consider, even if it seems a bit of a stretch, goalkeepers. The best goalkeepers perform the ostensibly straightforward tasks with a minimum of fuss. When a goalkeeper efficiently and competently makes a save that we would expect him to make we do not praise him directly for the save. Rather, we praise him for being solid and dependable, for being the kind of goalkeeper who does at least what is expected of him. Not making the save would be unacceptable, so in a sense it is no big deal that he made it. What is a big deal, however,

⁴¹ See Friedrich Schiller, "On Grace and Dignity," *Schiller's 'On Grace and Dignity' in its Cultural Context: Essays and a New Translation*, J.V. Curran and C. Fricker, eds. (New York, NY: Camden House, 2005), p. 152, on this point: "For this reason the actions of a beautiful soul are not themselves ethical, but the character as a whole is so."

is reaching a level of performance where we can put the proverbial house on him.

What ultimately matters here is how a person relates to her commitments and whether they form part of her identity because of how she acknowledges the reasons that count in their favour. Insofar as she is persuaded that a principle is a good one then she positively embraces it and, crucially, understands herself as so constrained. As Olsaretti says: "so long as one option is acceptable and is one which the agent very much likes, the absence of an acceptable alternative may not be what motivates the agent."⁴² It may, for instance, seem unacceptable not to be committed to a principle that forbids cold-blooded murder, but I submit that it is possible for us to adopt principles for behaviour on the basis of their, for want of a better word, attractiveness, which follows from their being sufficiently justified. As such, the commitment can be voluntary. The sanction, which we would exact from ourselves, of undermining one's practical identity explains the unacceptability of violating those principles that we incorporate into our practical identities. However, if the original commitment is voluntary then the imposition of the sanction is voluntary too.⁴³

I have said that a concern for voluntariness is an important part of the social contract tradition, but why should this be so? Why does voluntariness matter? Indeed, on the view that Stark takes about the moral foundations of the social contract, a general concern for voluntariness is irrelevant to the operation of hypothetical consent and the justification of moral principles. However, the key to appreciating the potential of a reimagined contract approach is understanding how an individual can be reconciled to principles that it would make sense for her to endorse. It matters, then, that she commits to those principles of her own accord.

This is for two reasons. First, it is only by incorporating principles into one's own self-conception that one can be tangibly bound to them in the appropriate way, as discussed above. Conscience is an internal

⁴² Olsaretti, *Liberty, Desert, and the Market*, p. 155.

⁴³ Of course, not all elements of our practical identities may be voluntarily adopted or retrospectively endorsed such that they become voluntary. However, this discussion would take me too far afield here and must wait for another time.

mechanism. And, second, we become more autonomous as more of our commitments are voluntarily selected or retrospectively endorsed. In this way we can gradually construct an intelligible identity by responding to reasons in a consistent and ordered fashion.

Although it should remain up to individuals to embrace an identity that is compatible with their political responsibilities, contract arguments are uniquely equipped to deploy the characteristic normative force of obligation because the prospective parties to the agreement model a commitment to basic principles with which most of us already identify. As the theory unfolds and new principles are derived, we can imagine the bare identities of the artificial parties being fleshed out. This provides a template through which we can understand our own self-conceptions and give a complete picture of political obligation: the just state embraced by a conscientious citizen.

What all of this means is that *we tie ourselves* to our moral obligations by endorsing them as exclusionary reasons and staking our self-understanding on treating them as such. What commitments can be best justified is a related, but distinct element of a complete theory of obligation. Hypothetical consent is not, as we established earlier, actual consent, but my hypothetical consent to some principle is enough to make me feel that I *have* to endorse it. I would have agreed, presumably, on account of the arrangement of my various beliefs and values. Once this is made transparent to me, and on the assumption that nothing happens in the meantime to change the balance of my reasons, then it would be very odd indeed to withhold my actual assent. More importantly, if the strength of my commitments is sufficient to generate my hypothetical consent then in the right circumstances it should be enough to generate my actual consent. If it did not then I would have to have a different relationship to my own commitments. Failing to give that consent would, therefore, undermine my self-understanding in exactly the way I have suggested so there is a cost attached to rejecting the salience of what I would have done. My actual commitments can thus bind me to my hypothetical consent. This is not, I think, an insignificant result.

Applying this insight to social contract theory opens up a new way to understand the force of hypothetical consent that is consistent with the deference traditionally paid to the ideal of voluntariness, an

ideal that would otherwise be dropped. Insofar as we can construct (or retrospectively endorse) our identities it is critical to consider how we relate to them. Since this kind of commitment is not always undertaken because there is no acceptable alternative I conclude that it can be voluntary.

Conclusion

For Rousseau, the question that prompts the social contract tradition is how to make coercive power legitimate.⁴⁴ It is natural to see the task here as figuring out the moral principles that should underpin a state and then designing a state to meet that standard. However, I want to propose a complementary approach. In offering a view about the moral foundations of the coercive state, a social contract theory has to do something else; it has to decide on a view of human beings. What matters to them and how do they work? The trick is not to envisage a society in which there are no chains, nor is it just to justify the chains that do exist. We must show how those chains can be borne.

Jean Hampton understands the classic social contract theories as attempts to provide a rational foundation for the state, which requires one if it is to be able to justify its existence to its citizens who must continue to support and maintain it. She holds that "the social contract argument is designed as a certain kind of *rational reconstruction* of the state ... the social contract theorist figuratively takes the state apart and (rationally) puts it back together again in order to explain the structure of any *existing* state and to determine whether or not it is justified."⁴⁵ Hampton comes close, but ultimately fails to see that a social contract theory is not limited to the rational reconstruction of state, but can also attempt the rational reconstruction of the individual who is to be a citizen.⁴⁶

⁴⁴ Jean-Jacques Rousseau, *The Social Contract* (London: Penguin, 1986).

⁴⁵ Hampton, "Contracts and Choices: Does Rawls Have a Social Contract Theory?," p. 269.

⁴⁶ *Ibid.*, p. 273: "It is because contractarians' conceptions of the person differ that their descriptions the state of nature differ, and this partially explains why the

So, just as the state is taken apart and put back together again, a template for the prospective citizen can be built up from the basic principles that the theory takes as its starting point, be they respect for persons, enlightened self-interest, or anything else. This means that the parties and the hierarchy of their eventual commitments can serve as a model⁴⁷ that those of us who subscribe to the starting principles have reason to consider very carefully as an ideal for approximation.

Our discussion of obligation has shown that its binding force takes the form of a sanction that individuals must ultimately exact from themselves. They do this by electing to understand themselves under particular practical identities which are constituted by a commitment to a hierarchy of principles. I propose that social contract theory could be partly, but significantly, understood in terms of the development of just such an identity – a contracting identity.

Within this framework, hypothetical consent can perform an indispensable theoretical and political function by extending the practical identities of prospective citizens from principles that they already endorse to further principles and ends that can be shown to follow from their original commitments. I submit, therefore, that the value of hypothetical consent is neither merely illustrative nor purely justificatory.

This paper has moved far too quickly, but I hope it has provided some reason for thinking that there is life in the social contract yet. More particularly, my aim has been to show that hypothetical consent can be picked up, dusted off, and put to, if you will pardon a parting pun, actual use. We are interested in justifying moral and political principles as reasoning beings. Hypothetical consent arguments are not purely illustrative because they can tell us something that will matter to us in this one critical regard: how we must relate to their conclusions if we are to remain intelligible to ourselves.

reasons they invoke to justify the state's creation differ, and why the structures of the states they advocate differ."

⁴⁷ Rawls, *A Theory of Justice*, p. 413, grants the importance of role models in the context of his three stages of moral psychology, however, he does not seem to realise that, in many ways, those of us to whom his principles of justice are really addressed could use role models of our own.

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Part III
Contractualism of Rawls and
Jean-Jacques Rousseau

On the (Historical) Grounds of the Original Position

MICHELE BOCCHIOLA

Introduction

Rawls famously argues that first principles of justice are justified when they can be accounted for as the outcome of the so-called *original position*, a hypothetical agreement among idealized individuals behind a veil of ignorance that rules out morally irrelevant considerations.¹ In *A Theory of Justice*, the original position is characterized as a generalized and highly abstract version of social contract theory – the view that principles of justice are justified when all individuals in ideal conditions agree on them.² Later on, since the 1980's *Dewey Lectures*,³ Rawls describes the original position as a procedure of construction – the view that objectively justified principles of justice are the outcome of a suitably specified procedure. What is the difference between the earlier contractualist interpretation of the original position, and its later constructivist understanding? In this chapter, I

¹ Rawls introduces the idea of the original position in *A Theory of Justice* (Cambridge, MA: Harvard University Press 1999), § 4 and §§20-30. It should be noted that the original position is one of Rawls' justificatory arguments; the others are the method of reflecting equilibrium and the idea of public reason. In this essay, I do not discuss all of them, but focus only on the idea of the original position. As I shall explain throughout the chapter, my aim is to understand the fundamental structure of the original position and the different claims it makes. Also, I do not take a position on the relations between the three arguments. For an overall view, see T. Scanlon, "Rawls on Justification," S. Freeman, ed., *The Cambridge Companion to Rawls* (Cambridge: Cambridge University Press 2002), pp. 139-167.

² J. Rawls, *A Theory of Justice*, p. 10.

³ J. Rawls, "Kantian Constructivism in Moral Theory: The *Dewey Lectures* 1980," *Journal of Philosophy* 77 (1980), pp. 515-72, reprinted as "Kantian Constructivism in Moral Theory," J. Rawls, *Collected Papers*, S. Freeman, ed. (Cambridge, MA: Harvard University Press 1999), pp. 303-358. The original position is characterized as a 'political' form of constructivism in J. Rawls, *Political Liberalism* (New York: Columbia University Press 1996), Lecture III, pp. 89-130.

try to address this question by disentangling the contractualist elements from the constructivist features of the original position, explaining how, and to what extent, contractualism and constructivism differ in Rawls' work and, more generally, in moral and political theorizing.

According to what we can call the 'standard view' in the Rawlsian scholarship, the original position admits of a contractualist and a constructivist reading, that Rawls merges into a single justificatory strategy.⁴ Thus, contractualism and constructivism might not be irreconcilable in Rawls' theory. However, in this way, it is unclear how each strand specifically contributes to the overall argument. To see this, we have to separate the two readings of the original position. Once separated, it shall be clear that the original position as a contractualist view makes weaker claims about the justification of principles of justice than the original position on the constructivist interpretation. As it shall turn out, on the constructivist interpretation the original position makes too strong a claim to be consistent with Rawls' overall view.

The difference between a contractualist and a constructivist version of the original position can be investigated through its possible (historical) grounds. In the *Lectures on the History of Political Philosophy*, Rawls interprets Locke's political theory as a social contract view – a normative theory about the justification of principles of justice: Locke believes that political authority can be established by a contract but its ultimate justification depends on the Fundamental Law of Nature.⁵ In the *Lectures on the History of Moral Philosophy*, Rawls reads Kant's ethics as a form of moral constructivism – a view about the nature and source of value: Kant claims that the source of validity of norms regulating our behaviors derives from the idea of autonomy, namely, the capacity for a moral agent to give laws to oneself – and they are not grounded on an independent order of moral facts and

⁴ See, for instance, S. Freeman, "The Burdens of Public Justification: Constructivism, Contractualism, and Publicity," *Politics, Philosophy and Economics*, Vol. 2, pp. 5-43.

⁵ J. Rawls, *Lectures on the History of Political Philosophy*, S. Freeman, ed. (Cambridge, MA: Harvard University Press 2007), pp. 103-155.

truths.⁶ As I shall try to show, Rawls reads Locke's view as a form 'contractualism without construction' and Kant's view as a version of 'constructivism without contract.'⁷

My aim in this chapter is neither a historical reconstruction of Locke's and Kant's views, nor an attempt to find out what Locke and Kant could have said about the contractualism/constructivism distinction. My purpose is conceptual and not interpretative: exploring the (historical) grounds of the original position could help us to appreciate the distinction between contractualism and constructivism in Rawls' theory, and more generally in moral and political philosophy. Hence the term 'historical' can remain between parentheses in the present chapter.

The Idea of Contract and Construction

In the contemporary debate, contractualism and constructivism are often considered similar or interchangeable views. Onora Sylvia O'Neill, for example, claims that contractualism and constructivism are "not wholly different" and "certainly not incompatible:"⁸ both theories account for the justification of principles appealing to the idea of hypothetical agreement, choice or deliberation among idealized individuals in appropriate circumstances. Thus, a "neat separation" cannot be found.⁹ The difference seems to consist merely in the fact that "contractualists ground ethical and political justification in *agreement* of some sort whereas constructivists ground them in some

⁶ J. Rawls, *Lectures on the History of Moral Philosophy*, B. Herman, ed. (Cambridge, MA: Harvard University Press 2000), pp. 143-325, especially §6, pp. 235-252. On Rawls' interpretation of Kant see also J. Rawls, "Themes in Kant's Moral Philosophy," *Collected Papers*, pp. 497-528.

⁷ I take this point from Freeman, who reads Locke as a "non-constructivist contractarian" (S. Freeman, *Rawls*, London: Routledge 2007: 292, 506 fn. 8) and Kant as a "non-contractarian constructivist," *Ibid.*, p. 293; S. Freeman, "The Burdens of Public Justification," p. 8. Freeman does not elaborate on these interpretations, and he would probably disagree with the conclusions I draw from the two possible readings of Rawls' original position.

⁸ O. O'Neill, "Constructivism vs. Contractualism," *Ratio (New Series)*, Vol. XVI, n. 4 (2003), pp. 319-331.

⁹ *Ibid.*

conception of reason.”¹⁰ If so, contractualism and constructivism are two interwoven thrusts of the same argument: “agreement may provide a basis for reasons, and reasoning a way of achieving agreement.”¹¹

However, once we clarify the kinds of claim that each theory makes, contractualism and constructivism turn out quite different, notwithstanding the apparent similarities. One way to illustrate the difference is to focus on the source of *ultima facie* or conclusive reasons – that is, the reasons that provide full justification for principles and judgments.

Traditional social contract theorists justify political power by imagining what the society could be like if there were not these political obligations. This is meant to prove that it is better, or more rational, to have principles correcting the failures of individual rationality at the collective level in a perfect state of freedom. In a similar way, some contemporary contractualists account for the rational desirability of political institutions by asking what kind of principles there could be, had everybody to agree on them. On this view, a contract is conceived of as a device working out principles that are, or could be, acceptable (or at least, not reasonably rejectable) to all individuals seen as free and equal cooperative members of a society.¹²

More specifically, social contract theories provide a normative framework for the justification of coercive authority and the legitimation of political power, without reference to the origin and nature of such authority and power. The contract works out principles of justice – which dictate what one ought to do – but not necessarily *all* the reasons why people ought to obey them. Thus, for contractualists, different people might accept the same principles, but the acceptance of such principles could depend on a wide range of reasons – different moral views, religious beliefs, self-interest considerations, and so on.

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹² For an overview of the varieties of contractualist theories, see W. Kymlicka, *Contemporary Political Philosophy. An Introduction*, 2nd edition (Oxford: Oxford University Press 2002), Chapter 3, and G. Sayre-McCord, “Contractarianism,” in H. LaFollette, ed., *The Blackwell Guide to Ethical Theory* (Oxford: Blackwell 2000), pp. 247-267.

Accordingly, people agreeing on the same principle might deeply disagree on what makes those very principles the true or objective principles we have reasons to follow.

Constructivists, rather than investigating the acceptability constraints, insist on the idea that correct moral reasoning constitutes the appropriate grounds for justification. On a constructivist view, justified principles and judgments are the outcome of a well-informed and ideally faultless process of practical reasoning, guided by norms of logical entailment, considerations of rationality and other rules – namely, a procedure of construction. A procedure is the formalization or description of the way a person reasons about a given practical problem in ideal circumstances.¹³ In this way, the grounds of political morality are moral agents and their capacity for reasoning from the standpoint defined by the procedure, and not an independent order of moral truths or facts.

Constructivists aim at a complete, independent and objective justification: nothing independent of, and external to, practical reasoning constitutes the moral correctness of a principle. Contractualists, instead, leave open the possibility of an external source of moral authority. To put it differently: both contractualists and constructivists think that moral claims are made true or objective but virtue of moral facts; but while for constructivists what counts as a moral fact is a function of our reasoning, contractualists could accept different and mutually exclusive metanormative accounts. To take an example, both contractualists and constructivists believe that judgments like

¹³ Notwithstanding its growing popularity, there is no consensus on what constructivism is about in the contemporary debate. The difficulty of defining constructivism consists in understanding whether it represents a normative justificatory method, a genuine metaethical theory or something else. Different definitions of constructivism have diverse philosophical aims. For an overview see C. Bagnoli, “Constructivism in Metaethics,” E.N. Zalta, ed., *The Stanford Encyclopedia of Philosophy (Winter 2011 Edition)*, URL: <<http://plato.stanford.edu/archives/win2011/entries/constructivism-metaethics/>> and S. Street, “What is Constructivism in Ethics and Metaethics?,” *Philosophy Compass*, 5 (2010): pp. 363–384. On the Rawlsian form of constructivism see O. O’Neill, “Constructivism in Rawls and Kant”, in S. Freeman, ed., *The Cambridge Companion to Rawls*, pp. 347–367; S. Freeman, *Rawls*, Chapters 7 and 8; S. Freeman, “The Burdens of Public Justification.”

“torturing children for fun is morally wrong” might be true or objective, but while for constructivists there is only one way of explaining what constitutes the truth or objectivity of such judgments, the contractualist approach only provides a normative criterion for their general acceptability. What makes the judgment “torturing children for fun is morally wrong” true or objective could be a brute moral fact, the dignity of human life, the capacity to feel pain, God’s will, etc. Whatever the source of conclusive reasons constituting the moral wrongness of torturing children is, what matters for contractualists is that all moral agents would agree on the judgment or principle at hand. For constructivists, instead, there is only one account of the moral wrongness: “torturing children for fun is morally wrong” is true because correct reasoning makes it so.

More generally, contractualists claim that ‘x is F’ – where x is an action or a state of affairs and F a normative predicate – *if* all moral agents would agree on ‘x is F’ in suitably defined conditions. So whether x is F depends upon the general acceptance of ‘x is F’. What makes the case that x is really F is a separate question that contractualists do not need to address.¹⁴ Constructivists, instead, claim that x is F *because* a procedure – an objective way of reasoning – makes ‘x is F’ true or objective.

Note that the notion of agreement does not figure in the constructivist account of what makes ‘x is F’ true. For contractualism the notion of agreement is central and fundamental. For constructivism the notion of agreement does not play any role. We can conclude that contractualism makes an existential claim about moral facts: a fact is a moral fact *when and as long as* moral agents, in a suitably specified condition, agree that that fact is relevant. The constructivist claim, instead, is conceptual: it specifies *what* makes a non-moral fact a moral fact.

¹⁴ Contractualists might even think that there is no answer at all to this question. Hence, the contractualist notion of objectivity can be less robust than a constructivist one. For instance, contractualists might think that judgments of the kind ‘x is F’ are objective insofar as they are, or could be, inter-subjectively accepted by a group of individuals. This quite minimal understanding of objectivity suffices. I thank an anonymous referee for this point.

These general remarks should clarify why contractualism and constructivism are “distinct and should not be confused with one another,” as M. Timmons suggests.¹⁵ Contractualism is a normative theory concerned with the content of morality and the motivations to endorse normative principles, while constructivism addresses ontological questions regarding “the existence and nature of moral properties, facts and truths.”¹⁶ And one might hold a contractualist view without necessarily endorsing constructivism, and vice versa. With these definitions at hand, we can now enter the details of Rawls’ original position.

The Original Position: Two Possible Interpretations

Rawls has never been very clear on how the original position should be read from a metanormative point of view. It seems that he has two different projects in mind when he explains the justificatory work the original position does. For instance, in *A Theory of Justice*, he writes:

[o]n a contract doctrine the moral facts are determined by the principles which would be chosen in the original position. These principles specify which considerations are relevant from the standpoint of social justice.¹⁷

This passage could be interpreted in two ways. On the first interpretation, the original position generates moral facts. This claim can be restated as follows: certain facts count as moral reasons *because* principles chosen in appropriate conditions confer a moral status to those facts. If so, moral facts do not exist prior to, and independently of, the original position. The reasoning that goes on in the original position *constructs* or *constitutes* the moral reality. If this interpretation is correct, this passage can be considered the first general statement of Rawls’ constructivism.

¹⁵ M. Timmons, “The Limits of Moral Constructivism,” *Ratio (New Series)*, Vol. XVI, n. 4 (2003), pp. 391-423, p. 392.

¹⁶ *Ibid.*, p. 394.

¹⁷ J. Rawls, *A Theory of Justice*, p. 40.

On the second interpretation, the role of the original position is more modest: it says what moral facts there are: its task is limited to the specification or detection of morally relevant facts, which might or might not exist independently of the original position. Rawls' view can thus be restated as follows: certain facts count as moral facts *if* principles chosen in appropriate conditions confer a moral status to those facts. On this second reading, the original position provides only a normative criterion for justification: it says which facts are relevant when moral agents deliberate about first principles of justice. The moral status of these facts could also be established prior to, and independently of, the original position. In this case, the original position would play a merely heuristic role. If this interpretation is correct, Rawls' position is a form of idealized contractualist theory (perhaps a bit overstated).

Now, what is the correct interpretation? This question is of interest not only for the Rawlsian scholarship, but also for all those interested in the question of justification in ethics and political philosophy. Before proceeding, I should note that Rawls' constructivism, described in this way, might appear to make too strong a claim. Some may object that this interpretation of the original position is based on a moral rather than political constructivism, as presented in Rawls' final statement of his view.¹⁸ Indeed, in *Political Liberalism*, Rawls denies that "the procedure of construction makes, or produces, the order of moral values,"¹⁹ as my understanding of constructivism implies. Whether political constructivism matches the desiderata of a robust constructivist position in ethics is a matter of discussion in the contemporary debate. Street, for instance, thinks that Rawls' view is a 'restricted' version of constructivism – that is, a normative argument for the justification of principles of justice, and not a full-blown

¹⁸ J. Rawls, *Political Liberalism*, Lecture III.

¹⁹ *Ibid.*, p. 95.

metaethical view.²⁰ Others think that Rawls' project never aimed at providing a metaphysical or metaethical view.²¹

However, the fact that the original position cannot provide a metaphysical or metaethical argument could simply show how weak a claim the constructivist original position makes to the overall argument. Constructivism (political or otherwise) could then just be another term for 'contractualism'. As I shall try to clarify, the *political* form of constructivism lay on the side of a contractualist (and not constructivist) interpretation of the original position.

The original position as a contractualist view makes weaker claims about the justification of principles of justice than the original position on the constructivist interpretation. The distinction between 'weaker' and 'stronger' claims draws on a distinction Rawls makes between 'political' and 'full' justification. Rawls says that political justification is *pro tanto* and limited in scope to a subset of values that provides considerations acceptable to all members of a cooperative society, whatever their comprehensive views might possibly be (within the boundaries of reasonableness). Full justification, instead, is *ultima facie*, conclusive and involves all values – not only the political ones – for the acceptance of a conception of justice.²²

To appreciate the specific weight of each strands of the original position, we can now look at its possible historical references – namely, Locke's social contract theory and Kant's constructivism.

²⁰ S. Street, "What is Constructivism in Ethics and Metaethics?," *Philosophy Compass*, 5 (2010), pp. 363-384.

²¹ On this point see, for instance, A.S. Laden, "Constructivism as Rhetoric," in J. Mandle and D.A. Reidy, eds., *A Companion to Rawls* (Oxford: Blackwell 2014), pp. 59-72.

²² J. Rawls, "Reply to Habermas," *Journal of Philosophy*, Vol. 92 (1995), pp. 132-180, reprinted in J. Rawls, *Political Liberalism*, p. 386. Rawls also individuates a third level of justification, *public justification*, which concerns the "public justification by a political society," *Ibid.*, pp. 386-387. I shall return to this point later. I know that 'hardcore' Rawlsians would disagree with me on this point. Freeman, for example, might confine what I consider a genuine constructivist project to mere philosophical speculation, because it does not consider the social role of a theory of justice ("The Burdens of Public Justification," p. 307). This line of criticism is external to the argument presented here. My concern is with the fundamental structure of a justificatory method, and not with how to do political philosophy.

A Contract without Construction

Rawls believes that a theory of justice should adjudicate on disputes over the distribution of social primary goods among the participants of a cooperative enterprise who differ in the interests they have, in the conception of good they hold, in the plans of life they form and so on. Given the permanent disagreement about what is of general value in life, in order to rule out appeal to the different moral, religious or philosophical arguments recognized by different citizens to settle disagreements in politics, a requirement of general acceptability is in order.

The idea that principles ought to be acceptable in order to be obeyed plays another important role: rules governing fundamental aspects of people's public life need not to be tailored to someone's particular interests, but should be impartial to everyone's advantage. And Rawls seems to have in mind the connection between impartiality and acceptability when, discussing the nature of justification in political philosophy, he says that in order to be justifiable to all, principles need to move from shared premises.²³ Shared premises individuate "possible bases of agreement where none seem to exist" about what principles ought to shape fundamental political institutions.²⁴ To reach an agreement of this sort – an agreement, that is, linking acceptability to impartiality – is the task assigned to the original position.

The connection between impartiality and acceptability motivates Rawls to consider the original position not as the ultimate source of normativity – the grounds of or truth-conditions for first principles of justice – but as a heuristic device for working out the principles

²³ According to Rawls, "justification is not to be regarded simply as valid argument from listed premises, even should these premises be true. Rather, justification is addressed to others who disagree with us, and therefore it must always proceed from some consensus, that is, from premises that we and others publicly recognize as true." J. Rawls, "Reply to Habermas," p. 394. Similar passages can be found in J. Rawls, *A Theory of Justice*, pp. 508-10; "On the Idea of an Overlapping Consensus," *Collected Papers*, p. 427.

²⁴ J. Rawls, *A Theory of Justice*, p. 509.

governing a system of social cooperation.²⁵ For Rawls, these principles hold independently of the original position and map onto an ideal of the person (as ‘free and equal’, and ‘reasonable and rational’) and society (as a liberal and democratic cooperative enterprise), and of the social role a conception of justice plays for such persons (a public basis of agreement).

The denizens of the original position choose the terms of cooperation that best fit those ideals: hence, people already have reasons to make an agreement in the original position; the original position does not generate or construct these ideals; these ideals hold independently of the original position. Thus, the original position is better seen as a “*device of representation*, or alternatively, a thought experiment for the purpose of public- and self-clarification.”²⁶ Therefore, the original position can be viewed as a *contract without construction*, a device that creates new principles, but does not provide all the reasons for endorsing them. I shall try to clarify this point.

On the contractualist interpretation, the original position says that principles of justice are the object of an agreement among individuals in adequately specified circumstances. Further questions about the nature and source of the principles’ normative authority are not addressed, nor need they be. Individuals can agree upon principles that are constituted by practical reason, derived from a deity’s will, or represent a device of welfare’s improvement; the ultimate reasons that make just or unjust a state of affairs – which derive from one’s own comprehensive doctrine – are not to be disclosed. The original position as a form of social contract does not generate all the reasons there are to abide by principles of justice, but rather it “models what we regard [...] as fair conditions under which the representatives of citizens [...] are to agree to the fair terms of cooperation.”²⁷

²⁵ S. Freeman, *Justice and the Social Contract: Essays on Rawlsian Political Philosophy* (Oxford: Oxford University Press 2007), p. 19.

²⁶ J. Rawls, *Justice as Fairness: A Restatement*, E. Kelly, ed. (Cambridge, MA: Harvard University Press), p. 17, emphasis added.

²⁷ *Ibid.*, emphasis added.

As an illustration of this idea, consider Locke's political philosophy as presented in the *Second Treatise on Government*.²⁸ It is not my contention here that Rawls derives the idea of original position from Locke's theory. More modestly, I argue that Rawls' interpretation of the social contract as a purely normative (i.e. non-metaphysical) argument is similar to Locke's view of the social contract, and this comparison could provide some understanding as to why the original position can do without the notion of construction.

Locke's social contract theory provides the grounds and limits of legitimate political power. For Locke, people are born naturally equal – or, as Rawls puts it, “free and equal, and reasonable and rational persons, starting from the state of nature regarded as a state of equal political jurisdiction, all being, as it were, equally sovereign over themselves” – and establish political institutions through a ‘compact.’²⁹ Given this original equal status, no superior authority over them, such as a legitimate government, can exist without people's consent. Consent, then, is seen as the “origin of political power.”³⁰ Locke's argument is limited in two ways. First, the scope of the argument from the contract is limited to *political* obligations only. Rawls says that Locke “does not hold what we might call a consensual (or contractualist) account of duties and obligations generally.”³¹ Obligations such as “duties to God,” “paternal power,” “private property,” “duties of a victor in a just war” and other general duties do not arise from the contract.³² Second, the contract can justify political obligations only in an indirect way: the ultimate grounds of justice – the source of normative authority of principles, as I called it above – is God, and not people's consent: the “legitimate and supreme legislative authority over all mankind” lies in God's will, not in human reason.³³

Rawls' reading seems to be the following: according to Locke, human beings have a special commitment to God; this commitment is

²⁸ J. Locke, *Two Treatises of Government*, edited by P. Laslett (Cambridge: Cambridge University Press 1988).

²⁹ J. Rawls, *Lectures on the History of Political Philosophy*, p. 107.

³⁰ *Ibid.*, p. 126.

³¹ *Ibid.*, p. 125.

³² *Ibid.*, pp. 125-126.

³³ *Ibid.*, p. 109.

expressed by the Fundamental Law of Nature, which prescribes “the preservation of the Society, and (as far as will consist with the public good) of every person in it.”³⁴ But this might not be strong enough to effectively regulate people’s behaviors and grant the realization of justice in the world. For a social compact creates political institutions embedding the requirements of the Fundamental Law of Nature, which is binding on all people whether or not they live under the authority of a government.³⁵ Thus, on Locke’s view, the social contract is a theoretical device for cashing out the content of God’s will by reference to which all subsequent principles – including the one governing the political institutions created by the contract – are justified.³⁶ From this, Rawls concludes that

Locke’s conception of natural law provides us with an example of an independent order of moral and political values by reference to which our political judgments of justice and the common good are to be assessed. Correct or sound judgments are true of, or accurate with respect to, this order, the content of which is in large part specified by the fundamental law of nature as God’s law.³⁷

On Locke’s view, the argument from the contract justifies the creation of new institutions – institutions that were not present in the state of nature. The criterion against which to evaluate the moral validity or correctness of such institutions is not the contract, but something given prior to, and independently of, the contract: the Fundamental Law of Nature. This consists in an ‘order of values’ independent of human will. This is the second limit of Locke’s contract argument.

In order to show the limit of Locke’s normative argument, Rawls makes explicit reference to Scanlon’s contractualism.³⁸ According to Scanlon, the many principles of the morality of “what we owe to each

³⁴ J. Locke, *Second Treatise*, § 134.

³⁵ *Ibid.*, § 135.

³⁶ J. Rawls, *Lectures on the History of Political Philosophy*, pp. 126-127.

³⁷ *Ibid.*, p. 112. See *Ibid.*, p. 114

³⁸ *Ibid.*, p. 125, fn 4.

other” are worked out by a contract, which holds that “an act is wrong if its performance under the circumstances would be disallowed by any set of principles for the general regulation of behavior that no one could reasonably reject as a basis for informed, unforced general agreement.”³⁹ A principle is “reasonably rejectable” when there are considerations that counts against it and those considerations hold for all people affected by such a principle. Scanlon’s theory can also be described as a form of contract without construction. For Scanlon, the agreement does not justify normative principles: there are non-natural facts of the matter about morality – which are prior to, and independent of, the contract – and those facts in turn determine what it is morally right and wrong. The contract for both Locke and Scanlon seems to have the function of working out what is morally required, starting from the Fundamental Law of Nature for Locke, and from some non-natural moral facts for Scanlon. I think that Rawls’ original position as a “device of representation” can be read in the same way.⁴⁰

A Construction without Contract

Locke, as we have seen, believes that political power can be established by a social contract. However, he contends that its ultimate justification depends on the capacity to account for a special commitment to God. Kant, on the other hand, claims that the source of the validity of norms regulating our behavior is grounded in autonomy – namely, the capacity that each moral agent has to give laws and principles to herself through reason.⁴¹ Since these univer-

³⁹ T. Scanlon, *What We Owe To Each Other* (Cambridge, MA: Harvard University Press 1998), p. 153.

⁴⁰ For its theological foundation, Rawls thinks that Locke’s contract cannot be acceptable as a *political* conception of justice because it entails a non-public conception of justification. See J. Rawls, *Lectures on the History of Political Philosophy*, p. 112 and J. Rawls *Justice as Fairness: A Restatement*, p. 27. For similar reasons, I believe Rawls would reject Scanlon’s realism. On Scanlon’s realism see his *Being Realistic about Reasons* (Oxford: Oxford University Press 2014). Notice, though, that Scanlon does not take his view to be a theory of justice. T. Scanlon, *What We Owe To Each Other*, pp. 6-7.

⁴¹ Kant introduces the notion of autonomy in II Section of his *Groundwork of the Metaphysics of Morals* (Cambridge: Cambridge University Press 1998), where he

sally valid laws and principles are not derived from a source which is external to moral agents, they are said to be ‘constructed’ out of practical reason alone. Constructivism is the view that almost everybody associates with Rawls’ work, and Rawls says he took it from Kant. Not all Kantian scholars would agree on this interpretation of Kant’s view, but I shall not take a side in that debate, limiting my focus to Rawls’ treatment of Kant’s view as a form of constructivism.

Rawls’ view, according to Kant universally valid norms are the product of the ‘categorical imperative,’ a deliberative procedure that rules out desire-based interests or other external sources of authority of principles. The categorical imperative is stated in different ways. The Formula of Universal Law, Kant’s favorite interpretation, requires moral agents to “act as if the maxim of your action were to become by your will a universal law of nature.”⁴² When applied to the agent’s subjective maxims, this formula should determine – or construct – both the content of morality and its normative authority for all rational agents.⁴³

Rawls seems to model the original position on Kant’s “CI-procedure.”⁴⁴ This interpretation of the original position can be better appreciated by looking at Rawls’ reading of Kant’s *Groundwork of the Metaphysics of Morals*.⁴⁵ For Rawls, Kant’s view is meant to oppose Leibniz’s metaphysical perfectionism and Clarke’s rational intuitionism – the views that “basic moral concepts are unanalyzable, and

claims that a moral agent is “subject *only to laws given by himself but still universal* and that he is bound only to act in conformity with his own will,” G 4: 432.

⁴² I. Kant, *Groundwork of the Metaphysics of Morals*, G 4: 421.

⁴³ There is vast disagreement on this point. For the sake of illustration, in the following pages I am going to follow what I take to be the standard Rawlsian reading of Kant’s *Groundwork*. For interpretations similar to Rawls’s, see O. O’Neil, *Constructions of Reasons: Explorations of Kant’s Practical Philosophy* (Cambridge: Cambridge University Press 1990), Chapter 5 and C. Korsgaard, *Creating the Kingdom of Ends* (Cambridge: Cambridge University Press 1996), Chapter 3. By this, I neither imply nor deny the validity of these readings of Kant.

⁴⁴ J. Rawls, *Lectures on the History of Moral Philosophy*, pp. 162-164. Rawls first qualifies his theory as ‘Kantian’ in § 40 of *A Theory of Justice*. In the *Dewey Lectures*, Rawls starts using the term ‘constructivism’ to qualify the original position.

⁴⁵ A deeper analysis of the Kantian moral doctrine would obviously be based on other writings than *Groundwork*. This would exceed the aim of the present chapter.

so are conceptually independent of natural concepts"⁴⁶ – as forms of heteronomy, that is, philosophical views that place the normative source of moral authority outside moral agency. On the contrary, Kant grounds his moral view on the idea of autonomy, which not only excludes parochial attitudes, but also “requires that there exists no moral order prior to and independent of those conceptions that determine the form of the procedure that specifies the content of the duties of justice and of virtue.”⁴⁷ On this view, the fact that certain norms are given by the procedure is the reason to abide by them, whether or not people come to agree on them. So, for Rawls, Kant’s constructivism can be expressed as the idea that

the particular categorical imperatives that give the content of the duties of justice and of virtue are viewed as specified by a procedure of construction (the CI-procedure), the form and structure of which mirror both of our two powers of practical reason as well as our status as free and equal moral persons.⁴⁸

The concept of a person for both Kant and Rawls is rather complex, and its full treatment falls outside of the scope of this chapter. It should suffice to say this: Rawls, like Kant, thinks that what a person does is dictated by empirical practical reason – the capacity to have desires and preferences, and to form and revise a plan of life and a general conception of the good. A person also has pure practical reason, which is the capacity to act on and from principles of justice. The original position links this conception of the person with that of a society where “each [person] can be a legislative member of a realm of ends.”⁴⁹

The CI-procedure is said to represent “all the requirements of practical reason (both pure and practical)”⁵⁰ because Rawls believes that, for Kant, “the content of the moral law [...] applies to us as

⁴⁶ J. Rawls, *Lectures on the History of Moral Philosophy*, p. 236.

⁴⁷ *Ibid.*, pp. 236-237.

⁴⁸ *Ibid.*, p. 237.

⁴⁹ J. Rawls, *Lectures on the History of Moral Philosophy*, p. 240.

⁵⁰ *Ibid.*, p. 165ff. See also pp. 241ff, pp. 237-238.

reasonable and rational persons in the natural world, endowed with conscience and moral sensibility, and affected by, but not determined by our natural desires and inclinations."⁵¹ By this Rawls means that in a well-ordered society, citizens are able to set aside at least some of their preferences and interests for the sake of universally acceptable norms of public conduct, establishing the 'right' over the 'good,' giving lexical priority to principles of justice over the particular ends every agent has, so that the 'reasonable' subordinates the 'rational.'⁵² Hence, what reasons we have to accept principles depend upon a procedure correctly carried out, not on people's consensus or any other idiosyncratic subjective attitude. Rawls can thus claim that first principles of justice are "analogous to categorical imperatives" because their validity "does not presuppose that one has a particular desire or aim."⁵³ The original position constructs first principles of justice, and in turn moral facts, *autonomously*, that is, without appealing to external sources of normativity or value.

The analogy between Rawls' first principles of justice and Kant's moral norms is based on the fact that both views rule out heteronomous elements from their justification, incorporating what Rawls calls "pure procedural justice at the highest level."⁵⁴ Let me unpack this idea in some greater detail. A procedure is pure when no independent criterion for the justification of its outcome is admitted. "[W]hat is just is defined by the outcome of the procedure itself,"⁵⁵ since "there is a correct or fair procedure such that the outcome is likewise correct or fair, whatever it is, provided that the procedure has been properly followed."⁵⁶ This point can be clarified by the contrast between 'perfect' and 'pure' procedural approaches to justice. Both approaches "devise a procedure that is sure to give the desired outcome;"⁵⁷ but in the case of perfect procedures, "there is an independent criterion for what is fair division, a criterion defined separately from and prior to

⁵¹ *Ibid.*, p. 164.

⁵² J. Rawls, *A Theory of Justice*, p. 532.

⁵³ J. Rawls, *A Theory of Justice*, pp. 222-223.

⁵⁴ *Ibid.*, pp. 311.

⁵⁵ *Ibid.*, p. 311.

⁵⁶ J. Rawls, *A Theory of Justice*, p. 75.

⁵⁷ *Ibid.*

the procedure which is to be followed.”⁵⁸ Considered in contractualist terms as I did above, the original position can be interpreted as an instance of perfect procedural justice, since it admits of or, better, it does not rule out *ex ante* or independent criteria of justice.

The idea of pure proceduralism captures the quintessential feature of a constructivist position: the lack of criteria given independently of the procedure places the source of principles’ normative authority in moral agents’ capacity of reasoning and not in an independent order of values, which obtains prior to social and political institutions. Rawls expounds this idea in “Kantian Constructivism in Moral Theory,” where he insists on the fact that it is a procedure that makes moral claims objective and not vice versa. Kantian constructivism accounts for the objectivity of judgments in terms of application of a correct procedure. On a rational intuitionist (or contemporary moral realist) account, the order of explanation would be reversed: judgments are correct because they track an order of moral values and facts, which is given prior to the procedure of construction and independently of practical reason.⁵⁹ On a constructivist view, there are no other sources of normativity prior to, and independent of, moral agency. For Rawls, first principles of justice do not reflect moral truths or facts about political morality, which are independent of moral agents; they are a function of practical reason.

This means that there are no independently objective claims tracked by the original position. As he writes:

[a]part from the procedure of constructing these principles, there are no reasons of justice. Put in another way, whether certain facts are to count as reasons of justice and what their

⁵⁸ *Ibid.*, p. 74. A perfect procedure, for example, leaves the cutting of a cake to the last person taking a slice (the procedure), so that it is possible to get some even-handedness (the criterion) in distribution (the outcome): the criterion of correctness for the outcome is independent of the procedure.

Rawls also considers cases of imperfect procedural justice. The difference between perfect and imperfect proceduralism is that, in the second case, we do not have a procedure able to guarantee a fair outcome. This distinction is not relevant here.

⁵⁹ *Ibid.*, pp. 238-239 and §§4-5. See also C.M. Korsgaard, *The Sources of Normativity* (Cambridge: Cambridge University Press 1996), pp. 35ff.

relative force is to be can be ascertained only on the basis of the principles that result from the construction.⁶⁰

Also, Rawls seems to endorse an anti-realist position when he affirms that:

[i]t is not that, being situated impartially [in original position], they have a clear and undistorted view of a prior and independent moral order. Rather (for constructivism), there is no such order, and therefore no such facts apart from the procedure of construction as a whole; the facts are identified by the principles that result.⁶¹

Some people might take these statements simply as 'over-statements.' For instance, Krasnoff seems to be of the opinion when he claims that "there are clearly moral considerations that support Rawls' conception of the person as rational and reasonable, as well as his design of the original position as a constructive procedure. And it could not be that *these* moral facts are constructed by the original position."⁶² Krasnoff is probably right. In his later work, Rawls admits that "[t]he idea of constructing [all] facts seems incoherent."⁶³ The constructivist procedure, rather than constructing moral facts, "is framed to yield the principles and criteria that specify which facts about actions, institutions, persons, and the social world generally, are relevant in political deliberation."⁶⁴ However, these alleged over-statements might be read in metaethical terms.⁶⁵ Although Rawls

⁶⁰ J. Rawls, "Kantian Constructivism in Moral Theory," p. 351.

⁶¹ *Ibid.*, p. 354.

⁶² L. Krasnoff, "How Kantian is Constructivism?," *Kant-Studien*, n. 90 (1999), p. 391. See also L. Krasnoff, "Kantian Constructivism," in J. Mandle and D.A. Reidy, eds., *A Companion to Rawls*, pp. 73-87.

⁶³ J. Rawls, *Political Liberalism*, p. 122.

⁶⁴ *Ibid.*

⁶⁵ Milo, for example, thinks that the original position could be interpreted in this way, at least before Rawls "sh[ie]d away" from a "brief flirtation with moral ontology." R. Milo, "Contractarian Constructivism," *The Journal of Philosophy*, Vol. XCII (1995), 181-204, p. 184, fn. 6. Milo develops the original position into a vull-blown metaethical account that could be considered, on the interpretation

generally remains agnostic on metaethical issues, there is some textual evidence to sustain the idea that Rawls has a (possibly) tentative (but nonetheless) metaethical position coherent with the idea of pure proceduralism.

Much more could and should be said about the parallel between Kant's categorical imperative and Rawls' original position. For lack of space, I shall limit my reconstruction to this final feature of the original position, which defines it as a form of *constructivism without contract*. For Rawls, the function of the categorical imperative, as well as that of the original position on the constructivist interpretation, is not only to cash out the content of political morality – what one ought to do – but also to provide a method – that is, a deliberative procedure – to determine which among all normative principles qualify as universally valid or objective principles. This selection is based not on a normative view, but on the formal requirements of a Kantian conception of practical reason, on the capacity of human beings to distinguish between moral and non-moral courses of actions. The original position, interpreted as a form of Kantian constructivism, could thus plausibly be seen as a distinctive, although incomplete, metaethical theory.

Contract vs. Construction

So far, I have introduced two interpretations of the original position, and I have illustrated the difference between contractualism and constructivism through Rawls, readings of Locke's and Kant's accounts of obligations. I have also shown that the contractualist original position makes weaker claims about the justification of first principles of justice than the constructivist original position. According to Freeman, the two approaches have irreconcilable aims and the Kantian-constructivist one needs to give way. On one side,

suggested here, as a form of construction without contract, because, on his view, the role of the agreement does not play an actual role.

On a contrary note, Laden points out that the original position cannot and could never be read as a metaethical position. At most, it should be read as a rhetorical argument to support the two principles of justice. If Rawls had metaethical view, that could be found in the methodology of reflecting equilibrium. See A.S. Laden, *Constructivism as Rhetoric*.

contractualists wants to provide a public basis for justification and agreement in a society; on the other, constructivists base their view on a Kantian-inspired conception of the person as an autonomous human being.⁶⁶ Freeman thinks that the social role of a conception of justice – to serve as public basis of justification – ought to take over, pushing political philosophers to give up on the full justification of principles of justice. Indeed, constructivism’s disclosure of the deepest reasons supporting a conception of justice would undermine the stability of such a conception. Given the fact of pluralism of different comprehensive views characterizing present societies, not all reasonable people would accept a constructivist foundation of justice. There is some truth to this, but I shall leave this point aside, as it concerns a general question about how to do political philosophy. My aim, as said, is to understand how the original position works and the difference between two possible interpretations.

Now, there should be no doubt that there is an important difference between the contractualist and the constructivist readings of the original position. A final question remains to be addressed: how constructivist does the original position-remain? If what I have said so far is plausible, then the answer is probably not “very much.” This becomes clear when paying attention to another distinction Rawls makes between “constitutive” and “doctrinal” autonomy.

Constitutive autonomy provides a strong metaethical claim about the source of normative authority: “the order of moral and political values must be made, or itself constituted, by the principles and conceptions of practical reason,” and such an order of values “is constituted by the activity, actual or ideal, of practical (human) reason itself.”⁶⁷ On this view, the moral agent is seen as a “self-originating source of valid claims.”⁶⁸ An autonomous agent does not need an external authority to justify principles of justice: she is not a mere

⁶⁶ S. Freeman, *Justice and The Social Contract*, chapters 7 and 8, and “The Burdens of Public Justification.” Freeman’s argument is meant to address Rawls’ political turn, from *A Theory of Justice* to *Political Liberalism*. I think his view can be generalized in the way I explain.

⁶⁷ J. Rawls, *Political Liberalism*, p. 99.

⁶⁸ J. Rawls, “Kantian Constructivism in Moral Theory,” p. 330, and *Political Liberalism*, p. 406, emphasis added.

“knower,” but the very origin of morality. She is a *constructor* of moral facts and truth.⁶⁹

Since the grounding of principles of justice on constitutive autonomy cannot provide a public basis for justification in a society characterized by permanent pluralism,⁷⁰ through a reinterpretation of his view in the mid 1980s, Rawls argues that without sacrificing one’s commitment to one’s comprehensive view, reasonable adherents of different religious sects and supporters of moral comprehensive theories can still subscribe to a liberal conception of justice. Rawls claims that a genuine *political* conception of justice need not to rely on a comprehensive view. A political conception is *freestanding*, or not derived: despite disagreements about first principles of political morality, all citizens can embrace its norms of social cooperation, justified by reasons that can be accepted by everyone and not only by the adherents of a specific comprehensive doctrine.⁷¹ Rawls assumes that some doctrines can be only partially comprehensive when supporters are willing to provide political grounds for their claims – that is, grounds, that are not metaphysical or theological in nature.⁷² A political conception is grounded on political reasons, which are *pro tanto* and so non-conclusive, and which therefore can be publicly justified – these are the third kind of justification, according to Rawls.⁷³ The conclusive reasons for agreeing on them still be derived from one’s comprehensive view. These reasons will not be disclosed. This withdrawal of the comprehensive from the political realm is what makes possible an overlapping consensus on a core-set of political

⁶⁹ J. Rawls, “Kantian Constructivism in Moral Theory,” pp. 343-346; *Political Liberalism*, Lecture III.1; *Lectures on the History of Moral Philosophy*, §VI.2.

⁷⁰ J. Rawls, *Political Liberalism*, p. 99.

⁷¹ This freestanding conception provides “a real *public* basis of justification on fundamental political questions.” J. Rawls, *Political Liberalism*, p. xix (emphasis added) for “reasonable though incompatible religious, philosophical, and moral doctrines.” *Ibid.*, p. xviii.

⁷² “I assume ... that citizens’ overall views have two parts: one part can be seen to be, or to coincide with, the publicly recognized political conception of justice; the other part is a (fully or partially) comprehensive doctrine to which the political conception is in the same manner related.” J. Rawls, *Political Liberalism*, p. 38.

⁷³ J. Rawls, *Political Liberalism*, pp. 386ff.

values among the reasonable comprehensive doctrines willing to set aside their stronger metaphysical claims.

This political restatement of the theory requires a less demanding conception of autonomy. For Rawls takes the notion of doctrinal autonomy as more suitable for grounding a conception of justice in a pluralist society. On doctrinal autonomy, “a political view is autonomous if it represents, or displays, the order of political values as based on principles of practical reason in union with the appropriate political conceptions of society and person.”⁷⁴ Here the person is seen as a “self-authenticating source of valid claims.”⁷⁵

Doctrinal autonomy is the basis for the political restatement of constructivism in *Political Liberalism*. Political constructivism seems closer to contractualism (as defined above) than the Kantian view to which Rawls was initially appealing to. It is a metaethically agnostic position, according to which the reasons for supporting principles of justice need not originate in moral agents’ practical reason, but might also have different sources, as on the contractualist interpretation of the original position.

Freeman explains this change as a way to rebut “Michael Sandel’s criticisms that Rawls’ conception of the person assumes the liberal illusion that people create their own conception of the good, as if it were not the product of years of conditioning, education, and social influence. In using ‘self-authenticating’ Rawls signals that he recognizes that we do not form our conceptions of the good *ab initio*.”⁷⁶ This explanation is not quite convincing.

It would be quite odd if Rawls or anybody else thought that people could actually create values (political or otherwise) *ab initio*. I suspect that the change from “originating” to “authenticating” in the qualification of the person hides more than a simple rebut of Sandel’s criticism. I think that the first phrasing is based on a genuinely constructivist understanding of political morality, according to which the moral agent is the author of principles. This moves the original position toward the Kantian notion of autonomy. The second phrasing leads ‘political’ constructivism towards a more metaethically agnostic

⁷⁴ J. Rawls, *Political Liberalism*, p. 99.

⁷⁵ *Ibid.*, p. 72, emphasis added.

⁷⁶ S. Freeman, *Rawls*, pp. 507-508, fn. 4.

position, according to which the reasons for supporting principles of justice do not need to originate in the moral agents' practical reason. 'To originate' here should not be understood as "forming a conception *ab initio*;" rather, it is a claim about the 'origin' or the source of such a conception, the person (autonomy) or something else (heteronomy).

Rawls does use both phrasings when explaining that the "principles of practical reason originate ... in our moral consciousness as informed by practical reason" and that "[t]hey derive from nowhere else," adding that "Kant is the historical source of the idea that reason ... is self-originating and self-authenticating."⁷⁷ But only on a constructivist view could reason be self-originating and self-authenticating; and when referring to political constructivism, Rawls limitedly refers to the latter characterization. What is really happening here, I conjecture, is that Rawls came to realize that in order to accommodate religious and other comprehensive reasons when discussing matters of constitutional essentials, he needed to give up on a lot of things, including a substantive metaethical view (constructivism), and a substantive notion of (constitutive) autonomy.

Eventually, Rawls chooses Locke over Kant, a choice that is motivated by the need to take the fact of pluralism seriously. Indeed, the constructivist interpretation of the original position would make too strong a claim to be acceptable in current society. However, this pragmatic point about the need for stability of a theory of justice does not show that the original position works if its constructivist features are ruled out. Having clarified the specific claims that a constructivist theory makes – a claim, as said, about the source of *ultima facie* or conclusive reasons for principles of justice – it seems obvious that the only interpretation of the original position consistent with Rawls' project is the contractualist one. Whether this is enough to provide the desired justification of first principles of justice is another matter.

Conclusion

In this chapter, I have discussed two possible interpretations of the original position, namely, as a contractualist and as a constructivist

⁷⁷ J. Rawls, *Political Liberalism*, p. 100.

theory respectively. I have shown how both views are based on some sort of test for the validity of principles, but a contractualist theory makes weaker claims than a constructivist one. While constructivism requires that the ultimate source of moral validity lies in the moral agents' reason and nothing else, the contractualist approach, instead, is compatible with a variety of metaethical claims.

The difference between contractualism and constructivism has been explained with the help of Rawls' *Lectures* on Locke's and Kant's accounts of obligations and the sources of justificatory reasons. This excursus on the (historical) grounds of the original position corroborated the idea that the original position should be read as a normative theory about the justification of principles of justice – similar to the Lockean interpretation of social contract – rather than as a metaethical view about the nature and source of moral value – as in Kantian constructivism.

The conclusions of this chapter should also contribute to understand Rawls' political turn, and to place his *political* constructivist view on the side of the contract interpretation of the original position. Although my position might be controversial, I hope I have been able to clarify the difference between contractualism and constructivism in Rawls' work and, more generally, in moral and political philosophy, more generally.⁷⁸

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⁷⁸ Thanks to Marcello Di Paola, Edwin Etieyibo, Gianfranco Pellegrino, Federico Zuolo and the anonymous referees for comments and suggestions on previous drafts of this chapter, and to Ania Barecka for the patient revisions.

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Beyond Rawls' Basic Structure of Society

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Introduction

My goal in this paper is twofold. Firstly, I intend to present the set of reasons Rawls employs with regard to the role of the basic structure of society within his contractualist theory of justice. Secondly, I will make a case as to why we should take these arguments to go beyond the domestic scope. The first part of the paper focuses on why, according to Rawls, the basic structure deserves to be the first and primary subject of justice. Rawls defends this point by arguing that it shapes a political community and that it is impossible to preserve background justice if there are no political institutions with that goal. However, the basic structure which is truly relevant in our days is not confined to the boundaries of nation states. It is in the global sphere of our post-sovereign era where more and more decisions which determine individuals' means and opportunities are made. Consider, for instance, the pervasive influence on peoples of institutions such as the International Monetary Fund or the World Bank. In this context, I will defend the theoretical possibility and the practical need to expand Rawls' domestic institutional framework to the international arena, where global actors have neither the democratic legitimacy nor the will to assign fundamental rights and duties or provide any basic services.

The Basic Structure in Rawls' Theory of Justice

This part focuses on the definition of "basic structure" offered in *Political Liberalism*. We consider, in particular, Rawls' reasoning as to why it ought to be regarded as the first and primary subject of justice. The basic structure has to be considered one of Rawls' key concepts and as such, it is closely linked to all the rest of his fundamental ideas (public reason, stability...). By the "basic structure" Rawls means a society's main institutions and the way in which they fit together into a system from one generation to the next. It is made up of a society's major political and social institutions, including the constitution, the

economic and legal systems, the legally recognized forms of property, the organization of the economy, and even the nature of the family. Rawls considers the basic structure as a system of institutions working together as a unified scheme of social cooperation.¹

Rawls considers, and he will never abandon this idea, it deserves to be the first and primary subject of justice.² Regarding the relationship of the basic structure and his theory of justice, it is worth mentioning that his political conception of justice is worked out for one single subject: the framework of the basic structure of a constitutional democratic state. Rawls is clear when he says “[t]here is no attempt to formulate first principles that apply equally to all subjects.”³ The reason is simple, not all possible subjects of justice play the same role. Therefore, the principles of justice ought to be chosen considering their specific role in social life.

What specific role does the basic structure play and what distinctive principles apply there? Assuming that the basic structure is that of a closed society, it has three related but different roles in order to give justice to all its citizens. Firstly, to apply the principles covering the basic freedoms. The basic structure must first and foremost guarantee, in Constitutional and legal provisions, citizens’ equal basic rights and liberties and institute just political procedures. This is the priority of the basic structure. Secondly, the basic structure also applies the principles referred to social and economic inequalities, that is, it sets up the background institutions of social and economic justice.⁴ Finally, the fundamental task of securing over time just background conditions against which the actions of individuals and associations take place.

As we can see, the basic structure is the starting point of Rawls’ contractarian theory. He places the emphasis on the institutional form of society because it is the common ground in which political relations

¹ John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993), p. 11; Rawls, *A Theory of Justice*, Revised edition (Cambridge, MA: Harvard University Press, 1999a), § 2.

² Rawls, *Political Liberalism*, Lecture VII; Rawls, *A Theory of Justice*, §2; John Rawls, *Justice as Fairness: A Restatement*, Erin Kelly, ed. (Cambridge, MA: Harvard University Press, 2001), §§4, pp. 15-16.

³ Rawls, *Political Liberalism*, p. 258.

⁴ *Ibid.*, p. 229.

of citizens take place. The basic structure defines membership in a society and what it means to be a citizen (contents, rights, duties...), it also fosters equality and a fair distribution of advantages. The institutions of basic structure also assure all citizens have sufficient all-purpose means to enable them to make effective use of their freedoms, that is why they have deep pervasive and long-term social and psychological effects (whether they are fair or not).⁵ The basic structure shapes citizens' conception of themselves, their character and aims; in brief, the kind of persons they are and aspire to be.⁶ It has such power to limit people's ambitions, desires, ends and future aspirations because it regulates the rights, means and opportunities people can have. It even determines to a large extent the talents and abilities of individuals, since these are partially caused by social conditions.

In summation, the arguments Rawls employs to defend the structure and why it deserves to be the first and primary subject of justice seem sound.⁷ However, it is the methodological reduction of its scope to the domestic case which we do not consider acceptable. We will evaluate the need of expanding the extent of the basic structure based on the idea that it is the basic structure which enjoys hierarchical primacy and determines the principles of any other subsequent social arrangements.

The Global Basic Structure

If we accept, following Rawls, that free and equal, rational and moral persons are to construct principles that apply to the complex of institutions that shape their lives, the question is to determine what is the relevant set of institutions that currently has pervasive effects on the lives of individuals. Few would say it is the state alone.

We live in a world in which more and more decisions that determine individuals' means and opportunities are made not only by states but also by individual choices and international actors in the global sphere. Economic globalization has increased the power of international institutions or multilateral organizations such as the

⁵ *Ibid.*, p. 260.

⁶ *Ibid.*, p. 68.

⁷ Thomas W. Pogge, *Realizing Rawls* (Ithaca: Cornell University Press, 1989).

International Monetary Fund, the World Bank or the World Trade Organization which undermine the power of states and exert an influence that considerably affects people's life prospects (especially those of the least advantaged), in a similar or even larger degree than the effects of the basic structure of a domestic society.⁸ There is little doubt that the place of birth can certainly make all the difference regarding life plans.⁹ Being born in certain areas of the world determines, for instance, that only a few will learn to read or write¹⁰ or have access to food or water. Life expectancy is also dramatically different depending on the regions of the world: from under 40 in some countries in Africa to almost 80 in some countries of Europe. However, it is certainly remarkable that whereas domestic political theory is very well understood, with multiple highly developed theories offering alternative solutions to well-defined problems, when it comes to theories of global justice, they are in the early stages of formation, and neither the main questions nor the possible answers are clear.¹¹

Given the present global conditions, it seems plausible to define this scenario as a basic structure.¹² It is not a regulated scheme, but there is no doubt it is fully operative.¹³ Does the fact that these global actors are not institutionally integrated into a political structure make any difference? Our answer is negative because we are discussing an ideal theory and because it is precisely the non-existence of a political democratic structure which creates, or at least allows, the emergence and development of injustice. Global relevant actors have neither the legitimacy to assign fundamental rights and duties, let alone shape the

⁸ Hank Johnston, *States and Social Movements* (Cambridge, UK/ Malden, MA: Polity Press, 2011), pp. 169-171.

⁹ Louis-Philippe Hodgson, "Why the Basic Structure?," *Canadian Journal of Philosophy*, Vol.42, No. 3/4 (September/December, 2012), pp. 303-334.

¹⁰ The years of average education instruction vary from 11.4 in the OECD countries to 3.7 in others. UNDP, *Human Development Report. The Real Wealth of Nations: Pathways to Human Development* (New York: UNO, 2010).

¹¹ Thomas Nagel, "The Problem of Global Justice," *Philosophy & Public Affairs* (33, 2005), pp. 113-147.

¹² See Juan Antonio Fernández Manzano, *Política para la globalización* (Madrid: Antígona, 2014a).

¹³ Arash Abizadeh, "Cooperation, Pervasive Impact, and Coercion: On the Scope (not Site) of Distributive Justice," *Philosophy & Public Affairs* 35, 2007, pp. 318-358.

division of advantages that arise through cooperation, nor the will to avoid that the thriving financial and commercial activities replace the political agenda. The absence of democratically controlled effective global political institutions is not a fact to start from. The compromise of any theory with realism is necessary, that is precisely the reason why domestic political theory based on nation-states is so well developed, but such compromise does not imply the acceptance of the *status quo* as a fact that cannot be altered.¹⁴ The need to define and create a global basic structure has to be understood as a demand of expanding justice background.¹⁵ Therefore, the question ought not to be how to extend justice considering the global balance of power and the existing countries in the global arena. The question ought to be, on the contrary, what new institutions should be created to assure the possibility of global justice. Real situations have an impact on theories but it is also true that we should not minimize the impact that theories have in the world.

Besides, it is not the existence or non-existence of a political entity what count as relevant in order to define what should be considered the basic structure but its deep effects on individuals. The effects of these disorganized actors fully justify its treatment as the relevant basic structure. It is not a fair system of institutions working together as a unified scheme of social cooperation but it is the most influential system under which individuals are born and lead a complete life. That is why we defend the theoretical possibility, as well as the practical need, to accept the domestic institutional framework that Rawls designed and expand it to the international arena.

After all, we could wonder why Rawls finally decided to include the family within the basic structure in which his two principles of justice apply. Rawls understood (correctly, in our opinion) that its influence on the lives of individuals, especially women, was huge and therefore it could not be considered a private realm but rather a political subject that a theory of justice could not avoid dealing with. If the basic structure is the primary subject of justice, then the family could not be out of it. The structures or institutions that foster any kind

¹⁴ Nagel, "The Problem of Global Justice."

¹⁵ Charles R. Beitz, *Political Theory and International Relations*, 2nd ed. (Princeton, NJ: Princeton University Press, 1999).

of oppression, domination or exploitation should be considered political. Going ever further than Rawls and following the premises we are defending, Cohen stated that if the primary subject of justice is responsible for distributing fundamental life prospects, then it ought to be expanded to include formal and informal institutions, that is, both coercive political institutions (the legal system, the economic organization), the family and even the way in which individuals internalize the principles of justice and act in ways consistent with them.¹⁶ This is the only way to deal with, for instance, the early unfair distribution of roles to sons and daughters inside families. Cohen's objection is consistent and demands the extension of the basic structure to include individuals. However, we will focus here on the extension of the basic structure from the state to the global level.

In *Political Liberalism*, Rawls points out some of the "problems of extension" of his theory. He admits it is necessary to extend justice as fairness to cover the concepts and principles that would apply to international law and the relations between political societies.¹⁷ However, in the attempt to extend justice presented in *The Law of Peoples*, he introduces new methods and principles for the "Society of Peoples" which are different from the two original ones.¹⁸ Rawls is right when he considers that different purposes and roles of different subjects would justify the existence of different principles of justice. The idea that the principles of justice do not apply beyond the domestic basic structure would be acceptable if we recognized the distinctive character of both subjects: the basic structure of closed societies and the basic structure of a global society. However, we consider that the distinction in roles cannot be easily justified if we understand that the basic requirements of justice in the national and international arena are not really that different, as we will try to present.

¹⁶ Gerald A. Cohen, "Where the Action Is: On the Site of Distributive Justice," *Philosophy & Public Affairs* 26 (1997), pp. 3-30.

¹⁷ Together with that, there is the question of extending justice as fairness to cover duties to future generations; the treatment of those who cannot be considered, temporarily or permanently, fully cooperating members of society, and finally, the question of what is owed to animals and the rest of nature. See Rawls, *Political Liberalism*, Lecture I.

¹⁸ John Rawls, *The Law of Peoples*; with, *The Idea of Public Reason Revisited* (Cambridge, MA: Harvard University Press, 1999b).

One of the possible arguments to extend justice has to do with the increasing possibility of global interaction. The possibility to negatively affect others under a global economic system that binds us all would justify the pretension to extend justice conditions all over the world. Some could probably reply that the most affluent cannot be blamed for all the suffering in the world and that they have no responsibility toward poverty eradication.¹⁹ However unreasonable that idea could sound, we consider that even if it were true it would not be a decisive objection. Although some were not at all responsible for the actual suffering of others, a theory of justice cannot ignore the existence of people's suffering regardless of where they live. From a moral perspective, it is difficult to state that moral responsibility cannot go beyond the small group of people whom we directly affect.

A theory of justice (global or domestic) cannot abstain from dealing with the fact that there are accidents out of the control of individuals, such as their place of birth or their social status, which seriously affect their life prospects. In his *Theory of Justice*, Rawls stated that these contingencies are neither moral nor immoral and what can be considered right or wrong is the way a theory of justice deals with these questions. Being born in a poor rather than a rich country is certainly as arbitrary as being born into a poor rather than a rich family in the same country.²⁰ Therefore, we can say that something is wrong when a theoretical framework fails to extend justice conditions to deal with contingencies that can determine shares, because this omission would in practice be restoring the feudal notion of birth right privilege.²¹

Beyond Mutual Benefit

The problem is that contract theories have traditionally tended to imagine the creation of a just political entity as a process in which the parties accept the sacrifices of losing some prerogatives in order to

¹⁹ Thomas W. Pogge, *World Poverty and Human Rights: Cosmopolitan Responsibilities and Reforms* (Cambridge: Polity Press, 2002).

²⁰ Nagel, "The Problem of Global Justice."

²¹ Michael Blake, "Distributive Justice, State Coercion, and Autonomy," *Philosophy & Public Affairs*, 30, 3 (2001), pp. 257-96.

obtain something they could never get by themselves. The fundamental organizing idea of justice as fairness, within which the other basic ideas are systematically connected, is that of society as a fair system of rational cooperation over time.²² The resulting concept of justice seems to be linked to *reciprocal* economic cooperation, and cooperation is based on the idea of each participant's rational advantage. The just contract is highly based on reciprocity. Those who are engaged in cooperation try to rationally promote their own good by considering others.²³

The social contract engaged in only on the basis of rational self-interest is a morally insufficient procedure. Consider slavery as an example. Basing policies on rational agreement about mutual benefit would not have been sufficient to abolish slavery. Some people (slave owners, say) would not benefit and others would. Of course, in the original position, under the veil of ignorance, the possibility that one of the participants could be a slave is introduced. Since any one of the participants could be a slave, it would be rational, in the original position, to legislate against slavery. However, there seems to be something else which makes slavery wrong. It is not, we think, merely that we would, in the original position, rationally avoid it.

The same could be said in some other areas such as justice for the disabled: the thought of oneself becoming disabled might help us understand the needs of people with disabilities but this is not the most decisive argument. In these cases, the reciprocity approach defended by Rawls gets weaker and weaker as there is no symmetrical advantage at all to be considered.²⁴ Let us think, for instance, about the difficulty to appeal to this argument to defend justice for animals. If mutual benefit is thought to be the keystone of justice, the most advantaged might not even consider the possibility of the contract.

We agree with Nussbaum in her suggestion that social contract theories need a wider conception of humans.²⁵ This would give

²² Rawls, *Political Liberalism*, Lecture I, § 3.

²³ Rawls, *Political Liberalism*, p. 16.

²⁴ Martha C. Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership* (Cambridge, MA: The Belknap Press of Harvard University Press, 2006).

²⁵ *Ibid.*

theorists more capacity to rethink the fundamentals which bind individuals, and the bases on which just political societies can be grounded. That means to include in the equation of justice some other factors such as sincere concern about other's well-being, leaving aside getting possible benefits one might obtain. A just society cannot be based only on mutual benefit. Let us consider G. A. Cohen's example,²⁶ which can be summarized as follows: assuming one of the aims of justice is the question of sharing benefits and burdens in society paying special attention to the worst off, maybe there are some other factors which should be taken into account and which go beyond the design of a basic structure designed to provide mutual benefit. Let us suppose the existence of two societies with identical basic structures: one with a capitalist competitive *ethos* and another in which their citizens appreciated values such as solidarity and egalitarianism. Surely both societies could not be considered equally just. If the promotion of an egalitarian disposition in society has a significant impact, why would the Rawlsian approach not require individuals to do what they can to uphold an egalitarian background and fight the gladiatorial *ethos* in their society?²⁷

The Institutional Approach

The example shows that declaring that the basic structure is the first and primary subject of justice can fail to properly grasp the treatment of some relevant questions because it is primarily an institutionally biased perspective. We certainly assume that the ethos of a society is closely related to the institutional structure and that values and institutions are mutually influenced.²⁸ A fair set of institutions should promote fair values among their citizens. That is a way to defend justice and promote stability: if individuals recognize that it is their

²⁶ Cohen, "Where the Action Is: On the Site of Distributive Justice."

²⁷ Louis-Philippe Hodgson, "Why the Basic Structure?," *Canadian Journal of Philosophy*, Vol.42, No. 3/4 (September/December, 2012), pp. 303-334.

²⁸ Hugo E. Biagini & Diego A. Fernández, "'Neoliberalismo o neuroliberalismo' Emergencia de la ética gladiatoria," *Utopía y Praxis Latinoamericana, Revista Internacional de Filosofía Iberoamericana y Teoría Social*, 18, 62 (2013), pp. 13-34.

duty to improve the position of the worst off, they are more likely to defend social and economic institutions that promote this view.

The institutional approach ought to leave space to consider that justice implies a non-instrumental treatment of others in which strategic considerations of self-interest cannot be the only motivation. The insistence of Rawls on pluralism leads him to think that finding a way to accommodate the differences was more important than trying to find the similarities and ties that link all human beings. The question here is that the colors Rawls chooses to employ in his palette (rational persons concerned to further their own interests) end up determining the narrow resulting painting.

Rawls' position fails to understand justice as primarily related to the way we react, think and act in the face of the arbitrary suffering of others. It is unjust that the life plans of individuals depend, as if it was a kind of lottery game, on factors such as the social class, status, religion, sex, or country of origin, which are either conventional, avoidable or arbitrary and in most cases, out of the reach of the individuals who suffer from them. If justice is understood as having to do with allowing people to live decent lives under a scheme of equality of opportunities, when people suffer or die and it is not due to inevitable causes or their entire responsibility, it seems their case is a matter of justice, especially when these inequalities are persistent and even growing. Let us just mention that the absolute number of malnourished people has risen dramatically in thirty years, from 850 million in 1980 to reach the 1,000 million people, most of them in Asia and the Pacific and in Sub-Saharan Africa.²⁹

Rousseau said he could perceive "two principles prior to reason": our own welfare and preservation, and the other was "the natural repugnance at seeing any other sensible being, and particularly any of our own species, suffer pain or death."³⁰

When Rawls takes a peoples-based approach in *The Law of Peoples*, he is not paying careful attention to human suffering because he

²⁹ UNDP, *Human Development Report*, p. 35.

³⁰ Jean J. Rousseau, "What is the Origin of Inequality Among Men, and is it Authorized by Natural Law?," *The First and Second Discourses Together with the Replies to Critics and Essay on the Origin of Languages* (New York: Harper & Row, 1990).

subordinates individuals to his communities.³¹ He designs two contracts, and in the second one, the parties are the representatives of the states, which are treated as individuals in the domestic case. He considers that independent peoples (states) have certain fundamental equal rights in analogy to the equal rights of citizens in a constitutional regime.³²

The primacy of the group over the individual is granted, according to Rawls, by the principle of self-determination, which gives people the right to settle their own affairs (including basic human rights of their inhabitants) without the intervention of foreign powers. However, the problem is that not giving individuals a more relevant role makes it more difficult to properly address the suffering of singular beings in a global sphere. The approach we find in *The Law of Peoples* focuses on the general principles that can and should be accepted by both liberal and non-liberal (but decent) societies as the standard for regulating their behavior toward one another. The question is that the society of peoples is not the society of individuals; Rawls seems to be more interested in regulating the relationships between well-ordered societies than in defending a global institutional framework in which individuals were protected by international patterns of justice. He is more interested in presenting the guidelines of a fair foreign policy for constitutional liberal democracies than in justifying the global principles of justice for the inhabitants of the world. The only exception to this is a modest 'duty of assistance' toward societies burdened by unfavorable conditions.³³

Rawls openly admits that two of the main reasons for reducing inequalities within a domestic society is to relieve the suffering and hardships of the poor and to avoid the fact that the worst-off citizens could be stigmatized and treated as inferiors.³⁴ Yet, there are no strong requirements toward the globally least advantaged individuals or toward the distribution of wealth. States and their riches seem to be taken for granted and unquestioned.

³¹ Rawls, *The Law of Peoples*; with, *The Idea of Public Reason Revisited*.

³² John Rawls, *A Theory of Justice*, p. 331.

³³ Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership*.

³⁴ Rawls, *The Law of Peoples*; with, *The Idea of Public Reason Revisited*, p. 114.

If the argument used to defend the importance of the basic structure (the pervasive effects on individuals) was paramount, Rawls would be forced to admit that the present deep influences of the complex of institutions and other political and non-political actors in the global arena clearly justify maintaining in the global basic structure the treatment given in *Political Liberalism* to the domestic basic structure.

It is individuals, not peoples or states, who are the worst off in the global arena. They are the morally relevant part because they are the weakest link of the chain. In the case of global injustice, some individuals are doubly victimized, suffering from the drawbacks of being part of a disadvantaged social position and from the disadvantages of belonging to a poor state. Let us think of a poor woman from a poor rural area in a poor country. That is why we consider that the badly-off individuals ought to be considered a priority in any egalitarian theory of justice. That means that the way to adopt the principles to regulate global cooperation ought to be the result of a suitable procedure of construction in which individuals (not peoples), under reasonable conditions, accept the principles to regulate a global just basic structure.

Let us now move from individuals to institutions: global justice demands sovereignty and global institutions, that is, a stable political framework of some kind. In its absence, justice has no practical expression of any kind.³⁵ Our aim is not to develop this idea because that would require a separate discussion.³⁶ For the moment, we leave this question aside, stating that the presence of some form of global basic structure is necessary for the same reasons Rawls employed in the domestic case.³⁷

Conclusion

Rawls was right when he assured that keeping background justice requires efforts and adjustments to prevent the tendency of justice to be eroded even if individuals acted always fairly. It is hard to think

³⁵ Nagel, "The Problem of Global Justice."

³⁶ Cf. Juan Antonio Fernández Manzano, *Un Estado global para un mundo plural* (Madrid: Biblioteca Nueva, 2014b).

³⁷ Pogge, *Realizing Rawls*.

that background justice has the least chance of persisting in the international sphere in the absence of a set of institutions aimed to preserve it. All the relevance Rawls gives to the institutional basic structure can only derive from the deep influence it has on the lives of individuals and on their possibility to lead a decent life.

We agree with Rawls that a decent life requires some all-purpose means, which after all do not differ much from one individual to another. Rawls presents an outline (the details of which might be disputed) of the basic primary goods and that can be reduced to three: a) equal basic rights and liberties (human rights, from liberty of thought to medical assistance without which no life plan can be fulfilled), b) income and wealth (economic distribution) and c) the social bases of self-respect.³⁸ This would imply freedom of movement for all individuals and economic distribution, since goods cannot be the exclusive property of the nationals of a country. Instead, choosing the state (or the peoples) as relevant actors means giving preference to national sovereignty rather than primary goods (basic rights), and therefore rather than human dignity. Primary rights deserve to be called 'primary' precisely because their importance cannot be subordinated to concepts such as the autonomy of a political entity. In the two-contract theory of *The Law of Peoples*, Rawls misses the opportunity to spread the principles of justice globally, turning the defense of basic rights as well as redistribution into domestic business.

We understand that the Rawlsian approach is valuable because a) it suggests that persons are to construct principles that apply to the complex of institutions that shape their lives b) the hypothetical agreement takes place between all rather than some members of society³⁹ and c) new political entities are not thought of as the result of invisible hand processes but the outcome of deliberate political acts in which all have had a say. However, as we have tried to show, the relevant basic structure nowadays certainly exceeds the limits of nation states. The basic subject of justice cannot be institutions alone, but individuals' rights and liberties. The double contract scheme gives basic rights a secondary status. Besides, justice in the global sphere

³⁸ Rawls, *Political Liberalism*, p. 181.

³⁹ *Ibid.*, §1.

ought to be considered a matter of basic justice, not a secondary matter to be dealt with in a future moment.

Therefore, the creation of global basic structure is a necessary condition to speak of global justice. Finally, the contract cannot be based on mutual benefit alone, but on the genuine interest in the well-being of other individuals or at least the repugnance to their suffering. To sum up: despite the large number of practical challenges, we defend the need to agree on special first principles to regulate the basic structure of a global political community made up of free and equal, moral and rational individuals. Unless this structure is suitably adjusted, no social process can be just.

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Rawlsian Contractualism and Cognitive Disabilities*

AKIRA INOUE

Introduction

John Rawls' theory of justice is enormously influential in political philosophy. Rawls' canonical works, *A Theory of Justice* (hereafter *TJ*) and *Political Liberalism* (hereafter *PL*), play a crucial role in the revival and reinforcement of social contract theory.¹ His account of justice has demonstrated the need to focus on what justice requires, specifically in ways that citizens can widely acknowledge and reasonably endorse. No one can plausibly deny the significance of Rawls' social contract account (*Rawlsian contractualism*).

Rawlsian contractualism has been challenged on many fronts. One major challenge questions the role of idealization in the account. In particular, the Rawlsian ideal that all citizens are able to engage in a scheme of social cooperation for reciprocal advantage has invited severe criticisms.² Among them is that of Martha Nussbaum, who calls into question the Rawlsian ideal that inevitably excludes people with severe disabilities, especially those that are cognitive.

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¹ John Rawls, *A Theory of Justice* (Cambridge, MA, Harvard University Press, 1971); John Rawls, *Political Liberalism* (New York, Columbia University Press, 1993).

² See B. Barry, *Theories of Justice* (Berkeley and Los Angeles, CA, University of California Press, 1989); A. Buchanan, "Justice as Reciprocity versus Subject-Centered Justice," *Philosophy and Public Affairs*, vol. 19, no. 3 (1990), pp. 227-252; B. Barry, *Justice as Impartiality* (Oxford, Clarendon Press, 1995); E.F. Kittay, *Love's Labor: Essays on Women, Equality, and Dependency* (New York, Routledge, 1999), chaps. 4-6; Martha. C. Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership* (Cambridge, MA, Harvard University Press, 2006), chaps. 1-3.

Rawls' appeal to the idea of reciprocity precludes people with cognitive disabilities and so cannot guarantee special care for them.

This paper engages with Nussbaum's objection to Rawlsian contractualism and provides a reasonable response to it. My argument proceeds as follows: First, I will show that there are two fundamental features of Rawlsian contractualism: namely, the idea of domain division and the idea of reciprocity. Following this I then examine Nussbaum's charge against Rawlsian contractualism in accordance with the three arguments concerning the idea of reciprocity. I will argue that existing arguments for the defense of Rawlsian contractualism fail to explore plausible responses to Nussbaum's attack. I contend that, with the idea of domain division, Rawlsian contractualism can reasonably accommodate those with cognitive disabilities.

There are two preliminaries: First, this paper does not discuss the conception of *primary goods* for two reasons. One is that the purpose of this paper is to examine Nussbaum's contention, i.e. whether the argument form in Rawlsian Contractualism makes the maltreatment of people with cognitive disabilities inevitable. Although the conception of primary goods is central to Rawls' theory of justice, it does not determine the propriety of Rawlsian contractualism. Second, more importantly, the conception of primary goods could be replaced with a different alternative if it was truly problematic as a metric of justice. As Sen and Nussbaum argue, the conception of capabilities is a powerful alternative.³ In any event, for our purposes here, we can set aside the metric issue of justice.

The second preliminary is that this paper does not scrutinize the plausibility of Nussbaum's theory of justice. I do not address whether her approach is better than Rawlsian contractualism. As Nussbaum herself admits, "it must await a further, and lengthier, examination."

³ Martha. C. Nussbaum and A. Sen, eds., *The Quality of Life* (Oxford, Clarendon Press, 1993). Note that Rawls believes that a measure of (basic) capabilities can be reasonably incorporated into the account of primary goods insofar as justice is concerned, since basic capabilities can be specified as primary goods with reference to citizens' capacities for the exercising and enjoyment of equal basic rights and liberties under the two principles of justice. See John Rawls, *Justice as Fairness: A Restatement* (Cambridge, MA, Harvard University Press, 2001), pp. 168-176).

Again, this paper argues whether Rawlsian contractualism can be defended against Nussbaum's attack over the treatment of people with cognitive disabilities.⁴

Rawlsian Contractualism: An Overview

The essential features of Rawlsian contractualism can be seen in the following famous passage from *TJ*:

My aim is to present a conception of justice which generalizes and carries to a higher level of abstraction the familiar theory of the social contract as found, say, in Locke, Rousseau, and Kant. In order to do this we are not to think of the original contract as one to enter a particular society or to set up a particular form of government. Rather, the guiding idea is that *the principles of justice for the basic structure of society are the object of the original agreement*. They are the principles that *free and rational persons concerned to further their own interests would accept in an initial position of equality as defining the fundamental terms of their association*.⁵

As has been interpreted in light of the above passage, especially the italicized sentences, it is often thought that the distinct features of Rawlsian contractualism are *institutionalism* and *proceduralism*. On the former, the main purpose of Rawlsian contractualism is to flesh out the principles of justice for the basic structure of society. The basic structure of society comprises the arrangement of the political constitution, the legal system, the economy, and the family, i.e., the social

⁴ Nussbaum, *Frontiers of Justice*, p. 6. Nussbaum regards her conception of justice as more directly connected to the global context, which differs significantly from Rawls' way of developing a theory of global justice from the conception of justice under the presumption of a closed society. *Ibid.*, pp. 224ff; cf. Rawls, *A Theory of Justice*, p. 8; Rawls, *Political Liberalism*, p. 12. Although this difference may be important for examining whether Rawlsian contractualism can be defended against Nussbaum's charge, I set aside this issue to focus specifically on whether Rawlsian contractualism can provide a more reasonable treatment of people with cognitive disabilities.

⁵ Rawls, *A Theory of Justice*, p. 11; emphasis added.

institutions that bear on benefits and burdens among citizens. The principles of justice determine the fair system of social cooperation in which all citizens are willing to participate. Not only Rawls, but also many of his followers and critics advocate that these principles are not necessarily the same as those for (personal acts of) individuals.⁶ This may well lead us to acknowledge Rawlsian contractualism as an institutionalist position that emphasizes the role of justice for social institutions.

Also, proceduralism is taken as a distinct feature of Rawlsian contractualism in its capacity to find the principle(s) of justice that reasonable people can endorse. To delineate the acceptable principles of justice, Rawls famously contends that parties aiming to form a social contract must be situated fundamentally as equals, which is reflected through the idea of the original position. The original position is a hypothetical device for explicating the acceptable principles of justice in which no parties are given information about their inborn traits and social backgrounds. Rawls takes this procedure as representative of purely procedural justice: all citizens can reasonably espouse the background conditions of the procedure.⁷ This procedure signifies the treatment of people as fundamentally equals, given that no independent criterion for the just consequence is available.

There is no denying that these two characteristics are of some importance in Rawlsian contractualism. However, I insist that Rawlsian contractualism has two related but more fundamental features: the idea of *domain division* and that of *reciprocity*.

First, from the passage cited above, it is evident that Rawls presents justice as the fundamental *principles* of allocating benefits and burdens among citizens. The fact that Rawls does not regard “the original contract as one to enter a particular society or to set up a

⁶ See Rawls, *A Theory of Justice*, pp. 54-55; Thomas Nagel, *Equality and Partiality* (New York, Oxford University Press, 1991), chap. 6; G.A. Cohen, “Where the Action Is: On the Site of Distributive Justice,” *Philosophy and Public Affairs*, vol. 26, no. 1 (1997), pp. 3-30; L.B. Murphy, “Institutions and the Demands of Justice,” *Philosophy and Public Affairs*, vol. 27, no. 4 (1998), pp. 251-291; Thomas Pogge, “On the Site of Distributive Justice: Reflections on Cohen and Murphy,” *Philosophy and Public Affairs*, vol. 29, no. 2 (2000), pp. 137-169.

⁷ Rawls, *A Theory of Justice*, p. 86.

particular form of government” illustrates this presentation. The object of an agreement in the original position is primarily to stipulate the basic principles of justice, not to establish directly the just institutions or rules. The fundamental principles of justice require effective social institutions, but not vice versa. It thus can be said that Rawlsian contractualism primarily aims to specify the basic principles of justice for enduring social cooperation.

Notably, the fundamental principles of justice are of distinct importance for distribution, since “there is a conflict of interests since persons are not indifferent as to how the greater benefits produced by their collaboration are distributed, for in order to pursue their ends they each prefer a larger to a lesser share.”⁸ This is exemplified by Rawls’ difference principle, a famous principle of justice that permits economic inequalities only insofar as they improve the prospects of the least advantaged: the difference principle is characterized as a principle for determining the just distribution of benefits and burdens that reasonable people, including the least advantaged, can support.

The important point is that, in explaining that “the primary subject of the principles of social justice is the basic structure of society” in *TJ*, Rawls stresses that “[t]he principles of justice for institutions must not be confused with the principles which apply to individuals and their actions in particular circumstances.”⁹ In *PL*, Rawls contends that even when matters of basic justice, including those of economic inequalities, are at stake, our personal deliberations and reflections involving “religious, philosophical, and moral considerations of many kinds may ... play a role.”¹⁰ Obviously, the difference principle is not necessarily relevant in other moral domains or a domain related to personal virtues: in some cases if not all, we can regard a worse-off person as virtuous in our society if she sacrifices her personal interests to help poor children in the developing world. This suggests what the idea of domain division is and its importance: namely, that while setting out the principles of distribution in the domain of justice is crucial, other moral and ethical considerations, e.g. the virtue of sacrifice, have a distinct role in forming our

⁸ *Ibid.*, p. 4.

⁹ *Ibid.*, p. 54.

¹⁰ Rawls, *Political Liberalism*, p. 215.

evaluative judgments about rules and people's actions. We thus cannot ignore the salience of the other moral and ethical domains in the general system of justice and morality.

Second, Rawls presumes that the purely fair procedure is imposed as a formal constraint by a more fundamental idea, i.e., the idea of reciprocity. In *PL*, Rawls explicitly proposes that there is a family of "principles and guidelines to which we appeal in such a way that the criterion of reciprocity is satisfied," and that "*one way* to identify those political principles and guidelines to show that they would be agreed to in what ... is the original position."¹¹ This is, I take it, presumed in *TJ*: As can be seen in the cited passage above, the point of presuming basic equality among free and rational people is to "define the fundamental terms of their association." In other words, the purpose of appealing to the purely fair procedure is to explicate the principles of justice to which free and rational people can commit themselves willingly. Since free and rational people are "concerned to further their own interests," as represented by the parties in the original position, the principles in question must be reciprocally supportable in such a way as to promote all people's interests equally. We thus can say that this idea of reciprocity underlies the conception of the original position and so characterizes Rawlsian Contractualism in a deeper way.¹²

Hence, the idea of domain division and the idea of reciprocity are more fundamental in Rawlsian contractualism. Although this understanding of Rawlsian contractualism is not original,¹³ my point

¹¹ *Ibid.*, pp. xlvi-xlix; emphasis added.

¹² Compare the characterization of Rawlsian contractualism by Henry Richardson. Richardson argues that the idea of reciprocity is not essential in Rawls' justification of the conception of justice, by reference to Jean Hampton's famous argument that Rawls' justification of the two principles of justice does not rely on any element of social contract theory. H.S. Richardson, "Rawlsian Social-Contract Theory and the Severely Disabled," *Journal of Ethics*, vol. 10, no. 4 (2006), pp. 427-428; cf. Jean Hampton, "Contracts and Choices: Does Rawls Have a Social Contract Theory?" *Journal of Philosophy*, vol. 77, no. 6 (1980), pp. 315-338. However, Hampton's argument narrowly focuses on the reasoning of *the parties* in the original position, not the public reasoning of free and equal *citizens*.

¹³ See S. Freeman, *Justice and the Social Contract: Essays on Rawlsian Political Philosophy* (New York, Oxford University Press, 2007), chap. 1; S. Scheffler,

here is that these characterizations are largely consistent from *TJ* to *PL*.¹⁴

Nussbaum on Rawlsian Contractualism and Some Rawlsian Responses

As was mentioned in the Introduction, Nussbaum provides a powerful critique against the idea of reciprocity in Rawlsian contractualism. By her scrupulous and insightful reading of *TJ* and *PL*, Nussbaum rightly sees that the idea of reciprocity is key to Rawlsian contractualism. She then finds a serious problem with Rawlsian contractualism: Rawlsian contractualism excludes people with severe disabilities, especially those with cognitive disabilities, mainly because they cannot be regarded as citizens in light of the idea of reciprocity.¹⁵

As is well-known, Rawls explicitly claims that “[s]ince we begin from the idea of society as a fair system of cooperation, we assume that persons as citizens have all the capacities that enable them to be cooperating members of society.”¹⁶ The capacities of citizens consist of two moral powers, which are the capacity for a sense of justice and the capacity for a conception of the good. The former is a capacity “to understand, to apply, and to act from ... the principles of political justice that specify the fair terms of social cooperation.” The latter is a “capacity to have, to revise, and rationally to pursue a conception of

Equality and Tradition: Questions of Value in Moral and Political Theory (New York, Oxford University Press), 2010, chap. 4; Kok-Chor Tan, *Justice, Institutions, and Luck: The Site, Ground, and Scope of Equality* (Oxford, Oxford University Press), 2012, chap. 3.

¹⁴ In *TJ*, Rawls often refers to the idea of reciprocity as implicit in the concept of a well-ordered society and the difference principle (Rawls, *A Theory of Justice*, pp. 14, 102-103). As will be seen below, the idea of reciprocity is more explicit in *PL*, especially in developing the idea of social cooperation, Rawls, *Political Liberalism*, pp. 16-17. Note that Nussbaum emphasizes that, concerning the idea of reciprocity, Rawls’ understanding of the original position and its restrictions is unchanged from *TJ* to *PL* and some restrictions are more explicit in *PL*, Nussbaum, *Frontiers of Justice*, p. 61.

¹⁵ Nussbaum, *Frontiers of Justice*, p. 31.

¹⁶ Rawls, *Political Liberalism*, p. 20.

good.”¹⁷ Thanks to these two moral powers, citizens are capable of engaging in social cooperation to maintain an enduring and well-ordered society and leading a complete life in that society. This is an underlying element of the idea of reciprocity: “all who are engaged in cooperation and who do their part as the rules and procedure require, are to benefit in an appropriate way.”¹⁸

Given this idea of reciprocity, it seems that persons with severe (cognitive) disabilities are not “normal,” in that not only can they not produce benefits to others, but they even create tremendous cost in a one-sided manner. Nor do they seem to be equipped even minimally with the two moral powers due to their cognitive disabilities. Nussbaum concludes:

Thus people with mental impairments and disabilities pose a double challenge to Rawls’ theory. The contract doctrine seems unable to accommodate their needs for special social attention, for the reasons of social productivity and cost that pertain to all people with impairments. But they are disqualified from citizenship in a deeper way as well, because they do not conform to the rather idealized picture of moral rationality that is used to define the citizen in the Well-Ordered Society. Like non-human animals, they are not regarded as capable of reciprocity of the requisite sort. And like animals again, they will have “some protection certainly” but not the status of full-fledged citizens.¹⁹

I examine this critique of Rawlsian contractualism. In so doing, I focus attention on Nussbaum’s challenges to the three arguments related to the three elements of reciprocity, *the circumstances of justice*, *the hybrid idea of reciprocity*, and *moral personhood*. I also scrutinize the existing defenses of Rawlsian contractualism with respect to each of the conceptions and then show that they are not successful.

¹⁷ *Ibid.*, p. 19.

¹⁸ *Ibid.*, p. 16. See also Rawls, *Justice as Fairness*, p. 6.

¹⁹ Nussbaum, *Frontiers of Justice*, p. 135.

On the Circumstances of Justice

In *TJ*, the circumstances of justice constitute conditions under which justice is indispensable for our cooperative venture for mutual advantage, which reflects David Hume's construal of backgrounds of justice as a social convention.²⁰ They comprise moderate scarcity of resources and motivational limitations for altruism, such that the parties in the original position are mutually disinterested in one another while selecting the principles of justice. In Rawlsian contractualism, the circumstances of justice thus play an important role in pursuing justice, on the grounds that the restrictions of the contractual situation must be "widely acknowledged and reasonable."²¹ In *PL*, their role in the pursuit of justice is not fundamentally changed, although the fact of reasonable pluralism is emphasized as the subjective circumstances of justice.²²

Nussbaum argues that these components boil down to "rough equality" between people in terms of their susceptibility to the conditions above.²³ Nussbaum then questions Rawls' adherence to the circumstances of justice. She highlights the decisive influence of the confines set up by the circumstances of justice. Within the confines, citizens are prepared to give everyone strict justice in such a way that they may limit their commitment to citizens who are "productive" in a system of social cooperation. It may not be rational for citizens to cooperate with people who are "unproductive" in the circumstances of justice. Since it seems difficult to advocate that people with cognitive disabilities are "productive" they cannot be seen as even

²⁰ Rawls, *A Theory of Justice*, pp. 4, 126. See also David Hume, "An Enquiry Concerning the Principles of Morals," L.A. Selby-Bigge, ed., *Enquiries Concerning Human Understanding and Concerning the Principles of Morals*, P.H. Nidditch, rev. 3rd ed. (Oxford, Clarendon Press, 1975), pp. 183-184.

²¹ Rawls, *A Theory of Justice*, p. 13.

²² Rawls, *Political Liberalism*, p. 66. Rawls explains that the subjective circumstances reflecting the fact of reasonable pluralism are "the circumstances that reflect the fact that in a modern democratic society citizens affirm different, and indeed incommensurable and irreconcilable, though reasonable, comprehensive doctrines in the light of which they understand their conceptions of the good." Rawls, *Justice as Fairness*, p. 84.

²³ Nussbaum, *Frontiers of Justice*, pp. 19ff.

roughly equal to other “normal” people. As a rational consequence, hence, the principles of justice do not accord full justice equally to people with cognitive disabilities in the circumstances of justice.²⁴

In examining this contention, it is important to note that Rawls characterizes the circumstances of justice as general *facts* about human society.²⁵ They are changeable. Relatedly, and more importantly, some facts would become more or less salient in the domain of justice, especially in the face of new problems or those which have not been acknowledged as matters of justice. With this in mind, we can say that Nussbaum’s criticism is levelled against the *specific content* of the circumstances of justice in *TJ*. Put another way, the circumstances of justice are not all subject to her criticism; for one thing, it may turn out that some facts are non-negligible as general facts about human society in which justice obtains. In *PL*, Rawls admits that there is an important necessary condition for justice to obtain, which is that the basic needs of all people are met. Unless their basic needs are met, citizens cannot fully understand the significance of, and so exercise, basic rights and liberties guaranteed by the first principle of justice.²⁶

This may prompt us to defend Rawlsian contractualism, such that, prior to the satisfaction of the first principle of justice, there is a lexically prior principle of justice which requires that basic needs be met. Henry Richardson provides this line of argument for Rawlsian contractualism against Nussbaum’s charge of its failure to address the issues of people with severe cognitive disabilities.²⁷ In order to enable Rawlsian contractualism to be sensitive to the claims of people with severe disabilities, Richardson attempts to widen the scope of reciprocity in order to render justice sensitive to their claims.²⁸ Roughly, this

²⁴ *Ibid.*, pp. 61-62.

²⁵ Rawls, *A Theory of Justice*, p. 137.

²⁶ Rawls, *Political Liberalism*, p. 7.

²⁷ Richardson, “Rawlsian Social-Contract Theory and the Severely Disabled.” Sophia Wong makes the same proposal, though it is more suggestive. Sophia I. Wong, “Duties of Justice to Citizens with Cognitive Disabilities,” E.F. Kittay and L. Carlson, eds., *Cognitive Disability and its Challenge to Moral Philosophy* (New York, Wiley-Blackwell, 2010), pp. 137-138. I will take up Wong’s other more serious arguments to defend Rawlsian contractualism below.

²⁸ Richardson, “Rawlsian Social-Contract Theory and the Severely Disabled,” pp. 426-427.

suggests modifications of the original position such that, in the original position, parties should have general knowledge about the diversity and prevalence of severe disabilities in our society.²⁹ Under the rearranged original position, they would be rationally motivated to choose the principle of basic needs – or, more precisely, basic capabilities – as a principle of justice lexically prior to the other two principles.³⁰ As a result, the conception of justice can guarantee people with cognitive disabilities the satisfaction of their special needs.

Richardson's strategy might seem plausible. Indeed, his argument seems to mirror Rawls' claim that "below a certain level of material and social well-being and of training and education, people simply cannot take part in society as citizens, much less as equal citizens."³¹ Since a basic minimum providing for the basic needs of all citizens is viewed as a constitutional essential in *PL*, it may seem that Rawls regards the "basic needs principle" as a top-ranked principle of justice.³² However, there is reasonable doubt about Richardson's strategy if we deeply scrutinize one of Rawls' claims in an important passage. In discussing the essential aspects of the two principles of justice in *PL*, Rawls states that the first principle of justice "may easily be preceded by a lexically prior principle requiring that citizens' basic needs be met, *at least insofar as their being met is necessary for citizens to understand and to be able fruitfully to exercise those rights and liberties.*"³³ As I see it, the italicized part highlights Rawls' reliance on the conditional claim that satisfying the basic needs of people is (at least) a necessary condition for the first principle of justice to operate. Taken together with this claim and his argument on the circumstances of justice retained in *PL*, basic needs being met can reasonably be interpreted as a circumstantial condition under which justice would function. This, I believe, means that the basic needs principle need not be regarded as a top-ranked principle of *justice* in Rawlsian contractualism.

²⁹ *Ibid.*, pp. 442-443.

³⁰ *Ibid.*, pp. 443-453.

³¹ Rawls, *Political Liberalism*, p. 166.

³² *Ibid.*, pp. 228-229.

³³ *Ibid.*, p. 7; emphasis added. See also Rawls, *Justice as Fairness*, p. 44n7.

There are two further arguments for my interpretation. First, given that the circumstances of justice are changeable, we can reasonably say that the contents of people's basic needs depend on social and economic facts about the availability of infrastructure and assistive devices.³⁴ The construal of basic needs being met, when considered a general fact about human society rather than as a principle of justice, then may cover the specific fundamental needs of people with severe disabilities more flexibly. Second, more importantly, justice is more cost-sensitive than Richardson supposes: Justice plays a role in determining the principles of assigning *burdens* as well as benefits among people whose interests are conflicting. It seems that the principle of basic needs should hold in such a way that is insensitive (or, at least, less sensitive) to the cost of caring for the needy; it is morally urgent to satisfy people's basic needs. It then may be more widely acknowledged and reasonable to see it as a principle that functions in a manner different from a principle of justice. Later, I will argue along these lines by referring to the idea of domain division.

On the Hybrid Idea of Reciprocity

Rawls formulates the idea of reciprocity as a hybrid notion that embraces both mutual advantage and impartiality.³⁵ This notion of reciprocity does not fundamentally change from *TJ* to *PL*: "the idea of reciprocity lies between the idea of impartiality ... and the idea of mutual advantage."³⁶ On this, however, Nussbaum contends that the idea of mutual advantage confines our commitments to reciprocal relationships, such that "the idea of justice remains linked to the idea that there is something we all gain by cooperation."³⁷ "This starting point," continues Nussbaum, "makes it very difficult for Rawls to include fully the interests of people with unusual physical and mental

³⁴ With the possibility of changes of this sort in mind, we may say that people with severe disabilities can reasonably be seen as full participants of the social cooperation. For this point, see C. Hartley, "Justice for the Disabled: A Contractualist Approach," *Journal of Social Philosophy*, vol. 77, no. 6 (2009), p. 25.

³⁵ Rawls, *A Theory of Justice*, p. 104.

³⁶ Rawls, *Political Liberalism*, p. 16.

³⁷ Nussbaum, *Frontiers of Justice*, p. 62.

disabilities” because those people are not “productive” enough for “normal” citizens to gain advantages through cooperating with them. Nussbaum thus concludes, “[w]hen we reach the case of mental disability, we see with utter clarity the extent to which the idea of mutual advantage distorts our understanding of the benefits of social cooperation.”³⁸

Yet it seems too hasty to conclude that the hybrid idea of reciprocity fails to include people with severe disabilities as fully cooperating members in our society, for reciprocity is the very idea that ought to be “fulfilled at the highest level.”³⁹ In emphasizing this, Rawls contrasts justice as reciprocity with contributory justice which takes the strength of the claims of agents to be “directly influenced by the distributions of natural abilities, and therefore by contingencies that are arbitrary from a moral point of view.”⁴⁰ Put another way, social cooperation can be seen as reciprocal, regardless of the degree to which different people contribute to our society. It seems that Nussbaum fails to see the level at which the idea of reciprocity ought to be fulfilled.

Cynthia Stark’s proposal echoes this presentation of reciprocity.⁴¹ Stark proposes that the ideal of social cooperation under the idea of reciprocity is a necessary constraint on the principles of justice; without it, the difference principle may implausibly apply to those who have unusual needs in ways that impose heavy burdens on the cooperative members.⁴² For the difference principle to be an acceptable principle of justice, the fully cooperating assumption in the original position should be retained. On the other hand, to cover the claims of people with severe disabilities who can never participate in social cooperation, the social cooperation restriction should be

³⁸ *Ibid.*, p. 130.

³⁹ Rawls, *A Theory of Justice*, p. 511.

⁴⁰ *Ibid.*, pp. 510-511.

⁴¹ Cynthia A. Stark, “How to Include the Severely Disabled in a Contractarian Theory of Justice,” *Journal of Political Philosophy*, vol. 15, no. 2 (2007), pp. 127-145.

⁴² Stark confines her discussion to severely impaired adults “who would ... be willing to participate in a scheme of social cooperation” but are unable to do so. *Ibid.*, p. 131. As will be seen, this confinement is necessary for her argument, because her proposal cannot appreciate the claims of people with severe cognitive disabilities under the conception of justice.

dropped at the legislative stage: Ideal legislators are presumably in a position through ideal deliberation to fill the shoes of claimants including people with severe disabilities within the guidelines of the reciprocal principles of justice. They would track the special needs of those with severe disabilities and represent them as trustees at the legislative stage, even though they are not fully cooperating members. The point is that this two-stage approach does not violate the principle of reciprocity because the ideal of full social cooperation is retained at the highest level. As a consequence, people with severe disabilities are guaranteed “a comprehensive social minimum that is compatible with the norm of reciprocity mandating adequate compensation to full contributors.”⁴³

On this proposal, however, it is difficult to claim that the hybrid idea of reciprocity honors the claims of people with severe *cognitive* disabilities. As Rawls admits, the idea of reciprocity being fulfilled at the highest level is not free from the contingency “of having or not having the capacity for a sense of justice.”⁴⁴ In other words, the idea of reciprocity presumes that citizens have the capacity for full cooperative contribution to society. As Christie Hartley says, “this justifies distinguishing the fully cooperating from others for purposes of considering the fundamental case of justice.”⁴⁵ It then seems dubious that ideal legislators can act on the principles of justice for people who lack the capacity for a sense of justice in a manner

⁴³ *Ibid.*, p. 139,

⁴⁴ Rawls, *A Theory of Justice*, p. 511.

⁴⁵ Hartley, “Justice for the Disabled,” p. 27. See also Christie Hartley, “Disability and Justice,” *Philosophy Compass*, vol. 6, issue. 2 (2011), pp. 127-128. Hartley then claims that the non-fully cooperating, of which people with severe cognitive disabilities are representative, should be entitled to equal justice, given that mere “political participation and contributions to the family count as fundamental contributions to society.” Hartley, “Justice for the Disabled,” p. 27. For a critique of Hartley’s argument, see G. Badano, “Political Liberalism and the Justice Claims of the Disabled: A Reconciliation’,” *Critical Review of International Social and Political Philosophy*, vol. 17, no. 4 (2013), pp. 409-414. As I see it, this view of justice for those with severe cognitive disabilities is not only too expansive, but also unreasonable in terms of the features of justice that purports to apportion burdens as well as benefits among citizens. I will show this in the next section “The Idea of Domain Division.”

consistent with the idea of reciprocity. Since people with severe cognitive disabilities do not have the sense of justice, Stark's argument cannot cover their claims under the relevant conception of justice. Hence, her proposal is not fully successful as a response to Nussbaum's challenge against Rawlsian Contractualism.

On Moral Personhood

The hybrid idea of reciprocity is parasitic in its conception of moral persons: all citizens possess two moral powers. But this conception of moral persons seems to disqualify some sentient beings as those owed justice. Among them are, as has been discussed above, people with severe cognitive disabilities whose capacity for a sense of justice is absent. Notoriously, Rawls postpones tackling this issue: "given our aim, I put aside for the time being ... temporary disabilities and also permanent disabilities or mental disorders so severe as to prevent people from being cooperating members of society in the usual sense."⁴⁶

Nussbaum believes that this postponement goes hand-in-hand with his argument for the basis of equality.⁴⁷ She notes that Rawls' account of moral personhood is developed in Section 77 of *TJ*, entitled "The Basis of Equality," where Rawls argues that the two moral powers, especially the capacity for a sense of justice, have the corresponding features of human natural abilities. The claim that equal justice should apply to those who have the moral powers thus enjoys an empirical basis, especially when it comes to the capacity for a sense of justice.⁴⁸ The link between a person's sense of justice and certain natural features of human abilities should not be regarded as stringent: we should treat people with a minimal capacity for a sense of justice on par with other citizens. Rawls characterizes the sense of justice as a *range property*, because it can come in degrees.⁴⁹ None-

⁴⁶ Rawls, *Political Liberalism*, p. 20.

⁴⁷ Nussbaum, *Frontiers of Justice*, p. 65.

⁴⁸ Rawls, *A Theory of Justice*, pp. 462-512.

⁴⁹ On a related note, Rawls stresses that possessing the capacity for a sense of justice is a sufficient condition for being entitled to equal justice. *Ibid.*, p. 506. This may seemingly push us to claim that people with congenitally cognitive

theless, Nussbaum sees this as evidence of excluding people with cognitive disabilities, because they do not possess the capacity for a sense of justice. This is obviously true in the case of people with *congenital* cognitive disabilities who do not possess that property from birth to death.⁵⁰

However, since the concept of moral personhood is ambiguous, it can be construed in various ways. While the standard view is that the possession of moral personhood entails the actual exercise of the two moral powers, the different view may say that people can be regarded as possessing moral personhood if they would exercise their two moral powers in some possible world(s). According to this view, any *actual* exercise of the two moral powers is not a prerequisite for being owed equal justice, because it does not depend upon the realization of them. Sophia Wong develops this conception of moral personhood as the Potentiality View that can accord justice equally to people with cognitive disabilities;⁵¹ unlike the standard view, the Potentiality View can treat those with congenitally cognitive disabilities as those having moral personhood in virtue of their capacity to possibly exercise these moral powers. It thus seems that the Potentiality View can respond to Nussbaum's charge against the conception of moral personhood.

However, there is an obvious problem with the Potentiality View: Potentiality itself can be construed in an unrestricted way to suggest that justice applies equally to all sentient beings. This seems implausible for two reasons. First, higher animals such as chimpanzees may have more potential to develop the cognitive capacities required for moral personhood than people with congenitally cognitive disabilities have, even given the current conditions of medical technology.⁵² Consider the case of distribution under the Rawlsian

disabilities are not excluded in light of the argument for the basis of equality. In *PL*, however, Rawls takes "the two moral powers as the *necessary* and sufficient condition for being counted a full and equal member of society in questions of political justice." Rawls, *Political Liberalism*, p. 302; emphasis added.

⁵⁰ Nussbaum, *Frontiers of Justice*, p. 66.

⁵¹ Wong, "Duties of Justice to Citizens with Cognitive Disabilities," p. 131.

⁵² J. McMahan, *The Ethics of Killing: Problems at the Margins of Life* (New York, Oxford University Press, 2002), pp. 205-206.

second principle of justice. The Potentiality View then may allow that, other things being equal, guaranteeing chimps a set of fair opportunities to careers and material goods is at least as equally just as doing so for people with congenitally cognitive disabilities. This runs counter to our moral intuition that they should be treated differently under the conception of justice. Second, we can imagine that external interventions, e.g., some cognitive enhancement, enable even lower animals to acquire the two moral powers, given that some kind of “science fiction” technology is available.⁵³ The Potentiality View then may commit us to the claim that lower animals can be reciprocal members of society on par with other citizens. This seems farfetched, because to grant lower animals moral personhood simply renders the notion of personhood insignificant in terms of justice as reciprocity: Under the Potentiality View, every animal is a person and *so* a reciprocal member of society.

Note that Wong has in mind, and responds to, this objection.⁵⁴ Her response is unconvincing. To deflect the objection, Wong attempts to base her argument not on potentiality *simpliciter*, but rather on species-potentiality: the fact that “the human being is a member of a species that has evolved to have certain capacities, and possesses cortical structures that we all share as human beings” makes an important and morally relevant difference to this view.⁵⁵ As I see it, it is arbitrary to place the limits of potentiality at the level of species, even by appealing to the evolutionary process of acquiring the capacities and cortical structures through the evolutionary process. On the other hand, Wong asserts that, if the argument above were not promising, her view can reasonably admit that non-human animals including lower ones be owed duties of justice even though it seems counterintuitive to many.⁵⁶ However, as argued above, it is hard to see why her Rawlsian view can disregard such counter intuitiveness. In conclusion, Wong’s response to the objection in question is not convincing enough to defend the Potentiality View.

⁵³ *Ibid.*, pp. 154-156; J. McMahan, “Cognitive Disability, Misfortune, and Justice,” *Philosophy and Public Affairs*, vol. 25, no. 1 (1996), pp. 21-23.

⁵⁴ Wong, “Duties of Justice to Citizens with Cognitive Disabilities,” pp. 142-143

⁵⁵ *Ibid.*, p. 143.

⁵⁶ *Ibid.*, p. 143.

The Idea of Domain Division

It becomes clear that the existing defenses of Rawlsian contractualism are not successful enough to refute Nussbaum's charge of Rawlsian contractualism's failure to treat people with cognitive disabilities in a reasonable manner. Richardson's proposal which widens the scope of reciprocity fails to show convincingly that the principle of basic needs must be a top-ranked principle of justice in light of Rawls' well-known remark in the important passage of *PL*. Stark's proposal on the basis of the idea of reciprocity which is fulfilled at the highest level is not convincing, on the ground that people with the cognitive disabilities apparently lack the capacity for a sense of justice that fundamentally motivates people to engage in social cooperation. Wong's appeal to the Potentiality View in order to cover the claims of people with congenitally cognitive disabilities under the name of justice is untenable, because the notion of potentiality itself can be interpreted in an unlimited manner.

Why do those defenses fail to provide promising arguments against Nussbaum's critique? As I see it, the reason amounts to their adherence to extending justice in ways that include people with (congenitally) cognitive disabilities as reciprocal members of society. More specifically, the features inherent in reciprocity run contrary to their proposals for incorporating the principle of basic needs into the conception of justice or including those with (congenitally) cognitive disabilities as reciprocal members. Now a question arises: Does this result disappoint supporters of Rawlsian contractualism? I would say no, for the supporters of Rawlsian contractualism need not embark on the project to extend justice to cover the claims of those with (congenitally) cognitive disabilities.

To see this, we should understand the significance of the idea of domain division, another essential feature of Rawlsian contractualism. Recall that the main purpose of Rawlsian contractualism is to specify the fundamental principles of justice for the basic structure of society. To achieve this aim, some (parts of) social institutions should be regulated by the principles in question, but not all; some values should be realized indirectly through the principles of justice under the presence of value pluralism. Given that the "principles of justice

as fairness are plainly not suitable for a general theory” and thus cannot apply across-the-board to all associations and individuals’ acts,⁵⁷ Rawls endorses the idea of domain division in accordance with different moral principles.⁵⁸

Now we can see why Rawls sticks to the two principles of justice, not to the three principles of justice involving the top-ranked principle of basic needs in *PL*. Justice distributes burdens as well as benefits among reciprocal members. Given this, the principle of basic needs does not conform to the reciprocal conception of justice, since the moral urgency of meeting people’s basic needs may be captured more sensibly if it is less sensitive to burdens imposed on citizens. For one, we should care for the needy even in cases in which it involves huge costs to people who are willing to support the fair scheme of social cooperation. This is true in the case of people with (congenital) cognitive disabilities: we can reasonably claim that their special needs ought to be met when the principle of basic needs operates in a distinct domain of morality and/or a different domain (of a more personal kind). This idea of domain division is in line with the claim that basic needs being met is an enabler of justice. The reasonableness of assigning independent roles of principles to different domains renders Nussbaum’s attack against, and the existing defenses of, Rawlsian contractualism categorically mistaken because they wrongly identify or implausibly broaden the scope of justice. The idea of domain division thus leads us to discern salient reasons that moral principles generate in the general system of justice as reciprocity and morality.

There are two potential objections to this proposal. First, the idea of domain division might seem conservative in a way that confines the issues in caring for people with cognitive disabilities to a more personal domain. It then might legitimize that families who care for people with the cognitive disabilities incur dire sacrifice, which seems quite common in contemporary society. As a consequence, Rawlsian contractualism demands no institutional support for them and so

⁵⁷ Rawls, *Political Liberalism*, p. 261.

⁵⁸ Scheffler, *Equality and Tradition*, p. 115; Tan, *Justice, Institutions, and Luck*, pp. 100-102; Akira. Inoue, “Can Luck Egalitarianism Serve as a Basis for Distributive Justice? A Critique of Kok-Chor Tan’s Institutional Luck Egalitarianism,” *Law and Philosophy*, vol. 35, issue 4 (2016), pp. 391-414.

people with cognitive disabilities would remain maltreated in existing institutions. In response, the idea of domain division does not presume the separation between social institutions and personal spheres. We can reasonably claim that the principle of basic needs would pave the way for reform of the current institutions that are not sufficiently contributory to meeting their special needs. This clarifies that the idea of domain division differs in significant ways from the claim for institutionalism. No doubt social institutions can be a target of the principle of basic needs.

Second, even if we admit that some caring-relevant moral domain(s) promote certain institutional reforms for people with cognitive disabilities, why can we say that they would be *sufficient*? Some might worry that the idea of domain division affirms that caring responsibilities are basically held in thick human relations, such as the family relationship, on grounds that the principle of basic needs requires that social institutions foster the value of the relations. One then might assert that, for our society to attend to the necessities for care, especially the care for people with cognitive disabilities, justice should mandate our social responsibility to provide institutional support for them.⁵⁹ In response, here again, justice is concerned not only with how to divide not only the benefits but also the burdens among all citizens. If the claims of those with cognitive disabilities counted as the claims for justice, they would possibly be balanced against the corresponding burdens. This may well render their special needs unmet under the name of justice. By contrast, if the caring-relevant domain(s) are located differently from the distributive domain of justice, meeting their special needs may reasonably be taken as a distinct reason for rearranging the caring institutions for those with cognitive disabilities. Although an extensive argument for this point is beyond the scope of my argument here, it would seem plausible to support the institution of caring for the fundamental needs of any human being even in cases where the rearrangement

⁵⁹ A similar claim can be seen in Eva Kittay's argument for including the principle of *doulia* as a (third) principle of justice, which requires that the burdens of caring for the dependent (including people with cognitive disabilities) not fall on caregivers only. Kittay, *Love's Labor*, pp. 108-109.

imposes unbalanced costs on citizens. This can reasonably be endorsed by the idea of domain division.

Conclusion

This paper has argued that Rawlsian contractualism has two essential features, the idea of domain division and the idea of reciprocity, through demonstrating that neither Nussbaum nor the existing defenders of Rawlsian contractualism grasp them properly. They fail to see that Rawlsian contractualism can provide a plausible solution to the problem of how to treat the claims of people with cognitive disabilities, congenital or otherwise, in light of the two fundamental ideas. On the one hand, the ideal of justice as reciprocity anchors the fair scheme of social cooperation where citizens are willing to share burdens as well as benefits. On the other hand, the principle of basic needs plays a salient role in the domain of morality if it is treated as an independent moral principle, which provides a morally compelling reason for satisfying the specific needs of the cognitively impaired. This proposal, I believe, defuses Nussbaum's worry about the maltreatment of those with cognitive disabilities in Rawlsian contractualism.

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Jean-Jacques Rousseau's Social Contract and the Formation of the Citizen

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Introduction

Jean-Jacques Rousseau's political philosophy has been one of the most influential in Western modern thought. Together with a powerful and inspired claim to freedom and equality, the reader is presented with a set of very high ethical requirements for the accomplishment of these ideals. Rousseau's radical views on the role of the citizen poses important questions on the possible conciliation between personal and civic freedom, which I would like to discuss in detail.

The primary focus of this paper is the issue of the formation of the citizen in the Rousseau's social contract theory. To begin with I examine the anthropological basis of Rousseau's political ideas. These are based on the conception of the natural human being. In the state of nature, human beings are simple, free and solitary. Their spiritual faculties are not yet developed. With the concept of perfectibility, Rousseau states that human beings are not fixed to a single model of development, but that they can adapt to different forms. Following I provide an analysis of the intentions of Rousseau's social contract, i.e. the construction of a free and equal society. According to Rousseau, the social contract gives rise to a political body whose general will must be expressed through laws directed towards the common good. Here the civil freedom of the individual finds its accomplishment. But the distance between one's own will and the general will still remain an open issue, with the risk of invalidating the project of the *social contract*. Thirdly, I discuss the civil education of the citizen, which is an instrument for overcoming the worry of the distance between one's own will and the general will. The purpose of this kind of education is to create a particular will that adjusts itself to the general one without dissonance. In conclusion I look at the set of problems posited by this kind of education with regard to the extent of freedom in the Rousseau's social contract theory.

Social Criticism and the Idea of the State of Nature

To begin with, it will be convenient to sum up some salient features of Rousseau's works which preceded the *Social Contract*. In his *Discourse on the Sciences and Arts* he criticizes modern societies, while in the *Discourse on the Origin and Foundations of Inequality among Men* he draws the picture of the state of nature. This second piece of works is particularly important, since the author lays here the foundations of his anthropological understanding of the origin of inequality and injustice among the human beings.

Intellectual and Moral Progress

With his first philosophical work, the *Discourse on the Sciences and Arts*, he tackled the question of the relation between intellectual and moral progress, by rejecting the idea of a positive correlation between the two. This was his first attack on two different fronts.

Social Criticism. In the first place, he denounced the poor human conditions in society, not only from a moral standpoint, but also considering injustice and oppression against the vast majority of the population. From a moral standpoint, Rousseau claims that people in society are used to deceit each other, always showing a public façade that has nothing to do with their true constitution. Such an attitude has material and concrete consequences in terms of the political and economic oppression of the leading class over the others. Secondly, he casts doubt on the enlightened confidence that spreading the lights of culture all over society would improve, although slowly, human conditions, in terms of their happiness, freedom and morality.¹

The polemic against society became more defined and sharper in his second major piece of work, the *Discourse on the Origin and Foundations of Inequality among Men*. Here we can find his strongest statements against the human conditions in society, together with the famous picture of the state of nature. As Rousseau explicitly states,

¹ For a discussion on the distance between Rousseau and the French Enlightenment, see E. Cassirer, *The Question of Jean-Jacques Rousseau* (New Haven–London: Yale University Press, 1989).

this picture, obtained through self-reflection and introspection, is by no means a historical reconstruction. Instead, it serves to acquire the knowledge of human nature, and it contains the basic anthropological principles of Rousseau's thought. As Ernst Cassirer puts it by transposing this issue in Kantian terms, the state of nature stands as an idea of reason and it works as a regulative principle for the correct judgement of society and human beings.²

Natural Human Being. In the *Discourse on the Origin and Foundations of Inequality among Men*, Rousseau depicts a veritable genealogy of social diseases stemming from the unguided evolution from the state of nature. According to the author, natural man was barely a human being, compared to his later stages: solitary, without reasoning and speech, guided only by the combination of simple self-love, or *amour de soi*, and compassion, or *pitié*, a visceral response to pain when confronting to the suffering of others. Basically ignorant of laws, morals and even unable to make a comparison between himself and the others, this natural man is good in a purely negative way: he has no ground to intentionally harm his fellows, except for very occasional fights, which are nonetheless unlikely to happen.

Everyone in the state of nature has just the same rights as everyone else, no one dominates other people: human beings are perfectly equal, the differences in physical strength and ability are balanced by the dispersion of people on the surface of the Earth and they constitute by no means the basis for the institution of any kind of power. Natural human beings spend their life peacefully and in absolute freedom, moved by simple needs immediately fulfilled by generous nature. Every individual is a single whole, his existence is absolutely independent: "Natural man is entirely for himself. He is a numerical unity, the absolute whole which is relative only to itself or its kind."³

Social Human Being. The social human being, by contrast, who has language, institutions and reason to a high degree, is caught in a net of relationships that make him strongly dependent on the others or, in

² See E. Cassirer, *Rousseau, Kant, Goethe: Two Essays* (Princeton: Princeton University Press, 1970).

³ J.-J. Rousseau, *Emile or On Education* (New York: Basic Books, 1979), p. 39.

the worst of cases, enslaved to them; his major source of behavior is *amour-propre*, a degeneration of self-love rooted in the competitive comparison with others, which brings out an entire multitude of vices and injustices. He is in perpetual conflict between his duties and his inclinations and filled with desires that cannot be fulfilled. He lives basically in oppressive political regimes which invariably favor the rich and the powerful over the poor.⁴ The result of Rousseau's critical analysis is that man in society suffers from inner conflicts and scissions, perpetual dissatisfaction, lack of freedom and unequal conditions.

Human Being Development. How could all of it stem from the idyllic picture of the state of nature? The tableau depicted by Rousseau is based on a very characteristic quality of the natural human being, which distinguishes him from other animals: his almost unlimited their almost unlimited power for adaptation and development, in other words, their *perfectibility*. The development of the human being, unlike any other animal, has no fixed natural goal or *telos*. In the pure state of nature, people have their spiritual and rational qualities only at a potential level. However, the perfectibility allows changes towards an improvement or perfection of human beings' constitution, but it can end up with the corruption of their nature as well. On the basis of perfectibility, combined with the action of ever-changing environmental conditions, human beings slowly developed their spiritual faculties in their increasing interaction with the others. This process involves, in particular, the development of *amour-propre* and of competition among people to attain social acknowledgement.

Initially personal qualities and abilities like strength and exhibition skills act as grounds for receiving social acknowledgment. This developed so that fame, power and possession of material resources later on became the grounds for receiving social acknowledgement. These changes in the nature of human beings and their relationships

⁴ Are not all the advantages of society for the rich and powerful? Are not all the lucrative posts filled by them alone? Is not every favor and every exemption reserved for them? Is not public authority entirely on their side? See J.-J. Rousseau, *Discourse on Political Economy*, in *Jean-Jacques Rousseau, The Social Contract*, trans. C. Betts (New York: Oxford University Press, 1994), p. 34.

got to the point when their evolution, a proto-division of labour and the institution of property, gave birth to violent conflicts urging the institution of political power to guarantee security and peace. In this reconstruction, the process of association inevitably ends up with the degeneration of institutions into oppressive regimes and the corruption of the people, due to the predominance of ambitions and actions rooted in the *amour propre*: modern societies show the disfigured face of the human being and the negative outcome of *perfectibilité*.

Concept of Freedom. At this point it will be worth making an observation. In the picture drawn by Rousseau – a hypothetical reconstruction of the development of societies – freedom is one of the main natural features of the human being: people are born free. Their natural freedom regards not only actions and relationships, but also the development of the potential faculties of natural human beings. However, it seems that human beings have been unable to develop their reason, technical abilities and social institutions without losing the freedom they the freedom they would naturally be born with. This is almost similar to a fault or incapacity of human beings. This is a very important point to highlight that shows an internal tension within Rousseau's thought.

To sum up, this is the critical standpoint on historical societies and their members developed by Rousseau in his negative writings⁵. These are followed by a more constructive set of works, where he tries to reconcile the development of human faculties with justice, virtue and personal accomplishment.

The Project of the Social Contract

In the *Social Contract*, Rousseau seeks to understand the conditions for a political constitution of the state which allows for

⁵ I accept here the division of Rousseau's writings into three groups, a negative and a positive group, followed by the autobiographical works. The distinction between constructive and destructive works was first posited by Kant and then embraced by scholars like E. Cassirer, J. Rawls and, more recently, J. Cohen. See J. Cohen, *Rousseau: A Free Community of Equals* (New York: Oxford University Press, 2010).

freedom and equality among human beings, who can flourish under legitimate institutions, and who look for a regulate transition into the social state. The ideal of a free and equal society is the cornerstone of this piece of work. Problems arise in relation to the conditions of possibility of such an ideal, which seem to contradict the purpose of the inquiry.

Humans as They Are or as They Should Be?

The Problem of the Social Contract. Since we have discussed human beings' perfectibility and the relation between their faculties and the development of society, a question which could be raised, is whether the goal of a free and equal society can be attained by the institutions alone, or whether it requires a deeper intervention action on people's inner constitution. This alternative is stated in the three different formulations of the problem at stake in the *Social Contract*:

I want to inquire whether in the civil order there can be some legitimate and sure rule of administration, taking men as they are, and the laws as they can be: in this inquiry I shall try always to combine what right permits with what interest prescribes, so that justice and utility may not be disjointed.⁶

Man is born free, and everywhere he is in chains. He who believes himself the masters of others is more enslaved than they. How has this change come about? I do not know. How can it be made legitimate? That is a question, which I believe I can resolve.⁷

To find a form of association that will defend and protect the person and the goods of each associate with all the common force, and by means of which each, uniting with all, nevertheless obey only himself and remain as free as before. This

⁶ J.-J. Rousseau, *The Social Contract* (Oxford: Oxford University Press, 1994), p. 45.

⁷ *Ibid.*, p. 45.

is the fundamental problem to which the social contract gives the answer.⁸

These are three different formulations of the problem at stake in Rousseau's *Social Contract*. Each of them emphasizes slightly different elements of the problem, which we may consider separately in order to facilitate a better understanding of the issue.

Institutions' Role. The first quote, which is the opening sentence of the *Social Contract*, speaks of a rule of administration *legitimate and sure*. This seems to refer to a pre-existing condition of association that ought to be administrated in a legitimate way, i.e. according to laws, justice and utility. The question sets up two conditions: to take human beings *as they are* and the laws *as they can be*. The issue can then be posed in these terms: is it possible to find a rightful and useful administration of people as they actually are by means of laws as we can shape them? Here Rousseau combines *what it is* (human beings' nature) with *what can be* (the law) in order to find what *ought to be* (a just political order). In my paraphrase above, I took for granted that "men as they are" means human beings as they stand in front of us, but the expression used by Rousseau is somewhat ambiguous: does he mean to take people as they actually are in the social state? Or should we understand the statement in a broader sense, namely human beings as they are including their potential abilities, qualities and defects, i.e. their perfectibility? According to this last point of view, "taking men as they are," including their potential being, would seem not so different from taking laws "as they can be." This would imply an action of shaping human beings analogous to that of shaping institutions, to guide their perfectibility towards a certain good.

The first understanding of the problem is quickly dealt with since Rousseau holds that there is no cure for the evils of corrupted institutions and their societies: "Once customs are established and prejudices rooted, it is a dangerous and futile undertaking to seek to reform them."⁹ It is impossible to restore nature, there is no coming back for a corrupted nation, except for the rare case where a revolution works

⁸ *Ibid.*, pp. 54-55.

⁹ *Ibid.*, p. 80.

like a crisis erasing the past violently and gives a fresh start to people. But, in more general terms, the inhabitants of modern societies are no longer fit to live in a healthy and rightful political regime. The only possible intervention regards the individual, and can be obtained through domestic education, as exemplified in the *Emile*.¹⁰

Human Beings' Condition. The second formulation of the problem of the *Social contract* comes immediately after the first one and it gives a brief description of what human beings actually are: they are born free, and now they are oppressed and enchained, even more if they are convinced of being the master of someone else. Illusion and chains are the elements of people's actual conditions. This situation is the outcome of an illegitimate change that caused the loss of their original freedom and equality. Given that a transformation has to come from the state of nature to social one, the problem is, again, a problem of legitimacy. The original transition was illegitimate (since it brought about the loss of freedom and equality) and this transition could have occurred differently. Through legitimacy it seems possible to give another direction to the transformation of human beings and its results, to avoid the chains of oppression and to restore equality. This is what Rousseau proposes, at least as a guiding ideal, with his *Social Contract*.

Association and its Effects on Human Beings. The third formulation of the problem, here explicitly defined as "the fundamental problem" of the *Social Contract*, clarifies programmatically the conditions of legitimacy of the association and its effects on human beings. Let us compare this third quote with the first one and the requests there formulated. First of all, one should note a shift in the language of this statement, if compared to the first formulation of the issue. Here Rousseau speaks of a form of *association*, and not of administration, and in so doing he takes a step back from the image of an existing society and moves to the condition of its birth. The answer to the utility request stated by the first formulation of the problem lays in

¹⁰ There is nonetheless the possibility, for certain exceptional cases, to intervene on a society that is still at an early stage of its development, not already corrupted, or, as Rousseau puts it, on a young people. As we will see, this is for Rousseau the case of Corsica and, in a way, Poland.

the protection of the person and the good of each associate, that, due to the conflicting interests of pre-associated human beings, are no longer assured in the last stage of state of nature. The legitimacy of the association – hence the fulfilment of the justice condition – is given by the freedom of the associates, which ought to be the same as before the conclusion of the pact, so that under the conditions of the association they need only obey themselves. What happens to human beings in the new state of association defined above? Is it possible for them to remain the same “as they are”? This, of course, depends on the interaction between the requests of the pact and the constitution of human beings.

General Will and Common Good. As it is well known, in the *Social Contract* the conclusion of the pact gives rise to a new moral body, namely the body politic, composed by the votes of the assembly and endowed with its own self and will.¹¹ The will of the body politic is the general will, which aims at the common good of the state through the promulgation of laws:

The laws are, strictly speaking, nothing but the conditions of the civil association. The people subject to the laws should be their author. It belongs only to those who are forming an association to regulate the conditions of the society.¹²

Each and every member of the state is part of the general will, and he has the right and the duty to participate in the deliberation: the sovereignty belongs to the people, not to a person or a group of any kind. This way, every citizen acquires a double role: he is both sovereign and subject to the law. In order to carry out his legislating function, the citizen must assume the point of view of the general will:

As long as several men united together regard themselves as a single body, they have only a single will, which relates to their common preservation and to the general welfare.¹³

¹¹ Rousseau, *The Social Contract*, p. 55.

¹² *Ibid.*, p. 75.

¹³ *Ibid.*, p. 134.

As we have seen, the common good includes the security of the person and the good of each associate, and it must guarantee the preservation of the freedom as it was before. For this reason, entering the society of the social contract involves a set of advantages and guarantees that lacked in the previous state, but this comes at a certain price. Following the text, this new condition has one important clause: “the total alienation of each associate with all his rights to the whole community.”¹⁴ Accordingly, the contractor must renounce his natural rights and belongings to regain them back in a different form along with his duties, established by the laws. To be sure, the acceptance of the pact involves a substantial transformation in the human beings who undertake it:

This transition from the state of nature to the civil state produces a most remarkable change in man by substituting justice for instinct in his conduct, and endowing his actions with the morality they previously lacked. Only then, when the voice of duty succeeds physical impulsion and right succeeds appetite, does man, who until then looked only to himself, see himself *forced* to act on other principles, and to consult his reason before listening to his inclinations.¹⁵

Some Critical Questions

At this point, one should pause and start interrogating the text and its coherence within the theoretical framework of social contract’s theories.

A Contract between the People and the State

A Reasonable Agreement. Firstly, Rousseau entitled his piece of work *The Social Contract*. At the very core of what is, generally speaking, called contractualism, one can find the idea that people as they are voluntarily take up some form of obligation between themselves and the nascent government. This way, the so-called contract

¹⁴ *Ibid.*, p. 55.

¹⁵ *Ibid.*, p. 59, emphasis mine.

states in a reasonable manner the rights and duties between the citizens and the state. In other words, there ought to be a reasonable and explicit understanding of the obligations people are expected to undertake by entering the social compact. Moving back to Rousseau, we can find a kind of formula for the contractualist nature of people's obligations towards the state:

Each of us puts his person and all his power in common under the supreme direction of the general will; and we as a body receive each member as an indivisible part of the whole.¹⁶

Citizen and State Rules. However, as we have seen, Rousseau stresses the idea that people undergo a process of transformation while passing from a natural to an associated state. The nature and magnitude of such transformation are yet to be analyzed, but it is already possible to ask whether such process is compatible with a contractualist view.

From now on, the citizen takes responsibility for the defense of the whole state and its members, even at the cost of his life. The State of the social contract ought to protect freedom and equality among people, but in the passage from one state to another, these concepts have to be understood differently. Civil freedom, delimited by the general will, replaces natural freedom, as legal property replaces the simple possession of goods in the state of nature. Society rewards people for giving up the unlimited natural right of taking what pleases them by providing the protection of their lives and the right of propriety for their goods, assured by the force of the entire social compact. Everyone must be free from any kind of personal dependence but he is at the same time extremely dependent on the whole of the state¹⁷, and everyone is equally subjected to the law they in turn

¹⁶ *Ibid.*, p. 55, emphasis in the text.

¹⁷ *Ibid.*, p. 89: "each citizen is in a position of perfect independence with respect to all the others and in a position of excessive dependence with respect to the city. This is always achieved by the same means, for it is only the state's force that creates its members' freedom;" see also Rousseau, *Emile*, p. 85.

legislated. This way, a “moral and legitimate equality”¹⁸ arises in substitution of the natural differences in strength or intellect. Moreover, since laws are determined by the entire collectivity, they are shaped to prevent extreme discrepancies in resources between the citizens, thus protecting the equality of means of the associates.¹⁹ However, the transition to the civil state involves one other crucial acquisition:

To the preceding one might add to the credit of the civil state moral freedom, which alone makes man truly the master of himself; for the impulsion of mere appetite is slavery, and obedience to the law one has prescribed to oneself is freedom.²⁰

Morals and Laws. The idea of the obedience to the self-prescribed law lies at the core of the legitimacy of the new association, and it is twofold: on the one hand, it refers to the laws of the state, that every citizen has issued as a member of the general will; on the other, it prescribes *in foro interno* to put the common good above the personal interests, separating one’s own particular will from the general one and choosing what the latter prescribes. This way, obeying the law of the state is the same as obeying the law one has prescribed to oneself in two different ways, raising human freedom up to a rational and moral conception²¹. It is clear that civil freedom and moral freedom are closely related, since they are both based on the obedience to the self-imposed law. Once one has acquired the rational point of view of the universal good, one is able to recognize, issue and follow just laws: in the rightful society, there is no discontinuity between morals and

¹⁸ Rousseau, *The Social Contract*, p. 62.

¹⁹ See J.-J. Rousseau, *Discourse on Political Economy*, in *The Social Contract* (Oxford: Oxford University Press, 1994), pp. 25 ff.

²⁰ Rousseau, *The Social Contract*, p. 59.

²¹ I. Kant, E. Cassirer, R. Derathé, J. Rawls and J. Cohen, among others, have positively evaluated this rationalistic understanding of human liberty. See E. Cassirer 1970; R. Derathé, *Jean-Jacques Rousseau et la pensée politique de son temps* (Paris: P.U.F., 1950); J. Rawls, *Lectures on the History of Political Philosophy* (Cambridge: Harvard University Press, 2007); J. Cohen, *A Free Community of Equals*.

laws. Law alone is able to guarantee freedom, and moral virtue is a condition of its effectiveness:

By what unimaginable *art* was a means found of *subjugating men in order to make them free*? To employ in the service of the state the possessions, the bodily strength and even the lives of its members, *without constraining them or consulting them*? *To enchain their wills with their own consent*? *To make consent prevail over refusal*, and force them to punish themselves when they act in a way that they did not will? How can it come about that they obey without anyone commanding, and serve without having a master, all the freer in fact because, under the appearance of subjection, none loses any share of his freedom except what may damage the freedom of another? These miracles are worked by the law. It is to law alone that men owe justice and liberty.²²

Reason's Role. Upon closer inspection of this point there is a problem, since in Rousseau's anthropological view, reason cannot serve alone as a ground for acting in a certain way. As we have seen, reason is a late acquisition in the natural human evolution, a path reproduced in the life of every human being:

Of all the faculties of man, reason, which is, so to speak, only a composite of all the others, is the one that develops with the most difficulty and latest.²³

The most important part in spurring people's will to action is the one played by passions:

The mistake of most moralists has always been that of regarding men as essentially reasonable being. Man is, instead, only a sensible being that acts consulting his passions only

²² Rousseau, *Political Economy*, p. 10, emphasis mine.

²³ Rousseau, *Emile*, p. 89.

and that uses his reason only to remedy the foolish things that passions make him do.²⁴

Even the best legislation is ineffective if it fails to have a firm grasp on the sentiments of the citizens, which are not naturally oriented towards the common good:

The law acts only from the outside and regulate actions only; habits alone penetrate in the inside and direct the wills.²⁵

Given that reason alone is an insufficient motivation for the action, the problem of a conflict between one's personal will, desires and inclinations and the general will remains a debatable issue. It is an issue that could eventually lead to the dissolution of the just and equal constitution of the well-ordered society of the social contract: if the respect of laws is not seen as a fundamental value to which one attaches the strongest motivation, the temptation of taking advantage of the benefits of the society without giving back what is due becomes all too easy to follow. The spreading of such an attitude would eventually lead to the constitution of different powerful groups founded on the interests of a minority and, sooner or later, those groups would succeed in taking control over the institution blocking the realization of an equal and free society.

Humans as They are. Looking back to the first of the three formulations of the opening question of *The Social Contract*, we should take the phrase "the men as they are" back into consideration. What kind of human beings are taken into consideration by Rousseau? The individual of modern societies is not able to participate in the society of the *Social Contract*, given the fact that he is incapable of recognizing

²⁴ J.-J. Rousseau, *Fragmentes Politiques, Œuvres Complètes*, III (Paris: Gallimard, 1964), p. 554, translation mine: "L'erreur de la plupart des moralistes fut toujours de prendre l'homme pour un être essentiellement raisonnable. L'homme n'est qu'un être sensible qui consulte uniquement ses passions pour agir, et à qui la raison ne sert qu'à pallier les sottises qu'elles lui font faire."

²⁵ *Ibid.*, p. 555, translation mine: "La loi n'agit qu'en dehors et ne règle que les actions; les moeurs seules pénètrent intérieurement et dirigent les volontés."

himself in the values of a community. It is necessary then to consider "men as they are" when the pact is concluded. Rousseau refers to them as having reached the point when the state of nature becomes untenable, and some form of association is necessary. We can then suppose that they are in the position to evaluate the pros and cons of the situation, according to prudential reasoning concerning their individual interest: the basic motivation to enter the contract is the protection of one's own person and goods.

This prudential kind of reasoner²⁶ used to consider himself as an absolute whole until he entered society, including at best his family in the narrow circle of his interests. We can imagine that this person is also capable of a rational understanding of the necessity of gathering the efforts of every associate to protect the social whole. However, since he joined the association moved by his own personal interest alone, who can guarantee that he will accept to take the risk of dying for it? Or, more basically, that he will sincerely renounce the pursuit of his own personal interest in favor of the general one? Rousseau says:

It is false to say that, in a condition of independence, reason leads us to contribute to the common good through consideration for our own interests. Private interest and the general welfare, far from being combined, exclude each other in the natural order of things, and social laws are a tie that each man will gladly impose on others, but by which he will not be bound himself.²⁷

For the particular will tends by its nature toward partiality, and the general will toward equality.²⁸

²⁶ For the concept of the "prudential reasoner" see C.L. Griswold, "Liberty and Compulsory Civil Religion in Rousseau's Social Contract" (*Journal of the History of Philosophy*, Vol. 53, No. 2, 2015), pp. 271-300.

²⁷ J.-J. Rousseau, *Geneva Manuscript*, in *The Social Contract* (Oxford: Oxford University Press, 1994), p. 172.

²⁸ Rousseau, *The Social Contract*, p. 63.

Critique of Diderot. In this respect, Rousseau has a precise target for his critiques, namely the idea expressed by Diderot in his entry *Natural Right* in the *Encyclopédie*, that every human being naturally has the ability to understand the general will of the human race. According to Diderot, the general will, which is equivalent to the natural right, tends naturally to the good of everybody and to the general interest of the human race. Everyone is thus able to recognize what the general will prescribes, provided that he listens to the pure intellect having silenced passions to apprehend what are his duties and rights towards his fellow humans. The mark of the general will is to be found at the core of every human association and existing legal system.

To summarize, according to Diderot, the general will is natural; it is oriented to the general good of the human race; it presupposes reason as a natural feature of human beings; it gives a rule of behavior to people in society and it is at the basis of the judicial systems and sets of rules in every historical or existing society. Rousseau refers to this position in the paper *The General Society of the Human Race* of the so called *Geneva Manuscript*. He asks here why people need political institution in the first place. The answer is that human beings are neither naturally fit for living in society, nor rational²⁹. On this basis, Rousseau rejects Diderot's idea of the general will of the human race as "sheer fantasy":

[...] the development of society, by arousing personal self-interest, stifles humane feelings in men's hearts, and that notions of the natural law, which should rather be called the law of reason, do not begin to develop until the prior development of the passions makes all its precepts useless. From this it will be seen that a social treaty supposedly dictated by nature is sheer fantasy; because its provisions are always unknown or impossible, and because we are necessarily either ignorant of them, or infringe them.³⁰

²⁹ To be sure, Rousseau rejects both the classical definitions of man as a rational animal and as a social animal implied in Diderot's theory of the general will.

³⁰ Rousseau, *Geneva Manuscript*, p. 171.

Society Organicistic Model. Moreover, Rousseau attacks the very concept of the human race as a ground for the rule of society. Rousseau thinks that the whole "human race" simply is the sum of its parts, an indefinite agglomerate with no features of its own. Since there is no "human race" over and above the independent parts no one, by nature, would be willing to put aside his own personal interest in favor of the common good for the sake of the "human race." Rousseau's ideal of society is, by contrast, oriented towards an organicist model:

If society in general existed anywhere else but in philosophers' theories, it would be a corporate entity [...] with its own properties, distinct from those of the individual beings of which it consists, in rather the same way as chemical compounds have properties which they do not receive from any of the elements which compose them. [...] the public good, or its opposite, would not merely be the total of individual goods and ills as in a simple aggregation, but would reside in the conjunction between the individuals and would be greater than this total; and public felicity, far from being founded on the happiness of individuals, would be the source of it.³¹

To put it in other words:

[...] a corporate moral entity endowed both with a sentiment of common existence, which confers individuality on it and unifies it, and with an all-embracing motivation that makes each part act for a general purpose relating to the whole.³²

All considered, the legitimate government cannot simply leave human beings as they are without taking the risk of the degeneration of the state and its institutions. The kind of people who join the social

³¹ *Ibid.*, pp. 171-172.

³² *Ibid.*, p. 171. A comparison between a state and a human body is drawn by Rousseau in the *Discourse on Political Economy*.

contract have the potential to become good citizens, but they may fail to become good, and this is why their development must be guided:

Good social institutions are those that best know how to denature man, to take his absolute existence from him in order to give him a relative one and transport the I into the common unity, with the result that each individual believes himself no longer one but a part of the unity and no longer feels except within the whole. A citizen of Rome was neither Caius nor Lucius; he was a Roman.³³

If human beings are not naturally fit to be part of a society where the whole of the community must precede logically and morally its parts, then human beings are to be completely transformed by means of the social art:

By new forms of association let us, if we can, correct the faults in the general form of association. [...]. Let us show [...], by perfecting the social art, how to mend the damage done to nature by this art in its beginnings [...].³⁴

The Project of Civil Education

As we have seen, the good institutions are able to shape the human beings in the form of the citizens. This purpose is obtained through various instruments: the laws, the civil religion and the civil education.

Shaping the Laws and the Citizens

The Legislator. Here we face another difficulty. Since at the moment of the passage to the social state, the contractors know nothing of laws and morality, how can they possibly be able to shape good laws – *and themselves?*

³³ Rousseau, *Emile*, p. 40.

³⁴ Rousseau, *Geneva Manuscript*, p. 175.

How will a blind multitude, which often does not know what it wants because it rarely knows what is good for it, carry out by itself an undertaking as vast, as difficult as a system of legislation? [...] Private individuals see the good they reject; the public wants the good it does not see. All are equally in need of guides. The first must be obliged to make their wills conform to their reason; the latter must be taught to know what it wants.³⁵

Just like a *deus ex machina*, Rousseau introduces here one of his most ambiguous and mysterious characters: the Legislator. He is the one who gives a nascent state its fundamental laws at the very moment of its constitution. He is "capable of, so to speak, changing human nature."³⁶ To fulfil his mission, the Legislator ought to be an exceptional man, wiser than any other and, just like the legendary Lycurgus, after his action he must take no part in the life of the new political body he has shaped. Having a deep knowledge of human nature, he recognizes the role of opinions and beliefs in spurring people to action, and he uses this knowledge to shape the heart and sentiments of the associates in order to let them become true citizens:

I speak of morals, customs, and especially opinion, a part of the laws unknown to our politicians, but upon which the success of all the others depends, a part to which the great lawgiver attends *in secret* while he appears to restrict himself to particular regulations which are merely the sides of the arch of which morals – slower to arise – ultimately form the unshakeable keystone.³⁷

Finally, the lawgiver should present his laws as a gift of the gods to the rising state, to make them worthy of honour.³⁸

³⁵ Rousseau, *The Social Contract*, p. 75.

³⁶ *Ibid.*, p. 76.

³⁷ *Ibid.*, p. 89, emphasis mine.

³⁸ *Ibid.*, p. 78.

Civil Religion and Civil Education. The lawgiver shape both the laws of the society as well as the spirituality of the citizens. As a key element of this action, at the end of his work Rousseau introduces the further (problematic) notion of the “civil religion.” This notion refers to a set of religious dogmas to which all people must subscribe if they are to become citizens of the new society.

Even if the discussion of the issue is aporetic at most,³⁹ one can identify at least three purposes of the institution of a civil religion. Firstly, to avoid the emergence of an ecclesiastic power in competition with the sovereign. Secondly, to prevent fights between different religions within the state. Finally, and perhaps most importantly, to create a sacred aura around the laws and the social contract itself. The dogmas of the civil religion bind the citizens to obedience to the laws and they must be publicly professed. This is not to be regarded as a sheer formality: after the public profession of civil faith, a compulsory act if one wants to become an effective member of the society, the one who acts against the dogmas of the civil religion deserves to be sentenced to death. Although the issue is far more complicated, there is a clear suggestion that the state should have some power over its citizens’ beliefs.

In other political writings, under the heading “Civil Education,” Rousseau details the right constitution of people in the state. This term makes its first appearance in the *Discourse on Political Economy*, published in 1755 in the fifth volume of Diderot and d’Alembert’s *Encyclopédie*, right after the publication of the *Discourse on Inequality*. Here Rousseau deals with “political economy.” This concerns the government of a state or the executive power, as distinguished from the legislative power. Legitimacy of a government can only be secured if there is respect for the directives of the general will. It is regarding

³⁹ For some discussion on this issue, see K. Barth, *Protestant Thought: from Rousseau to Ritschl. Being the Translation of Eleven Chapters of Die protestantische Theologie im 19. Jahrhundert* (New York: Harper & Brothers Publishers, 1959); B. Bernardi, “La religion civile, institution de tolérance?,” *Rousseau and L’Infâme: Religion, Toleration, and Fanaticism in the Age of the Enlightenment* (Amsterdam: Rodopi 2009), pp. 153-72; R. Derathé, “La religion civile selon Rousseau,” *Annales de la Société Jean-Jacques Rousseau*. Vol. 35, 1959-1962; Griswold, *Liberty and Compulsory Civil Religion*; G. Waterlot, *Rousseau. Religion et politique* (Paris: PUF, 2004).

this that Rousseau raises a problem. The problem is that there is potential conflict between the particular wills of individual citizens and the general will of the society. As a guarantor of the effectiveness of the general will, the government must assure that people obey *and love* the laws:

But although the government does not control the law, it is no small thing to be its guarantor, and to possess innumerable ways of *making men love it*. It is in this that the *art of ruling* consists.⁴⁰

If the first rule of the political economy is to conform the laws to the general will, the second one is to conform the particular wills to it or, in a single word, to make citizens virtuous⁴¹, since virtue consists in the control over impulsion and in the fulfilment of duty requested by law and society.

It is good to know how to use men taking them as they are, but it is much better still *to make them what there is need that they should be*; the most complete authority is the kind that penetrates the inner man, and influences *his will as much as his actions*. There can be no doubt that, in the long run, nations are what their governments make of them: warriors, citizens, men, when it wants them to be; a rabble or mob, as it pleases.⁴²

The task of making citizens as they should be is obtained by the means of civil education. The most important exposition of Rousseau's ideas about education is found in his *Emile*. In this piece of work, the author draws an analogy between human beings at the beginning of their lives and natural human beings: every child is born free and uncorrupted just like the natural human being. Education has the task of raising children guiding the development of their faculties to avoid the corruption of their inner constitution: "Plants are shaped

⁴⁰ Rousseau, *Political Economy*, p. 12; emphasis mine.

⁴¹ *Ibid.*, p. 14.

⁴² *Ibid.*, pp. 12-13; emphasis mine.

by cultivation, and men by education."⁴³ Here Rousseau distinguishes between two different kinds of education, the domestic and the public.

Domestic and Public Education. The distinction between domestic and public education is based on the different purposes of the two kinds of education: to shape a person who can live in modern societies maintaining a natural constitution on the one hand, or to form a citizen on the other hand. These purposes are by no means superimposable: "Forced to combat nature or the social institutions, one must choose between making a man or a citizen, for one cannot make both at the same time."⁴⁴ To understand better what Rousseau means by fighting nature in order to make a citizen, it will be convenient to quote the following passage at length:

The Lacedaemonian Pedaretus runs for the council of three hundred. He is defeated. He goes home delighted that there were three hundred men worthier than he to be found in Sparta. I take this display to be sincere, and there is reason to believe that it was. This is the citizen. A Spartan woman had five sons in the army and was awaiting news of the battle. A Helot arrives; trembling, she asks him for news. "Your five sons were killed." "Base slave, did I ask you that?" "We won the victory." The mother runs to the temple and gives thanks to the gods. This is the female citizen. He who in the civil order wants to preserve the primacy of the sentiments of nature does not know what he wants. Always in contradiction with himself, always floating between his inclinations and his duties, he will never be either man or citizen. He will be good neither for himself nor for others. He will be one of these men of our days: a Frenchman, an Englishman, a bourgeois. He will be nothing.⁴⁵

Such is the kind of harsh control over one's personal feelings and inclinations that characterizes a true citizen. Rousseau drafts else-

⁴³ Rousseau, *Emile*, p. 38.

⁴⁴ *Ibid.*, p. 39.

⁴⁵ *Ibid.*, p. 40.

where the guidelines of a civic education. He does this in the *Discourse on Political Economy*, in the *Considerations on the Government of Poland* and, less directly, in his *Plan for a Constitution for Corsica*. Although in the *Emile* Rousseau declares that it is impossible to realize the education of citizens in modern times, Corsica and Poland are nonetheless two exceptional cases, because they both have a young spirit. Due to their peculiar histories, Rousseau holds Corsica to be a very recent nation, hence a young one, and Poland to be a state with a long history but a young spirit. For this reason, he accepts the request of writing political projects for two nations fighting for their independence and freedom. Considering that the two countries already had their religious traditions, in these projects there is no mention of the issue of civil religion.

The main principles of the public education can only be followed in the context of the well-ordered state. Since every human being is born free and good like the natural man, it is during childhood that the most effective education begins. The main focus of this kind of education is the construction of a strong sentiment of patriotic love for the country, which will be the leading passion of the citizens:

Let their country therefore be a common mother to all the citizens; let the advantages which they enjoy there make them cherish it; let the government allow them a share in public administration sufficient to make them feel that they are in their home country, and let the laws, in their eyes, be nothing less than the guarantee of liberty for all.⁴⁶

In the civic education, the public sphere must be the paramount concern for children from the very beginning of their lives. No one must be able to conceive of his own identity independently from their relationship with the body of the state:

If, for instance, they are trained early enough to consider their individual selves only in relation to the body of the state, and to see their own existence, so to speak, only as a

⁴⁶ Rousseau, *Political Economy*, p. 20.

part of its existence, they may finally come to identify themselves to some extent with the greater whole, to feel that they are members of their home country, to have towards it those supreme feelings that every man living in isolation has only towards himself, to raise their souls constantly to this higher level, and so transform the dangerous inclination towards *amour propre*, the source of all our vices, into a sublime virtue.⁴⁷

Thus, children will grow up in public schools, managed by the state according to its laws and principles. The public administration acquires all the rights of parents: in children's imagination their homeland appears like their own mother, and they all have to consider their fellow citizens like brothers and sisters. Most of all, they must internalize the principle of obedience to the laws and learn their duties toward the state as soon as possible.

Every moment in a child's life is under the eyes and judgment of the community, even their games and competitions: all these activities should be public and assessed by the adults.⁴⁸ Only public approval can keep the sense of one's own self intact, one ought to identify oneself with the totality of the state. The *amour-propre* of the individual must leave his private sphere and find its accomplishment in the public one:

He [the child] sees only the fatherland, he lives only for it; as soon as he is alone, he is nothing: as soon as he has no more fatherland, he no longer is, and if he is not dead, he is worse than dead.⁴⁹

⁴⁷ *Ibid.*, p. 22.

⁴⁸ See J.-J. Rousseau, *Considerations on the Government of Poland and on Its Planned Reformation*, *The Collected Writings of Rousseau*, Vol. 11 (Lebanon, NH: Dartmouth College Press, University Press of New England, 2005).

⁴⁹ Rousseau, *Considerations on the Government of Poland*, p. 179.

Furthermore, public education does not end with childhood. By means of public celebrations, ceremonies and festivals,⁵⁰ lifelong *cursus honorum*⁵¹ and the periodic assemblies of the people, the love for the state and the patriotic values are stimulated during the entire lifespan of a citizen.⁵²

Concept of the Common Good. At this point, one could reasonably ask what kind of common good such socially formed citizens are able to seek. It is now clear that the shared purpose of a community of this kind, where the whole precedes the individual components, cannot be derived from citizens' individual goods. A view of this kind would lead back to Diderot's ideas on the general society of the human race. If we consider the examples taken from Sparta and Rome and the stress put by Rousseau on war-time and the importance of the self-preservation of the polity over the most natural feelings of its members, it seems that the imperative to preserve and reproduce the polity is what remains left to the common good. Such a view would be confirmed by the importance attached to traditions, the suspicion of strangers and innovations, the promotion of a simple lifestyle and of a certain narrow-mindedness. The equal and just society lasts as long as citizens do not have personal ambitions other than being a good member of society and perhaps to escalate the *cursus honorum* of the polity. If this gives the idea of an impoverished political philosophy it is because Rousseau's ideal society is one which is stable and equal, rather than one which is in flux, dynamic and evolving.

⁵⁰ For the role of the festivals in the political life see E. Franzini, *Il teatro, la festa e la rivoluzione. Su Rousseau e gli enciclopedisti* (Palermo: Aesthetica Preprint, 2002) and J. Shklar, *Men and Citizens. A Study in Rousseau's Social Theory* (Oxford: Cambridge University Press, 1969); G.L. Mosse, *The Nationalization of the Masses: Political Symbolism and Mass Movements in Germany from the Napoleonic Wars through the Third Reich* (New York: Howard Fertig, 1975).

⁵¹ See J.-J. Rousseau, *Plan for a Constitution for Corsica, The Collected Writings of Rousseau*, Vol. 11 (Lebanon, NH: Dartmouth College Press, University Press of New England, 2005) and *Considerations on the Government of Poland*.

⁵² For a critical analysis on this point, see Shklar, *Men and Citizens*.

Conclusion

In conclusion, Rousseau's political writings show an ideal of the just and equal society that comes with the conception that such a form of human association can only survive if its citizens are shaped to preserve it. The requirements are indeed very hard to fulfil, as they imply the suppression of basic human feelings, for example in the case of children and family: a real citizen puts the common good above everything, even his parental love. Accordingly, the only way to obtain such an extreme goal is to let the citizens undergo a lifelong process of conditioning through the multiple means suggested by Rousseau to keep them attached to the state above all the rest. The changing of natural freedom in civil freedom seems to come at a high price, even more if one thinks about the issue of the consent of the citizen to the educational process they undergo. This side of a political theory that seems otherwise to be oriented towards the ideal of the most effective freedom can be disturbing for the reader who takes it seriously⁵³, and the question arises whether this is an aspect inseparable from Rousseau's political theory.

If we consider together all the elements I tried to summarize in this paper, we realize that Rousseau's political ideas are rooted in his anthropological views. According to Rousseau, the most natural human attitude towards the others is oriented to the personal benefit of the individual. This causes no problems in a situation of solitude, like that of the state of nature for example, but it is the origin of all the injustice and sufferings in modern societies. Since Rousseau holds that from the composition of different personal interests no common good can arise, the political values of his ideal association should be supported by morals and habits oriented to the realization and preservation of the common good. Moreover, one's ethical attitude towards one's role as a citizen cannot be determined by reason alone. Reason is too weak when compared with the inclination toward self-interest. If virtue is needed to be a citizen, it can be obtained and

⁵³ See, among others, Shklar, *Men and Citizens*, Griswold, *Liberty and Compulsory Civil Religion*; T. Todorov, *Frail Happiness: An Essay on Rousseau* (University Park, PA: Penn State University Press, 2001).

assured only by a constant action on the whole of human inclinations and the molding of feelings towards the attachment to the state.

If one accepts both Rousseau's anthropological views and his radical ethical-political requirements for the construction of a free and equal society, the education of the citizen seems to come as an inevitable consequence of that kind of reasoning. However, it should be said that the intransigence displayed by Rousseau in describing his idealized citizens is based on his deep concern for the protection of the rightful order from inner menaces of subversion and abuse of power. He tries to avoid even the possibility to think of turning the laws to one's own advantage, since in his view this would be the beginning of an inescapable chain of corruption and injustice. Hence necessity of molding humans in the austere shape of the citizen.

On the basis of all of this, can we still speak of Rousseau's political philosophy in terms of contractualism? Or, to put it differently, does Rousseau maintain what he declared at the beginning of the inquiry? Does his project actually promote freedom? In classical contractualism, as well in Rousseau's *Social Contract*, people agree to enter society because the state of nature is, for different reasons, no more tenable:

I make the assumption that there is a point in the development of mankind at which the obstacles to men's self-preservation in the state of nature are too great to be overcome by the strength that any one individual can exert in order to maintain himself in this state. The original state can then subsist no longer, and the human race would perish if it did not change its mode of existence.⁵⁴

It is in everyone's interest to find some form of association to protect their safety and goods. However, in Rousseau's theory this is the very last stage of the state of nature, whereas this kind of individualism has to be transformed if one wants to build a just and equal society. The problem for the interpreter is that the transformation of the individual is not chosen by people, as the reference to the secrecy

⁵⁴ Rousseau, *The Social Contract*, p. 54.

of this part of the lawgiver's work makes clear.⁵⁵ The contractors do not explicitly agree to undergo a transformation of the kind we have analyzed, one that is deep enough to bring one up to the level of abnegation and inner obligation required by the role of citizen.

We have seen that in *The Social Contract* there is some kind of formula that people could have used to mean the consensual nature of their obligations towards the State, including their transformation:

Each of us puts his person and all his power in common under the supreme direction of the general will; and we as a body receive each member as an indivisible part of the whole.⁵⁶

Given the characterization of human beings during their transition to the associated state, can we really admit that they would have been able to understand the real extension of their commitment? Even if one should admit that (which Rousseau does not imply), the problem of a free and reasonable acceptance of one's role as a citizen still stands in the case of the newborns. Children are put into a system that molds and conditions them from the very beginning of their lives. It is certainly true that every kind of education includes a number of choices and contents made by the adults for the children. The problem with Rousseau's civil education is that it interferes radically with the ability to criticize one's own environment. This kind of critical blindness is carried out through the construction of a deep sentimental attachment to patriotic values and the fatherland, one of the most difficult kinds to overcome.

If we should ask the question once again, what kind of freedom is the one Rousseau talks about in his constructive political writings? I think that Rousseau wants to guarantee freedom from personal dependence and servitude; freedom from political systems in which one class or even one person oppresses the rest of the population; he wants to give people freedom from the material goods and economies that create inequality, injustice and oppression for most people. However, to avoid these diseases of modern societies, Rousseau seeks

⁵⁵ *Ibid.*, p. 89.

⁵⁶ *Ibid.*, p. 55, emphasis in the text.

the elimination of their preconditions. Rousseau recognizes that the cause of the degeneration of natural self-love, and other social developments, is the pursuit of or drive for competition. That is why human beings need to be denaturated in order to build a just society: one has to sublimate the individual *amour-propre* in collective *amour-de patrie*. Thanks to that, it is possible to avoid the irreparable chain of consequences of competition among individuals, described in the second part of the *Discourse on Inequality*. To sum it up, in Rousseau's political writings, freedom from injustice and inequality of society is obtained by reducing the possibilities of choice and criticism of the citizens and by conforming their will to the ideals of the polity.

This analysis aimed to underline the atypical position of Rousseau as a member of the Enlightenment and to augment the common understanding of the political views of this philosopher. However, the richness of a thought lies especially in its most problematic passages. Rousseau's powerful inspiration forces the reader to reflect on the issues raised by his works, which are still worth the most careful inquiry. The conciliation between the requests raised by personal liberty, a political system capable of guaranteeing a true and deep involvement of the citizen in the political life and the motivation towards the common good is still an actual issue, and Rousseau's discussion still gives important insights to the understanding of the problem.

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Part IV
Contractarianism – Moral and Dynamic

Moral Contractarianism, Moral Skepticism, and Agreement¹

EDWIN ETIEYIBO

Introduction

Moral contractarianism is a strand of social contract theory. In broad representation, moral contractarianism is the view that takes moral norms and consequently, moral and political obligations to be underpinned by an ideal description of a hypothetical and abstract contract entered into by rational agents. In the social contract tradition, David Gauthier's version of moral contractarianism, which he calls, "Morals by Agreement" is regarded by many, and rightly so, as the most systematic, sophisticated, and rigorous. In *Morals by Agreement* (or "moral contractarianism," MbA for short²) David Gauthier offers an attractive account of the centrality of bargaining for how we cooperate socially. This account rigorously demonstrates that to act rationally one must act morally and to act morally is to act rationally. Stated differently, Gauthier's moral contractarianism makes a case as to why the aggregate of individual rational preferences yield some principle of distribution, and how the outcomes that emerge from such principle are funnelled by agreement, and why *ipso facto* this process ought to be considered moral or just.³

¹ A version of this essay was first presented at the *Wits Philosophy Research Seminar* (formerly *Hoernlé Research Seminar in Philosophy*), Department of Philosophy, University of the Witwatersrand (September 12, 2013) and the International Conference on *Social Contract Theory: Past, Present, and Future* at the University of Lisbon (May 15-17, 2014). I thank participants at both fora for their positive and constructive feedback, which have helped to improve the paper.

² In this chapter, I will be using "Morals by Agreement" when referring to David Gauthier's 1986 book *Morals by Agreement* (Oxford: Oxford University Press) and moral contractarianism or MbA to denote his moral/social contract theory.

³ Henceforth, I will be using morality (or moral) interchangeably with justice (or just). I am using justice and morality interchangeably since, for a moral contractarian like Gauthier, the *moral* rules are *just* rules as long as they arise from the

In this chapter, I am interested in doing two things. Firstly, I want to show why we should take seriously the social contract tradition, particularly contractarianism, as a moral standpoint. Secondly, I shall be raising some worries for Gauthier's moral contractarianism. By raising these worries, I build on my discussion of some related worries in an earlier paper.⁴ The worries that I raise here connect with the general point about the role, significance, and value of the two standpoints – the individual and Archimedean – of calibrating justice/morality. One conclusion that I gesture towards is that if Gauthier is right that the Archimedean standpoint tells us something substantive about justice and an essentially just society, then we may suppose that he is more responsive to liberal egalitarianism than to libertarianism.

Taking Contractarianism Seriously: Contractarianism and the Crisis of Morality

Contractarianism, David Gauthier argues, offers the only plausible resolution to the foundational crisis facing morality in our modern world. The crisis of morality concerns the justifiability of an impartial prescriptive or moral principles that are in some sense universal in scope but which seem to diverge from the individual's valuation or non-moral reasons and interest. That is, there is conflict between morality as universal and our psychological states as moral agents that want to act in particular ways. Or simply put, there is "a lack of fit between what morality presupposes – objective values" and our desires and beliefs.⁵ This crisis has been recognized by a number of philosophers⁶ and is captured by Friedrich Nietzsche's remark in

rational preferences of individuals or moral agents in the context of bargaining and agreement.

⁴ See Edwin Etieyibo, "Bargaining and Agreement in Gauthier's Moral Contractarianism," *South African Journal of Philosophy* (2013), 32(3):221-233.

⁵ David Gauthier, "Why Contractarianism?" *Contractarianism and Rational Choice: Essays on David Gauthier's Moral by Agreement*, Peter Vallentyne, ed. (Cambridge: Cambridge University Press, 1991), p. 16.

⁶ Below are a couple of examples of this. (1) "There are no objective values.... [However] the main tradition of European moral philosophy includes the contrary claim," John L. Mackie, *Ethics: Inventing Right and Wrong* (Harmondsworth: Penguin, 1997), pp. 15, 30; (2) "Moral hypotheses do not help explain why

On the Genealogy of Morals: “As the will to truth thus gains consciousness – there can be no doubt of that – morality will gradually *perish* now.”⁷

Nietzsche’s remark is best summarized as follows. There are two worldviews: our present view of the world and an old view of the world. Moral language presupposes the old worldview – a view of the world as purposively ordered. Our present worldview and not the old one best explain our psychological states. Given this fact and given that we have abandoned the old worldview, the moral language that goes with it must equally be abandoned, and abandoning the old worldview along with the moral language that presupposes this worldview essentially amounts to the perishing of morality.

The foundational crisis of morality is a genuine moral problem. The problem is fittingly represented by the “moral skeptic,” who comes to us in various shape and guise: as the wearer of the invisible ring in Plato’s account of the “Ring of Gyges;” as Hobbes’ “fool,” and as Hume’s “sensible knaves.” From the standpoint of the agent (and as the moral skeptic presses upon us), moral considerations present themselves as “unwanted” constraints on her choices and action. These constraints are independent of her desires, aims, and interests. Thus, the individual is led to engage with the justificatory question or problem of morality by asking, “what reasons do I have for recognizing and accepting this and that constraint that is independent of my desires and interests?” As moral agents, we can recognize the question that the moral agent is asking (if we have not asked the question yet

people observe what they observe. So ethics is problematic and nihilism must be taken seriously,” Gilbert Harman, *The Nature of Morality* (New York: Oxford University Press, 1977), p. 11; (3) “The hypothesis which I wish to advance is that in the actual world which we inhabit the language of morality is in ... [a] state of grave disorder ... we have – very largely, if not entirely – lost our comprehension, both theoretical and practical, of morality,” Alasdair MacIntyre, *After Virtue* (Notre Dame, IN: University of Notre Dame Press, 1981), p. 2; (4) “The resources of most modern moral philosophy are not well adjusted to the modern world,” Bernard Williams, *Ethics and the Limits of Philosophy* (Cambridge, MA: Harvard University Press, 1985), p. 197.

⁷ Friedrich Nietzsche, *On the Genealogy of Morals*, 3rd edition, translated by Walter Kaufman and R.J. Hollingdale (New York: Random House, 1987), section 27, p. 161, emphasis in original.

on reflection). In any case, if we take on the Archimedean standpoint, as objective moral onlookers, we will be drawn to the same question and will be led to ask, “what justifies paying attention to morality, rather than dismissing it as an appendage of outworn beliefs” or as a superstition based on outmoded metaphysical theories and world-views?⁸

Old moral theories are deficient when deployed as answers to the moral skeptic or as responses to the “justificatory problem of morality.” The justificatory problem is one concerning providing some acceptable and satisfactory answer to the question “why be moral?” If our justificatory problem is not simply about what morality requires, but whether morality ought to be paid attention to, then, it would seem that, only the view that merges with our psychology is able to account for morality. Contractarianism rescues morality from the jaws of death or the hammer of the moral skeptic because it gives us reasons as to why we are or should be committed to morality. We are moral simply because being moral is an effective way to further our non-moral aims and interests. The contractarian project is therefore a reductionist project in a pretty straightforward sense. That is, in the sense that it derives moral reasons from non-moral ones. The contractarian project doubts that moral reasons are genuine or motivationally effective. Its reductionist strategy thus grounds morality on the simple requirements of instrumentalist practical rationality. For contractarianism, then, the justificatory question “why be moral?” becomes transformed into the less troubling question “why be rational?” So even if the agent is not independently motivated by morality (and even if we recognize moral reasons as genuine in some sense), insofar as the agent is prudent or can be said to be a candidate of instrumental practical rationality she has or would have reason to reflectively endorse morality.

Gauthier’s moral contractarianism challenges the Nietzschean outlook of the perishing of morality by attempting to “allay the fear, or suspicion, or hope, that without a foundation in objective value or objective reason, in sympathy or sociality, the moral enterprise must

⁸ Gauthier, “Why Contractarianism?,” p. 16

fail.”⁹ In resolving this crisis, moral contractarianism grounds human behavior, choices, and actions in coherent considered preferences of individuals.¹⁰ By grounding choices on considered preferences, Gauthier jettisons accounts of value that are objective and takes value to be subjective.

There is an important reason why Gauthier thinks that we must embrace a subjective account of value. A subjective account of value, he claims, explains better our behavior and our psychological states. To think of value as objective is to regard it as existing independently of the preferences of agents and as providing a standard to govern preferences. Gauthier’s subjective account of value identifies value with utility and takes it as a measure rather than the norm for rational preference. On this account of subjective value and utility, we take an action or disposition as valuable if and only if that action or disposition maximizes expected utility.

It is important to note that a subjective account of value does not imply that whatsoever an agent maximizes insofar as it is indexed to utility must be the measure of preferences. Satisfied preferences must meet the objective conditions of preferences, i.e., preferences must be objectively valuable. Preferences are objectively valuable when utility measures not just revealed preferences but also attitudinal or “expressed preferences.”¹¹ To state differently the point about preferences and utility we can think of it in terms of subjective and objective determination of reasons for acting. In acting, individuals have reasons motivated primarily by their beliefs, desires, and emotions. Although these reasons for acting will largely confirm and be confirmed by what other agents consider as reasons what is decisive is the individual’s own determination.¹² The subjective determination explains the individuality of agents and the objective determination explains the objective condition of reasons.

The point about subjective value and rational preference help us to understand the contractarian view, which takes moral principles to

⁹ David Gauthier, “Moral Artifice: A Reply by Gauthier,” *Canadian Journal of Philosophy* (1988), 18:385.

¹⁰ Gauthier, “Why Contractarianism?,” pp. 15-25.

¹¹ Gauthier, *Morals by Agreement*, p. 28.

¹² Gauthier, “Moral Artifice: A Reply by Gauthier,” p. 388.

be rational constraints on individual behavior. The reason why moral principles so constrain is because they arise from agreements made between rational agents for the purpose of advancing self-interest. But why should we accept constraints on our behavior? The idea is that, as utility-seeking agents, we desire or aim to maximize the possible outcomes of actions (or dispositions) and the reason we accept or ought to accept moral or rational constraints on our behavior is that those constraints facilitate cooperation. So for anyone who asks the question: “why must I accept the constraints of morality?” The answer, according to Gauthier, is clear and simple: *the constraints make possible the conditions that are necessary for pursuing your rational self-interest*, i.e. for achieving your desires or aims.

If the outcomes that moral principles make possible are those that we desire and value, then it is rational for us to embrace the constraints that they impose. If we embrace moral constraints for the outcomes they make possible, then it is right to say that the constraints are self-imposed, i.e. they arise from our considered coherent preferences and not imposed by some eternal conceptual relations that hold true independently of us. Because Gauthier’s strategy in *MbA* ties moral constraints with preferences he can boldly declare that (moral) contractarianism provides the most plausible resolution to the crisis of morality in our modern world. Moral contractarianism, according to Gauthier, does more than resolve the crisis of morality. It provides a perceptive strategy for resolving the general problem of rational compliance.

Some of the dominant moral theorists – the rationalists, who side with Kant and construe moral constraints as natural, i.e. drawn from our reasoning faculties, and the naturalists, who side with Hume and take morality to be constructed from shared sentiments – fail, according to Gauthier, to address both the crisis of morality and the problem of rational compliance.¹³ These theories fail the demand of the rational *qua* moral skeptic because they do not speak to the interests of the skeptic. It is one thing to say that moral terms and obligations are essentially indexed to reasoning faculties or benevolent sentiments and it is another thing to show how they provide sufficient motivation or justification for their acceptance. While one

¹³ See Gauthier, “Why Contractarianism?” pp. 18-19.

might claim that reason and sentiment provide the templates for morality, one cannot guarantee that people would embrace the constraints that arise from them. For if agents do not identify with these faculties the constraints that emerge from them would be useless if not empty or vacuous.

Contractarianism and Agreement

Gauthier's moral contractarianism can simply be reduced to this: that to act rationally one must act morally or that morality or justice is some rational constraints arising from the outcome of some bargaining process by some rational agents. To say that one acts rationally one must act morally or justly or that one acts morally or justly when one acts rationally is to say that there is a linkage role for contractarianism, namely it plays a connecting role between rationality and morality or justice according to which mutual agreement refers to both rationality and justice or morality.¹⁴ Justice is however broadly understood here as something that agents of roughly equal status would agree on. If this summation of the moral contractarian project is correct, then we can say that for MbA, agreement is the *only* game in town. Succinctly put, agreement is the *only* game in town because "morals is by agreement." Being the *only* game in town means that for agents, what matters mostly in the bargaining process is the outcomes *qua* agreement that emerges from the process. Agents who bargain do not bargain simply for the sake of bargaining. The whole point about bargaining is to reach some agreement on the "moral" rules or norms that will help agents realize optimal utility (or the division of the cooperative surplus¹⁵).

As part of the bargaining process, Gauthier proposes the minimal relative concession (MRC) as the strategy or principle that agents employ in realizing agreement (or the end of divvying up the cooperative surplus). And he takes this strategy as a unique principle

¹⁴ For further discussion on this point see David Gauthier, "The Social Contract as Ideology," *Philosophy and Public Affairs*, (Winter 1977), 6(2):130–64.

¹⁵ The cooperative surplus essentially refers to the sum of benefits (minus the costs of cooperation) that are available for bargainers in a given cooperative scheme.

of distribution. MRC, for Gauthier is roughly a measure of an agent's stake in a bargain situation. It is simply put, the difference between the least each person that bargains over the cooperative surplus would accept in place of no agreement and the most each receives in place of being excluded by others from the agreement that result from bargaining.¹⁶

If we focus our attention on the point of view of rational cooperation, then the plausibility of MRC can be taken to rest on the number of assumptions that Gauthier makes about agents. One of those assumptions is that agents possess "equal rationality." Another is that they have the dispositions to fair interactions. I have discussed the connections of these assumptions to Gauthier's overall aim in MbA in another paper. I have also argued in this paper that Gauthier could be said not to be warranted in appealing to equal rationality, and that if this is the case then it is not clear if MRC will be adopted by the agents. The upshot of my critique is that if MRC is not adopted, then the claim that agents would entertain roughly equal concessions during bargaining and that the point of division of the cooperative surplus would be roughly equal (or in the middle) is mistaken.¹⁷ The issue of equal rationality and MRC is a different worry. What I want to focus on now is the worries in connection to the general point about the role, significance, and value of the individual and Archimedean standpoints of calibrating justice that can be raised for MbA.

The Two Standpoints of Calibrating Justice: The Individual and Archimedean

One way to justify MRC is to consider justice from a purely impartial perspective. Gauthier does seem to accept this perspective, the standpoint which he calls the ideal or Archimedean. The Archimedean standpoint is a hypothetical vantage point from which an

¹⁶ Gauthier, *Morals by Agreement*, p. 143

¹⁷ See Etieyibo, "Bargaining and Agreement in Gauthier's Moral Contractarianism." I did also argue in this paper that if the assumption of equal rationality and the claim that they employ MRC undermines the indeterminate claim, then both the assumption of equal rationality and principle of MRC deviate from the fundamental claim that agreement is the *only* game in town.

individual can affect some object or objectively perceive with totality the subject of inquiry. Gauthier defines the Archimedean standpoint in moral theory as that position an individual must occupy if that individual is to have the moral capacity to affect society, i.e. it is that vantage point that an individual must be in if that individual's "decisions are to have the moral force needed to govern the moral realm."¹⁸ From this standpoint, rational actors are mostly interested in selecting principles that discount unjustifiable inequalities, that is to say, they are primarily moved to choose principles that promote an essentially just society. Examples of unjustifiable inequalities that Gauthier discusses are the right of bequest, factor rent, and the socialization process whereby males are "encouraged to actualize capacities repressed in females."¹⁹

Impartiality is satisfied just in case unjustifiable inequalities are discounted and this is tied to agents taking up the Archimedean standpoint or when they choose as Archimedean choosers. They take up this standpoint when they choose in full view of everyone's individuality (human capacities, preferences, and circumstances). From this standpoint they choose not as if they were this *particular person*, but as if they were *every possible person*. This is different from John Rawls' idea of impartiality in the sense that whereas Gauthier takes impartiality to be satisfied when agents choose as if they are *every person*, Rawls takes impartiality to be satisfied when agents choose as *this particular person*.²⁰

From the Archimedean standpoint justice is satisfied, according to Gauthier, when an agent's expected share of the cooperative surplus is related not to what she *actually* contributes but to what she *would* have contributed in a feasible social arrangement or scheme of cooperation. This is because the actual contributions of agents may

¹⁸ Gauthier, *Morals by Agreement*, p. 233

¹⁹ *Ibid.*, p. 263.

²⁰ Note also that for Rawls, in so choosing, agents adopt the *maximin* principle, which constrains the choice of principles behind the veil of ignorance. The principle of *maximin* and the veil of ignorance constitute the Archimedean standpoint for Rawls, which essentially collapses with the point of view of the least advantaged member of society. See John Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, 1999), pp. 181-123, 230-232.

deeply reflect the contingent permissions and prohibitions found in any social structure whereas what they potentially could and would have contributed will reflect what would have been or what they would have brought to the bargaining table were those contingent permissions and prohibitions absent or excludable. Gauthier puts the point poignantly in the following way:

Each person's expected share of the fruits of social interaction be related ... to the contribution he *would* make in that social structure most favorable to the actualization of his capacities and character traits, and to the fulfilment of his preferences, provided that this structure is a feasible alternative meeting the other requirements of the Archimedean choice.²¹

Because MRC relates agents' benefits to their relative concession point and takes into account the contribution an agent *would* have made in that social structure most favorable to the actualization of his or her capacities and character traits, and to the fulfilment of his or her preferences it meets the requirements of the Archimedean standpoint of choosing in full view of everyone's individuality. In the distribution of the cooperative surplus it ensures that what an agent gets in return reflects both contributions and agreement. Returns reflect contributions and agreement as long as they appropriately reflect social contingencies of socialization and inequalities. In general, particular social structures are unjust not necessarily because they fail to relate benefits to contributions or allow individuals to take advantage of their fellows but because they fail, according to Gauthier, "to relate benefits to the contributions each person *would* have made had each enjoyed similar opportunities and received similar encouragements."²²

What are we to take from all of this? That choosing as Archimedean choosers models Gauthier's conception of justice whereby an agent is disposed not to take advantage of others, not to seek free goods or to impose uncompensated costs. Choosing from the Archi-

²¹ Gauthier, *Morals by Agreement*, p. 264, emphasis added.

²² *Ibid.*, pp. 263-264.

medean standpoint models the idea of justice insofar as the standpoint can be employed to calibrate interactions at the individual level. Additionally, for although the standpoint speaks to interactions at the global level it justifies the reasoning behind the claim that MRC is a unique bargaining principle, and the corollary claim that in bargain situations concessions be roughly equal.

Here comes the worry. On the one hand, we have the individual perspective from which to evaluate justice, and on the other, we have the Archimedean perspective from which to evaluate justice. How can that be? On the former standpoint, principles of justice agreed upon are to be used by individuals to promote and ensure a desirable cooperative relationship, but on the latter standpoint, the principles aim to structure social institutions and systems that play a profound role in creating and shaping individuals. Whereas the ground of the individual standpoint is determinate, fully socialized individuals who are endowed with all kinds of abilities and know what their utility functions would be under various schemes of cooperation, the ground of the Archimedean standpoint is indeterminate individuals who select a scheme of cooperation not on the basis of who they *are*, but on the basis of *who they could be* in any of these schemes. Thus we seem to not only have two methodologies and approaches by which to evaluate morality, we equally have two types of agents – determinate and indeterminate individuals – as grounds for both standpoints.

Gauthier offers a response to this worry at the end of chapter VIII of *Morals by Agreement*. Moral theory, he says, “offers an Archimedean point analysis of human interaction” [but the] “theory of rational choice offers an analysis from the standpoint of each interacting individual.”²³ Gauthier’s point is that whereas the individual with reference to rational choice theory is concerned with rational agreements as they affect “individual interactions,” the Archimedean chooser with reference to the ideal choice is concerned with impartial choices as they affect “human interactions.” The bottom line is that for Gauthier, the impartial perspective of the ideal rational actor has to or must cohere with the perspective of rational individuals engaged in strategic choices, and their coherence is a demonstration of the appro-

²³ *Ibid.*, p. 266.

priateness of both methodologies. The Archimedean standpoint, according to Gauthier, does not itself yield compliance with the social contract since it primarily serves to confirm “from a moral perspective, the rational derivation of impartial constraints on straightforward maximization.”²⁴ Both methodologies in this sense yield the same results, as far as principles, social institutions and practices are concerned. For example, an individual who chooses rationally “may consider existing social institutions and practices ultimately unjustified.” That same individual may agree that given the person she really is, the existing social institutions and practices “afford her a fair share of the benefits of social cooperation. For the person she is may not be the person that she supposes she would have been in an essentially just society.”²⁵

Gauthier’s position here seems to indicate that he is fully aware that the two standpoints or methodologies may not necessarily cohere although it would be better if they did. If in any given contract situation the division of the cooperative surplus falls outside roughly equal concessions and an equal distribution but agreed to by all parties such division may constitute “injustice” from the appraisal of the Archimedean standpoint but not necessarily from that of the individual standpoint. The ideal impartial perspective in this circumstance provides the standpoint and context from within which it could be claimed that certain inequalities have not been rectified or fairness has not been fully served. Such cases may include situations where there have been unequal distributions of the cooperative surplus or where the selected outcome fails to take into account the process of socialization that represses certain individuals. So those for instance with the smallest share in the distribution or those that have been significantly affected by the socialization process could be said to have been taken advantage of from the Archimedean standpoint, even if such evaluation cannot be made from the individual standpoint.

However, since both standpoints may not necessarily cohere what are we left with? Broadly, two options. Either we accept the individual standpoint (thus rejecting the impartial Archimedean

²⁴ Gauthier, “Moral Artifice: A Reply by Gauthier,” p. 414.

²⁵ *Ibid.*, p. 415.

standpoint) or we accept the Archimedean standpoint (thus rejecting the individual standpoint).

Suppose that Gauthier goes with the former, then our riposte to him may come in two ways. First, we will say to him that it is unclear what the necessity is of the Archimedean standpoint. For if the Archimedean standpoint will not be strictly employed to affect how outcomes are distributed and how justice is to be calibrated why then introduce the standpoint in the first place. Second, we will point out that it is not clear how far the individual standpoint remedies unjustifiable inequalities. Since the individual standpoint may still leave us with some indefensible inequalities it seems that with MbA Gauthier has not provided a comprehensive account of justice that prohibits possible interactions where some are taken advantage of or where freeriding is allowed or encouraged. Given that some unjustifiable inequalities are left unrectified from the point of view of individual interactions or given that the individual standpoint has not (completely) excluded and eliminated parasitic or disadvantageous interactions one can reasonably ask if justice has been *fully* satisfied under a social scheme of cooperation sanctioned by MbA.

Recall my earlier claim that the justification of MRC is provided not by the individual standpoint but by the Archimedean standpoint simply because it is from this standpoint that we relate each agent's expected share of the cooperative surplus not to what she *actually* contributes but to what she *would* have contributed in a feasible scheme of cooperation. If Gauthier hopes to defend MRC as a unique bargaining principle, then it seems to me that he has to be committed to the Archimedean standpoint. If he is committed to the MRC as a unique bargaining principle, then I think one can say that that he is committed to prioritizing the Archimedean standpoint over the individual standpoint. However, Gauthier's acceptance of the Archimedean standpoint or his commitment to prioritizing it over the individual standpoint raises a different issue. It raises the issue of the necessity of the individual standpoint and the corresponding issue of the role and significance of agreement in morality. For if we accept the Archimedean standpoint simply because it helps us appreciate the larger context of justice with regard to the rectification of unjustifiable inequalities (or simply suggesting how certain inequalities may or

could have been rectified), then Gauthier has to explain what the individual perspective is doing in MbA. Since the individual standpoint may require that we accept whatever results that arise from agreements, even when these outcomes may perpetuate a host of unjustifiable inequalities we may legitimately raise the question of the role and significance of agreement in MbA. The point is that given the relegation of agreement to the backseat or the weakening of its hold in the context of Archimedean choice and choosers the prioritization of the Archimedean standpoint over the individual standpoint raises the issue of the legitimacy of agreement in the derivation project and the sort of work it is doing in bargaining. Or simply put, how can it be said that morality is by agreement if agreement has little hold and takes on a lesser or minor role in the derivation project.

I think that the worry about the role and significance of agreement for the derivation project is quite decisive for MbA in the sense that it suggests that justice is not fully captured by agreement. The point is that if Gauthier accepts that the ideal standpoint tells us something substantive about what an essentially just society is or should be, or if the coherence of this standpoint with the individual standpoint demonstrates the justness of social cooperation, then it may be the case that justice is not simply all about bargainers coming to an agreement or arriving at some “satisfactory outcomes.” It is safe to say that Gauthier takes the Archimedean standpoint to be a substantive standpoint about justice and about what an essentially just society is or should be, or else why would he devote a chapter in *Morals by Agreement* to it or discuss it as an integral part of an account of justice.²⁶ Given that this standpoint may not necessarily cohere with the individual standpoint it puts Gauthier in a position where he may have to accept a minimal role for agreement.

Let me end with a couple of thoughts about agreement. Agreement is core to every contract and indeed the social contract idea. It underlines and reinforces the notion that the contract follows a process and that the process itself respects the moral equality of all persons. On this thought and in connection with the points about the individual and Archimedean standpoints, one may say that indivi-

²⁶ See Gauthier, *Morals by Agreement*, “The Archimedean Point,” ch.8, pp. 233-267; and “Moral Artifice: A Reply by Gauthier,” pp. 385-418.

duals may reach agreement on say a particular matter or agree to certain terms following a robust bargain, but the agreements reached may not take into account the socialization process or other aspects of social life that engender and perpetuate certain kinds of inequalities. As long as this can be said about the individual standpoint, it is legitimate to claim that this standpoint may diverge from the Archimedean standpoint. Yet, from the point of view of “morals by agreement” we want to say that justice is served insofar as all parties are satisfied with the outcome or agreement. The Archimedean standpoint (as well as the assumption of equal rationality of the MRC) disagrees with such evaluation. Thus, if we are to accept the Archimedean perspective, we may have to say that morality is not fully captured by rational agreement. How can this be given that we, like Gauthier, want to argue that “morality is by agreement?”

Conclusion

In this chapter, I have examined the reasons as to why we should take seriously contractarianism, as a moral standpoint as well as the worries about the role, significance, and value of the individual and Archimedean standpoints of calibrating justice. I now want to conclude by looking at one further implication for the individual or Archimedean standpoints. I take this implication to emerge from accepting or taking seriously either standpoint in Gauthier’s account of justice. This is that if Gauthier’s acceptance of the Archimedean standpoint as a standpoint that makes transparent the principal idea of what an essentially just society is or should be, then Gauthier seems to be more responsive to liberal egalitarianism than to libertarianism.

I do think that commitment to the Archimedean standpoint brings Gauthier closer to egalitarian liberals than to libertarians. The language that Gauthier uses in describing the Archimedean standpoint suggests that he can be placed as some kind of a liberal egalitarian although not necessarily in the mold or ilk of liberal egalitarians like Rawls. Expressions like the Archimedean standpoint as a standpoint that eschews “the taking of advantage of others,” that “relates benefits to the contributions each person *would* have made had each enjoyed similar opportunities and received similar encourage-

ments"²⁷ strike me as deeply egalitarian rather than libertarian. Although there are differences between the Archimedean standpoints and methodologies in Gauthier and Rawls they share a lot in common. Both share the view that fairness and justice in the hypothetical contract are determined largely by the extent they remedy unjustifiable inequalities and that such inequalities are rectified to the extent that morally arbitrary circumstances are discounted. The one relevant difference other than the difference of constraint of knowledge in the contract situation imposed by Rawls is that whereas Gauthier limits the morally arbitrary circumstances to social contingencies of socialization, Rawls extend them beyond social contingencies to natural contingencies, i.e. features and factors disbursed by the natural lottery. Here is not much difference between both methods. Since inequalities of any sort, *are inequalities all the same*, there is no reason to suppose that rational actors in the Archimedean standpoint, who are at least "aware that [they have] an identity"²⁸ would pick which inequality that (society) ought to rectify. Rationally, it would seem that they would opt for a social scheme where *all* inequalities are rectified since they would be bargaining not as *this* person but as *each* person.

Gauthier's view that it is important to recognize unjustifiable inequalities such as factor rent and others occasioned because certain groups of people are "mis-socialized" or misshaped is interesting and worth pointing out here. However, this view is not significantly different from the view (of Rawls) that it is important that we consider as well factors such as those of nature that place some people on the wrong side of things by "mis-bestowing," or "withholding" certain natural endowments from them. Both sets of contingences have a profound effect on the lives of individuals; they fundamentally affect them and aid or hinder them in some deep and important ways. Simply, they can determine the direction a person's life will take or the sort of projects that they will be able to embark on. From a moral point of view, both sets of inequalities are morally arbitrary and ought to be discounted by an appropriate moral account and theory of justice.

²⁷ Gauthier, *Morals by Agreement*, pp. 263-264

²⁸ *Ibid.*, p. 251.

If the above analysis is right, then Gauthier seems to be closer to Rawls or the camp of liberal egalitarianism than that of Robert Nozick or the camp of libertarianism. Accordingly, libertarians, like Narveson, who want to interpret Gauthier along libertarian lines although may have reasons to do so would have to dig deep to pull such interpretation off.²⁹ Even at that, it may be a difficult task to show how and why Gauthier is or should be a libertarian, who is committed to a very robust view of individual rights. This is because Gauthier's approach to justice which takes into account an impartial standpoint where such standpoint eschews morally arbitrary circumstances and consequently remedies unjustifiable inequalities seems to me to be more congenial to a liberal egalitarian interpretation of justice as *fair distribution* than to a libertarian interpretation of justice as *respect for rights*.

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²⁹ See Jan Narveson, "Gauthier on Distributive Justice and the Natural Baseline," *Contractarianism and Rational Choice: Essays on David Gauthier's Moral by Agreement*, Peter Vallentyne, (ed.) (Cambridge: Cambridge University Press, 1991), pp. 127-148; Jan Narveson, *The Libertarian Idea* (Peterborough, ON: Broadview Press, 2001).

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Dynamic Contractarianism

VANGELIS CHIOTIS

Introduction

The social contract is best understood as a dynamic process instead of a static structure. The proposed dynamic nature of the social contract follows from the Humean rationale of contract by convention. In mainstream contractarianism, as presented by Hobbes, the contract regulates behaviour based on an original agreement between two parties, usually the government and the people. Once the contract terms are agreed upon, it is assumed that the contract is a stable construct, provided its terms are met. However, this ignores the dynamic nature of preferences, information availability and the number and disposition of interlocutors. Dynamic contractarianism considers these parameters to suggest an account of contractarianism that better describes and explains moral norms.

A social contract determines the rules of social behaviour for a variable period with more successful social contracts lasting longer. Hobbes is not clear about the right to revolt or defy the Leviathan. On the one hand, “at times he writes as if the whole project ... is to demonstrate the illegitimacy and imprudence of rebelling against an established and stable political order.”¹ On the other hand, *Leviathan* has been described as rebel’s catechism, in Hobbes’s time but also more recently by Jean Hampton². Unlike Locke, Hobbes is openly critical about the right to rebel but at the same time he can be seen to allow for revolution and the right to overthrow the government. There is tension within *Leviathan* about the right to rebel against the government and Hobbes is ambivalent³. The need for revolution is deemed unlikely given Leviathan’s rationality and self-interested

¹ Susanne Sreedhar, *Hobbes on Resistance: Defying the Leviathan* (New York: Cambridge University Press, 2010).

² Jean Hampton, *Hobbes and the Social Contract Tradition*, new edition (New York: Cambridge University Press, 1988).

³ Thomas Hobbes, *Leviathan* (London: Forgotten Books, 1976).

nature. However, and especially if we consider Hobbes's individualistic approach and the primacy of individual freedom, it is plausible to argue that, at least according to one understanding of Hobbesian social contract theory, the contract lasts for as long as it fulfils its original purpose. Moreover, in the case of an absolute monarchy Hobbes suggests that "the commonwealth exists only as long as the ruler lives."⁴ This highlights Hobbes's ambiguity about the final nature of the state and therefore, the right to rebel. As such, contractual terms can be changed and take effect successively, should the terms of the original contract be violated; for Hobbes the people have the right to revolt if the Leviathan does not fulfil his duties and self-preservation is at risk.

Moreover, the possibility of changes in preferences by either side is not considered. The basic premise of contractarianism, namely that a social contract is an agreement based on common understanding, implies that change is possible. Unless we assume that the terms of the contract derive from divine authority or that there are humans with superior intellectual capabilities, the contract is an exclusively human construct. In Rawls it is implied that once the premises of the social contract have been agreed behind the veil of ignorance, they are final.⁵ However, this finality is problematic as the Rawlsian contract is based on reasonableness. Arguing that reason is universal and impervious to historical changes in essence replaces the metaphysical roots of morality with unrealistic assumption of human nature and behaviour. The characteristics of reasonable action and argument may change and have changed in the course of history. Asserting that individuals behind the veil of ignorance will make decisions that will hold forever is as unrealistic as assuming that the basis of morality is metaphysical. As such, it changes when individual preferences or social circumstances change. To argue otherwise one would have to claim that human preferences and the social environment remain unchanged irrespective of population dynamics, technological and environmental changes. The speed of change varies and may be incremental and last

⁴ Hampton, *Hobbes and the Social Contract Tradition*, p. 188.

⁵ John Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 2005).

several generations, but should we accept the basic premises of contractarianism we also have to accept its dynamic nature.

Furthermore, the parties in the contract change as generations of individuals change and individual preferences develop as a result of population dynamics and information availability variations. As a result, the structure and the terms of the contract change accordingly. Changes do not need to occur in the basic principles of the contract to justify reference to dynamic contractarianism; they may as well consist of small adjustments as a result of topical convention shifts.

This dynamic approach to contractarianism has several advantages by comparison to traditional social contract theory. First, it does not depend on compliance. In repeated interactions, compliance is evaluated continually by one's actions as opposed to one's promises; an agent's history indicates her future behaviour. Second, there is no need for a third party enforcer. Agents who tend to behave non-conventionally are simply avoided, thus being punished by social exclusion. Finally, dynamic contractarianism avoids criticism related to hypothetical consent and the bargaining process by relying on assumptions of repeated interactions and social structures.

As such, assuming self-interested agents and repeated interactions within a society, following Hobbes and Hume respectively, the social contract must be dynamic and evolving. In order to show this dynamic and evolving nature of the social contract, a number of concepts have to be discussed. The Hobbesian social contract relies on self-interest and rational agency and therefore, it is important that rationality and bargaining between rational actors are discussed. This will help examine the concept of a social convention based on rational interactions, and argue for the dynamic nature of the social contract. Social conventions and rational agency constitute an attempt to incorporate Humean premises in an argument that is based on Hobbesian premises of human behaviour. This is further explored through the concept of coevolution, which investigates the interdependence of rational strategies and social structures. Finally, having explored rational agency, bargaining, social conventions and coevolution, will help explain why the social contract is best understood as a dynamic process.

Rationality and Bargaining

Contractarianism based on rational morality, as argued for by Gauthier, discusses how moral norms can be established, without reference to Rawlsian morality and justice. These moral norms do not have to agree with specific ideals of morality or justice. Since they are the outcome of a contract among individuals of similar rationality, denouncing them as non-just would imply a higher moral authority or an “impartial observer,”⁶ whose judgement is considered superior, thus conflicting with assumption of equal individual rationality.

A rational agent would not accept an agreement that constrains her utility maximisation, in the short or long run. Since all contractors would do the same, the final contract must be one that maximises the utility of all contractors given the limitations of social interaction. Hence, it will be in a situation where social welfare is Pareto efficient. The history and culture of a society determines the culture of individuals who sign the contract. Their rationality is, in a sense, defined by their cultural and social environment. The ability to deliberate and the availability of information are similar in all members of a given social group and therefore, they are all equally rational.⁷ As a result, they are expected to make similar decisions about how to maximise their utility and what is a realistic beneficial social equilibrium. Thus, the assumption of equal rationality has implications for what is considered rational behaviour and justice in a given society.

Contractarianism plays a connecting role between rationality and justice;⁸ the underlying idea of mutual agreement refers to both rationality and justice. Justice, broadly understood, is an interaction outcome that agents of roughly equal status would agree on. On the contractarian account any interaction between agents of similar rationality has to lead to a just outcome. Thus, contractarianism

⁶ Adam Smith and Knud Haakonssen, *The Theory of Moral Sentiments* (New York: Cambridge University Press, 2002).

⁷ Peter Vallentyne, ed., *Contractarianism and Rational Choice: Essays on David Gauthier's *Morals by Agreement** (New York: Cambridge University Press, 1991).

⁸ Gauthier, “The Social Contract as Ideology,” *Philosophy and Public Affairs* 6, no. 2 (1977), pp. 130–64.

provides a framework to conceptually fuse justice and rationality, and by extent, individual maximisation and social morality.

The following paragraphs discuss the bargaining procedure as it is typically used in the contemporary contractarian tradition. Although the dynamic account of the social contract bypasses the need for bargaining, this discussion is useful in examining the advantages of a conventionalist explanation of the social contract. In addition, a type of bargaining still takes place in the conventionalist account; rational agents' interactions lead to an equilibrium. These interactions can be seen as a bargaining procedure embedded in the game and with no need for a distinction between bargaining and game interactions. Bargaining is assumed to take place between rational individuals who want to make the most of the possibilities of cooperation and subsequently maximise their share of the cooperative surplus. In Hobbes's *Leviathan* the state of nature is used as the starting point and incentive for agreement. In the present account, the "original position"⁹ is taken to be the given status-quo which does not need to be ideal or abstract and as such it is closer to the "initial bargaining position."¹⁰

A basic bargaining procedure is defined by the Edgeworth box and Pareto optimality and describes a simplified model of the interaction between two rational individuals. It is valuable because, in its simplicity, it provides a concise description of the possible outcomes of an interaction.¹¹ The Edgeworth box in its simplest form exhibits the interaction between two persons trading with two goods. Each player's utility is represented by her indifference curves which are tangential when both agents maximise. The contract curve is the line connecting all such points and constitutes the set of Pareto optimal trading points. Since both agents are rational, the outcome of their interaction will be found on this contract curve. At the beginning of their interaction each player has a set amount of a good which, on its own, does not maximise her utility. As bargaining proceeds, the players move to higher utility levels until they reach a Pareto optimal

⁹ Rawls, *A Theory of Justice*.

¹⁰ David Gauthier, *Morals by Agreement*.

¹¹ Ken Binmore, *Playing for Real: A Text on Game Theory* (New York: Oxford University Press, 2007).

point, where their utility is the maximum possible. There is a single optimal point where both players maximise, but there are many points where collective welfare is at a maximum. The exact point of agreement then depends on the players bargaining skills.¹²

Bargaining is central to contractarianism and to the concept of the social contract as it leads to an agreement on the responsibilities that derive from the contract.¹³ Two agents who interact repeatedly will either have to bargain repeatedly over the rules of their interaction or agree that their first agreement will be binding for all their subsequent interactions. However, their interactions will be continuously changing their history and therefore their maximisation strategies. It is more plausible then to assume that agreement points will be more stable when they are decided on a more frequent basis. Each agreement point can be used for a number of interactions.¹⁴ Then a new bargaining procedure can be initiated by either agent when he believes the existing contract is outdated. In this account bargaining is part of the interaction; the agents' repeated bargaining and interactions are part of an enlarged game consisting of periods of negotiation and longer periods of interaction. Assuming repeated interactions means that the interacting agents have similar histories, or at least each agent's history is known. Therefore, their strategies can be predicted. In game theoretical terms, repeated interactions make the game played cooperative, thus increasing the likelihood of a mutually beneficial agreement.

Following Binmore's discussion of the Nash bargaining solution,¹⁵ the two bargaining parties have roughly similar bargaining skills. Their bargaining skills are included in the rationality function and since they act in similar environments their bargaining skill-set is similar. Therefore, the bargaining game is symmetric as far as the players' rationality and bargaining powers are concerned. Given repeated interactions, even in the case where their bargaining skills

¹² *Ibid.*

¹³ John C. Harsanyi, Werner Leinfellner and Eckehart Köhler, *Game Theory, Experience, Rationality* (Rotterdam: Springer, 1998).

¹⁴ Ken Binmore, *Game Theory and the Social Contract: Just Playing v. 2* (Cambridge, MA: MIT Press, 1998).

¹⁵ *Ibid.*

are not strictly symmetric, they will converge to being similar enough to not have an impact on their bargaining. Their repeated interactions are a trial and error procedure, where the least skilful player has the opportunity to learn and improve. And by reflecting on past interactions, she will be able to improve her bargaining skills.¹⁶ Therefore, once we assume repeated, non-random interactions bargaining skills are also assumed to be similar.

The bargaining procedure changes once we assume repetitiveness of interactions. A bargaining problem has a starting point, break-down point and agreement point.¹⁷ Rational agents compare their utilities under each and adopt maximising strategies. In repeated bargaining games, there cannot be a break-down point. In the case where there can be no agreement, the agent will bargain with someone new who will be more willing to accept her claims. Rational reflection on the bargaining procedure and the contract point of each interaction results in players choosing whether they will interact with the same person in the future. In this sense, the role of rationality in the bargaining is two-fold: first, during bargaining players are assumed to be rational. Second, when bargaining has reached a likely agreement point, when the available information about the terms of the agreement can be contrasted with other contracts. Thus, salient maximising strategies develop.¹⁸ Individuals with similar maximising strategies will tend to bargain with each other giving rise to specific bargaining strategies and solutions. In conclusion, in a framework of repeated interactions, bargaining strategies converge and over time rational agents adopt similar strategies.

Contract

Broadly understood, the social contract is a thought experiment to derive political and moral legitimacy. Hobbes describes the social contract in an effort to justify the political legitimacy of the monarch.¹⁹

¹⁶ Young, "The Evolution of Conventions," *Econometrica* 61, no. 1 (1993), pp. 57-84.

¹⁷ Binmore, *Playing for Real*.

¹⁸ Binmore, *Game Theory and the Social Contract*.

¹⁹ Hobbes, *Leviathan*.

Since Plato, Hobbes was the first to explicitly use such a mechanism to discuss social and political obligations, with no metaphysical implications or reference to a divine law and the divine right of the monarch. Hobbes, Locke and Rousseau²⁰ offered alternatives to metaphysical accounts of legitimacy that rely on human reason, rationality and ultimately individuality and the value of the human being.

Hobbes uses the social contract as a thought experiment, or a historical account of social evolution, to argue for the need for government. His “state of nature”²¹ is a situation where individuals live in constant war, thus being unable to fulfil their potential. They have reasons then, to reach an agreement and establish a government that will protect them from violence; in return individuals have to obey it. Perhaps Hobbes’s most significant contribution is that he bases his argument on human rationality and self-interest. Individuals are self-interested and rational and as a result, want to escape the state of nature in order to ensure protection of their lives and property. Hobbes makes important assumptions about agency, such as that people want to “shun death”²² and that they are similar in strength, physical and intellectual. The individual is the centre-piece of his theory. Thus, despite tensions in *Leviathan* about the right to rebel, the legitimacy of the government stems from its ability to protect individuals. If it fails to do so, they have the right and rational incentive to overthrow it and return to the state of nature, or replace it. Although there are different interpretations about the extent of the right to revolution, it is obvious that for Hobbes the social contract is artificial and as such, subject to adjustment. The state of nature is the “original position” from which parties bargain for the final agreement, the social contract, that binds them and regulates social responsibilities and rights. These apply to both political contractarianism that describes state legitimacy and moral contractarianism that offers legitimacy for moral rules in Hobbes’s *Leviathan*.

²⁰ Ernest Barker, *Social Contract: Essays by Locke, Hume and Rousseau*, new edition (New York: Oxford University Press, 1979).

²¹ Hobbes, *Leviathan*.

²² *Ibid.*

Although the Humean and Hobbesian approaches are often seen as conflicting, Hume can also be viewed as contractarian.²³ Hume is mostly known as a critic of social contract theory. However, the primary target of his criticism is the “original contract”²⁴ by which he refers to historic accounts of political contractarianism. Hume takes issue with the idea that contemporary governments derive their legitimacy from the agreement between the government and the people in historic time. However, even political contractarianism is not exclusively seen as a historical argument but is also approached as a theory to understand, explain and justify political legitimacy. More importantly for the present argument however, moral contractarianism is not affected by Hume’s criticism because moral contractarianism is understood as a theoretical construct to help us examine and understand the moral rules of society. Moral contractarianism is a theoretical tool to examine and justify morality, not a historical account of the origins of morality.²⁵

Furthermore, the Humean conventionalist account of social interactions is by nature dynamic as it is based on interactions that are repeated.²⁶ Therefore, the two approaches can be used in combination to offer a more powerful and comprehensive contractarian explanation of social life and moral/political legitimacy. In a sense, Hobbes describes social arrangements at the macro-level, in terms of a social equilibrium, and Hume at the micro-level, in terms of interactions and agreements between individuals and groups. The two approaches complement each other in that they tell a story about the legitimacy and justification of moral rules, in local interactions and on a wider social scale. Considering the two approaches in combination strengthens the argument that our responsibilities and rights are the result of an implicit agreement, by taking into account that the agreement

²³ Gauthier, “David Hume, Contractarian,” *The Philosophical Review* 88, no. 1 (1979), pp. 3-38.

²⁴ Barker, *Social Contract: Essays by Locke, Hume and Rousseau*.

²⁵ David Gauthier and Robert Sugden, eds., *Rationality, Justice and the Social Contract: Themes from ‘Morals by Agreement’* (Ann Arbor: University of Michigan Press, 1993).

²⁶ David Hume, *A Treatise of Human Nature: Being an Attempt to Introduce the Experimental Method of Reasoning into Moral Subjects*, Ernest Mossner, ed., new edition (London: Penguin Classics, 1985).

depends on actions and the interdependence between the general (society) and the specific (individuals interacting).

Binmore's account of the social contract is in the same direction as he understands it as the equilibrium of a super-game played on a social scale.²⁷ For Binmore, game theory is "the appropriate vehicle within which to express Hume's ideas."²⁸ The social contract is one of the many possible social equilibria that have been chosen arbitrarily as a result of a process of cultural evolution. As such, the social contract dictating moral rules is arbitrary and its value lies in the fact that it allows and ensures coordination. Binmore, similarly to Hume, suggests that repeated interactions give rise to social conventions that regulate behaviour. These conventions are the sub-game equilibria that sustain the super-game. The collection of social conventions established within a society makes up the social contract.

The difference between "the trivial and the profound ... are differences only of degree."²⁹ A social contract regulates the important moral rules, such as against murder, but these rules have coevolved with the less important, such as the rule to drive on the left. This coevolution means that the two sets of rules are interdependent. Social conventions sustain the social contract and direct its development, whereas the social contract frames the boundaries of social conventions. In other words conventions are the rules that sustain society for Hume but also for Binmore's game theoretical approach.

The starting point for Binmore's theory is a state of nature that is different from Hobbes's war of all against all or Locke's more benign original state. We should not choose an ideal starting point when constructing a social contract theory, we should be realistic and consider our current status/state of affairs: "Like it or not, we are what history has made of us."³⁰ Binmore's original position is the current state of society which makes his theory less controversial and more easily applicable to contemporary societies since it bypasses the criticism linked to the idea of an original position in contractarian theories.

²⁷ Binmore, *Game Theory and the Social Contract*.

²⁸ Ken Binmore, *Natural Justice* (Oxford: Oxford University Press, 2005), p. 4.

²⁹ *Ibid.*, 3.

³⁰ *Ibid.*, p. 25.

The social contract is a promise; from the government to the people or, when talking about moral contractarianism, from one individual to another. This promise, like all promises can be broken and therefore, there is a need for a way to enforce compliance. Hume's account of social conventions does not have to deal with the problem of compliance because conventions emerge from and are based on actions. A social contract that also relies on actions also bypasses the problems of hypothetical consent, compliance and enforcement. If we view participation in mutual beneficial interactions as a promise that the participation will continue, then convention-based contractarianism does not have to deal with the problems of compliance, enforcement and consent. Rational agents participate if it is beneficial for them and as such they do not have to be forced to comply. In this context of repeated interactions within established social conventions, free-riders cannot fare as well. Given repeated interactions and the associated information availability, those who do not contribute are excluded from the cooperative surplus. Therefore, a free-rider may benefit from one interaction but he will lose out from the benefits of repeated interactions. If a social equilibrium stops providing mutual beneficial outcomes, it will collapse because the topical interaction equilibria, the conventions, will have collapsed, making any Leviathan-type enforcer of secondary importance.

Convention

Social convention is a social equilibrium of behaviour that is the result of repeated interactions between rational, self-interested individuals. The term is used by Hume³¹ and then again brought into prominence by Lewis³² and Sugden.³³ For Hume, convention is the sense of common interest,³⁴ which allows individuals to interact and cooperate. Hume's account of social conventions is especially relevant

³¹ Hume, *A Treatise of Human Nature*.

³² David Lewis, *Convention: A Philosophical Study* (New York: John Wiley & Sons, 2013).

³³ Robert Sugden, *The Economics of Rights, Co-Operation, and Welfare* (London: Palgrave Macmillan, 2004).

³⁴ Hume, *A Treatise of Human Nature*.

here as he sees conventions as the basis of political and moral legitimacy. According to Hume, established social laws and behaviours are determined by social conventions that arise from social interactions.

Repeated interactions within a society are bound to reach social equilibria that regulate behaviour; rational individuals who interact repeatedly have incentives to regulate their interactions to avoid costs, or interrupt them. Convention is a coordination mechanism that allows and facilitates social interaction. Past interactions, or precedents, are of great importance as they allow us to reach an equilibrium more easily than otherwise. Each social interaction is a new coordination problem which can be 'solved' by considering past interactions and the analogies with the current one.³⁵

Lewis and Sugden take different approaches to conventions, but they are similar in some significant aspects. Conventions arise by chance and can be arbitrary; they become established as a result of repeated interactions within a social group. From that we can say that any type of social equilibrium is the result of repeated, non-random interactions³⁶ (non-random refers to the fact that individuals are not picked randomly from a population but rather that relative location plays a role; like in real life one is more likely to interact with neighbours and colleagues). Thus, a social convention is an efficient way to avoid conflict and reach efficient social equilibria that bind individual behaviour on a social level.³⁷

Social conventions do not have to be applied throughout a society; they can be observed in small groups within a given society. Topical equilibria can be established and be independent as long as they serve those adhering to the particular convention rules.³⁸ Farmers who help each other drain their meadows may be an instance of a local social behaviour equilibrium that is observed yearly.³⁹ Rowers on a boat, is another instance of a social behaviour equilibrium that has to

³⁵ Lewis, *Convention*.

³⁶ H. Peyton Young, *Individual Strategy and Social Structure* (Princeton, NJ: Princeton University Press, 2001).

³⁷ Sugden, *The Economics of Rights, Co-Operation, and Welfare*.

³⁸ Brian Skyrms, *The Stag Hunt and the Evolution of Social Structure* (New York: Cambridge University Press, 2004).

³⁹ Hume, *A Treatise of Human Nature*.

be observed at a completely different time-scale in order to be successful.⁴⁰ Conventional rules and expectations do not necessarily apply uniformly throughout a society. Each individual complies with different social conventions, as she sees fit. Therefore, different and diverse social conventions may coexist and even compete within a social contract.

The links between individual conventions and contracts are not usually explicit. Sending a Christmas card⁴¹ does not affect whether we live in a society that executes thieves, or whether we live in a democracy or a dictatorship. However, a stable social contract, whatever its premises, depends on stable social conventions. The links between social contract and social conventions become clearer when we examine both from a game theoretical angle. Binmore's account of a contract as a game equilibrium is complemented by Sugden's account of social conventions as "stable equilibrium in a game that has two or more stable equilibria."⁴²

Stable equilibria are the result of iterated interactions among rational actors and by definition cannot be destabilised by the adoption of alternative strategies. Society reaches a stable equilibrium when all its members, or almost all of them, follow their maximising strategy. Thus, an overwhelming majority of a population has to adopt the conventional behaviour in order for the convention to become established. The greater the number of individuals that follow a convention the more likely it is that this convention will expand, until it becomes a social convention that is generally followed. The implication here is that conventions arise and become stable randomly and not so much because of individual rational deliberation. What matters is the establishment of a convention to regulate social interactions and avoid conflict and not the selection of a specific convention. In conclusion, the type of convention and the equilibrium point are not important. What matters in this analysis is their becoming

⁴⁰ Hugh Ward, "Three Men in a Boat, Two Must Row: An Analysis of a Three-Person Chicken Pregame," *The Journal of Conflict Resolution* 34, no. 3 (1990), pp. 371-400.

⁴¹ Or any other "card-like" practice that has to do with marking or celebrating some event.

⁴² Sugden, *The Economics of Rights, Co-Operation, and Welfare*, p. 32.

established and stable. There are different types of conventions with various structures and equilibrium points.

For Sugden all types of conventions (of coordination, property and reciprocity) are seen as equilibria of repeated games whose purpose is social peace by generating an understanding of justice⁴³. The break from conventional behaviour is viewed as unjust by those who follow it, as it is the convention in the first place that has created a sense of what is just. The breaking of a convention for whatever reason, either by mistake or weaknesses of will or because it is deemed irrational, creates a feeling of injustice to others, as established conventions serve as social behaviour regulators. Since it is rational to keep conventions as long as others keep them, it follows that it is also rational for one to want others to keep the convention.

Conventions are characterised as moral and rational: "...conventions are normally maintained by both interest and morality..."⁴⁴ They come about as the result of rational interaction, but rationality alone cannot sustain them. In this context, our sense of morality is being informed by established conventions, which are also the outcome of rational interactions. Moreover, since there is no equilibrium selection mechanism provided, an established convention, while maximising for its members, may very well be random, not moral.

Coevolution

Hobbes's individualistic account of the social contract is the basis of the present argument, especially as was enriched and enhanced by Binmore's game theoretical approach. Hume's theory about how local interaction lead to social equilibria of behaviour is able to complement the contractarian approach and explain how it works on the micro level. The concept of coevolution explains how the two interact and are interdependent as they evolve.⁴⁵ When the contract changes, it affects the social conventions and similarly topical changes in the social conventions influence the general social equilibrium.

⁴³ Sugden, *The Economics of Rights, Co-Operation, and Welfare*; Gauthier and Sugden, *Rationality, Justice and the Social Contract*.

⁴⁴ Sugden, *The Economics of Rights, Co-Operation, and Welfare*, p. 22.

⁴⁵ Skyrms, *The Stag Hunt and the Evolution of Social Structure*.

Individuals, by choosing their strategy and their interlocutors, affect the structure of the interaction and the eventual equilibrium point. Therefore, there is a dynamic process by which maximising strategies develop in parallel with structural changes in social groups. Association refers to the strategy revisions and learning during repeated interactions. Coevolution of structure and strategy adds to association the fact that now agents are able to imitate behaviour that is observed in their social group, even if they have not encountered it before; “a player looks around, and if another strategy is getting a better payoff than his is, he imitates that one.”⁴⁶

The concept of coevolution entails the fact that rational individuals change their behaviour when they see someone else doing better or realise that changing interlocutors will maximise their utility. Rationality here is not assumed to be the *homo-economicus* rationality that assumes complete information and perfect memory; rather it is assumed that individuals are self-interested and aim at utility maximisation, but at the same time are able to learn and adjust to their environment.⁴⁷ Humans make friends and enemies based on the pleasure of their interactions; the more the interactions continue being pleasant and beneficial, the more the bonds between the interacting agents strengthen, creating social structures that support the given behaviour. As such, there exist topical equilibria through which agents maximise their utility. These social equilibria are the result of repeated interactions between self-interested agents, whose main aim is utility maximisation. At the same time, topical equilibria are affected by behaviours in neighbouring social groups, given information availability which can be achieved through observation. To use Skyrms’s analogy, a group hunting stag can see the social output of a group hunting hare individually and compare outcomes. One should expect then that neighbouring social equilibria would converge to adopting behaviours that yield the higher individual utility and social welfare.⁴⁸ The analogy is used to describe the social contract, but it is very useful to explain how social conventions influence the social contract. A society where most topical equilibria dictate hunting stag is more

⁴⁶ *Ibid.*, 106.

⁴⁷ Young, *Individual Strategy and Social Structure*.

⁴⁸ Skyrms, *The Stag Hunt and the Evolution of Social Structure*.

likely to prioritise social welfare over individual utility, if such a dilemma was offered. On the contrary, a society made up of social groups where the equilibrium is hare hunting is more likely to end up with a social equilibrium that promotes individual over social welfare.

The dynamic analysis of the social contract offered by Skyrms is more realistic than the static analyses found in traditional contractarianism. Societies are dynamic in that individuals change behaviour and social structures shift accordingly. Coevolution exhibits how topical social equilibria are interdependent with each other and with the general social equilibrium.

Dynamics

A social contract determines the rules of social behaviour for a variable period with more successful social contracts lasting longer. Therefore, contracts can be changed and take effect successively, provided all contractors agree. This understanding of social contract theory can be derived from the theory's basic premises. The social contract is an agreement based on common understanding for mutual benefit. Being a human construct, the terms of the contract changes when individual preferences change. The alternative would mean that human preferences remain unchanged irrespective of population dynamics, technological and environmental changes, or that preferences follow contractarian rules. Both of these alternatives are inconsistent with assumptions about human reason, behaviour and the artificial nature of the contract; contractarian rules follow preferences and not the other way around. The value of the social contract is purely instrumental as it is established to serve individuals' aims and survives only as long as it succeeds in that.

Parties to the social contract change as generations of individuals change while individuals' preferences change as a result of behavioural dynamics within a population. Thus, the social contract is dynamic by definition. Its members change irrespective of how conservative one is about the social contract theory. Even in the case that the social contract is considered to be an agreement that has taken place historically and binds future generations, the contractors do change. If the contract is taken as a thought experiment, then indivi-

duals' preferences change as life goes on, or as generations change. As such, the structure and the terms of the contract change accordingly. An alternative and stricter reading of the social contract theory implies that the symbolic representation of the parties, usually the people and the government, remain the same throughout history and as such the original contract bind them and the future generations. However, this is not the account of contractarianism which was used as a starting point for the present argument, in addition to this reading being most closely linked to early contractarians such as Filmer⁴⁹ and perhaps even Hobbes.⁵⁰

Changes do not need to occur in the basic principles of the contract to justify talk of dynamic contractarianism; they can be made up of small adjustments as a result of local convention changes. In addition, a single conventional shift to a higher utility equilibrium does not need to result in the social contract reaching higher social welfare. The salience and popularity of each convention is central in the effect it has on the social contract. Or in Skyrms's terminology, a social group changing to hunting stag from hunting hare will not lead to the whole of society shifting, or at least shifting immediately.⁵¹ For instance, if the social convention of driving on the right or left changes, one should not expect to have a direct effect on the social contract.⁵² When the social convention that dictated that women were of inferior ability to men changed, its influence on the social contract is more intense and straightforward. Over time gender discrimination moved from a topical social convention of understanding genders as equal to a social wide law. Discrimination was not only frowned upon on a conventional level but became illegal on the social contract level. The implication here is that there is little need for enforcement at the scale of society, given that social contract shifts when the underlying social conventions change. Enforcement can take place within social conventions, where information spreads more quickly and accurately, because of their relatively small size. As such, discrimination against

⁴⁹ Robert Filmer, *Patriarcha; Or, the Natural Power of Kings* (Gloucestershire: Dodo Press, 2008).

⁵⁰ Hobbes, *Leviathan*.

⁵¹ Skyrms, *The Stag Hunt and the Evolution of Social Structure*.

⁵² Sugden, *The Economics of Rights, Co-Operation, and Welfare*.

women would be punishable conventionally, by social exclusion, thus minimising the likelihood that it would be a social contract requirement.⁵³

As implied above not all convention changes lead to social contract shifts. Historically, changes in driving laws and rules have not influenced social contracts; on the other hand, changes in gender roles within a given society are more likely to have more wide-spread social implications and thus, affect the social contract rules. Although social conventions are assumed to have diverse kinds of influences on the social contract, the underlying premise is that the type of established convention is a strong indication for the type of the social contract. Therefore, it is not so much a matter of which side of the road one drives on, as much as how strictly the driving convention is adhered to or enforced. Similarly, gender equality has implications for the inclusiveness of a given social contract. A society that respects established social conventions, such as driving on the left, is more likely to respect social conventions calling for gender equality. In turn, adhering to social conventions is more likely to sustain a stable social contract. Considering that individuals participate in more than one of the conventions within a society, it is plausible to assume that social conventions overlap, irrespectively of their importance. Conventions overlap and are interdependent; “conventions arise through the accumulation of precedent.”⁵⁴ Following driving rules leads to an expectation of following gender equality norms. The understanding of the importance of following conventional rules is likely to be independent of the convention. As such, the establishment and viability of one convention influences other conventions and by extension the social contract, in various degrees.

According to the dynamic understanding of contractarianism, for each new generation or for new participants the original position is the status-quo when they first started interacting within the given social contract. Thus, the original position is merely another equilibrium point in the dynamic process of contractarian evolution. The most successful equilibria last longer and historically, most social

⁵³ Paul Weirich, “Exclusion from the Social Contract,” *Politics, Philosophy & Economics* 10, no. 2 (2011), pp. 148–69.

⁵⁴ Young, *Individual Strategy and Social Structure*, p. 116.

contracts last longer than several human generations. Therefore, social contract change is most frequently incremental by human biological standards and only conventional change can be perceived directly and influenced by individuals. In addition, the fact that dynamic contractarianism does not rely on a single original position makes it possible to bypass criticisms against rational agency. For dynamic contractarianism, rationality dictates conforming to the social contract rules for as long as they facilitate mutual advantage. If, for any reason, rational deliberation points towards new conventional or contractarian rules, a new equilibrium is reached, which allows for different rational strategies. Rational strategies depend on the social environment, contractarian and conventional equilibria, and as such, may change during an agent's lifetime. On this understanding of rational agency, through contractarianism, one can address Parfit's⁵⁵ criticism that rational agency and personal identity are linked. Without necessarily referring to ontological considerations, a rational agent may change strategies and remain rational throughout her lifetime. Thus, individual agency, and therefore moral responsibility, is in a sense attached to the given social contract. If this changes, then the individual cannot be held accountable for actions that were permissible under the previous social contract. A businessman discriminating against women when it was legal to do so, cannot face consequences for his actions after the law changes, provided that he does not violate the new law.⁵⁶

The original position is the result of a historical and cultural process.⁵⁷ The moral and political principles that govern our societies have developed over time to accommodate changing cultural beliefs about what is right. For instance, if the enslavement of people with different skin colour is acceptable in the status-quo, the renewed social contract cannot be dramatically different. Similarly, when people believe in the divine right of a monarch, this will have implications for

⁵⁵ Derek Parfit, *Reasons and Persons*, new edition (Oxford University Press, USA, 1986).

⁵⁶ *Ibid.*, David Shoemaker, "Personal Identity and Ethics," *The Stanford Encyclopedia of Philosophy*, Edward N. Zalta, ed. (Spring 2016), <http://plato.stanford.edu/archives/spr2016/entries/identity-ethics/>.

⁵⁷ Binmore, *Game Theory and the Social Contract*.

the political social contract and its development. Individuals' perceptions depend on and are framed by the status-quo. Therefore, an equilibrium change might shift perceptions to accepting that only people with a specific skin colour can justifiably be enslaved before rejecting slavery altogether. The examples used here are meant to highlight that the social contract, as understood here, refers primarily to moral and social legitimacy. The right of the monarchy has political implications and leads to political legitimacy, but it depends on deeper social norms about the relationship with authority and the source of legitimacy. Hence, the present argument focuses on legitimacy of moral and social conventions and examines the influence of existing conventions on the social contract, with implications for political legitimacy.

The terms and structure of successive social contracts depend on the respective equilibria that serve as original positions.⁵⁸ A social contract leads to a new status-quo, which in turn affects the terms of the next social contract. Since a social contract is assumed to consist of social conventions, it is the dynamic structure of conventions that direct the changes on the general level of society. Social conventions and the social contract coevolve; although the contract structure depends on its social conventions similar to the ways that a super-game depends on its sub-games, a social contract also serves as the status-quo and therefore, influences the possible changes of the conventions as well. Their relationship is bidirectional with the social contract defining the bounds for the social conventions, whereas conventional change is essential for a change in the social contract.

The change of conventions is influenced by pre-existing social contracts. A stable social contract implies the previous existence of stable social conventions. Repeated interactions lead to rational conventions that in turn lead to the establishment of a social contract. Thus, the stability of the conventions directly influences the stability of the social contract and the absence of – stable – conventions is equivalent to the absence of a – stable – social contract. Driving on the left, stopping at the red light, signalling to turn, giving priority to an ambulance, are all instances of conventional behaviour that make safe driving possible. If one collapses, it does not necessarily follow that

⁵⁸ *Ibid.*

the rest will also collapse. But if all are followed by all, or almost all drivers, then the driving contract will be more stable and efficient. Moreover, although these conventions are not immediately related to conventions such as slave ownership they can be components of the same social contract. Changes in one convention will not necessarily lead to changes for very different social conventions; however, given adequate time they can lead to the destabilisation of other conventions either via a topical change or through a change in the social contract. A convention that facilitates higher individual utility and social welfare is bound to expand at the expense of conventions of behaviour that do not do as well, provided that there is information availability and agents are rational. Rational agency is the basic assumption of the proposed account and information availability and spreading within a society should be an easily accepted feature of the account.

Successful conventional change provides incentives for rational individuals to learn new behaviour and adapt to new strategies. A successful shift to a new convention is more likely to make a greater number of rational actors willing to abandon their old strategies, thus accelerating the shift. Hence, a conventional change can have an effect on the strategies employed in a different convention as long as some individuals participating in the first convention also participate in the second one. Conventional change is contagious and it can lead to a change in the social contract, in ways similar to the ways a hare hunter can pollute a stag hunting population; a critical number of hare hunters invading a stag hunting convention can cause stag hunters to shift as the efficiency, and thus rationality, of stag hunting depends on others' behaviour.⁵⁹

Conventional change is based on individuals' learning process. Individuals learn through a trial and error process and by imitating behaviour that yields higher utility.⁶⁰ Both mechanisms require information availability and also a trial period for the newly adopted behaviour. Even in cases where information spreading is quick and accurate, adopting a new strategy within a group is costly and time-consuming. Shifting from driving on the left to driving on the right includes practical costs and a learning process for the drivers; abolish-

⁵⁹ Skyrms, *The Stag Hunt and the Evolution of Social Structure*.

⁶⁰ Young, *Individual Strategy and Social Structure*.

ing slavery requires a new understanding and organisation of the economy (among other things). Moreover, reaching a point where deliberation about change is possible is also part of the changing process. In the driving convention the change may take centuries, whereas abolishing slave ownership in a given society may happen a few years after a long process of perceptions shifting. These examples do not mean that conventional change must occur exclusively over very long periods of time, but they are meant to show how learning and the subsequent equilibrium shift can be very time-consuming and incremental.

A social contract needs all or at least an overwhelming majority of the population to behave according to its rules in order to be effective. In addition, the slow process of conventional change means that there is no effective way to enforce an abrupt change in conventional behaviour. Conventions that are the outcome of rational interaction are stable because no party has an incentive to abandon them. At the same time repeated interactions between rational individuals can only lead to stable conventions. Enforced conventions by a third party that are not in accordance with the previously established conventions and do not take into account the interaction history cannot be stable; since a social convention is the equilibrium at a series of interactions, its stability and duration are based on the fact that these interactions were among rational agents and thus cannot include coercion. Therefore, a stable convention must be the result of repeated rational interactions and its stability is ensured by the rationality of its members.

Understanding the social contract as a collection of topical social conventions, which in turn are the result of repeated interactions among self-interested agents, bypasses the problem of compliance that traditional contractarian theories face.⁶¹ This is because repeated interactions and information about agents' interaction history ensure that one can choose her interlocutors based on their history. Hence, rational agents will choose to interact with those similarly disposed. For instance, if one pretends to be a hare hunter within a stag hunt convention, he is bound to be found out after a few interactions within

⁶¹ Vallentyne, *Contractarianism and Rational Choice: Essays on David Gauthier's Morals by Agreement*.

the convention and excluded. Social exclusion plays the role of punishment in the convention and as a result this can to a large extent serve as an enforcing mechanism in the macro level, replacing a Hobbesian Leviathan. Therefore, compliance and enforcement are endogenous parameters of the contract once repeated interactions, information availability within conventions and self-interested agents are accepted as basic assumptions.

Conclusion

The strength of the social contract metaphor lies in that it offers an argument for the establishment and development of political authority and moral norms without presupposing anything but self-interested individuals. Morality can be reached without presupposing moral agency. However, given the assumption of self-interested individuals, compliance with the terms of the agreement becomes a significant problem. Hobbes asserts that rational individuals will prefer the coercion of a Leviathan to the anarchy of a state of nature.

Assuming that individuals prefer being coerced to living in a state of anarchy can be problematic as the same rational agents who engage in a war of all against all in the state of nature are expected to obey the Leviathan once the contract has been drawn. The proposed dynamic contractarian approach deals with this problem by suggesting that the social contract is the equilibrium of a repeated super-game. Moreover, the super-game consists of sub-games that are in turn the equilibria of topical interactions. The main assumption of rational agency and self-interest remains the same. However, in dynamic contractarianism, information about others' past behaviour is known and hence each agent can select interlocutors and the interactions in which he participates. As a result, conventions of similarly disposed rational agents are formed, which are more likely to be stable as the conventional agents joined voluntarily aiming to maximise their utility. In addition, within the convention information spreads readily, which means that non-conventional behaviour is detected and can be punished by social exclusion, further strengthening the stability of each convention. The social contract in turn consists of competing social conventions; the most successful con-

ventions in maximising member individual utility and collective welfare expand by attracting more members, thus expanding their relative salience within the social contract. Ultimately, the social contract, as social equilibrium, depends on topical equilibria.

The proposed account of contractarian theory relies on a synthesis of Hobbesian assumptions about human behaviour and Hume's approach to social interactions and conventions. To some degree we can say that Hume has an answer for every problem that Hobbesian theory poses. Contemporary tools of game theory as used by Skyrms and Binmore make this synthesis a possibility, allowing us to take a more flexible approach to rational agency and insert it in a paradigm of repeated interactions and social equilibria. This paper attempted to give an overview of the possibilities and strengths of a dynamic approach to contractarianism. Equilibrium selection and the content and characterisation of justice and morality were not included as they are beyond the scope of the paper. Obviously however, these are the important issues regarding moral contractarianism, such as the content and characterisation of justice and moral behaviour and equilibrium selection in the context of repeated interactions, and there are significant implications for them by accepting the dynamic nature of contractarianism. Arguments for a public morality such as Gaus's⁶² and evolutionary considerations such as Binmore's and Vanderschraaf's⁶³ seem to be the logical next step to enhance a theory of dynamic contractarianism, technically and philosophically.

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⁶² Gerald F. Gaus, *The Order of Public Reason: A Theory of Freedom and Morality in a Diverse and Bounded World* (New York: Cambridge University Press, 2011).

⁶³ Peter Vanderschraaf, "A Governing Convention?" *RMM Special Topic: Can the Social Contract Be Signed by an Invisible Hand?* 4, no. Special Topic: Can the Social Contract Be Signed by an Invisible Hand? (2013), pp. 131–56.

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Part V
Social Contract Theory and
African Tradition

Traditional African Consensual Democracy and the Three Notions of Consent in Social Contract Theory

EMMANUEL IFEANYI ANI

Introduction

I seek in this paper to examine the three notions of consent in social contract theory from the standpoint of traditional African consensual decision-making. In the first section, I examine the three forms of consent. First, I point out that participants in a consensual decision *consented* to the decision. The decision, as it is consensual, is an *agreement* and thus a *contract*: indeed a social contract. In the second section, I expose the typical traditional African consensual arrangement, and in the third section, I argue that the consent given by participants to a consensual decision does not meet the descriptions of actual consent as described by social contract theorists. But I argue that participants in a consensual decision meet the descriptive requirements of democratic consent.

There are objections that democratic consent is problematic in the sense that it raises the question of whether a participant has consented to a decision or government she did not vote in favour of. I respond to this objection by distinguishing political from contractual consent, and argue that the objection affects only political consent. My argument is that voters may not have favoured a particular government or decision, but the mere act of voting means they consent to any government or decision at a contractual level. Thus, a democratic government in a majoritarian democracy may not enjoy the political consent of those who voted the opposition, but they nevertheless enjoy their contractual consent. Furthermore, I argue that a consensual arrangement escapes the problem with political consent in a majoritarian system (at least at the formal level), because a consensus precisely means that those who did not initially favour a decision have given their tacit consent (which is political consent) in addition to their

contractual consent, to let the decision stand as that of the group. What distinguishes the consensus arrangement from the majoritarian is that they are bound by the spirit or understanding of consensus to stand by the group decision.

The general conclusion then is that consensual arrangements fulfil the requirements of democratic consent, even in ways that majoritarian systems do not. However, I am not so sure that they fulfil the descriptive requirements of hypothetical consent. This is because a hypothetical assessor would have the initial opportunity to compare consensus and majoritarian systems and to thoroughly appraise their qualities. My argument here is that the hypothetical assessor would notice that consensus systems are in reality also majority systems in a way (we still talk of majority and minority in consensus deliberations) and the consensual arrangement places more burden of agreement on the minority, often at the expense of their interests or critical issues. The hypothetical assessor would be reluctant to choose this system since she does not know (via the veiled of ignorance) whether she will be a majority or a minority.

Three Forms of Consent

Social contract theory is very crucially hinged on the concept of consent. We ask whether governments are legitimate (whether they deserve the compliance they get from us) by asking ourselves whether we consented to their authority (actual consent); whether participating in their jurisdiction of authority implies that we consent to their authority (democratic consent); or whether we would have consented to them were we asked (hypothetical consent). I will discuss these forms of consent in relation to traditional African consensus-generated political organization.

Basically, when we participate in a discussion that leads to a consensual decision, we *consent* to the decision. This means that the concept of consent is vital to discussing the idea of consensus. Similarly, when we participate in reaching an agreement or signing a contract, it means we consent to the contract. This means that the concept of consent is also vital to discussing the concept of a contract (any contract), and in the case of this paper, a social contract. As I have

already hinted, this concept has seen three *conceptions* in social contract theory, in terms of three senses in which we could interpret the word 'consent.' These three senses crystallized when John Rawls attempted to distinguish his hypothetical consent from actual consent.¹ Nicole Hassoun refers to the three conceptions when she writes:

... liberal theories make consent central to legitimacy. On hypothetical consent theories, for instance, the relationship between rulers and ruled is only voluntary if (reasonable) people *would* agree to be subject to the rulers' dictates *were* they asked. Democratic theory requires more. On democratic theory, legitimacy arises through the democratic process where the majority must actually consent to the institutions to which they are subject. Perhaps the most demanding theory of this type is actual consent theory. On actual consent theory, coercive institutions are legitimate only if they secure their subjects' actual consent.²

Actual consent would mean that everyone under a government actually signed a contract to be ruled by a government, and this is not possible. If this were to be the case, no government in the world would be legitimate since quite a number of people may refuse to sign such a contract. Since legitimacy is virtually impossible with this sort of consent, Peter Stone (in this volume) considers what he calls 'non-ideal' consent: people consent to a government, not by actually signing a contract, but "by paying taxes, owning property, using public facilities like roads, etc." Stone adds that tacit consent, as famously proposed by John Locke, falls under this category. Indeed, Stone regards the nonideal consent as tacit consent: by paying taxes and using public roads and facilities, we tacitly agree that there is a

¹ See John Rawls, *The Law of Peoples* (Cambridge, MA: Harvard University Press, 1999); and John Rawls, *A Theory of Justice*, revised edition (Cambridge, MA: Belknap Press, 1999).

² Nicole Hassoun, *Globalization and Global Justice: Shrinking Distance, Expanding Obligations* (New York: Cambridge University Press, 2012), pp. 57-58. Emphasis in original.

government. Stone, however, argued that this understanding of consent renders virtually every government legitimate. Let me quote him directly:

While the first understanding of consent renders virtually all governments illegitimate – by making consent almost impossible to attain – the second understanding risks rendering virtually all governments legitimate – by making consent an entirely trivial affair. In Mussolini’s Italy, after all, most people paid taxes, obeyed the law, and rode the trains (which, of course, ran on time).³

I would add that most people paid taxes and obeyed the law in Idi Amin’s government. The second understanding of consent essentially trivializes the issue of consent. Proponents of ‘democratic’ consent have attempted an answer to this problem by arguing that democratic societies embody a form of consent that non-democratic societies do not. This comes in the form of political participation: citizens are offered the chance to air their opinions through their vote, as well as other forms of political engagement. Stone refers us to Bernard Manin’s book⁴ for details of this argument. The problem with the argument, however, is whether to regard a citizen as having consented to a government she did not vote for. Stone puts it this way:

Voting is not the same as actual consent, even if at first glance they appear similar. Declaring “I vote for X” may look suspiciously like “I authorize X to act for me,” but elections are never that simple. What if I vote for somebody other than X, and X wins? What if I do not vote at all, and X wins? What if I vote for X, and X wins, but X’s party fails to gain control of the government? In light of these problems, democratic theorists must either count as consent acts that are radically

³ Peter Stone, “Contract, Consent, and Autonomy.” (Chapter 2 in this volume).

⁴ Bernard Manin, *The Principles of Representative Government* (New York: Cambridge University Press, 1997).

unlike actual consent, or else admit that even in a democracy large numbers of citizens have not granted consent.⁵

My observation is that this objection by Stone depends upon an understanding of consent that equates voting to consenting to *particular persons in power*. This understanding of voting means that if a party came to power by fifty-one percentage of the votes, then forty-nine percent of the citizenry have not signed a social contract to live in that society. Some scholars have responded by arguing that voting is an act of consent, but even these scholars agree that citizens have not consented to a government they voted against. This is what Joseph Tussman⁶ does. So the understanding of democratic consent that still prevails is that consent is to vote particular persons or parties into government.

In my view, however, democratic voting expresses *two levels* of consent. The first I would call *contractual* consent: by voting we consent to being a member of a democratically ruled society (irrespective of which persons or party won to rule it). The second level of consent I would call *political* consent: consenting to particular persons (which we call parties) to form government. When theorists discuss democratic consent, they refer only to political consent (consenting *who* to rule and *when*) rather than contractual consent (a more fundamental democratic consent). It is a mistake to discuss the political and to neglect the contractual consent in reference to democratic consent. Accommodating the contractual level of consent saves democratic consent from the criticism of the partisan limitation of consent, which Stone has highlighted.

The third conception of consent is that proposed by Rawls, who conceived consent as that which would be granted by anyone who is given the opportunity to be in a hypothetical position in which she did not know what her position or condition could be in that society (Rawls calls this the "original position"). It is the kind of consent that

⁵ Stone, "Contract, Consent, and Autonomy".

⁶ Joseph Tussman, *Obligation and the Body Politic* (New York: Oxford University Press, 1960).

anyone would grant through a “veil of ignorance”: a removal of any knowledge of actual existential and social status.⁷

My next objective is to demonstrate that traditional African practices of consensus fulfil the descriptive criterion for according legitimacy to traditional governments through democratic tacit consent. To do this, I will first briefly describe these consensual practices as depicted by Kwasi Wiredu.

Traditional African Consensual Practices

Not all traditional African societies were consensual in terms of the procedural workings of traditional governance. Testimonies from diverse parts of the continent show that it was widespread, as we would expect with traditional societies.⁸ Kenneth Kaunda, the former President of Zambia, noted, “In our original societies we operated by consensus. An issue was talked out in solemn conclave until such time as agreement could be achieved.”⁹ And Julius Nyerere (the former President) of Tanzania commented, “The elders would sit under the big trees, and talk until they agree.”¹⁰ There were traditional African societies, however, in which consensual decision making was institutionalized in a more formal and bigger fashion compared to a few elders reaching agreements after discussing under trees. For example, Kwasi Wiredu tells us that the Ashanti Kingdom was an entire political structure resting on consensus decision making because this was the method of decision making used at all levels. The basic political unit was the lineage, and the election of each lineage head was the point at which consensus first made itself felt in the Ashanti political process.¹¹ Lineage heads represented their lineages in the governing council of a town. The town councils were represented at divisional councils, who in turn were represented at the national

⁷ See Rawls, *A Theory of Justice*, pp. 10-15.

⁸ See Philippe Urfalino, “The Rule of Non-Opposition: Opening Up Decision-Making by Consensus,” *The Journal of Political Philosophy*. Vol. 22, No. 3, 320-341.

⁹ Mutiso and Rohio, (1975: 476), cited in Kwasi Wiredu, *Cultural Universals and Particulars* (Bloomington and Indianapolis: Indiana University Press, 1996), p. 182.

¹⁰ *Ibid.*

¹¹ *Ibid.*, p. 184.

council presided over by the 'Asantehene.' Decision at all these levels was by consensus.¹² Wiredu argued that the Ashanti were aware that it was easier to reach decisions by majority voting, but they "spurned that line of least resistance,"¹³ which suggested that their preference for consensus was not accidental but based on first principles.¹⁴

Importantly for Wiredu, consensus did not entail total agreement (since this would have meant *unanimity* as a decision making procedure). Wiredu clarifies that dialogue was used to "produce compromises" by leading to a "suspension of disagreement, making possible agreed actions without necessarily agreed notions."¹⁵ This is usually done by reasonable individuals who, although have divergent beliefs or notions, give priority to the need to decide and act together to avoid immobilization. Wiredu concedes that the greatest challenge with consensus is how a group without unanimity could reach a decision without alienating anyone. He also concedes that it is the residual minority that is usually expected to suspend disagreement.¹⁶ He adds that "the majority prevails not over, but upon, the minority – they prevail upon them to accept the proposal in question, not just to live with it, which is the basic plight of minorities under majoritarian democracy."¹⁷

This is the basic framework of the traditional consensual practices of the Ashanti, an African ethnic group that Wiredu hails from. But we could see similar procedural lines in consensual settings generally among many ethnic groups in sub-Saharan Africa. My aim would now be to show that the legitimacy enjoyed by these consensus-driven traditional governments fulfil the descriptive criterion for democratic consent, and in addition that consensus-driven systems enjoy both political and contractual consent, a combination that majoritarian systems lack.

¹² *Ibid*, p. 185.

¹³ *Ibid*, p. 186.

¹⁴ *Ibid*, p. 143.

¹⁵ *Ibid*, p. 183.

¹⁶ *Ibid*.

¹⁷ *Ibid*, p. 190.

The Legitimacy of Traditional Consensual Political Organization and the Question of Consent

Do traditional African consensus-driven governments fulfil the requirements of legitimacy? I would answer, “yes” depending on the sense of ‘consent’ that we mean. First of all, no one actually signs a contract to live under a traditional African consensus-driven government, so actual consent is not under consideration here. The same goes for nonideal consent in the broad sense: I am not convinced that simply *existing* under a government is to have given consent to it. The notion of democratic consent applies to consensus democratic systems even more than majoritarian systems because consensus systems enjoy the political consent of minorities (those whose positions did not reflect in the final group decision) in addition to the contractual consent of all participants, whereas majoritarian systems enjoy only the contractual consent of all participants and are not guaranteed the political consent of all participants at each point in time.

When we say that I have not consented to the government of President X because I had voted for candidate Y, we are referring to what I have called *political* consent. This form of consent *does not exhaust* the range of consent accorded by democratic voters to democratic governance. I have argued that *by voting at all*, I confer *contractual* consent: I have agreed to be ruled by *any* candidate that wins power because I am quite aware that my candidate must not necessarily win.

The argument that citizens of less-advanced majoritarian democracies are ignorant of the contractual level of consent is dubious: it misrepresents their level of understanding of the legitimacy they confer on the idea of *being governed* (as an idea in the first place) by agreeing to vote. When citizens of less-advanced majoritarian democracies decide to go to war because their candidates did not win, it is only because they wish to express their non-conferment of political consent. It does not mean that they have not conferred contractual consent. They could be interpreted as saying: we agree quite alright to be *governed* by someone, but not by this person or

persons.¹⁸ Thus, this objection does not affect the contractual level of consent accorded through the act of voting.

Consensual democratic systems escape the partisan objection to consent even more than majoritarian systems, because everyone gives *both* political and contractual consents in a consensus, whereas everyone does not give political consent at once in a majoritarian system. Consensual agreements are usually called consensual not because they are usually unanimous decisions, but because they are decisions in which the minorities decided to let the final decision *stand* as the decision of the entire group. This means that for a consensus decision to hold, the minority have given their *political* consent to a decision they did not initially support. What it means is that any consensus decision implies that the political consent of those who initially opposed the final decision is just as guaranteed as their contractual consent. This is in contrast to the majoritarian arrangement. Alfred Moore and Kieran O'Doherty call this "tacit consent."¹⁹ They describe the consent of the opinion minorities as

... a kind of tacit consent to let something stand as the position of the group. This involves not full but *partial* normative unanimity, in which all participants agree to let something stand as the position of the group even if they do not personally share it. For such tacit consent to meet deliberative standards, we suggest, it must be actualized by the live possibility of refusing it. The normative potentials of such consent are realized to the extent that it is achieved in a context in which each participant has an effective veto. Furthermore, the absence of opposition or dissent must follow a process in which there were real opportunities to question, object, scrutinize, and oppose.²⁰

¹⁸ Even the idea that people go to war because their candidates did not win power is a misconception. What is realistic is that greedy politicians incite people by playing ethnic cards for selfish purposes.

¹⁹ Alfred Moore and Kieran O'Doherty, "Deliberative Voting: Clarifying Consent in a Consensus Process," *The Journal of Political Philosophy*, Vol. 22, No. 3, 302-319.

²⁰ *Ibid*, p. 302.

This is different from Locke's conception of tacit consent, by which he means that anyone who has property and lives under the dominion of any government has consented to that government, and more generally that accepting the benefits of government implies accepting the burdens that such a government has placed on the subject or person.²¹ As Stone has observed, this is an obviously trivial conception of consent that permits the existence of just about any government.

By tacit consent, Moore and O'Doherty mean that we should allow a position to stand as that of a group even if we did not share in the position. They argue that if we have all given ourselves the chance to make our arguments, and a certain position prevails, we should endorse it *by virtue* of having allowed competing positions to be entertained. This makes political consent in a consensus similar to contractual consent, or we can say that it is only in majoritarian arrangements that political consent becomes clearly distinguished from contractual consent. This is because this kind of tacit consent does not depend on who wins or loses an argument or vote. Even if we insisted that political consent remains distinguished from contractual consent, the kind of tacit consent proposed by Moore and O'Doherty also offers a more responsible political consent compared to majoritarian arrangements. This is because the consensual arrangement requires that we permit a position contrary to ours to stand as the group position. Consensual tacit consent therefore minimizes what a group or organization should fear from participants who did not genuinely agree to its final decision, since it requires them to support the decision nonetheless. By securing political as well as contractual consent, consensual tacit consent as such offers a version of democratic consent that seems superior to the democratic consent offered by a simple majoritarian arrangement.

Does consensual decision making fulfil the descriptive requirements of a hypothetical consent? Would people agree to a consensus-style government in which decisions are taken through consensus *were* they asked to choose in advance what kind of governmental arrangements they would live with in the world? Here I must note

²¹ John Locke, *Second Treatise of Government* (Charleston NC: CreateSpace Independent Publishing Platform, 2013), section 119.

that putting people in a hypothetical situation is to present the matter at hand for scrutiny in more detailed and thorough fashion. Asking a person to choose a consensus-driven system is to give the person the opportunity to examine the matter from a *meta*-position in which such a person has no knowledge of whether she would be a residual majority or minority, or how many times she would be in support of or in opposition to the opinion of the numerical majority. The opinions of the numerical majority are the usual candidates for consensus.²² This person is in an impartial position to consider matters quite dispassionately. Let me, for the purpose of this essay, call a person in an original position, characterized by Rawls' "veil of ignorance," a *hypothetical assessor*. A hypothetical assessor, upon asked if she would prefer a consensus to a majoritarian political system, would weigh the overall benefits against the overall liabilities. I have discussed these benefits and liabilities elsewhere.²³

First, a consensus system is still a majority system. I have written elsewhere,

When a group comprising A, B, C, D, E, and F reach a common agreement, it is very often because, for instance, A, B, D and F have adopted an opinion (and better arguments in a few instances) regarding the issue at hand, and C and E have little option than to yield to this quantitative (and sometimes qualitative) epistemological superiority.²⁴

It is the opinion of the numerical majority that is usually considered for adoption as group decision. Rarely would a numerically minority opinion achieve this fit, unless it is so clearly superior in quality. The majority does not always adopt opinions because they are superior in fact and logic. The majority could be an ethnic or ethnocentric majority.

If a consensus system is usually also a majority system, what then distinguishes a consensus system from a majority system? It is what

²² Emmanuel I. Ani, "On Traditional African Consensual Rationality," *The Journal of Political Philosophy*, Vol. 22, No. 3 (2014), 342-365.

²³ *Ibid.*

²⁴ *Ibid.*, p. 353.

Moore and O'Doherty have called tacit consent. Those who were not represented in the final decision allow the final decision to stand as the decision of the group. It is this procedural requirement that distinguishes consensus from simple majority voting.

This is the point where we could now ask: why do we need *tacit* consent? The answer is *unity*. This is what I call "inclusive value."²⁵ When a group reaches a collective decision, such a group would wish to stay united behind its collective decision, otherwise it does not make much sense to call it a 'group.' Staying united behind a decision would help this group *function well* as a group, because factions in this group would not continue to fight or struggle against the collective decision. The hypothetical assessor would really appreciate this advantage of a consensus system. And the hypothetical assessor, on the basis of this advantage, would desire to be part of a consensus system (like we have said, she is not in a position to know whether or how many times she will be on the majority or minority of a decision).

However, the hypothetical assessor's enthusiasm would be diluted when she notices an *occupational hazard* of aiming at unity regarding group decisions. This hazard is that critical issues and important queries from minorities are often overlooked in the quest for unity. Sometimes the majority's opinion is little more than their *pre-deliberative* preferences, and when queries from the minority are not critically considered, then pre-deliberative majority preferences often become final consensus decision. This reduces consensus to the level of simple majority (the simple aggregation and collation of pre-deliberative preferences). This reduction in quality actually goes below the level of simple majority because of the tacit consent of the minority. When a low quality idea has been adopted by the group and enjoys the full support of the minority of the group (those who do not support and obviously know that the idea is not right) it is *double tragedy*.

Let me offer an example with an event that actually occurred. A brilliant scholar and prolific writer arrives at an academic department in a university, and this department has been occupied by lazy academics, most of whom have not been promoted for decades. These lazy academics are not lazy in extra curricula business: they are rich

²⁵ *Ibid.*

merchants but are supposed to be primarily academic researchers. These lazy academics (let us call them merchants) are certain that this new arrival would be promoted ahead of them and they dread the nightmare of seeing this happen. They then wait for an opportunity for a disagreement with the new arrival, and they hope that such an opportunity would give them the opportunity to inform the university authorities that they cannot work with the new arrival. An opportunity comes when the new arrival performs a task given to her by the department. The merchants accuse the new arrival (quite unfairly) of doing a disastrous work. The new arrival, unaware that this is a trap, fires back by telling them their criticisms are unfair. The merchants then respond by calling a meeting of every member of the department, and this includes younger members who do not necessarily agree with the position of the merchants. They propose that the department should write to the university authorities arguing that members of the department can no longer work with the new arrival. The younger members of the department are not very convinced of this proposal, but they are in the minority for two reasons: first they are fewer than the merchants, and second they depend on the whims of the merchants (who have control of the department) for the survival of their short contracts. The younger members thus have no choice but to append their signatures to *whatever* the merchants propose. The consensus decision is thus that the department is unable to work with the new arrival, and the proposal is that the university should 'remove' the new arrival.

There are other examples of low-quality consensus decisions in the literature. A meeting of all-white participants produced consensus, but consensus against the racial integration of schools, and this happened somewhere in the USA.²⁶ Philippe Urfalino reports that a certain President of the *Fonds Régionaux d'Art Contemporain* (or FRAC) in one of the regions of France had the habit of using a combination of "proposition and intimidation" to get members of his fellow board members to agree to a consensus decision over the acceptance of

²⁶ Tali Mendelberg and John Oleske, "Race and Public Deliberation," *Political Communication*. Vol. 17, No. 2 (2000), 169-191. Also, see Dennis F. Thompson, "Deliberative Democratic Theory and Empirical Political Science," *Annual Review of Political Science*. Vol. 11 (2008), p. 499.

certain works of arts that some members may have reservations about. He does this precisely to avoid a majority vote, which would highlight the members' distaste for certain art works he wishes to accept for more political reasons.²⁷

What we see is that *dominant players* could abuse the unity aim of consensus, the instrument of tacit consent. Faced with the same threat of abuse, a majoritarian arrangement would do better, since the minority could still boldly tell the world what they think about the group decision: they do not owe the group a tacit consent. What it all means is that a consensus system could value unity sometimes at the expense of the epistemic quality of decisions.

A second major problem with consensus as a decision making rule is that certain issues do not command normative agreement in contemporary societies. Normative issues are *unavoidable* in politics. Wiredu's suggestion that we only agree about actions without agreeing on notions does not solve this problem if we were to migrate to a consensus-driven system. If, for example, the USA were to become a consensus aiming society, they would have to reach a consensus over permitting or not permitting abortion and gay marriages. These are only two examples out of an entire range of ideological, political, religious and moral divergences that form the fabric of our contemporary societies. In contrast, consensus probably fared better in traditional societies because these were narrower communities who shared common religion, norms and even diet!

A thoroughly hypothetical assessor, observing these occupational hazards of a consensus system in advance, may or may not opt for a consensus system, including when she considers other merits and demerits that I may not be aware of. On the basis of the advantages and disadvantages discussed here, the chances that a hypothetical assessor would choose a consensus driven government over a majoritarian one is an open one. What it means is that when I am surveying the consent that applies to consensus driven systems (such as those of some traditional African political systems) I place my emphasis on democratic consent, since this is where the legitimacy of a consensus system trumps that of a majority system. Those who are already involved in a consensus system could at least boast that they

²⁷ Urfalino, "The Rule of Non-Opposition," p. 327.

support group final outcomes in more inclusive fashion than those in explicitly majoritarian systems do. As we have seen, both majority and consensus systems enjoy contractual consent, but courtesy of tacit consent, a consensus system enjoys a more broad based political consent from its members compared to a majority system.

Conclusion

In this paper I have examined the three notions of consent discussed by social contract theorists from the standpoint of consensual democratic practice. My general argument has been that traditional consensual agreement to a decision is consent, and that this consent meets the descriptive requirements of democratic consent. I have clarified that democratic consent consists of both political and contractual consent, and that whilst majoritarianism fully enjoys only contractual consent, consensual systems enjoy both the contractual and the political consent of minorities. But this aspect of consent could precisely deter a hypothetical assessor who has been given a prior opportunity to choose whether she wishes to belong to a consensual or majoritarian system, as she may worry about the burdens (enumerated in this paper) of the consensual version of consent to her if she were a minority.

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Universal Human Rights from an African Social Contract*

CHRISTOPHER ALLSOBROOK

Introduction

The basic purpose of a social contract is to justify the rules enforced by a sovereign authority. The normative principles to be derived from a foundational social contract are supposed to underwrite rules regarding right relations between the political authority of the sovereign and the consent of society. The idea has a long history (revived in political philosophy by John Rawls), although it also has few intrinsic implications or purposes and no single, unified tradition may be traced back to Ancient Greece.¹ Regarding relations between individuals and the state, the purpose of the social contract is twofold. The social contract must yield criteria, which both legitimate the political authority of the state and justify citizen's consent.

The main challenge social contract theory faces, in meeting this twofold objective, follows from a fundamental normative paradox arising from these competing goals, to justify political authority and citizens' consent, since this consent depends on the very authority it authorises. A polity establishes the citizens' consent that establishes it. In other words: there is no political authority (in the consent of citizens) which the political authority (to which they consent) does not, itself, establish. Both are interdependent, fundamental aspects of the social contract – neither can get off the ground without the other. Jean Jacques Rousseau takes care to emphasise this point, that the social contract addresses extant civil society and not pre-political human nature. He is dismissive of thinkers who use the idea of the social contract to, “read back into the natural condition attributes and

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¹ David Boucher and Paul Kelly, “The Social Contract and its Critics,” *The Social Contract from Hobbes to Rawls* (London: Routledge, 1994), pp. 1-2.

desires which are peculiar to civil society.”² Rawls, like Rousseau before him, likewise emphasises that the principles of fairness to be derived from his social contract are those which belong to extant political society. The constructivism of his approach is made explicit and he avoids giving the impression that it appeals to natural rights.

In responding to the paradox of interdependent consent and authority in social contract theory, it is essential to avoid naturalising political conditions under which consent and authority are derived. The classical social contract theory of the Enlightenment was often abused to justify the extension of imperial dominion by European powers, to derive supposedly universal rights, which are in fact expressive of European culture. These rights were used to justify (mainly to other European powers) the extension of imperial dominion.³

It is important that social contract theory does not deny the political culture which informs it, but, instead, meets the challenge, of showing how members of different communities may arrive, independently or in dialogue, at some fundamental conception of just interaction, by reflecting on the operative normative principles, to which anyone would consent, which belong to and underlie their traditional beliefs and customary practices. This task is especially significant in Africa, where the abuse of European discourse of universal rights has proved especially egregious, first, during the “civilising mission,” which coincided with colonialism, and now, again, through selective and hypocritical appeals to Human Rights, which have been used to justify enduring neo-colonial interference in the sovereign affairs of independent African states, in the name of, “humanitarian intervention.”

Since the status and merit of universal rights in Africa is undermined by their disingenuous interpretation in terms of a social contract that reflects and best suits European political culture, it is important that a more adequate normative basis for Human Rights be developed, which better accords with African political culture and

² *Ibid.*, p. 7.

³ David Boucher, *The Limits of Ethics in International Relations: Natural Law, Natural Rights and Human Rights in Transition* (Oxford: Oxford University Press, 2009), p.11.

which follows from a distinctively African social contract. An African normative foundation for Human Rights should avoid naturalising the status of the basic premises of Human Rights, since this tends to obscure hegemonic interests that may influence dominant interpretation thereof, in international law and practice. An African conception of the social contract and of Human Rights should explicitly reflect the distinctively African character of its heritage. Universal rights may be derived from a social contract which draws on a uniquely African heritage to elicit universal principles by which to justify consent and legitimate political authority. This paper therefore develops an account of normative criteria for universal Human Rights, which may be said to be derived from characteristic features of an African social contract.

A common reason cited by African philosophers for rejecting Western conceptions of Human Rights is that these are grounded in an individualistic concept of personhood that does not suit Africans' characteristically communitarian conceptions of personhood. Human Rights are typically assigned to individual rights-bearers, modelled, on a peculiarly Western conception of people, as discrete, self-interested agents. This does not translate well in Africa. Africans conceive of persons in communal, relational terms. Rather than judging the legitimacy of government in terms of its success in securing negative rights, or freedoms from interference, as Westerners commonly do, Africans are more likely to assess the legitimacy of government behaviour in terms of the fulfilment of social duties. Economic and social rights are consequently more highly regarded in Africa than political rights.

Acknowledging such criticisms of the individualistic cultural bias in dominant Western conceptions of Human Rights, I argue that these cultural problems, which African philosophers typically identify, do not stem from an individualistic concept of personhood, which is merely symptomatic. The imposition of ill-suited Western values and cultural practices under the guise of universal Human Rights is certainly a problem in Africa. But this problem is not best addressed by replacing an individualistic, liberal model of personhood with a communal, communitarian one. Such neat substitution makes the mistake of assuming Human Rights belong to persons not

by precedent, tradition, institutionalised authority and enforcement, but, by ordained human nature; i.e. that Human Rights are natural rights, which belong to persons because of their personhood. It is as if the citizens of a polity are already citizens of that polity before the polity even exists (to establish their citizenship). This assumption does not accord with cultural particularism. Human Rights have translated badly in Africa precisely where naturalisation of their universality distracts from the historical factors that make them significant. Human Rights do not follow from natural or essential facts about persons but from their actual moral and social recognition. Following TH Green's insight that *rights are powers which are recognised to uphold a common good*, which is implicitly accepted in the customary practices of traditional South African and Ghanaian courts, I develop a rights recognition thesis, which (a) better supports the universal status of Human Rights in Africa, and (b) better accords with thinking about rights in Africa – which is implicit in African customary practices – than accounts which rely on a culturally particular ontology of personhood.

I begin with some typical criticisms of Human Rights, put forward in African ethics, to identify problems that have been raised against a dominant Western account, due to its normative grounding in an overly individualistic conception of human personhood. I also give an overview of alternative accounts put forward by African philosophers, such as Kwame Gyekye and Thaddeus Metz, who ground Human Rights in distinctively African ontologies of personhood. I then explain how Western philosophers such as Edmund Burke, Karl Marx and TH Green, raised similar criticisms against natural rights to those raised by African philosophers against Human Rights. From this discussion, I argue against switching one account of personhood for another, in favour of a rights recognition thesis. In sum, to better attend to the problem of Western bias in social contract theory, identified by African thinkers, and to avoid naturalising the universality of Human Rights, I develop a rights recognition thesis to account for the normative foundations for universal Human Rights based on an explicitly and distinctively African social contract.

African Criticism of Human Rights

A major problem with Human Rights, from the perspective of the African developing world, which this paper aims to address, is nicely identified by Antony Anghie⁴ as follows: international Human Rights law presents and imposes as universally binding a model of society which is not only grounded in Western experience but which, in fact, excludes alternative experiences and visions of a just society. Many newly decolonised African states were early champions of international Human Rights law as it emerged in the 1950s and 1960s, using it to assert equality, self-determination and the “right to development.”⁵ The United Nations Declaration of Human Rights (UNDHR) was a key factor and instrument for political mobilisation against racial discrimination, especially against apartheid in South Africa.⁶ However, as time went on, developing countries grew increasingly wary of international Human Rights enforcement mechanisms, especially where this involves intervention and coercion. By the 1970s, developing countries began to downplay political human rights in favour of economic development.⁷ Human Rights discourse became associated in Africa with conditions of “good governance and the rule of law,” imposed by Bretton Woods institutions in the 1990s. These conditions undermined national sovereignty to advance the interests of investors in deregulated markets, over and above social development and community upliftment.⁸ Human Rights law has been attended to by the “rule of experts” who often exacerbate problems by imposing standard solutions wherever they go, without sufficient sensitivity to the delicate complexities of local situations.⁹

⁴ Antony Anghie, “International Human Rights and a Developing World Perspective,” *Routledge Handbook of International Human Rights Law* (New York: Routledge, 2013), p. 10.

⁵ *Ibid.*, pp. 114, 117.

⁶ *Ibid.*, p. 116.

⁷ Francis M. Deng, “Human Rights in the African Context,” *A Companion to African Philosophy* (Oxford: Blackwell, 2004), p. 505.

⁸ Anghie, “International Human Rights and a Developing World Perspective,” pp. 119-120.

⁹ *Ibid.*, p. 123.

Suspicion of the universality of Human Rights in Africa allows nationalist leaders to exploit traditions to justify absolutism, to rationalise patronage and to crush dissent, in the name of cultural consensus.¹⁰ The legacies of colonialism in one-party states, dominated by former liberation movements and military governments, which are coerced into debt refinancing austerity measures, have resulted in under-resourced government organs and weak structures of accountability for the protection of Human Rights.¹¹ The African Charter on Human and Peoples' Rights (the Banjul Charter) was adopted in 1981 and the related African Commission was established in 1987 to safeguard a uniquely African system of Human Rights, which, it was hoped, would better suit the regional social, political, economic and cultural context.¹² The Charter theoretically forms part of the domestic law of the states who ratified it.¹³ Yet, although the African Human Rights system has proved influential for Non-Governmental Organisations and African legal scholarship, the impact of the system derives mainly from the core obligation of state parties to "give effect" to the rights guaranteed in the African Charter. The introduction of the African Human Rights Court in 2004 has addressed the problem to some extent but, still, overriding institutional weaknesses mean that the findings and recommendations of the Commission are largely ignored and it lacks reliable mechanisms to assess and to enforce compliance.¹⁴

Given such institutional weaknesses and cultural criticism, almost everyone agrees, interpretation and application of Human Rights in Africa must be informed by local cultures to be accepted as legitimate. Human Rights cannot be implemented without considering – and they are most secure when they are embedded and expressed within – the extant values, norms, practices and languages of all different local cultures. Most international Human Rights

¹⁰ Deng, "Human Rights in the African Context," p. 500, 504.

¹¹ Frans Viljoen, "The Impact and Influence of the African Regional Human Rights System on Domestic Law," *Routledge Handbook of International Human Rights Law* (New York: Routledge, 2013), p. 458.

¹² *Ibid.*, p. 445.

¹³ *Ibid.*, p. 451.

¹⁴ *Ibid.*, pp. 446, 448-450.

institutions accept that universal Human Rights standards should be interpreted differently in different cultural contexts. No one may invoke cultural diversity to violate Human Rights, of course, but how are we to distinguish adaption from violation? Wiredu argues that Human Rights violations in Africa cannot be rationalised by appeal to African traditions, so it is essential to devise a system of politics which best reflects African traditions of Human Rights thinking.¹⁵ To protect Human Rights, the right to culture must be reconciled with need to criticise incompatible cultural practices.¹⁶

Personhood as a Basis for Human Rights in Africa

As discussed so far, Western conceptions of Human Rights are often criticised for emphasising and for promoting negative individual liberties at the cost of positive communal duties. African philosophers typically follow up such criticism of an individualistic conception of right-bearing agency by elaborating and substituting for it an alternative, communal ontology of personhood. Kwame Gyekye reiterates this foundationalism with his claim that the type of social structure or arrangement evolved by a society reflects the public conceptions of personhood, held by the society, articulated in the arguments of its intellectuals.¹⁷

The foundational orientation of Human Rights practice in any society is said to turn on its members' characteristic response to the metaphysical question Gyekye sets out: is a person is (a) a self-sufficient and atomic individual – who does not depend on his relationships with others (as Westerners supposedly believe) and who has ontological priority over the community – or (b) a communal (or communitarian) being – who has natural and essential relationships with others?¹⁸ The contours of this debate in African philosophy are

¹⁵ Deng, "Human Rights in the African Context," p. 500.

¹⁶ Michael Freeman, "The Philosophical Foundations of Human Rights," *Human Rights Quarterly*, 16.3 (1994), pp. 55-56.

¹⁷ Kwame Gyekye, "Person and Community in African Thought," *Person and Community* (Washington, DC: Council for Research in Values and Philosophy, 1992), p. 1.

¹⁸ *Ibid.*, p. 1.

well known. As Leopold Senghor puts it, early on, “Negro-African society puts more stress on the group than on individuals, more on solidarity than on the activity and needs of the individual, more on the communion of persons than on autonomy. Ours is a community society.”¹⁹ Jomo Kenyatta likewise claimed, “Nobody is an isolated individual ... His uniqueness is a secondary fact about him.”²⁰ Gyekye disagrees with Ifeanyi Menkiti’s radical communitarian view that society wholly defines the individual, arguing, instead, for a more moderate Afro-communitarian position, that the morality of Human Rights depends in part on individual conscience and dignity.²¹

Whether one is defending radical or a moderate communitarian position, or even a liberal, Western viewpoint, it is often assumed in African philosophy that effective Human Rights must be grounded in a culturally appropriate account of human personhood. Francis Deng, for instance, holds that Human Rights across the world speak for the basic concept of dignity, that is, the dignity of the human person, “for which all human beings yearn.”²² The critical issue, for him, is whether cross-cultural analysis can be used to transform local notions of dignity into Human Rights principles on which there is universal agreement. He argues that evidence for a common grounding for human dignity in Africa may be found, for instance, in the Dinka view that protecting the rights of each member of society is ultimately in the interests of each, and also in the Akan view that everyone is the offspring of God.²³ Thaddeus Metz²⁴ argues against a common interpretation of dignity, in African philosophy, as that which inheres in vitality – in favour of an alternative interpretation, as having a capacity for friendly and loving relationships – but he maintains the underlying common assumption in African philosophy that Human Rights follow from the inherent dignity, or essential worth, of human

¹⁹ *Ibid.*, p. 2.

²⁰ *Ibid.*, p. 2.

²¹ *Ibid.*, pp. 10-11.

²² Deng, “Human Rights in the African Context,” p. 499.

²³ *Ibid.*, p. 501.

²⁴ Thaddeus Metz, “African Conceptions of Human Dignity: Vitality and Community as the Ground of Human Rights,” *Human Rights Review* (2012), 13.1, 19-37.

persons. As Gyekye puts it, it is respect for human dignity, which no community can deny, that generates regard for personal rights.²⁵

From Western Criticism of Natural Rights to Human Rights

Western Criticism of Natural Rights

Against the preceding views expressed in the previous section, which predicate Human Rights on an ontology of human personhood, in this section I advance an alternative account, that Human Rights are just those which most of us, collectively, have come to recognise as such. This account insists that the universality of Human Rights does not depend on natural properties of personhood and that we come to International Human Rights from different places. Jacques Maritain, who headed the UNESCO panel, which surveyed philosophers from around the world on Human Rights, leading up to the UNHCR, famously quotes a member of the committee, who commented on the final list, "Yes, we agree about the rights but on condition that no one asks us why."²⁶ That "why," adds Maritain, is where the argument begins. But it will not do to stop here if Eurocentric cultural or ethnic prejudice calls into question the universality of international Human Rights law. To call attention to the cultural dispositions, hegemonic or otherwise, shaping interpretations of Human Rights, instead of asking whose view of natural human personhood is apt in any cultural setting we should rather consider how rights are supported by cultural practices around the world. To this end, I argue that (a) African legal and political customary practices support universal Human Rights, and (b) these practices implicitly support the meta-ethical theory of the normative foundations of rights put forward here, that rights are grounded in recognised customary practices.

To assess the criticisms of Human Rights raised above, in relation to the postcolonial African context, we must critically examine the

²⁵ Gyekye, "Person and Community in African Thought," p. 10.

²⁶ Guglielmo Verdirame, "Human Rights in Political and Legal Theory," *Routledge Handbook of International Human Rights Law* (New York: Routledge, 2013), p. 31.

normative grounds of Human Rights for cultural bias. This requires that we recognise as such the misconception, commonly perpetuated by revolutionary discourse, that Human Rights belong to inherent human nature, prior to political society. Against this misconception, the international lawyer Owen Fiss asserts, "Human rights are not derived from a common understanding of human nature, nor are they deduced philosophically from first principles – they are the articulation of aspirations immanent in a culture – a statement of what that society wants to become, which provides a standard by which to judge it."²⁷ Individualist bias in the dominant Western conception of (natural) Human Rights, stems not from an atomistic idea of human persons (to whom these rights belong) but from a prior assumption, underlying such convenient fiction, that Human Rights follow from attributes which naturally belong to each of one of us.

After a prolonged struggle against absolutist monarchy waged by European citizens, Eighteenth Century bills of rights, such as John Locke's tended to legislate rights in the individual-state terms of a Social Contract, grounded in natural law.²⁸ By the time the idea of Human Rights began to find a receptive audience, after the American and French Revolutions, conservatives, following Edmund Burke, and socialists, following Karl Marx, from opposite directions, converged in their criticism of Revolutionaries' typically rationalistic neglect of extant material conditions and institutions, in transposing sovereign authority from the political State to the natural Individual.

In response to Jean Jacques Rousseau's and Locke's ideas of natural rights, Burke argued that rights abstracted from traditional authority are just desires. Rights emerge from customary social practices, he argued, which are developed through experience, reason and compromise over time. Rights cannot be prescribed or imposed from above based on speculative, abstract ideals. This insight, neglected with devastating effect in recent interventions in Libya and Iraq, resonates with a long and commonly held African belief that we should be guided in ethical conduct by our ancestors' ways. Like Burke and the African thinkers, whose views I have discussed above,

²⁷ David Boucher, "The Recognition Theory of Rights, Customary International Law and Human Rights," *Political Studies*, 59 (2011), p. 762.

²⁸ Verdirame, "Human Rights in Political and Legal Theory," p. 45.

Marx criticises the French Revolutionaries' accounts of natural rights for representing the freedom of man 'as a monad, isolated and withdrawn into himself'.²⁹ As the British Idealist, TH Green, explains, natural rights theorists fail to account for how rights develop within (and make no sense outside of) a political community, in which people recognise these rights in one another. They are deluded in thinking that the higher essence of a person is somehow separable from political society and its norms.³⁰ Hannah Arendt, likewise, criticised neo-Kantians' grounding of Human Rights in human dignity, reluctantly agreeing with Burke's criticism of French Revolutionaries, when he argued, they forget that individual and political community are so deeply interconnected that individual liberty cannot be abstracted from its conditioning in political community.³¹

From Natural to Human Rights

By the time Green was writing the *Principles of Political Obligation*, in late 19th Century Europe, the notion of natural rights, which inspired Locke a century earlier, had lost its appeal in international law and in political philosophy.³² A conservative liberal, Green argued that rights are not bound to individualism and negative liberties; rather, rights and community are mutually supportive. We do not bring to society our rights as individuals; rather, all rights regarding private, individual concerns depend on public, political society.³³ By the time global Human Rights were established, after the Second World War, in the Universal Declaration, these were not generally thought to be rights that were held naturally by individuals, independently of society. Rather, they were thought to be the rights of persons in organised societies, representing concerns held to be im-

²⁹ Verdirame, "Human Rights in Political and Legal Theory," p. 28.

³⁰ Boucher, "The Recognition Theory of Rights, Customary International Law and Human Rights," p. 756.

³¹ Verdirame, "Human Rights in Political and Legal Theory," p. 30.

³² Rex Martin, "Human Rights and the Social Recognition Thesis," *Journal of Social Philosophy*, 44.1 (2013), p. 2.

³³ Avital Simhony, "T.H Green's Community of Rights: An Essay of the Complexity of Liberalism," *Journal of Political Ideologies*, 8.3 (2003), p. 273.

portant because modern society, organised around the state, presents typical threats.³⁴

Whatever we may think about the dignity of persons, David Boucher writes, "The establishment of which rules are genuinely universally binding is a discursive activity evidentially based on the actual practices of states, legal precedent and the opinions of learned jurists."³⁵ In fact, the two traditional components of international law (including Human Rights law) are, firstly, law from custom, i.e. customary international law, and, secondly, law deriving from treaties or conventions, i.e. conventional international law. The former originates in widespread consistent practice and *opinio juris*; the latter is grounded in international conventions expressing shared rules.³⁶ As R.G. Collingwood explains, modern European international law, including Human Rights law, emerged directly from international customary law. Most people regarded it as bad form to disregard this code. It was conventionally enforced by the collective action of those who were obedient to it against those who were not.³⁷ International law coherently codifies existing social practices, which are already immanent in practices of the international community, by recognising their basic social, moral and political structures in the form of customary rules.

Since the Second World War, the legal international Human Rights regime has typically held that Human Rights obligations are binding not because they flow from some philosophy but because they are rooted in positive law. Since all contracting state parties have decided to ratify the treaty mechanisms, they are, basically, bound to live up to obligations to which they have committed themselves.³⁸ For

³⁴ Martin, "Human Rights and the Social Recognition Thesis," p. 2.

³⁵ Boucher, "The Recognition Theory of Rights, Customary International Law and Human Rights," p. 753.

³⁶ Roozbeh B. Baker, "Customary International Law in the 21st Century: Old Challenges and New Debates," *European Journal of International Law*, 21.1 (2010), p. 176.

³⁷ Boucher, "The Recognition Theory of Rights, Customary International Law and Human Rights," p. 760.

³⁸ Tom Zwart, "Using Local Culture to Further the Implementation of International Human Rights: The Receptor Approach," *Human Rights Quarterly*, 34 (2012), p. 552.

the past forty years the two main schools of legal thought in the USA (legal positivism and critical legal studies) have rested on pragmatist assumptions which treat Human Rights as “global practice.”³⁹ For instance, in *North Sea Continental Shelf*, the International Court of Justice claimed, to be considered international customary law: the acts concerned must amount to a settled practice, “carried out in such a way as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it.”⁴⁰

Along with consistent state practice, the cumulative practice of judicial, quasi-judicial and supervisory organs in arbitration plays a significant role in generating customary rules at the international level. Traditional understanding of the source of customary international law in practice-based methodology has been increasingly challenged, over the past few decades, by one which seeks to move to methods which are purely normative. International tribunals, declarations and treaties, including trade treaties, are increasingly used to challenge the traditional emphasis on customary practice, to argue for their universally binding scope.⁴¹ This trend is especially problematic if these new rules are inconsistent with long-held customary international norms, such as extension of traditional criminal immunity to all heads of state.⁴² Departure from practice-based international customary law is especially alarming, since the global influence of limited tribunals, such as in Yugoslavia, thus outstrips their mandate, refracting into domestic criminal legal systems, undermining long-held norms and undermining their legitimacy.⁴³

Although there remains much debate over the relative weight and merit of custom, precedent or convention in international law, and although there remain aspects of natural law and natural rights in modern Human Rights, Boucher claims, the prevailing assumption is that, through a long process of convergence and agreement, we have

³⁹ Verdirame, “Human Rights in Political and Legal Theory,” p. 32

⁴⁰ Theodor Meron, *Human Rights and Humanitarian Norms in Customary Law* (Oxford: Clarendon Paperbacks, 1992), p.15.

⁴¹ Baker, “Customary International Law in the 21st Century: Old Challenges and New Debates,” p. 183.

⁴² *Ibid.*, p. 188.

⁴³ *Ibid.*, p. 203.

all come to settle on those Human Rights norms which canvassed wider and wider support in the process of being accepted as “universal.”⁴⁴ This process of convergence and agreement involves conventional and customary law more than it does right reason. Not all international law is customary, but most fundamental rights have their origins in customary law. Despite the challenge they pose to certain aspects of customary international law, as we have just discussed, the terms of reference, for the Yugoslavia and Rwanda criminal trials and the Rome Treaty, for the International Criminal Court, are all explicitly declaratory of principles and practices which their authors take to be well-established and obligatory in international customary practice. Human Rights do not follow a rationalist method of right reason, nor are they derived from natural law, nor human nature. They are declared to have the social recognition of the international community and are morally justified on grounds that they contribute to the common good of global society.⁴⁵ Human Rights require more than moral justification, argues Rex Martin; they must also be socially recognised. Active human rights must be institutionally embodied, since they are enforced not by individuals but by states.⁴⁶

Most criticism of the normative grounds of Human Rights in African Philosophy, discussed earlier, turned on the Eurocentric particularity that compromises their universal normative status. Such criticism follows the assumption that Human Rights discourse is grounded in Western understanding of the ethical role of the individual rights-bearer. In response, African philosophers have argued that the ethical role of an individual person is better understood in terms of each individual’s reciprocal communal obligations within society. While African ethicists have argued that individual rights depend on reciprocal communal duties, as I have explained in this section, similar criticism, of such arid individualism, has been raised in Western Philosophy, against the natural rights tradition by conservative and socialist thinkers, ranging from Burke to Marx.

⁴⁴ Boucher, “The Recognition Theory of Rights, Customary International Law and Human Rights,” p. 766.

⁴⁵ *Ibid.* p. 767.

⁴⁶ Martin, “Human Rights and the Social Recognition Thesis,” p. 6.

Conservatives have argued that normative rights are grounded in precedent and they are gradually refined over time. Socialists have argued that rights are shaped by material conditions shaped by class divisions. I have explained how, under such criticism, in the late Nineteenth Century, the natural rights tradition away in favour of the Human Rights we have today. As I will now explain in more detail, Human Rights are grounded in the moral and official recognition of particular customary practices. This suggests that African criticism of Western Human Rights should look beyond ontological reflections on the nature of human identity to the normative principles embedded in the cultural origins, applications and implications of those customary practices, which give rise to Human Rights.

The Rights Recognition Thesis

Since we cannot be expected each to call on our own personal understanding of the common good, at all times, a socially recognised system is needed to establish reliable consensus on who has moral authority over which decisions, to coordinate moral priorities in our everyday normative conduct. Over time, the illegitimacy of the apartheid system (the wide gap between justice and the law) undermined respect for tradition and orthodoxy, in the old South Africa, in favour of revolution and revelation. Traditional authority and customary law were perceived to be co-opted by a regime, whose morally bankrupt authority depended, increasingly, on direct and brutal coercion. After apartheid, radical inequality still undermines the perceived legitimacy of state institutions and the law. Citizens are accustomed to fall back on personal discretion in matters of moral reasoning. This widespread cultural habit, in which personal moral convictions and indiscretions trump rule-governed compliance, presents a crisis of legitimacy for the post-apartheid South African state.

The South African Bill of Rights is enshrined in the Constitutional Court on Constitutional Hill, secured, like a bunker, in a former prison, in the heart of Johannesburg, against the criminality, greed, corruption and urban decay around it. As the recognition theory of rights warns us, unrecognized co-ordinators do not co-ordinate. Following Green, Gaus argues that rights actually recognised do a

morally required job no ideal set of rights can ever do, that is, provide actual moral consensus. 'The great moral good of a system of recognised authority is undermined by each person deciding for herself what is the best distribution of moral authority and acting on that [revealed] ideal,' he writes.⁴⁷ Twenty years after they were introduced, South Africa's foundational constitutional principles (crafted by the best, learned legal experts, hired by Afrikaner and African nationalists in negotiations) are not well recognised by the general public or its officials. Despite its formidable reputation abroad, the Bill of Rights lacks widespread, authoritative recognition at home. Costly to use, best understood by elites, it functions as a *partial* intermediary.

Natural rights theorists argue that the moral status of Human Rights does not depend on social recognition, since Human Rights belong to all of us, naturally, as a consequence, for instance, of the inherent dignity of human personhood, or of our capacity for loving, communal relationships, or rational thought, or some such favoured human attribute. Natural rights theorists think that Human Rights somehow pre-exist social recognition or social enforcement (for example, the right not to be enslaved, even if slavery is commonly socially accepted). For moral rights to "gain a grip" in guiding action, argues Rex Martin, people must first understand their justification and internalise them as having moral authority, in directing their obligations and conduct. An ideal morality, which lacks social recognition, provides no moral authority or justification. Rights recognition theorists, therefore, claim that moral rights must presuppose practices of social recognition.⁴⁸

For Green, a moral right (R) is 'a *power* claimed and *recognised* as contributory to a *common good*'. Gaus explains that this entails at least the three distinct elements for R (three definitive conditions); i.e. R is (i) a *power*; which is (ii) *recognised*, to contribute to (iii) a *common good*. In addition to the argument from moral authority I have mentioned, for the necessity of the condition of *recognition*, for moral rights, Gaus

⁴⁷ Gerald F. Gaus, "The Rights Recognition Thesis: Defending and Extending Green," *T.H. Green Ethics, Metaphysics, and Political Philosophy* (Oxford: Clarendon Press, 2006), p. 232.

⁴⁸ Martin, "Human Rights and the Social Recognition Thesis," pp. 4-5.

argues that Green's recognition thesis follows from a doctrine of the correlativity of rights and duties, which involves at least two defensible premises: (i) Alf's right against Betty implies Betty's duty to Alf; (ii) Betty's duty to Alf implies Alf's right against Betty. The rights recognition thesis assumes a Kantian practical moral internalism, which entails that a moral ought must determine practical action and only does so if it arises from within the agent. From moral internalism and correlativity of rights and duties, it follows, R cannot obtain if no rational agent recognises she has a correlative duty (D) on which she is generally motivated to act.⁴⁹ No alleged right would have authority in normative consideration if it is not recognised.

The African Recognition Theory of Human Rights I develop in the next section follows the format of Green's Rights Recognition Thesis, presented by Martin,⁵⁰ which stipulates that Human Rights are ways of acting or being treated, which are considered *active* only if: (i) they are morally accredited (justified by critical moral standards, converging on a list of rights, each of which is arguably to the perceived benefit of each and all persons); (ii) they have significant, effective social recognition, (iii) they are officially recognised in law and in the action of courts (or there is a situating of these rights in legally supported, regulated social and economic institutions); (iv) they are maintained primarily by conforming conduct; (v) they are protected through government oversight and enforcement.

An African Recognition Theory of Human Rights

This section adapts the format of (Martin's account of) Green's rights recognition thesis for two reasons: first, to show how rights recognition theory addresses criticism raised in African philosophy about Eurocentric prejudice in international Human Rights law; second, to show how universal Human Rights may be grounded in African legal and political customary norms.

I first present and then go on to develop in more detail the following African recognition theory of Human Rights. In the context of

⁴⁹ Gaus, "The Rights Recognition Thesis: Defending and Extending Green," pp. 217-220.

⁵⁰ Martin, "Human Rights and the Social Recognition Thesis," p. 13.

typically African ethical practices, a universal Human Right may be interpreted as a way of acting, or of being treated, that is:

1. Justified by an *overlapping consensus* of critical moral standards, belonging to independent, comprehensive ethical doctrines, with these standards converging on a list of rights, each of which accords with *Ubuntu*, such that almost everyone agrees that these rights serve the common good, to the benefit of each and all, and;
2. That morally accredited way of acting or of being treated has some sort of *significant social recognition* in living customary practices.
In the case of an Active Human Right,
3. There is *official recognition* of these ways, in law and in the action of courts, or there is a situating of these ways in legally supported and regulated social and economic institutions,
4. These ways of acting and of being treated are *maintained* primarily by conforming conduct, in *living customary practices* and are, if need be,
5. *Officially protected* through oversight and enforcement by government.

Note, there are two basic changes to Martin's account. First, moral accreditation of the universality of Human Rights is not cached out, like Martin's, as, "Justification by critical moral standards, converging on a list of rights, each of which is arguably to the perceived benefit of each and all persons."⁵¹ Martin argues that moral justification of Human Rights at the international level may be seen to take the form of an "overlapping consensus" of independent bases, each independently tested by the principle of mutual and general benefit. Overlapping consensus and mutual and general benefit are interpreted in this account from an African ethical perspective. Moral accreditation of the universality of Human Rights is interpreted in terms of *Ubuntu*, to secure mutual and general benefit, and on the basis of a principle of social consensus grounded in African political philosophy and jurisprudence. Second, in response to Martin's requirements for social and official recognition (as well as conforming social conduct and official regulation and enforcement), this account

⁵¹ *Ibid.*

stresses the need for recognition of Human Rights in both *living* and *official* customary law. Despite hierarchical or patriarchal distortions of tradition in official customary law (owing to colonial manipulation, for instance) I argue that reform of customary law (due to morally accredited changes in living customary practices, for example) should follow the principle of continuity in change. Rights recognition theory can appreciate the value of official customary law and established courts for the practical coordination of rights-based reform, which is typically neglected in natural rights thinking.

Moral Accreditation: *Ubuntu* and Overlapping Consensus

Ubuntu and the Common Good

Any account of African normative grounds for Human Rights must reconcile its competing claims to universality and cultural relevance, just as Human Rights law must reconcile the right to equality with the right to culture, including customary laws, some of which may undermine equality. A process of moral accreditation is needed to identify universal Human Rights among substantive African customary practices, to test for their universality and to avoid cultural prejudice in their universal formulation. Since the account of moral accreditation I have presented depends on the concept of *Ubuntu*, it is worth considering a concern, raised by Dylan Futter,⁵² that it is not clear whether *Ubuntu* is a teleological virtue concept, a plurality of fundamental virtues, the fundamental virtue or, even, perhaps, the term for virtue itself.⁵³ Despite such ambiguity, in the phrase commonly used to explain *Ubuntu*, namely, “a person is a person through other people,” one may, at least, ascribe to the concept a moral sensibility which concurs with Green’s claim, that the good of others converges with my good in morality, to articulate a common good.⁵⁴

⁵² Dylan B. Futter, “Ethical Methodology in Metz’s Theory of *Ubuntu*,” *Phronimon*, 17.1 (2016), pp. 57-70.

⁵³ *Ibid.*

⁵⁴ Gaus, “The Rights Recognition Thesis: Defending and Extending Green,” p. 223.

In the literature on *Ubuntu* in African ethics, disagreement about the meaning of the term is often thought to hinge on the precise nature of personhood to which the term refers. The predication of a concept of personhood need not constrain discussion and understanding of the phrase, “a person a person through other people,” which, after all, advances a claim about the interdependence of people. This is not just a phrase about what a person is but a normative injunction, to act in accordance with respect for our interdependence on one another for our identity and well-being (to remind us not selfishly and irrationally to take for granted or undermine those on whom we rely). Those who insist on a metaphysical and ontological interpretation of personhood in *Ubuntu*, against the critique of natural rights I give, would nonetheless surely agree that Human Rights, even if they are grounded on a concept of personhood, should still address the good of each and all persons and not sacrifice the good of some for that of others, as per the concept and practices of *Ubuntu*.

Whatever kind of good *Ubuntu* is – be it a virtue to which we ought to aspire, a set of basic virtues, the ultimate virtue, a civic virtue, belonging to certain historically specific political formations, or even an essential attribute of human personhood – it most certainly has something to do with a good attached to the inter-dependence of individual and social well-being in society. Chuma Himonga claims that, in living customary law and in constitutional law in South Africa, *Ubuntu* encompasses communality and the interdependence of community members, as well as respect for life and human dignity, humaneness, social justice and fairness, and reconciliation.⁵⁵ This is a tall order for one word, but, whatever the concept encompasses, we may assume, at the very least, that it would not accord with *Ubuntu* to construe any particular customary practice as a universal Human Right unless it was thought to serve the good of all persons. Although the term *Ubuntu* basically functions here in lieu of the principle of mutual and general benefit, and despite its ambiguity, the main advantage of this term is that it has gained wide currency in sub-

⁵⁵ Chuma Himonga, “The Future of Living Customary Law in African Legal Systems in the Twenty-First Century and Beyond, with Special Reference to South Africa,” *The Future of African Customary Law* (Cambridge: Cambridge University Press, 2015), p. 45.

Saharan African ethics. This consideration is not a trivial factor, since – following the basic premise of the rights recognition thesis – the existence of rights depends on their recognition. Moral accreditation of universal Human Rights in Africa ought to follow such autochthonous African normative foundations.

Overlapping Consensus

I argued earlier that Gyekye's moderate communitarian account of Human Rights in Africa follows a common misconception that western Human Rights are grounded in personhood. Aside from his well-known contributions to ontology, however, Gyekye's work offers valuable insight into traditional practices of social consensus that are relevant to the moral accreditation of Human Rights in Africa, particularly in his account of "Traditional political ideas and their relevance to development in contemporary Africa."⁵⁶ This inquiry into the status, nature of authority and role of chiefly authority in Akan society discloses the centrality of consensus to traditional relations of power between the chief and the people he represents, in African social structures where, "chieftaincy was the outstanding feature of the political landscape."⁵⁷ Gyekye claims each Akan village typically had a chief and a council of elders. Chiefs were elected from the royal lineage by the head of the lineage in consultation with members of the lineage and had to be acceptable to councillors and citizens. Although descent was important, the candidate to be chosen was not always obvious. Despite the hierarchy of the social structure, the chief was restricted by law to rule in accordance with the consent of the people and in accordance with customary precedent and a series of injunctions publicly recited before him, which he, in turn, would publicly acknowledge. The effectiveness and continuity of the chief's rule depended heavily on the accountability and popularity of the ruler.⁵⁸ In decision-making and in legal judgments over which the chief

⁵⁶ Kwame Gyekye, "Traditional Political Ideas and their Relevance to Development in Contemporary Africa," *Person and Community* (Washington, DC: Council for Research in Values and Philosophy, 1992), pp. 240-255.

⁵⁷ *Ibid.*, p. 1.

⁵⁸ *Ibid.*, pp. 2-4.

presided, consensus was of the highest priority. In public assembly, there was free expression of opinion. The council would listen to arguments until reconciliation of opposed views was achieved with unanimous consensus. The chief could not alone deliberate and adopt any policy or action that affects others; he was bound to act on the advice of and with the concurrence of his councillors.⁵⁹ It is important to note that, in this account, the authority of a traditional African chief is limited by custom and consensus, since his role depends on its social recognition.

Gyekye's description of the consensual character of traditional Akan politics resonates with accounts of traditional Thembu politics given by Nelson Mandela at the Rivonia Trial, in 1962, and again in his autobiography, which he drafted in prison. It is worth quoting here at length, since he speaks directly to the topic. Mandela claimed at his trial that, before the white people came,

The council was so completely democratic that all members of the tribe could participate in its deliberations. Chief and subject, warrior and medicine man, all took part and endeavoured to influence its decisions. It was so weighty and influential a body that no step of any importance could ever be taken by the tribe without reference to it...⁶⁰

He elaborates further, in his autobiography, on Thembu tribal meetings:

It was democracy in its purest form. There may have been a hierarchy of importance among the speakers, but everyone was heard: chief and subject, warrior and medicine man, shopkeeper and farmer, landowner and labourer ... The meetings would continue until some kind of consensus was reached. They ended in unanimity or not at all ... Democracy meant all men were to be heard, and a decision was taken

⁵⁹ *Ibid.*, pp. 4-5.

⁶⁰ Nelson R. Mandela, *Long Walk to Freedom: the Autobiography of Nelson Mandela* (Boston: Little Brown, 1994), p. 150.

together as a people. Majority rule was a foreign notion. A minority was not to be crushed by a majority.⁶¹

Although, as Bernard Matolino⁶² points out, Emmanuel Eze and Kwasi Wiredu disagree on the factors and criteria responsible for it, he also admits, these philosophers agree that consensus is of overriding importance in African decision-making. Wiredu has consistently questioned the suitability of Western majoritarian democracy in Africa, to advocate, instead, for a consensual democracy that better accords with traditional African norms. He makes it clear that, in African life, "The reliance on consensus is not a peculiarly political phenomenon"; rather, political decision-making follows a basic ethical orientation which applies to all interpersonal relations among adults, where, 'Consensus as a basis of joint action was taken as axiomatic.'⁶³ Gyekye laments the way that colonial and post-colonial governmental and legislative systems undermined consensual African politics by creating a distance between the government and the governed, since this leads to bribery, corruption and carelessness about state property and public enterprises.⁶⁴

Achievement of consensus was an overriding objective not only in political decision-making but also in settlement of legal disputes. The customary law scholar, Thomas Bennett, claims South African customary law is rooted in communal behavior, consensus and acceptance.⁶⁵ As Sindiso Weeks explains,⁶⁶ the position of African headmen depended on their abilities to sum up the general opinion of parties to a dispute and to represent the consensus of the council and community. Koyana observes that the purpose of traditional courts is

⁶¹ Mandela, *Long Walk to Freedom: the Autobiography of Nelson Mandela*, p. 150.

⁶² Bernard Matolino, "Rationality and Consensus in Kwasi Wiredu's Traditional African Politics," *Theoria*, 146 (2016), pp. 36-55.

⁶³ Kwasi Wiredu, "Democracy in African Traditional Politics: A Plea for a Non-racial Polity," *The Centennial Review*, 39.1 (1995), p. 53.

⁶⁴ Gyekye, "Person and Community in African Thought," p. 8.

⁶⁵ Thomas Bennett, "Human Rights and Customary Law under the new Constitution," *Transformation: Critical Perspectives on Southern Africa*, 75 (2011), p. 78.

⁶⁶ Sindiso M. Weeks, "Beyond the Traditional Courts Bill: Regulating Customary Courts in Line with Customary Law and the Constitution," *SA Crime Quarterly*, 35 (2011), p. 33.

to reconcile disputing parties so they can coexist in peace. Elders act as arbitrators, to point out relevant traditions and customs. Following established precedence, then, the aim, in hearing out the respective claims of disputing parties, is to bring these into agreement in such a way as avoid vengeance.⁶⁷

Weeks argues that interference by colonialism and apartheid distorted the consensual, democratic basis of African chieftaincy, consolidating the power of allied leaders at the expense of their communities. He claims customary courts never existed at the chief's level alone. Most legal work was done by lower courts (i.e. family, clan and headsmen's courts), who settled disputes at the local level. Since the viability of customary courts in any region depended on their use by citizens, it was in the immediate interest of presiding officers to maintain a reputation for accountability and consensual agreements.⁶⁸ Centralisation of chiefly authority by the state undermined the democratic accountability of such consensual African norms. Evadne Grant⁶⁹ agrees that colonial authorities consolidated their rule by taking control of dispute resolution. This colonial stifling of traditional democratic dynamics of accountability was then exacerbated by the written codification of flexible, contested oral traditions in living customary law.

We see here that consensus is an overriding objective in traditional African political and legal life. This supports the inclusion of overlapping consensus in the African recognition theory I have presented, which, so far, includes two criteria for the accreditation of any way of acting or being treated with universal moral status as a Human Right. In the first half of this section, I argued from *Ubuntu* for the claim that Human Rights must be thought to achieve a common good. I then argued that overlapping consensus of moral doctrines is necessary for the moral accreditation of Human Rights in Africa, given

⁶⁷ Digby S. Koyana, "Traditional Courts in South Africa in the Twentieth-Century," *The Future of African Customary Law* (Cambridge: Cambridge University Press, 2015), p. 241.

⁶⁸ Weeks, "Beyond the Traditional Courts Bill: Regulating Customary Courts in Line with Customary Law and the Constitution." pp. 33-34.

⁶⁹ Evadne Grant, "Customary Law and Human Rights," *Routledge Handbook of International Human Rights Law* (New York: Routledge, 2013), p. 307.

the normative significance of social consensus in traditional African politics and jurisprudence as an overriding objective in dispute-resolution practices. In an African cultural context one may, then, say that Human Rights attain their moral status only where there may be said to be sufficient overlapping *consensus*, that most people agree, these rights serve the common good, in accordance with *Ubuntu*. Having discussed these criteria of moral accreditation, for Human Rights in Africa, in the next section I explain why Human Rights require social and official recognition.

Recognition of Human Rights in Customary Law

Social Recognition in Living Customary Law

Given that international Human Rights law is ultimately grounded in customary international law, it is revealing that African customary law is so often framed as a problem for Human Rights. Much of the literature in English on relations between Human Rights and cultural norms in Africa opens with a dilemma, which claims that, although international Human Rights law guarantees the right to use customary law, such legal norms may contravene certain Human Rights, such as basic rights of equality. Questions of how to reconcile international Human Rights law and customary norms are then typically framed in terms of how to adapt customary norms to the independent standard of foundational international Human Rights law. This interpretive framework is not shared by all, however, as is demonstrated by the uneven support of different countries for the United Nations Human Rights Council workshop, convened in 2010 so that representatives of different countries may exchange views on how a better understanding of traditional values underpinning Human Rights norms and standards can contribute to their promotion and protection.⁷⁰

The objective of the workshop, stated by the South African High Commissioner for Human Rights, Navanethem Pillay, was “to ex-

⁷⁰ Obiajulu Nnamuchi, “Towards a New Human Rights Paradigm: Integrating Hitherto Neglected Traditional Values into the Corpus of Human Rights and the Legitimacy Question,” *Human Rights Review*, 14 (2012), p. 27.

plore traditional values underpinning Human Rights."⁷¹ Her bottom-up interpretation of Human Rights was shared by Chinese and Russian delegates, who agreed that Human Rights belong to the traditional values of all cultures, that all cultures contribute to Human Rights and that compliance with Human Rights out of conviction depends on interpreting the normative foundations of Human Rights in terms of the traditional values of all cultures. Delegates of trans-Atlantic states, whose norms are best represented by dominant interpretations of international Human Rights law, such as the USA, the UK, France and Belgium, were generally opposed to the workshop, seeing its emphasis on the traditional values of non-Western nations as a suspicious way to excuse Human Rights violations. True to form, at the conference, the USA also conflated international human rights law with universal natural justice.⁷²

A significant danger with the naturalisation of Human Rights, pointed out by critics of natural law, from Burke to Arendt, is that this fails to appreciate how rights are embodied in political community. As I explained earlier, international Human Rights law is based on customary international law and conventions, which developed out of the characteristic interactions of Christian, European states. Those who identify with the universalist principles of these traditions are more likely to take for granted cultural peculiarities they believe to be natural. If one assumes one's ideas of Human Rights reflect a natural, universal, foundational standard, one is more likely to find fault with and to desire reform of divergent interpretations belonging to cultural others. Such an assumption validates the criticisms of African theorists, who see Eurocentric prejudice in Human Rights law as symptomatic of an imperialistic "civilising mission," which imposes Western culture and values on client states.

Besides the danger with passing off culturally particular assumptions as universal common sense, naturalisation of the normative foundations of Human Rights, anyway, kicks the hermeneutic can of cultural interpretation further down the road. At some point, regard-

⁷¹ *Ibid.*, p 28.

⁷² Nnamuchi, "Towards a New Human Rights Paradigm: Integrating Hitherto Neglected Traditional Values into the Corpus of Human Rights and the Legitimacy Question," pp. 29-32.

less of their historical origins, Human Rights must, ultimately, be interpreted from a variety of different cultural contexts at their points of application. As Nnamuchi insists, if laws are not home-grown, they may conflict with the ideals and expectations of the people whose conduct is targeted, such that the legislative framework suffers a congenital defect.⁷³ Regarding attempts by foreign agents to reform practices of female genital mutilation, Amy Gutmann, likewise, observes that oppressed women typically want their rights to be secured within their own culture, and not at the expense of exile from their culture or destruction of what they and others take to be valuable about their culture.⁷⁴ A recognition theory of rights follows from this realisation, that rights presuppose social recognition and depend on social practice. As Martin argues, for moral rights to gain a grip in guiding action, people must understand their justification and internalise it as having a moral authority for them in directing their conduct. Conversely, against natural rights, one may argue, an ideal morality which lacks recognition provides no moral authority or justification.⁷⁵

The criterion of social recognition in conforming conduct, which is a requirement for moral accreditation of Human Rights, in the African recognition theory of Human Rights I have presented, corresponds closely with one of three criteria recognised by the South African Constitutional Court, in the *Shilubana* judgment, by which African customary law may be ascertained in customary courts.⁷⁶ In the *Shilubana* judgment, the Constitutional Court distinguished between living official customary law. The former was said to represent unwritten practices, which may be observed, which have been invested with authority in the relevant community through conforming practice. These practice change and adapt to changes in socio-economic and political conditions, unlike official customary law, which is embodied in courts, legislation, precedents and aca-

⁷³ *Ibid.*, p. 81.

⁷⁴ *Ibid.*, p. 72.

⁷⁵ Martin, "Human Rights and the Social Recognition Thesis," p. 5.

⁷⁶ Himonga, "The Future of Living Customary Law in African Legal Systems in the Twenty-First Century and Beyond, with Special Reference to South Africa," pp. 31-57.

democratic texts.⁷⁷ The court ruled that it is the former which the cultural rights provisions of the Bill of Rights secures, since the latter is distorted by its colonial and apartheid history.⁷⁸ Traditions and past practices of the community should be tested with reference to their current setting and caution should be taken with regards to historical records.⁷⁹

To determine customary law, reference may be made to historical records of the traditions and past practices of a community. Continuity is maintained by rules of precedent encapsulated in myths, proverbs, maxims, rhymes, ceremonies and the testimony of elders.⁸⁰ But historical records of past practice must be considered with cautious consideration of current conforming conduct.⁸¹ In *Bhe*, on the role of gender and equality in inheritance, the Constitutional Court again distinguished living and official customary law, noting that official statutes, case law and state documents may offer a distorted view of the law as lived by the community.⁸² Grant claims customary law was distorted by a series of factors. First, male traditional leaders and colonial administrators endorsed a hierarchical system of patriarchy. Second, customary law was interpreted poorly through the conceptual apparatus of the dominant colonial legal system. Third, direct accountability was undermined by the imposition of a centralised court system. This process, she argues, 'robbed customary law of its character as *living law*' and, "ossified customary law in the interests of a narrow segment of the community."⁸³

Living customary law is said to give the best indication of what customary law is. Grant stresses the point that the validity of African customary law is primarily defined by its social practice, since it is unwritten and fluid and it varies over time and from place to place.⁸⁴

⁷⁷ *Ibid.*, pp. 34-35.

⁷⁸ Grant, "Customary Law and Human Rights," p. 19.

⁷⁹ *Ibid.*, p. 306.

⁸⁰ *Ibid.*, p. 306.

⁸¹ Himonga, "The Future of Living Customary Law in African Legal Systems in the Twenty-First Century and Beyond, with Special Reference to South Africa," p. 53.

⁸² Grant, "Customary Law and Human Rights," pp. 13, 15.

⁸³ *Ibid.*, p. 307.

⁸⁴ *Ibid.*, p. 16.

Bennett and Vermeulen even argue that codification of customary law is impossible, since the system derives its legitimacy from its dynamic and contested adaptation to changing circumstances.⁸⁵ With reference to various judgments made by the post-apartheid South African Constitutional Court, Himonga affirms the claim that living customary law represents observable, unwritten social practices which have been invested with authority. The test of the validity of the rules and norms of customary law is its acceptance as obligation by the people who use it. South African courts cannot refer only to official customary law, where such law is applicable, but are obligated to consider the relevant customary communities' consensual views on customary laws.⁸⁶

These views, on the significance of conforming social conduct in determining African customary law support my inclusion of the requirement, of recognition in conforming social conduct, as a key component of moral accreditation, for an African recognition theory of Human Rights. Recognition in conforming conduct is a fundamental consideration for the ascertainment of African customary law, so it must be a basic criterion for the moral recognition of Human Rights in Africa, which must be grounded in the moral reasoning of recognised customary practices. In the following section, however, I argue that, in determining which customary practices accord with Human Rights, official customary law cannot simply be discounted in favour of living customary law. This is because, unlike living customary law, Human Rights are essentially institutionally embodied in the codes and practices of the state. Written codification and organisation, under a centralised court system may compromise some of the dynamic flexibility of traditional customary practices but such institutional embodiment is a necessary feature of active Human Rights, which need a state to backstop the correlative duties they entail. Human Rights are moral but they also have a practical, institutional function which depends upon their legal enactment, regulation and enforcement by government.

⁸⁵ *Ibid.*, p. 19.

⁸⁶ Himonga, "The Future of Living Customary Law in African Legal Systems in the Twenty-First Century and Beyond, with Special Reference to South Africa," p. 41.

Official Recognition and Institutional Embodiment

On the practical significance of official recognition of moral rights, Rex Martin refers to the right not to be enslaved by helpful way of example. Martin argues, since the US Declaration of Independence holds that all men are created equal, the idea that slavery is a moral wrong was understood in that society. But slaves had to wait another century before, by 1865, it had gained sufficient widespread social acceptance to be taken as authoritative and given priority over competing normative considerations, as an *active* Human Right, to the extent that this sparked off the US Civil War. This example shows that active Human Rights depend on moral and institutional recognition. Martin points out that, although the moral right not to be enslaved was socially recognised in 1776, such that it could be understood in that society to resonate with existing values, it had not yet achieved sufficient widespread acceptance in practical guidance and institutionalised enforcement of conduct to count as an active Human Right. This is an important condition, since a moral right without widespread social and official recognition cannot be afforded priority against competing normative concerns.⁸⁷ A key insight of the rights recognition thesis is that rights are partly justified by the fact that they coordinate our activities. As Gaus explains, rights actually recognised can do a job no ideal set of rights could ever do, that is, provide actual moral consensus.⁸⁸

As African traditions commonly hold and as Green understood, authoritative consensus is a vital moral concern in organised society, since we cannot be expected each to call on our own understanding of the common good. The great moral good of a system of recognised authority is undermined by each deciding for herself what is the best distribution of moral authority and acting on it.⁸⁹ This concern is especially serious for universal Human Rights, which represent the interests of all people, around the world, who face the characteristic threats posed by organised modern society. Human Rights need

⁸⁷ Martin, "Human Rights and the Social Recognition Thesis," pp. 14-15.

⁸⁸ Gaus, "The Rights Recognition Thesis: Defending and Extending Green," p. 233.

⁸⁹ *Ibid.*, p. 232.

official recognition. Although their moral recognition depends on moral justification and social recognition, Human Rights are not typically directed at individuals. They are mainly restraints on the governments of organised societies, in which the state is intended as the main organiser who is expected to backstop the duties that result from them.⁹⁰

“Practices of *governmental* formulation, harmonization, and promotion are one of the main forms, if not the *main* one, for the institutional maintenance of human rights to take in a society,” writes Martin.⁹¹ Though they are seriously compromised and due for on-going reform, our established institutions in organised society are what allow us to agree on who has authority over which moral decisions. Human Rights must hold the state to account and they require state enforcement. Social recognition affirms the coordination of the justifying element of a right (i.e. *Ubuntu* and consensus, in the account I have presented) with extant moral principles. Widespread acceptance of these principles means the right can be taken as authoritative and given priority against competing normative considerations. Martin argues that effective recognition of an active Human Right depends on both social and official recognition and corresponding maintenance in conforming conduct and institutionalised practice.⁹² He acknowledges that a right may fail at one of these criteria, such as the right not to be enslaved, in 1776, and yet still have sufficient substantial support to function normatively as a Human Right. But, if such a right is blocked by competing, officially accepted, normative considerations, it will most likely fail to support the normative directions on conduct which are required of active and effective Human Rights.⁹³

I agree with Grant, Bennett and Himonga that official customary law in South Africa must be approached with caution, especially when it conflicts with practices of living customary law or with competing normative considerations, such as basic, constitutionally recognised rights of equality. However, living customary law should not auto-

⁹⁰ Martin, “Human Rights and the Social Recognition Thesis,” pp. 6, 9.

⁹¹ *Ibid.*, p. 10.

⁹² *Ibid.*, pp. 15-16.

⁹³ Martin, “Human Rights and the Social Recognition Thesis,” p. 16.

matically trump official customary law where such conflict arises. Official customary law ought to be reviewed and developed to align coherently with living customary law and with other constitutional rights, especially in post-apartheid South Africa, but, equally, living customary law must be codified and integrated within a centralised court system, with different levels of appeal, which is officially authorised and regulated by the state. As I shall explain in the final section, official customary law should be reviewed and developed in a recursive process, in accordance with institutionally recognised and constitutionally protected Human Rights, which must, in turn, be supported with reference to morally recognised, living customary practices.

Where official customary practices of male inheritance conflicted with the right to equality, in the *Bhe* judgment, the Constitutional Court ruled that women cannot be excluded from inheritance. Although the Court acknowledged the necessity for living customary law to be developed toward compliance and applied, it did not take the opportunity to do so, in this instance, despite a dissenting judgment, which insisted that it should, since the process was deemed to take too long, which would unduly delay the urgent administration of justice in the respective case. In the absence of acceptable customary law on the matter, the Court therefore applied Roman-Dutch common law, effectively reiterating the colonial and apartheid – era use of the repugnancy principle.⁹⁴ This result is repugnant, given the urgent need, identified in the African recognition theory I present, for official recognition and institutional embodiment of active Human Rights. It is essential, for their own vitality, that the customary practices, in which Human Rights are embedded, are officially recognised and actively maintained by relevant state-sanctioned institutions in Africa.

Although my account insists on official recognition, it is, nevertheless, important to acknowledge Boucher's contention that formal recognition may only arrive some time after rights have become socially established. As he explains, precedent customary social practices, which Human Rights recognise, "are embedded in and dependent on moral communities which may exist below the level of

⁹⁴ Grant, "Customary Law and Human Rights," p. 317.

the state and extend beyond it’.”⁹⁵ I have emphasised the basis of social recognition in African customary law but this should not distract from the fact that such recognition develops in ordinary ways. Boucher gives the example of two friends meeting in a bar every Thursday evening. One only notices an emergent obligation when the other fails to turn up without notice. It is in these ordinary ways that rights arise, out of extant moral claims, which develop from the social habits that we cultivate through our general normative interactions over time.⁹⁶

Likewise, it is important to acknowledge the relevance of living customary law in cases where official customary law is found to conflict with competing normative principles, especially Human Rights. Thoroughgoing reform and development of official customary law is needed but it must not be overridden by living customary law. Development of official customary law in accordance with Human Rights is needed, not vague appeals to adaptable and contested living customary laws whose flexible and dynamic sense defies codification. Social recognition is not enough to maintain active Human Rights. Although official customary law is compromised by domination and, although the consensual accountability of customary courts is undermined by centralisation, and the flexibility of oral traditions is undermined by written codification of legal concepts, the accountability of customary courts is better supported in organised, modern society, by the option for citizens to appeal, against possibly unfair rulings, to legal codes which comply with morally recognised Human Rights. As Weeks⁹⁷ argues, to maintain their accountability, it is essential that people may choose which customary courts to patronise and whether to opt out to state courts. The state should have information on the operation of customary courts to ensure they recognise constitutional rights and values and to evaluate their procedures and reports. Sanctions must be placed on customary courts which do not conform to basic requirements. Where problems are systemic and irreparable

⁹⁵ Boucher, “The Recognition Theory of Rights, Customary International Law and Human Rights,” p. 758.

⁹⁶ *Ibid.*, p. 758.

⁹⁷ Weeks, “Beyond the Traditional Courts Bill: Regulating customary courts in line with customary law and the Constitution,” p. 35.

they should be withdrawn. Ongoing dialogue between civil and customary courts is also needed to deal with them.⁹⁸ Reform of official customary law and courts is therefore needed, to reflect and better to support the Human Rights they underwrite.

Accreditation and Reform of African Customary Law in Accordance with Human Rights

As discussed at the outset of this paper, criticism of Human Rights in African ethics typically rejects an individualistic, Western conception of personhood on which Human Rights law is allegedly based. I argued that such criticism misinterprets the normative grounds of international Human Rights law in terms of natural rights. Such criticism, I explained, also resonates with that of Western natural rights critics, including Bentham, Burke, Marx, Arendt and Green. But these thinkers variously attributed the normative basis of Human Rights to historical customs, developed through trial, error, reform, compromise and domination. Reform of international Human Rights law is evidently needed if it is prejudiced by Eurocentric domination. But this does not depend on our agreeing to any account of the natural rights of persons. Following the rights recognition thesis, it is clear, Human Rights – based reform must cater to the operative principles which coordinate the normative conduct of actual organised societies around the world. To avoid Eurocentric prejudice in international Human Rights law, Human Rights must be situated among well-supported local customary practices. In this final section I argue that Human Rights reform should follow the principle of continuity in change, to integrate well with established customary practices, and I show how the African recognition theory of rights, which I have presented, helps this process.

Comprehensive law reform is urgently needed in South Africa, where the Communal Land Rights Act has been declared unconstitutional and the proposed Traditional Courts Bill has been shelved in the face of considerable opposition. In practice, customary practices of succession and inheritance are simply trumped, without further

⁹⁸ *Ibid.*, p. 37.

development, by common law.⁹⁹ Their status, and the status of customary courts, which cater to most South Africans, remains in limbo. In 1999, a state-sponsored Special Project Committee published a Discussion Paper on Traditional Courts in South Africa which recommended retaining the existing system despite certain problems to be addressed. These included sexism, a tendency to presume guilt, lack of formal legal training of presiding officers, loose rules of evidence and the absence of legal representatives.¹⁰⁰ The headmen acting as presiding officers in such courts are often uneducated and illiterate, so they are ill-equipped to handle complex legal decisions involving considerable sums. Customary courts also do not respect the separation of juridical and executive powers. They leave no room for presumption of innocence or the right to remain silent. Women are disadvantaged by various legal norms; for instance, they may not present or preside over cases.¹⁰¹

The advantages of customary courts are thought to outweigh such concerns. They are accessible, widespread, consensual, informal, simple, cheap, familiar and commonly accepted in rural areas.¹⁰² Patekile Holomisa argues that customary courts are widespread and dispense justice in case of petty crimes routinely, to the satisfaction of most litigants; whereas, town courts are clogged with cases and subject to long delays. Modern justice is also expensive and wealth buys more likely favourable outcomes for those can afford better legal representatives.¹⁰³ Procedural safeguards of common law, which customary courts neglect, delay cases and increase costs. Koyana¹⁰⁴ agrees: customary courts increase participation and legitimacy, since

⁹⁹ Bennett, "Human Rights and Customary Law under the new Constitution," pp. 73-75.

¹⁰⁰ Bennett, "Customary Criminal Law in the South African Legal System," *The Future of African Customary Law* (Cambridge: Cambridge University Press: 2015), p. 368.

¹⁰¹ Koyana, "Traditional Courts in South Africa in the Twentieth-Century," pp. 232-233.

¹⁰² Bennett, "Customary Criminal Law in the South African Legal System," p. 368.

¹⁰³ *Ibid.*, p. 381.

¹⁰⁴ Koyana, "Traditional Courts in South Africa in the Twentieth-Century," p. 230.

they are socially and geographically accessible, allowing affordable access to justice in the local language, derived from familiar rules and practices of the community, using procedures which are simple and flexible. Customary courts remain suited to the needs of African people due to their simple and convenient procedures and their ability to adapt to changes. These courts bring legal machine to easy reach of communities and retain flexible informality. They interpret laws in local languages, in terms of norms which enjoy local credibility. Subject to appropriate reform, a pluralist approach, allowing consensual use of customary courts and appeal to higher courts, can provide an expedient solution to these problems. But it is essential that official customary law is further developed to accord with Human Rights. Since they are likely to continue, Koyana argues, harmonisation with the Constitution and with Human Rights is both necessary and inevitable.¹⁰⁵ However, integration of national law and customary law is not easy, observes Berat,¹⁰⁶ since there are few treatises on customary law and these are not necessarily reflective of its dynamic character. The general emphasis in customary law on fostering communalism, conciliation and harmony makes it difficult to align with national law. Moreover, the precise nature of customary law is not clearly determined.

For Human Rights – based legal reform, the position for which I have argued, so far, therefore leaves us with a paradox. On the one hand, international Human Rights law is criticised in African ethics for its Eurocentric prejudice and Human Rights cannot function actively and effectively in Africa if these rights are not consistent with normative principles which belong to extant customary practices. On the other hand, African customary practices are compromised by Eurocentric manipulation and some are inconsistent with Human Rights. This inconsistency may be due to Eurocentric prejudice in Human Rights law or it may be due to inconsistencies between African customary practices (for example, between living and official customary law, or between customary practices informed by normative principles which accord with and support Human Rights and

¹⁰⁵ *Ibid.*, p. 243.

¹⁰⁶ Lynn Berat, "Customary Law in a New South Africa: A Proposal," *Fordham International Journal* 15.1 (1991), p. 125.

those which do not and therefore stand in need of reform). The paradox follows: to know which customary practices accord with Human Rights, we must know what these Human Rights are. To know what Human Rights are, we must interpret them in terms of customary practices which accord with Human Rights.

Himonga¹⁰⁷ agrees that customary law must be actively developed to align with Human Rights, while maximally preserving the values and fundamental features of living customary law.¹⁰⁸ However, he complains that the doctrine of precedent poses a dilemma for reform, since it is needed to validate living customary law, even while it frustrates its development. Indeed, it is the mutual interdependence of these competing normative standards, under the African recognition theory of Human Rights I have presented, which leaves us with a chicken-and-egg puzzle, in which we never know where to start. Nevertheless, we, anyway, do not enjoy the luxury of making such decisions, since we have no choice but to work with what already coordinates our behaviour. Martin¹⁰⁹ argues, accordingly, that social recognition is crucial to the normative, critical character of Human Rights and to its practical efficacy. It is key to the moral justification and to the institutional embodiment of Human Rights. With social recognition performing a recursive function, in between, Human Rights must be interpreted in terms of receptive African customary practices and African customary practices must be applied in accordance with Human Rights. This conception of reform accords with Abdullah An-Na'im's claim, that arguments for universal Human Rights standards must be consistent with the internal logic of a culture. The universality of Human Rights depends on the norms and institutions of particular cultures. Reform of cultural practices, in line with Human Rights, depends on norms within the given culture,

¹⁰⁷ Himonga, "The Future of Living Customary Law in African Legal Systems in the Twenty-First Century and Beyond, with Special Reference to South Africa," p. 57.

¹⁰⁸ *Ibid.*, p. 48.

¹⁰⁹ Martin, "Human Rights and the Social Recognition Thesis," p. 18.

as interpreted by those who know it.¹¹⁰ An-Na'im and Ibhawoh¹¹¹ argue that observance of Human Rights standards is best improved by enhancement of their cultural legitimacy, since people are more likely to observe normative propositions if they believe them to be sanctioned by their own cultural traditions.

Since various aspects of official customary law must be reformed in accordance with Human Rights, and the active effectiveness of these rights depends on their social and official recognition, such reform should follow a principle of continuity in change, as Boucher advises,¹¹² by appealing to socially and officially recognised, morally accredited, extant customary practices. The principle of continuity in change is already accepted in common law, which is derived from the historical reasoning which emerges from precedent judgments, bound by customs and traditions.¹¹³ The principle of continuity in change accords not only with common law but with a basic obligation for African customary practices to ensure accordance with the ethical reasoning of ancestral ways. As Gyekye writes, "It is sensible, even imperative, to revive those ancestral political values and attitudes which are relevant to development of the democratic politics of the modern world."¹¹⁴ While components may change over time, through ongoing reform, the authority of the law, like the identity of the ship of Theseus, depends on successful adaption to what exists.

The principles of reform which Tom Zwart outlines as the basis of a "receptor approach" are premised on the idea that reforms should supplement, not replace, existing social arrangements and home-grown remedies should be sought.¹¹⁵ This idea accords well with the African recognition theory of Human Rights I have given. Zwart's receptor approach relies on local socio-cultural arrangements to

¹¹⁰ Deng, "Human Rights in the African Context," p. 500.

¹¹¹ Zwart, "Using Local Culture to Further the Implementation of International Human Rights: The Receptor Approach," p.561.

¹¹² Boucher, "The Recognition Theory of Rights, Customary International Law and Human Rights," p. 761.

¹¹³ Koyana, "Traditional Courts in South Africa in the Twentieth-Century," p. 227.

¹¹⁴ Gyekye, "Person and Community in African Thought," p 8.

¹¹⁵ Zwart, "Using Local Culture to Further the Implementation of International Human Rights: The Receptor Approach," p.560.

implement Human Rights protection. This requires identifying and making visible those domestic social arrangements which support and protect the Human Rights already in place. If these arrangements fall short of international Human Rights, amplification of existing elements with supplementary measures may be needed, so long as this does not negate or replace existing elements.¹¹⁶ Zwart¹¹⁷ argues that social institutions should be reformed and not replaced, if they are inadequate from the point of view of international Human Rights standards, and he pleads for a sensitive approach that seeks first to understand the social basis of cultural traditions, to find autochthonous remedies. The receptor approach therefore relies on ethnographic and social research to identify receptive practices.¹¹⁸ If existing social institutions fall short of treaty requirements, they should be adjusted or amended, to bring them into line with treaty standards. However, the cultural legitimacy of such institutional changes depends on adequate linking of reforms to existing cultural receptors. Changes depend on local involvement and should be executed in a way that does not compromise the cultural integrity of those involved. Local people must feel a sense of ownership of the reform process. Appropriate remedies to inhumane or degrading practices should be tailored to their rationale and motives in such a way as to redirect these to more appropriate modes of expression which enjoy cultural legitimacy.¹¹⁹

The receptor approach to the reform of customary practices, which violate Human Rights, demonstrates the recursive function social recognition can perform in the reconciliation of customary practices and Human Rights, helping to identify and to integrate Human Rights with the normative principles of customary practices in accordance with the principle of continuity in change. The theory helps identify appropriate cultural receptors. Various aspects of the receptor approach may be clarified, philosophically, by appealing to the criteria of the African recognition theory of Human Rights I have developed here. Customary practices should be identified, which

¹¹⁶ *Ibid.*, p. 547.

¹¹⁷ *Ibid.*, p. 561.

¹¹⁸ *Ibid.*, p. 557.

¹¹⁹ *Ibid.*, p. 558.

stand in need of reform in light of normative principles which follow from other recognised customary practices, which are morally accredited in accordance with *Ubuntu* and in accordance with an international overlapping consensus of comprehensive ethical doctrines. Recognition theory assists in the identification and reform of customary practices, to redirect the rationale of wayward conduct by appealing to morally and officially recognised, culturally receptive norms.

Conclusion

African recognition theory of Human Rights I present calls for urgent development of official customary practices and criteria for such reform. I have argued this approach to Human Rights is preferable to a dominant approach in African philosophy, which grounds Human Rights in an Afrocentric ontology of personhood. Afrocentric accounts of the natural rights of persons redress the individualistic aspects of international Human Rights law with alternative accounts of rights based on personhood. Recognition theory better accords with international law and with communal African norms, in which rights are conceived in terms of the moral reasoning of extant communities. Recognised African legal and political customary practices, I have argued, support international Human Rights. Moreover, I have argued, such African practices also implicitly support a meta-ethical rights recognition thesis, such as I advance here.

I identified an implicit rights recognition thesis in (a) Gyekye's account of Akan political practices, in (b) customary practices South African traditional courts and in (c) the typical weight attached in Africa to the precedent of tradition and the ways of ancestors, as interpreted by the elders and leaders of communities. Instead of opposing wayward customary practices with fixed universal standards, based on pre-conceived natural rights of personhood, recognition theory finds remedies to such practices in the moral reasoning of communities, working with norms which coordinate conduct. While natural rights of personhood are isolated from political society, recognition theory looks to political society and state involvement to

secure Human Rights. Rather than opposing compromised, Eurocentric norms with an Afrocentric model of personhood, recognition theory acknowledges the need for reform of the compromised standards to which it must appeal, calling for their urgent adaptation and development, while acknowledging the need to base such reform on morally and officially recognised, institutionally embedded customary practices.

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Afro-Libertarianism and the Social Contract Framework in Post-Colonial Africa: The Case of Post-2007 Elections Kenya*

SIRKKU HELLSTEN

Introduction*

One main theoretical, and often also practical, approach in dealing with the legitimate power structure of a state is a shared agreement usually conceptualised as a “social contract.” With the endorsement of this contract, the rational and autonomous citizens agree on being subjects of a central political authority, a sovereign. While there are different philosophical frameworks for the concept of the social contract, the main assumption is that the citizens are choosing the best overall solution for themselves in order to move from the “state of nature” to an organized society and an impartial state in order to avoid continuing conflicts and disputes over resources and power. In practice this contract can be signed at the inception of the independence of the state, after a conflict between the disputing or warring parties, and symbolically at every election. This chapter looks at the shortcomings and possibilities of the social contract approach, with special reference to the Kenyan post 2007 elections political crisis.

While the social contract framework cannot be directly applied to the current Kenyan political situation, it nevertheless gives an interesting point of analysis to the problems of the power sharing attempts between the different ethnic groups and classes of the heterogeneous Kenyan society. The country is now in a situation in

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which there are louder and louder demands to find a legitimate political authority that is more inclusive, participatory, accountable, and equally respects the rights of all the citizens (APRM 2006, 2008). The main thesis is that if sustainable peace, social reconstruction and national unity are to be achieved, there is need to have more comprehensive understanding of moral, social and economic dimensions of the concept of "justice." The focus has to be on the building of an impartial state with a clear national agenda and strong ethnically and politically neutral institutions and processes.

The Current Kenyan Political Context

Kenya is a multi-ethnic country, which has succeeded, since independence in 1963, to remain reasonably stable despite the wide spread political and economic turmoil in the Eastern and Horn of Africa. However, the December 2007 disputed general elections¹ brought the country to the brink of civil war. Neighbours turned into enemies in a protest of what they saw as flawed elections. Kenya went through a violent experience of post electoral chaos that led to the loss of over a thousand lives, displacement of more than three hundred thousand people, and destruction of property and infrastructure worth millions of dollars. The attempts by the state security agencies to control heavy-handedly the situation led to violations of human rights and democratic freedoms. Consequently, people's confidence in the political leadership and state institutions has further diminished, and the tensions between different ethnic groups remain high (see African Development Bank 2008; Amani Forum 2008; Human Rights Watch 2008; KNCHR 2008).

President Mwai Kibaki was swiftly sworn into office for his 2nd term after the election results were officially announced. However, for many Kenyans, Kibaki was no longer seen as a legitimate leader of the

¹ Few dispute that the election was fraudulent. The European Union, the Commonwealth, Kenyan elections monitors and other observers reported many anomalies and irregularities: unusually high voter turnout, lack of access to voting centers, names missing from registers, questionable voting hours, party agents disappearing at crucial moments, and the Electoral Commission of Kenya showing signs of manipulating the results.

country. People's loss of trust in the leadership and in state institutions – particularly in the justice, governance and security sectors – had already made people from different ethnic backgrounds² to turn into sub-national political and communal solutions, including lawless ethnically based militia movements, criminal gangs and hooliganism.³

After the disputed elections, the people in Kenya no longer believed that any formal institutional structures or processes could deal with the volatile situation that they saw not only as violent and insecure, but also profoundly unjust. The country was saved from falling apart mainly by the mediation efforts led by former UN Secretary General Kofi Annan, with the support of the international community (See Amani Forum 2008; Human Rights Watch 2008; IREC 2008; KNCHR 2008). These efforts led to the formation of a grand coalition government (GCG) in April 2008. This government includes both the former ruling coalition that came together under the name of *Party of National Unity (PNU)*, as well as the former opposition coalition *Orange Democratic Movement (ODM)*. This presented an opportunity for Kenyans to openly discuss underlying national issues

² The largest ethnic group is Kikuyu, with 21 percent of the population, followed by Luo (15 percent), Luhya (14 percent), Kalenjin (11 percent), Kamba (11 percent), Kisii (6 percent), and Meru (6 percent). Smaller groups include the Embu, Maasai, Mijikenda, Samburu, Somali, Taita, Teso, Turkana, and others. About one percent of the population consists of Europeans, Asians, and Arabs.

³ Since the 1980's, militias have surfaced on the Kenyan socio-political scene. The origins of many of these gangs are partly cultural, partly ethnic and partly political. Before and after the 2007 elections, these gangs have been better organized and clearly more politicized. According to the International Crisis Group Report 2008, the extremists, informal gangs and militia groups are responsible for much of the over 1000 dead in post-election violence, while attacks and threats have been used to deliberately drive away minority groups from their homes and workplaces. If the grand coalition government fails and the formal security forces remain partially under the control of the executive, these groups are ready to provide their own "protection" against repression (by other groups), and hope for settlements through violence. The government of Kenya denies the strength of the groups, but is clearly concerned about how to deal with them. The question here is even more complicated and controversial, since the political elites are often claimed to have been participating in the organization and funding of these groups.

and historical injustices in order to take forward related reforms and to give people hope on more equal power sharing between the ethnic groups.

High expectations were vested in the coalition government: it was expected to deliver stability, a new constitution, land reforms, peace and security and national reconciliation. However, despite this seeming reconciliation between the different parties – and particularly between the political elites of the two main protagonists, the situation across the country remains tense. The collaboration between the various stakeholders at the political level has turned out to be difficult. During its first year, the grand coalition government has failed to deliver most of the reforms expected from it, and to bring people (and peoples) together. It still appears that there are two governments in place, one pushing forward and the other pulling backward. Kenyans are increasingly dissatisfied with the GCG, and are more insistent in their request for truth and justice (African Development Bank 2008; APRM 2008; TI 2009).

The result is that Kenya remains politically feeble, institutionally and ethnically divided and thus a fragile state.⁴ *First*, the distrust between the different ethnic communities remains; *second*, the ordinary citizenry is now more and more openly starting to question the motives of the political elites; *third*, the political leaders are now arguing both between and within the different sides of the coalition. Both sides of the coalition are already looking forward to the next general elections in 2012, and strategizing for the future rather than dealing with the burning issues at hand.

However, ethnic divisions, the loss of public trust, and the sense of injustice in Kenya go much further back than the last general elections. Kenyans are demanding now – as they have done for decades – for a new “social contract” that deals exhaustively with ethnic imbalances, past injustices and persistent socio-economic disparities (NEPAD/APRM 2006, 2008).

⁴ According to OECD/DAC principles, the criteria for fragile states are their poor governance, restricted administrative capacity, chronic humanitarian crisis, persistent social and political tensions, violence, and a history of civil wars – all this resulting in violent conflict, organized crime, migration and drug trafficking. All, but open civil wars have been present in post-independence Kenya.

Post-conflict Justice and the Social Contract Framework

In Kenya, as in many other African countries, emerging conflicts have their roots in injustices of the past. On the one hand, the colonial divide-and-rule strategy, and on the other post-colonial nation building within arbitrarily contrived borders that failed to properly deal with the region's ethnic diversity, cultivated deep-seated ethnically based mistrust and inequalities. For cultural and individual self-preservation, people learnt to support "their own," and to distrust "the others."

In most conflicts, greed and grievances relating to existing injustices are the main causes of violent clashes. Consequently, it is often claimed that the creation or restoration of justice must be the most important goal of post-conflict reconstruction (Addison and Bruck 2009, 15-30). Indeed, it is vital to acknowledge that any social contract that follows a conflict and is the foundation for sustainable peace must aim at a common vision of social justice. However, we too often look at the concept of justice from a merely technical point of view, as a rapid fix to overcome war. Such a perspective relates the notion of "peace" to "security," so that "lack of violence" replaces the wider dimension of "social justice" with the concepts of "law and order" (Hellsten 2009, 75-97).

Restoration of sustainable peace and national harmony, however, does not mean merely establishment of order, with institutional procedures and mechanisms of justice. In a conflict situation and particularly during post-conflict reconstruction, the concept of justice has much wider moral, social, and economic dimensions that have to be taken into account if the goal is to find a normative direction that can offer a way to lasting social harmony, national unity and a stable state. This means that the concept of justice in a post-conflict context needs to be considered in relation to local social ethics, ethnic relations, historical circumstances as well as traditional and international values (Addison and Murshed 2003; Hellsten 2009).

However, the traditional theoretical approaches to social contract tend to focus strictly either on "backward looking" or "forward looking" concepts of justice. A backward looking concept of justice deals with corrective elements of justice by focusing on retribution and

reparation, and is thus concerned with the issues of accountability, punishment for and compensation of the offences committed (Nozick 1983). The forward looking concept of justice, on its part, examines how to find impartial processes and arrangements that can bring about social justice in a manner that prevents conflicts in the future. It focuses particularly on impartially enforcing the rule of law, and more equitable (re) distribution of public resources, including political power and public offices (Rawls 1971, 1993). If we want to make a social contract to work in reality, it is essential to realize that the concept of justice reaches both directions – to the past and to the future. Thus, when justice is discussed in pre-conflict, conflict and post-conflict situations, we have to be aware whether we are referring to a backward- or forward looking concept of justice, or a combination of both.

Various organisations and commissions in Kenya are “looking for the Truth,” investigating different types of violations of rights and entitlements in relation to the past injustices.⁵ While this is important, focusing merely on a backward-looking concept of justice can also be problematic in achieving sustainable peace. Historically, biased and unequal distribution of resources and consequent socio-economic disparities in Kenya – and particularly the injustices related to the ownership and allocation of land – are obvious and need to be dealt with. However, it is difficult to undo all the earlier wrongs in a manner that does not punish the innocent and hence create further grievances. Neither will it be easy to find a way to settle the demands of collective and community rights against those of individuals, particularly in the issues of land ownership. Internally displaced people are of particular concern in this context. The quest for truth and restitution has to go hand in hand with a united forward-looking national agenda, and the

⁵ The African Union Panel of Eminent African Personalities and the Kenyan mediation team recommended setting up various Commissions to deal with the issues of truth and justice, such as the Independent Review Commission (IREC) on the weaknesses of the election processes, and the Commission of Inquiry on Post-Election violence (CIPEV). There is also the Act to set up The Truth, Justice and Reconciliation Commission (TJRC). Furthermore, civil society organizations are also persistently demanding an investigation into the truth concerning past and recent injustices.

strengthening of the impartiality of state structures and services (APRM 2006, 2008).

In order to achieve national unity, public trust and sustainable peace, it is important to include both dimensions of justice into reconstruction and reconciliation: correcting the past injustices – as well as looking forward in building a more inclusive and equal society in the future. The backward looking elements of justice are important, because if people's grievances are not properly handled, the deals on power sharing reached at the top, between the rivalling political elites, will not be considered legitimate by the grassroots. It must be remembered that in many cases the attempts to reconstruct peace and harmony by "top-down social contracts" have resulted in unstable and weak states, which, for their part, have collapsed again. Examples could be taken from Somalia and the Democratic Republic of Congo (Addison and Murshed 2003).

Kenyans have been frustrated by the authoritarian political system based on "stick-and-carrot" policies. The citizenry voted across ethnic lines in the 2002 elections, hoping for a radical change in the governance style, and a more widely legitimized political leadership. However, while the democratic space appeared to increase after the 2002 elections that brought president Mwai Kibaki to power, the tribalism, cronyism, favouritism, and nepotism remained in political practice. The out-dated constitution and governance structures that gave almost absolute power to the presidency appeared to pull the new ethnically and politically "rainbow" government to the old networks of corruption. As the old saying goes, power corrupts, and absolute power corrupts absolutely: as time went by the old, often economically based, ethnic hostilities started to (re) emerge.

Today Kenya can be seen as a country without strong state institutions and fully legitimized political leadership. In addition, ethnic relations remain tense and violent clashes are possible. The power sharing deal works inefficiently, and the future of the GCG is uncertain. New ethnically based political alliances are already surfacing. Warnings that the next elections could lead to even worse violence if the long-term injustices are not dealt with have not taken the reform agenda forward. On the corruption front, too many central figures on both sides of the political divide have been implicated in scandals for

anyone to seriously take Kibaki's 2002 election promise on "zero tolerance against corruption."

Ethnicity, Patrimonialism and "Äfro-libertarianism"

While negative ethnicity played a central role in the violence during the campaigning as well as after the 2007 elections, the political framework is more complex than mere issues of communal or cultural identity. It has its roots in persistent inclusion and exclusion, usually based on ethnic divisions, power struggles and biased (re) distribution of public resources. This has created structural injustices and long-term socio-economic disparities. Historically, bad governance has gradually created a very unequal society that has public trust neither in the impartiality of the state institutions, nor in those who are holding the highest offices (APRM 2009). In fact, Kenya is now a class society in which the political elites hold the power as well as vast fortunes, while the people in the grass roots often survive below the poverty line. What is worse, the emerging middle class focuses more on business and improvement of their own quality of life than on changing the system to be more accountable and equitable to all.

Even the violence after the 2007 elections is not a unique phenomenon in Kenya. Since the establishment of a multi-party system in 1991, Kenya has witnessed violent conflicts during election times. This violence is linked to long-standing grievances, and the failures of governance that run deeper than mere electoral politics. Kenya has a history of extensive corruption and systemic abuse of office by public officials that has resulted in a situation in which encouraging statistic about economic growth co-exist with depressing figures of poverty (approximately a half of the population still lives on less than two USD a day). Political contexts have become all the more charged because of what is at stake: those who achieve political power benefit from widespread abuses of office, irregular acquisition of land, the corrupt misuse of public financial resources and politically motivated manipulation of ethnicity and, in general, the culture of impunity (APRM 2006, 2008).

All the above mentioned forms of bad governance occur at the expense of groups that are out of – and outside of – power at a

particular moment. Besides political manipulation of ethnicity, the socio-economic disparities result in tensions between different groups, increasing distrust in the government, which remains partisan and self-interested, but maintains power with the support of the leaders' kin. Political elites use ethnic identity, encouraging an "them-against-us" mentality, thereby diverting attention from the real problems of governance (See also KNCHR 2008 on ethnic hate speech and ethnic agitation; Hagg and Kabwanja 2007 on the role of ethnic identity in a conflict). This situation could be dubbed as "Afro-libertarianism." This refers to a politico-economic setting which I have in another context labelled as "libertarian communitarism" (Hellsten 2008, 155-169). "Afro-libertarianism" could be described as a mixture of African communitarian cultural traditions and patrimonial hierarchies integrated with the Western individualistic politico-economic framework. In the context of Afro-libertarianism, the self-interest of a rational profit maker of classical (or neo-) liberalism is set in the context of communitarian traditional solidarity, with social duties and networks.⁶ Communitarian solidarity creates biased loyalties, where neo-liberalism calls for market rationality, but the political authority is still based on patrimonial relations. Here patrimonialism refers to an authority relationship in which the leader controls an administrative staff selected from his relatives, and based on personal loyalty to him. Through this administrative apparatus the sovereign compels obedience from subjects, rather than persuading compliance from participating and autonomous agents. In such a social context, political rights and economic rights come together, and political power often includes also the command of vast public resources. Property rights or political rights for any group do not exist impartially or independently of the sovereign.

Communitarism and related patrimonialism within the context of globalization have created the socio-economic setting of Afro-libertarianism. This mixture of cultures sees the expansion of the

⁶ Another typical feature of "Afro-libertarianism" is that the political and business elites (often composed of the same individuals) have adopted the free-market profit-making ideology of libertarianism, while the grass-roots have to heavily rely on the communitarian solidarity in order to secure their collective benefits.

traditional social contract framework from individuals to social collectives (“communities”). In the crude Hobbesian form of social contract, only individuals were understood to sign the agreement for their *personal* self-preservation (Hobbes 1996). In sharp contrast to the Hobbesian framework, in the Afro-libertarian context we have not only individuals, but also groups of people who do not trust each other, but need to agree on some central authority in order to move away from “the state of nature” characterised by continuous war of everyone against everyone.⁷ In this collective context, however, the authority that in the Western liberal tradition is granted to the independent individual sovereign is now kept by a particular (ethnic, tribal, regional, religious, etc.) group/community as the “social extension” of the sovereign.

With regard to the original concept of the social contract, the impartiality of the political authority is both the foundational starting value as well as the final aim to be realized. However, as the communitarian critics of individualist social contract theory have noted, the subjects of social contract thinking are not autonomous individuals but people who are always tied to their circumstances, historical, social and cultural contexts (see for example Walzer 1980, 1983; MacIntyre 1984), and thus, the original starting position for the contract fails to be neutral.

In many African countries, not only are communal ties, responsibilities and expectations strong, but also the whole political culture is set within the context of communitarian traditionalism integrated with globalization with Western influence. Old values and demands of communal solidarity are mixed with the principles of self-interested market libertarianism that aims for the maximum and immediate personal and economic benefits, and creates strong “old boys networks” and other communal sub-national loyalties. In such a context, neither the sovereign nor its subjects are autonomous or neutral. Consequently, the legitimacy of the state tends to remain superficial. The state is not built as neutral, and the government (and the individuals in it) favour their own kin. As long as the conflicts and

⁷ On the Hobbesian original social contract framework, see Hobbes 1996. On post-colonial political theory in Africa see Ahluwalia 2001, Wiredu 1996. On communitarian political theory in Africa see for example Nkrumah 1970, Nyerere 1968.

inequalities between the various communities are not resolved, the sovereign can only rule by authoritarian means (Hellsten 2008, 155-169).

In such a situation, autonomous decisions by either the sovereign or the citizenry are not possible. The result is “a double hostage situation,” in which the sovereign remains dependent on his or her ethnic support, while the electorate is under continuous pressure to support leaders from their own communities in order to expect to get at least some benefits “back home.” The famous “hostage syndrome” develops, and the victims start to team up with their capturer.

As a result of the developments outlined above, room is created for “dirty hand” politics⁸ that is the core of political realism, justifying the use even of unethical means to political gains (Cody 1991). In practice, the result tends to be a culture of impunity, and leaders learn to “get away with murder” without having to take public responsibility, because their supporters from the same communal background think that this is the only way to protect their collective interest – since if there is a power shift, the new leaders would (be forced to) use the same means to guarantee their own support. The supporters, for their part, expect handouts and other favours in exchange.⁹

The upshot is a vicious cycle of biased distribution of power and resources. The evident partiality of the sovereign and the weakness of the state lead to struggles to get one’s “own man” into the government. Even after the 2007 election crisis, the hottest debates that were tangled around the coalition government were about who gets what position, and who is left out. After the national accord between Mwai Kibaki and Raila Odinga in February 2008, the stalemate on how to share ministerial portfolios was immediate. Kibaki’s Party of National

⁸ The “dirty hands” approach to governance refers to the acceptance of the use of means that might be considered unethical, when needed to reach certain political goals. For more on Dirty Hands in political ethics – and the conflict between idealistic and realistic political ethics – see Coady 1991.

⁹ In Kenya many people go directly to political representatives from their regions to ask for favours and business deals. Impartial appointments or contracting becomes very difficult, because people coming from a certain region or ethnic group expect to be favored by “their man” in the office – and they anticipate the best deals to be given to them and not to anyone from elsewhere – no matter how much more cost-effective or fairer these deals would be.

Unity (PNU) and Odinga's Orange Democratic Movement (ODM) found it hard to share political power, cabinet as well as civil service posts, equally. Instead of focusing on the distributional issues and social justice that could heal, unite and reconcile the country, the different sides continue to argue about balance in official positions.

This situation also partly explains why the grand coalition has had a difficult time finding its political direction. The coalition government is bloated to inefficiency. From 222 MPs, 94 altogether are in the government that has 42 ministers and 52 assistant ministers, including the President, Prime Minister and two deputy prime ministers. This extravagance was rationalized (though not logically and ethically justified) with the demand of "all-inclusiveness." Those who did not make it to the government fiercely complain that they – and their respective communities – had been side-lined, and insist on forming a "grand opposition," despite the fact that other members of their political coalitions are already in the government.

This principle of "all-inclusiveness" has come to cost the taxpayers extensively. Despite the government's plea for external support for the reconstruction priorities and humanitarian aid, political elites are ready to spend millions of Shillings on the new ministerial posts, while the country is suffering from famine and needs more funds for health care, education and other basic state services.

The ODM side has openly complained that it has been short-changed in the power sharing deal, but there is a danger that if *The National Accord* were to be renegotiated, the whole coalition could fall apart. The increasing dissatisfaction of the citizenry is also a factor that the CGC cannot risk, and this also restrains discussions on early elections (APRM 2008, TI 2009).

How the "Prisoner's Dilemma" in a Collective Context Leads to an Anti-reform Agenda

In an individualist context of the Hobbesian model of social contract, individuals may overcome conflicts and constant war by surrendering some of their "unlimited natural rights" to the political control of the neutral sovereign. However, in the collectivist context of Afro-libertarianism, individuals, including the sovereign, are not

neutral. This means that since the sovereign's authority is seen – almost inherently – to be partial/partisan, it is more difficult to find an agreement on acceptable rulers. Thus there is either a quick rotation of power, or the power is held onto by force and with “dirty hands” tactics in accord with realistic neo-Machiavellian politics and self-interested pursuits of the libertarian economic rationalism.

In the Kenyan case, as Kinyanjui and Maina (2008) have observed, the free market economy has directly influenced ethnic relations. When the market and economic power was gradually centralized to a particular ethnic group, it further enforced the ethnic discontent and distrust. When finally the economic and political power is concentrated in a particular region and ethnic community, the rebellion for more democracy and resource sharing is likely to break out, particularly during the elections period.

In such a setting, any contractual agreement remains weak. Since it is the different (interdependent) groups – rather than autonomous individual citizens – that are represented in the government, the result is overwhelming pressure on whoever has the political authority. The ones in power tend to use all means available to guarantee continuity of the benefits to their supporting groups, instead of focusing on the public good. Simultaneously the groups outside and without power are in constant “ethnic opposition,” just waiting for their chance to take over the power and turn the tables around. Again we see “pseudo-democracy” at work. Democratic processes provide the stage, but the real battles are fought behind the scenes. People participation is used manipulatively to fight the real battles on the ground when political support is needed, or where there is need to show once might in front of the others, as the Kenyan situation has shown us once again. Simultaneously the political leaders and elites make their own deals with each other in a manner that will personally benefit them most in any given circumstances.

As Kwasi Wiredu (1996) has explained, there is a crucial distinction between decision by majority vote and decision by consensus attained through a reasoned deference to the position of a majority. The first is decision in spite of the minorities; the second is one inspired by the majority. In the first case, opposition survives decision; in the second, decision incorporates at least the goodwill of opposi-

tion. In Kenya, the formation of the grand coalition was a consensus solution that brought together the interests of the politicians from both sides of the divide. However, as to whether or not it really brought together the interests of the people is a debatable issue.

In Kenya, politically-related violence is often blamed on multipartism. However, the problem is in lack of political direction and political commitment. Political parties have been mere vehicles to public positions, without any substantive national and/or developmental agenda, values or vision that could bring different ethnic groups to work seriously together. The fact that parties are more ethnically than ideologically based allows political manipulation of ethnicity in pursuit of self-interest. Where there is no state impartiality or effective state services, in people's minds government becomes the almighty political power that is expected to deliver benefits and services. Partial and partisan government in a country that lacks efficient state structures maintains socio-economic disparities. In this type of patrimonial states, leaders learn to believe they are above any ethical or moral demands – and in general the rule of law. Unfortunately, it is partly the citizenry itself that allows the culture of impunity to continue in order to ensure that their “own kin” stay in power.

Charles Khamala (2007) notes that in a typical African context, self-interested rationality is set in a collective milieu, and this creates a different type of prisoner's dilemma scenario from the kind associated with individualistic Western societies¹⁰. In the African context, individuals who act rationally to advance their own self-interest will together sacrifice individual autonomy for the greater good of their restricted communities. In Kenya, many voters experience vicarious

¹⁰ The “prisoner's dilemma” is in the area of game theory, and describes a situation in which local optimization leads to the worst possible outcome globally: Two prisoners are questioned separately about a crime they committed. Each may give evidence against the other, or may say nothing. If both say nothing, they get a minor reprimand and go free because of lack of evidence. If one gives evidence and the other says nothing, the first goes free and the second is severely punished. If both give evidence, both are severely punished. The overall (globally) best strategy is for both to say nothing. However not knowing (or trusting) what the other will do, each prisoner's (locally) best strategy is to give evidence, which is the worst possible outcome (Black 2005).

kinships with their elected members of parliament, and tend to elect clansmen or other relatives to articulate or represent ethnic interests at national fora. No competent candidate from a smaller ethnic group, community or clan is likely to emerge victorious, unless coalitions between the smaller ethnic groups are made. The merits of the candidates' political ideology, agenda or programme remain of secondary interest at best, and downright irrelevant at worst. This creates a political context in which ideologies or planning for a comprehensive national political agenda become futile.

While the ethnic criteria used to select the individual's best interests appear irrational from the perspective of Western individualistic voting theory, in the African electoral context a voter from a large ethnic group or clan lives well by not asking how his or her vote will provide the maximum impact to himself/herself, but rather by calculating how the collective interest might best be achieved by a tribalized leader. Voting patterns thus usually reflect candidates chosen from big ethnic groups or regions, who are considered more likely to advance the parochial rather than abstract, wider national interest. Political coalitions are formed on the same principle, by bringing together ethnic groups that cannot manage to get enough loyalty votes within their own ethnic support base, but need other smaller communities to expand their scope of ethnic support. As a result, formal development policies are likely to be subordinated to the demands of the patronage politics of rewarding relatives or members of their own – or supportive – ethnic communities with public offices and resources in order to maintain their power base. This, for its part, entrenches and perpetuates patterns of historical injustices, and effectively resists any reforms that are aimed at building impartial state structures (Khamala 2007, 9).

In general, Kenya's "winner-takes-it-all" system provides the executive with almost absolute power and full control of public institutions, including Parliament. While almost everyone recognizes the flaws of this system, change is hard to come by, and the reforms are usually done in piecemeal amendments, because the existing legal and institutional framework has been gradually (re) constructed by the self-interested leaders in order to guarantee them absolute, sovereign power. Thomas Hobbes' observation that "Covenants with-

out swords are but words” applies to the Kenyan situation. Memoranda of Understanding on power sharing (between individual leaders) are easily disregarded after the winner of the elections is clear. Thus, political coalitions tend to be short-lived. We need only to recall what happened when president Mwai Kibaki came to power under the National Rainbow Coalition (NARC) in the 2002 elections against the former president Moi’s long-time ruling party KANU’s candidate Uhuru Kenyatta. The MoU had promised that the new coalition would urgently deliver a new constitution, that would share executive powers in a manner that would give the rivalling ethnic groups more equal shares. This never happened, and the ethnic tensions and distrust built up among the political elites, as well as among the ethnic communities across the country.¹¹

Feminist Critique and Gender in Post-conflict Reconstruction

The top down social contract approach such as the pre-2002 Elections MoU and the National Accord after the botched 2007 elections between the Kibaki and Raila camps also tends to ignore social context and grass-root concerns. In addition to this, it also easily disregards gender inequality. Women have in theory and in practice been marginalized in political life, and violations of women’s rights are often ignored or belittled.¹² In Kenya this is also the case, yet in general women are the ones who suffer the most in and from conflicts. This happens even during times when the conflicts are not yet full-blown violence, but appear in the form of disparities and structural injustice. In a libertarian communitarist context, women do not have

¹¹ Hobbes in *Leviathan* (1651, chapter 17) “Of the Causes, Generation, and Definition of a Commonwealth” explains *why* and *how* individuals join together in civil states (or commonwealths in his terms): For the laws of nature, as justice, equality, modesty, mercy, and in sum, doing to others as we would have done to, of themselves, without the terror of some power to cause them to be observed, are contrary to our natural passions, that carry us to partiality, pride, revenge, and the like. And covenants, without the swords, are but words, and of no strength to secure a man at all.

¹² Violence against women is not just a byproduct of war, but often a deliberate military strategy, with women particularly targeted in ethnic cleansing campaigns, as occurred in genocides in Bosnia and in Rwanda, for example.

a serious place in the political scene. They can and are used in political games, but in the end they tend to remain at the losing end. Women are in double jeopardy: their rights are often violated due to their gender *and* due to their ethnicity, political opinion, or social status (Zuckerman and Greenberg 2004).

The paradox is that in introducing gender equality as part of a peace agreement, women's situation in society may in fact deteriorate rather than improve. Women's rights might be "justifiably" suppressed in the name of the common good of their own community or in the name of preserving traditional values. The attempts to introduce or support gender mainstreaming might even lead to (violent) resistance by traditional societies (and this resistance might even come from women with a traditional view of their own gender-based roles). In Kenya the role of women tends to be undermined by ethnic concerns. While there are now more women in parliament than before¹³, the leadership is still firmly in the hands of men. Women are also used by the ethnically based political parties – to "do the dirty job," or collect the ethnic and maybe also some female support, though many women still do not vote for women. If a woman wants a political job she needs to be loyal – not to her "sisters," but to her masters in the political game plan.

Leaders motivated by their own personal interests may present an argument that in a post-conflict situation, "justice" has to be introduced step by step, by keeping the gender dimension for a later date, after national-level violence is reduced and national unity is achieved. This creates a yielding duty to gender equality. Impartiality and justice, however, cannot be introduced in a partial fashion. If the reconstruction of the society is to be based on justice, all types of structural violence should be taken into account at the same time. Failing to do so prevents comprehensive reform from a forward-looking perspective of justice. Women's rights should not be based on demands that ask "gender equality" to wait until other types, pur-

¹³ In the 2007 Kenyan elections, 15 women got elected and 5 nominated to the parliament of 222 MPS – an improvement from the 2002 elections, in which only 10 got elected and nominated. Still Kenya is far behind in women's participation in politics in the region, with its under 10% female MPs, whereas Uganda and Tanzania are at 30% and Rwanda over 50%.

portedly more pressing aspects of justice are realized. In practice in many places, this has led into a situation in which all other constitutional rights and freedoms come first, with the struggle for gender equality yielding to the pursuit of “religious freedom,” “freedom of negotiation,” “freedom of association,” “freedom of expression,” and/or ethnic inclusion. This means that the realization of all these rights and freedoms requires that the promotion of women’s equal rights be set aside – if it would offend religious minorities, cultural traditions, etc. Women’s rights and gender equality then has to yield to other “human rights” – and to wait for a more suitable and less explosive time to be introduced to the post-conflict society. This cannot provide for inclusion of the disadvantaged, which entails full impartiality and respect for the rule of law in general. We need to focus on the human potential to be actualised – even, and particularly, in the situation in which some groups appear less advantaged than others (Eade 2004; Keating and Knight 2004).

If we paid more attention to the struggles of women, and to the feminist critique pointing out these, we could learn that the concept of justice has much wider scope than is often recognized. Justice means admitting as well as correcting structural injustices, whether they be social, cultural, ethnic, institutional, political or gender based. Feminist approaches to peace note that the traditional social contract thinking focuses on “negative peace,” that is, the absence of violence and warfare, while, as Betty Reardon (1996) explains, the feminist conception of peace and security focuses more on “positive peace.” “Positive peace” is a concept presented originally by Johan Galtung (1975), and means an absence of structural violence, which is much more than merely a laying down of arms. Structural violence involves exploitation, penetration of the autonomy of those at the bottom of society, fragmentation and marginalization. The way in which power relations – including gender – are configured at the end of any conflict will affect post-conflict reconstruction and the likelihood of sustainable peace, impartiality and participation in making and realising a truly inclusive social contract.¹⁴

¹⁴ Many of the countries experiencing actual or latent conflicts have never experienced “development” in the sense of social justice, Democratic Republic of Congo being a prime example of such a situation. Societies in these countries can-

In Kenya, the quest for positive peace would mean that we need to understand how and why certain communities (ethnic, women, religious, disability, etc.) have been marginalized, and to whose advantage. In other words, it actually explains the Truth in quest for justice. However, it also insists that we recognize that this marginalization is in reality not based on certain characteristics of certain communities or individuals, or due to a lack of some other characteristic that is used to claim that they do not have “leadership qualities,” but rather that particular groups of people use various kinds of “rationalizations” as justification to keep the power exclusively to themselves.

Conclusion

In Kenya, members of various communities demand for “justice” in its various forms. However, the idea that justice needs to promote impartiality is not easily understood. Since political unrest is partly due to past injustices, the root of true reconciliation is assumed to be in “righting the wrongs.” The real problem is the lack of shared visions and values entailing forward-looking strategies for social justice that promotes public good and national unity, instead of relying on sub-national loyalties. Thus the nation remains divided, and the state weak. There is no public trust in partisan and self-interested governments, or in inefficient state structures with often (ethnically and/or regionally) biased (re) distribution of resources, corruption, waste of public funds, and unequal service delivery. Therefore, hand in hand with finding out “the truth,” there is need for

not return to “democracy” with the help of a social contract, because democratic institutions need to be grounded in local realities, and in order to be fully participatory must evolve over time and cannot be merely set from above. However, external agencies involved in peace-making and reconstruction tend to focus not on local capacities, but on their own interventions (what can they do to prevent conflict and enhance development as they see it?) In many cases, these agencies do not appreciate the impact that the role of gender relations has on “the ability of traumatized, poor, and ill-educated populations to play their full role in the post-conflict reconstruction.”

a comprehensive plan for forward-looking impartial distributive justice, as well as the rule of law that will treat the citizens equally. The challenge is to get people to believe that it is worthwhile to work together towards a shared national agenda, rather than for narrow communal benefits. The focus has to be in removing structural inequalities and on positive peace, which requires both institutional reforms and new attitudes and commitment to public ethics, as well as a resolute fight against corruption. Achieving sustainable peace is about building a strong, impartial and “election-proof” state that provides for all its citizens equally, not about a government that tries to embrace all rivalling factions of society – or merely the ambitions of the political elite.

In order to give people ownership in the reconstruction of an impartial framework for social justice, there is need to pay more attention to the bottom-up approach to peace-building. Only then will we foster a climate of interrelated understanding among ethnic, cultural and religious divides from which violence has stemmed in the past, and redirect people’s focus towards social justice and the shared public good. This can reduce the tendency to identify “the evil other” which has shaped the consciousness of many communities and nations, thereby damaging peaceful coexistence in so many places.

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Ubuntu and Social Contract Theory

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Introduction

The traction and attraction of social contract theory in contemporary discourses in politics, political theory and political philosophy can be said to have largely come about from the writings of John Rawls, particularly his 1971 *A Theory of Justice* – a work of political philosophy and ethics which attempts to solve the problem of distributive justice through the mechanism of social contract.¹ Employing the device of social contract to explain and resolve issues of distributive justice makes social contract theory an important account both in political philosophy and ethics in respect of norms and obligations. It is in this sense that social contract theory can be considered a normative theory, i.e. an account that prescribes obligations and certain norms of actions and attempts to provide a justification for those obligation and norms.

Like social contract theory, Ubuntu is a normative account, which prescribes obligations and certain norms of actions as well as attempt to justify them. Ubuntu is not social contract theory. Ubuntu is concerned with what it is that makes one human or a person and what obligations arise from this understanding of personhood that circumscribes conduct. In this paper, we want to examine Ubuntu within the context of social contract theory. There is a couple of motivation for doing this. First, Ubuntu has been discussed extensively in connections with a host of different topics and issues.² No one (as far as

¹ John Rawls's *A Theory of Justice* was originally published in 1971 and revised in 1975 (for the translated editions) and 1999.

² For some discussion of Ubuntu in connection with various topical issues see Luchien Karsten and Honorine Illa, "Ubuntu as a Management Concept," *Quest: An African Journal of Philosophy* (African Renaissance and Ubuntu Philosophy Special Issue), P. Boele Van Hensbroek, ed. (2001), 15(1-2): 91-112; M.I. Goduka and B.B. Swadener, *Affirming Unity in Diversity in Education: Healing with Ubuntu* (Cape Town: Juta & Co, 1999); F. De Beer, *Ubuntu and Community Development* (Tshwane, Pretoria: Ubuntu School of Philosophy, 1995); E.D. Prinsloo, *Ubuntu*

we are aware) has attempted to discuss Ubuntu in connection with social contract theory.³ We believe that there are interesting connections and seek to fill that gap. Second, Ubuntu is presented both as a normative standpoint as well as a lived philosophy of people in sub-

from a Eurocentric and Afrocentric Perspective and its Influence on Leadership (Tshwane, Pretoria: Ubuntu School of Philosophy, 1995); E.D. Prinsloo, "Ubuntu Culture and Participatory Management," P.H. Coetzee and A.P.J. Roux, eds., *Philosophy from Africa: A Text with Readings* (Johannesburg: ITP, 1998), pp. 41-55; Mfuniselwa J. Bhengu, *Ubuntu: the Essence of Democracy* (Cape Town: Novalis Press, 1996); Lovemore Mbigi and J. Maree, *Ubuntu: The Spirit of African Transformation Management* (Randburg: Knowledge Resources, 1995); Johann Broodryk, *Ubuntuism as Doctrine for the Ordering of Society*, Tshwane, Pretoria: Ubuntu School of Philosophy, 1994); Jabu Sindane, *Ubuntu and Nation Building*, Tshwane, Pretoria: Ubuntu School of Philosophy, 1994); Penny Enslin and Kai Horsthemke, "Can Ubuntu Provide a Model for Citizenship Education in African Democracies?" *Comparative Education* (November 2004), 40(4):545-558; Dirk Louw, "Power Sharing and the Challenge of Ubuntu Ethics," <http://uir.unisa.ac.za/bitstream/handle/10500/4316/Louw.pdf> 9; (accessed June 3 2017); Thaddeus Metz, "Human Dignity, Capital Punishment, and an African Moral Theory: Toward a New Philosophy of Human Rights," *Journal of Human Rights* (2010), 9(1):81-99; Thaddeus Metz, "Ubuntu as a Moral Theory and Human Rights in South Africa," *African Human Rights Law Journal* (2011), 11(2):532-559; Thaddeus Metz "African Conceptions of Human Dignity: Vitality and Community as the Ground of Human Rights," *Human Rights Review* (2012), 13(1):19-37; Edwin Etieyibo (2017a) "Ubuntu, Cosmopolitanism and Distribution of Natural Resources," *Philosophical Papers*, March 46(1):139-162; Edwin Etieyibo (2017b) "Moral Education, Ubuntu and Ubuntu-inspired Communities," *South African Journal of Philosophy* 36(2); Edwin Etieyibo (2017c) "Ubuntu and the Environment," Adeshina Afolayan and Toyin Falola, eds., *The Palgrave Handbook of African Philosophy*, Palgrave Macmillan.

³ The attempts to contextualize Ubuntu within and around political theory and political philosophy in the literature are limited to a few issues such as: leadership, power sharing, the law and human rights. For some attempts at discussing Ubuntu in connection with these issues see E.D. Prinsloo, *Ubuntu from a Eurocentric and Afrocentric Perspective and its Influence on Leadership*, Tshwane, Pretoria: Ubuntu School of Philosophy, 1995; Dirk Louw, "Power Sharing and the Challenge of Ubuntu Ethics," <http://uir.unisa.ac.za/bitstream/handle/10500/4316/Louw.pdf> 9; Accessed June 3 2017); Metz, "Human Dignity, Capital Punishment, and an African Moral Theory: Toward a New Philosophy of Human Rights"; Metz, "Ubuntu as a Moral Theory and Human Rights in South Africa"; Metz, "African Conceptions of Human Dignity: Vitality and Community as the Ground of Human Rights."

Saharan Africa. On this view, particularly the latter point about a lived philosophy, Ubuntu is taken to be endogenous to the people and to belong to them. Our attempt here will afford the context to compare an autochthonous normative system with relevant features of the social contract theory rooted in the Western philosophical tradition. Third, in doing the required comparative work, we wish to demonstrate that although these two normative systems diverge in important ways, they, nevertheless, have more in common than we might have expected.

Throughout, what we aim to do in this paper is to explore the sorts of connections that may be taken to exist between Ubuntu and social contract theory. In particular, we are interested in exploring certain topics and issues that are central to social contract theory and which are implicated in Ubuntu – issues such as mutual advantage, consent, agreement and negotiation.⁴

What is Ubuntu?

Ubuntu literally means “human-ness.” At its core is the concept of “humanity” or “human-ness” or “personhood.” Using this core as the point of departure for conceptualizing Ubuntu one will say that the general ways of rendering the concept includes expressions such as “humanity towards others,” “a universal bond of sharing that connects all humanity,” “human existing with other humans,” “human embeddedness in humanity.”⁵

⁴ We must hasten to point out that even though we are suggesting that mutual advantage, consent, agreement and negotiation are salient to both Ubuntu and social contract theory, we are not thereby suggesting that Ubuntu is the same or similar to social contract theory. We do hope that our discussion in this paper of mutual advantage, consent, agreement and negotiation will show the sense in which Ubuntu is different from social contract theory and the connections between them.

⁵ For some of the literature on Ubuntu see the following in addition to the ones in footnote 2. N. Mkhize, “Ubuntu and Harmony: an African Approach to Morality and Ethics,” R. Nicolson, ed., *Persons in Community: African Ethics in a Global Culture* (Scottsville: University of KwaZulu-Natal Press, 2008), pp. 35-44; Thaddeus Metz (2007), “Toward an African Moral Theory,” *Journal of Political Philosophy*, 15(3):321-341; Mogobe Ramose, *African Philosophy Through Ubuntu*,

Linguistically, Ubuntu is an Nguni-Bantu term, which can be broken down into *ubu* and *ntu* and which respectively broadly translate to “being” and “person.” In some Bantu languages such as Zulu, Sotho and Chewa various expressions have been used to capture the relationship between the *ubu* and *ntu*. In Zulu we have *umuntu ngumuntu ngabantu*, in Sotho *motho ke motho ka batho Babang* and in Chewa where *Umunthu* is the word that translates the term *ubunthu* we have *ali ndi umunthu*.⁶

There are cognate terms and expressions that exist across other societies in sub-Saharan Africa which are similar to those of the Zulu, Sotho and Chewa. On the basis of these expressions the following aphorisms of Ubuntu are suggested:

I am because we are, and since we are, therefore, I am.⁷

revised edition (Harare: Mond, 2002); Dirk J. Louw, “Ubuntu and the Challenges of Multiculturalism in Post-Apartheid South Africa,” *Quest: An African Journal of Philosophy* (African Renaissance and Ubuntu Philosophy Special Issue), P. Boele Van Hensbroek, ed. (2001), 15 (1-2):15-36; Van Binsbergen Wim, “Ubuntu and the Globalization of Southern African Thought and Society,” *Quest: An African Journal of Philosophy* (African Renaissance and Ubuntu Philosophy Special Issue), P. Boele Van Hensbroek, ed. (2001), 15 (1-2):53-89; Kgalushi K. Koka, *Ubuntu: People’s Humanness* (Tshwane, Pretoria: Ubuntu School of Philosophy, 1997); E.D. Prinsloo, *Ubuntu: In Search of a Definition* (Tshwane, Pretoria: Ubuntu School of Philosophy, 1994); E.D. Prinsloo, *The Ubuntu Concept of Caring* (Tshwane, Pretoria, Ubuntu School of Philosophy, 1997); Johann Broodryk, “Is Ubutuism Unique?,” J.G. Malherbe, ed., *Decolonizing the Mind* (Pretoria: Research Unit for African Philosophy, UNISA, 1995), pp. 31-37; Johann Broodryk, *Ubuntuism: Philosophy of the New South Africa* (Tshwane, Ubuntu School of Philosophy, 1988); Lovemore Mbigi, *Ubuntu: A Rainbow Celebration of Cultural Diversity* (Tshwane, Pretoria: Ubuntu School of Philosophy, 1995); W.J. Ndaba, *Ubuntu in Comparison to Western Philosophies* (Tshwane, Pretoria: Ubuntu School of Philosophy, 1994); Lesiba J. Teffo, *The Concept of Ubuntu as a Cohesive Moral Value* (Pretoria, Ubuntu School of Philosophy, 1994); Lesiba J. Teffo, “Towards a Conceptualization of Ubuntu” (Tshwane, Pretoria: Ubuntu School of Philosophy, 1994).

⁶ *Ali ndi umunthu* literally means morally sound person.

⁷ John Mbiti, *African Religions and Philosophies* (New York: Doubleday, 1970), p. 141.

Living is ultimately the discovery and realization of –ntu (person) and this is only accomplished through other –ntu (persons).⁸

An individual is a human or person or exists as a human in virtue of the very existence of other persons.

This way of understanding Ubuntu places the idea in the category of a normative theory in ethics and political philosophy insofar as it is concerned with what it is that makes one human or a person and the norms and obligations that come out from this and the way these norms and obligations can be understood to circumscribe the conduct of individual and social institutions. Mogobe Ramose provides us one way of thinking of these norms and obligations.

[For Ubuntu, to] be a human being is to affirm one's humanity by recognising the humanity of others and, on that basis, establish *humane relations* with them. ... One is enjoined, yes, commanded as it were, to actually become a human being.⁹

To say that Ubuntu commands one to form humane relations is to say that it obliges a person to behave and act in certain ways. And, as Edwin Etieyibo has argued elsewhere, one way of fulfilling this obligation, i.e. establishing humane relations with others, is both by supporting them in what they do as well as seeing oneself in their projects or simply identifying with and taking their projects as one's projects.¹⁰ This, Etieyibo has noted, is similar to Immanuel Kant's idea of supporting the rational ends of persons insofar as Kant's categorical imperative (i.e. the principle of autonomy) implies a duty to treat humanity as an end in itself.¹¹ Kant formulates this principle as follows: "For the ends of any person who is an end in himself must, if this idea is to have its full effect in me, be also, as far as possible, my

⁸ Vuselelo Ngcoya, "Ubuntu: Toward an Emancipatory Cosmopolitanism?," *International Political Sociology* (2015), 9:253.

⁹ Mogobe Ramose, *African Philosophy Through Ubuntu*, p. 52, Emphasis ours.

¹⁰ Etieyibo, "Ubuntu and the Environment."

¹¹ *Ibid.*

ends."¹² This principle requires that we treat humanity or persons as rational ends or rationally make the ends of others as our ends.

It is worth signalling that the notion of Ubuntu does not lend itself to any easy characterization. Roughly, we can identify two ways of characterising the idea. This is by no means an exhaustive list of characterisations and it is very likely that a different taxonomy might yield more than two ways of characterising Ubuntu.

For our present purposes, the first way of characterising Ubuntu involves conceptualising it as lived experience as opposed to an abstract set of principles that regulate conduct. On this view, Ubuntu as a system of norms is dynamic and may be said to be less formalistic than the social contract theory. For example, Nkondo is explicit that "ubuntu is not a system of general or abstract principles..."¹³ and Mkhize insists that we should pay attention "not to principles that have been abstracted from their context but to the phenomenological and lived experiences of the people in question."¹⁴ In addition, Ramose has suggested that Ubuntu is more properly understood as flexible and informal such that it is always responsive to and adaptable to the context in which it has evolved. The implication is that people are socialized into the experience of living out Ubuntu.¹⁵

The other way of characterizing Ubuntu involves just the opposite. Specifically, it aims to systematize the values associated with the idea of Ubuntu into a recognizable principle of right conduct and justice in the mould of Kantianism and Utilitarianism. One representative of this approach to Ubuntu is Thaddeus Metz, who distinguishes his approach as involving the development of a general principle comparable to Hobbes' egoism or Kantian respect for persons.¹⁶

¹² Immanuel Kant, *Groundwork of the Metaphysics of Morals*, edited and translated by Mary J. Gregor (Cambridge: Cambridge University Press, 1998), 4:430.

¹³ Gessler Muxe Nkondo, "Ubuntu as Public Policy in South Africa: A Conceptual Framework," *International Journal of African Renaissance Studies* (2007), 2(1): 93.

¹⁴ N. Mkhize, "Communal Personhood and the Principle of Autonomy: The Ethical Challenges," *Continuing Medical Education* (2006), 24(1): 28.

¹⁵ Mogobe Ramose, "An African Perspective on Justice and Race," *Polylog: Forum for Intercultural Philosophy* (2001), 3.

¹⁶ Metz, "Toward an African Moral Theory," p. 321.

While our aim in this chapter is not to make a case for any one of these ways of characterizing Ubuntu, the discussion below reveals that whether and to what extent the Ubuntu normative system is comparable to the social contract theory depends in part on which of these ways one prefers. Where necessary we will indicate how both ways of characterizing Ubuntu differ with regard to the comparative potential between Ubuntu and the social contract theory.

In the meantime, abstractly construed, this idea of establishing humane relations is what we will regard as engendering the norms and obligations that define the Ubuntu normative system. And insofar as these norms and obligations are generated from the notions of *ubu* and *ntu* we will take them to be endogenous to humans as well as to be imposed on individuals and in this sense need some form of justification if they are to command the acceptance of each and every one. It is this latter idea that situates and connects Ubuntu to social contract theory – both as normative theories that prescribe obligations and certain norms of actions as well as attempt to justify them.¹⁷

Defining Social Contract Theory

In broad outline, social contract theory is the view that ground moral or political obligations on some form of agreement between rational persons who are motivated by self-interest to form societies. On a more technical understanding, social contract theory is a theoretical standpoint that provides some justification for the existence of moral and political norms and obligations. In this sense, social contract theory is normative. As a normative account, it attempts to solve the problem of distributive justice by which we mean the problem of how to socially distribute goods in society and doing so in a just and fair manner.

At the basic level, the everyday commercial contract that takes place among individuals in society gives an indication of some of the issues that are at play in social contract theory. Let us take the typical written or “unwritten” contract of sale (of buying and selling of goods or services), which is captured in common law and in many customs.

¹⁷ Henceforth we will speak of the obligations and certain norms of actions that are prescribed by Ubuntu as Ubuntu norms.

A wants to buy X and she goes to B who sells X. They begin by negotiating about the price and other terms and conditions of sale. The *negotiation* may take some time, minutes, days, hours, weeks or even months. Selling X satisfies B's interest and buying X satisfies A's interest – which makes the case of buying and selling X an instance of *mutual advantage* to both parties. Once A and B have individually given their *consent* to the terms of the contract and *agreement* is struck on the relevant aspects of the sale, the contract comes to life. As is clear from this, there are lots of things that go on for this contract to be concluded, all of which works on the assumption of the rationality of the buyer and seller. It is this assumption that enable one to talk about reliance on the parties to follow through on the terms of the contract.

The example of the contract of sale helps us to isolate a number of topics which are salient for social contract theory and, as we shall demonstrate, for Ubuntu as well. These are *mutual advantage*, *consent*, *agreement* and *negotiation*. *Mutual advantage* can be taken to be the object of the contract, *consent* and *agreement* as the acceptance of the terms of the contract and *negotiation* as the process by which consent is given and agreement reached in the context of the desired outcome or object of mutual advantage. Consent, agreement, mutual advantage and negotiation are all connected to the contract insofar as (a) parties following through on the terms of the contract depend on the various dynamics that take place during the negotiation stage; (b) the contract is beneficial (mutually advantageous) to them; (c) they have consented to these terms and, (d) accordingly agreement can be said to have been reached.

Ubuntu and Mutual Advantage

As has been noted, the notion of mutual advantage is important for social contract theory. Mutual advantage is about benefits jointly accruing to each and every party that is implicated and involved in a relationship. In the context of the social contract, this idea of parties collectively benefiting from a relationship for which they are part of and have invested time and resources on is what we think John Rawls was referring to when he said that society is a cooperative venture for

mutual advantage.¹⁸ The idea of “a society being a cooperative venture for mutual advantage” is central to Rawls’ “Justice as Fairness,” in that mutual advantage connotes the idea of reciprocity built into our sense of justice, which for Rawls, extend an innate tendency that people have to “answer in kind.”¹⁹ To “answer in kind” is to accept to be part of a relationship, in this case society, on the ground that such relationship is mutually beneficial.

We have said that for Rawls “Justice as Fairness” is related to reciprocity. This is not an overreach. This is because Rawls himself at one point referred to his account of justice as “Justice as Reciprocity.” Indeed, this was the title of a 1959 essay that Rawls wrote where he initially discussed some of the substantive issues of his account of justice.²⁰ Although as Andrew Lister has noted, Rawls later took the fundamental requirement of public justifiability of political liberalism as a principle of reciprocity.²¹

The idea of fairness, of reciprocity or of “answering in kind” is in a sense similar to David Gauthier’s point about the transition of the “economic individual” to the “liberal individual” – a transition that leads to the display of tuistic bonds and value being placed on participatory activities whereby individuals take an interest in the interests of fellow contract participants and in the mutual unwillingness of not taking advantage of others.²² To simply contextualize the idea of reciprocity and justice, the idea for both Rawls and Gauthier is that to act from a sense of justice is to act in concert and consistently with

¹⁸ John Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1999a), p. 84.

¹⁹ *Ibid.* (1999), p.433.

²⁰ For a discussion of these issues in connections with his view of justice as reciprocity see Rawls, “Justice as Reciprocity,” *Collected Papers*, Samuel Freeman, ed. (Cambridge, MA: Harvard University Press, 1999b).

²¹ Andrew Lister, “Justice as Fairness and Reciprocity,” *Analyse & Kritik* (2011), 1:93-112; see Rawls, *Political Liberalism* (New York: Columbia University Press, 1996), pp. xlvi, li.

²² David Gauthier, *Moral by Agreement* (Oxford: Oxford University Press, 1986), p. 338. For a discussion of the dynamics of this transition into tuistic bonds of the liberal individual see Edwin Etieyibo, *David Gauthier’s Moral Contractarianism and the Problem of Secession*, Ph.D. Dissertation (Edmonton: University of Alberta, 2009), chapter 3, particularly section 3.2 247-260.

one's fundamental personal interest. However, acting in concert and consistently with such basic interest is to engage and interact with others (like oneself) in mutually beneficial relationship.

We have thus far highlighted two key ideas – Rawls' reciprocity and Gauthier's point about the mutual unwillingness to take advantage of others – that underpin the notion of mutual advantage. Understood in this way, the notion of mutual advantage is primarily concerned with ensuring a form of association that embodies a just and equitable society. To the extent that Ubuntu requires parties to relate positively toward others, to engage in cooperation with fellow humans, and in this sense broadly encourage solidarity, as well as collaborative and harmonious values, it is comparable to the notion of mutual advantage in the social contract tradition. Desmond Tutu summarizes some aspects of these values when he notes:

A person with Ubuntu is available and open to others, affirming of others, does not feel threatened that others are able or good, for he or she has a proper self-assurance that comes from knowing that he or she belongs in a greater whole and is diminished when others are humiliated or diminished, when others are tortured or oppressed.²³

The values of solidarity, collaboration and harmony may be seen as forming part of what we said earlier is the Kantian notion of supporting the rational ends of others and of rationally making the ends of others as one's ends.

Although we believe that the values of solidarity, collaboration and harmony in the Ubuntu framework is compatible with the notion of mutual advantage, we also recognize that there are key differences in the way these notions are employed in the Ubuntu and social contract tradition respectively. One such difference is that Ubuntu is not typically interpreted in individualistic terms whereas the idea that social cooperation is motivated primarily by mutual advantage reeks of the sort of individualism that Ubuntu advocates characteristically

²³ Desmond Tutu, "Sermon in Birmingham Cathedral," transcript published by the Committee for Black Affairs, Diocese of Birmingham (April 21, 1988), 4-5.

jettison. It is individualistic in that it represents social cooperation as a means principally to enable agents pursue their self-interested ends. In comparison, friends of Ubuntu take solidarity, harmony and cooperation with others to constitute part of what is fundamentally, as opposed to just instrumentally good. Notwithstanding the difference, however, we think that the two normative frameworks under consideration share at least one basic feature. In particular, the fact that Ubuntu is communal-centered and rests on the notion of a community, i.e., a collective society – a society that works for everyone or the “I’s” insofar as they belong to the “we” – suggest to us that the idea of mutually advantageous interactions and engagements, as envisaged by social contract theorists, is crucial to the Ubuntu system.

Put differently, our view is that although the Ubuntu framework is amenable to the idea that there are other motivations besides mutual advantage for social cooperation, including considerations of solidarity and care, and it envisages a wider range of relationships, including those with dependents that often cannot be made sense of in terms of mutual advantage (e.g. between caregiver and a person with disability), it is nevertheless the case that within the Ubuntu system mutual advantage for the parties involved is a key motivation insofar as there are expectations of reciprocity between agents and that agents ought not to take advantage of others.

Ubuntu, Consent and Agreement

Consent is important to social contract theory; and so is agreement. Consent refers to one accepting something, say accepting the terms of the contract, while agreement, which can also mean consensus refers to parties coming to the same decision on an issue or say the terms of the contract. Given that to reach agreement implies that individuals have more or else consented we shall treat consent and agreement as roughly identical. Accordingly, in this section we shall only focus our discussion on consent.²⁴

The claim that consent is central to social contract theory can be seen from the fact that the justification of moral and political norms or

²⁴ Even though we are treating consent as basic and consent and agreement as roughly identical we are not thereby suggesting that they are the same.

the idea of justice and legitimacy are grounded on the notion of consent. That is, within the social contract tradition one typically finds the view that whether or not political authority is justified hinges heavily on whether or not it is based on the consent of the relevant parties. There is a couple of meanings of the notion of consent in the social contract literature. These are actual consent, non-ideal or tacit consent, and hypothetical consent.²⁵ We begin by briefly discussing each of these senses of consent following which we show which of the sense of consent is implicated in the notion of Ubuntu.

Actual consent means explicit agreement. That is, the element of actual consent is that there is consent if it is the case that people did actually agree to the terms of the contract, i.e. everyone signed on the dotted lines. One objection to this notion of consent is that since no one or not everyone has actually signed or could actually sign on the dotted line this form of consent is implausible. The second form of consent is non-ideal. On this view, consent is said to have been given insofar as people effectively participate in some form of democratic or non-democratic activities and life of society. While this sense of consent avoids some of the worries of actual consent it has some problems of its own such as that it does not seem to respect the deep sense of voluntariness that is crucial to the idea of consent. The third sense of consent is hypothetical consent, according to which consent or the terms of agreement are taken to be given if these are the terms that people would give under carefully specified circumstances, i.e. circumstances that are just and fair. Some objections to this form of

²⁵ For some of the literature on these forms of consent see Roland Dworkin, "The Original Position," Norman Daniels, ed., *Reading Rawls* (New York, NY: Basic Books, 1975); John A. Simmons, "Justification and Legitimacy," *Ethics* (July 1999), 109(4):739-771; John A. Simmons, *On the Edge of Anarchy: Locke, Consent, and the Limits of Society* (Princeton, NJ: Princeton University Press, 1995); John A. Simmons, "Liberal Impartiality and Political Legitimacy," *Philosophical Books* (1993), 34(4):213-223; John A. Simmons, *Moral Principles and Political Obligations* (Princeton, NJ: Princeton University Press, 1979); Cynthia Stark, "Hypothetical Consent and Justification," *The Journal of Philosophy* (2000), 97 (6):313-334; Peter Stone, "Contract, Consent, and Autonomy," chapter 2 in this volume; Carl Fox, "Hypothetical Consent and the Bindingness of Obligations," chapter 4 in this volume.

consent is that it does not appear to be consent at all and, if it is, then it does not seem to have any normative significance.²⁶

We do not intend to wade into the debate as to which of these forms of consent is acceptable, plausible or defensible. Our aim rather is to show which form of consent is likely to be implicated in the Ubuntu framework.

As we have noted, Ubuntu as a normative standpoint implores people to form humane relations. The norms prescribed by Ubuntu are norms that are representative of what it means to be truly human. It is for this reason that the norms can be assumed or taken to be those that work out to the benefit of humans, broadly construed. Even so, the fact that the norms work for the benefits of humans and that they derive from the facticity of humans does not mean that their justification or legitimacy is a settled issue. As it is with questions of consent and the broad aims of social contract, one has to inquire about what it is that justifies Ubuntu norms as the sort of norms that people would and should accept. In other words, the question that arises is why would and should anyone form humane relations or why should one accept the norms that are recommended by Ubuntu and seek to work with others in producing communal benefits? Otherwise, why do these norms have authority to regulate the behavior of agents in particular ways?

To answer these questions we have to have recourse to the notion of consent. It is here that consent is implicated in Ubuntu. Given the three senses of consent discussed above the question we then should be asking is which form of consent is implicated in Ubuntu? Let us begin with actual consent. We do not think that Ubuntu appeals to this form of consent, in which case the answer cannot be that the norms of forming humane relations are justified because they are the norms that we all have actually accepted or signed on to. Besides the fact that it is especially hard to truthfully claim that any such actual consenting occurred, there are likely to be dissenters – i.e., those who do not actually accept these norms – even in a society regulated by Ubuntu norms. If it is the case that not everyone has consented to these norms,

²⁶ See Stone and Fox (*Ibid.*) for substantial discussions of these forms of consent and the various problems associated with them.

then to claim that actual consent is a feature of the Ubuntu system is to rest Ubuntu on a shaky and problematic foundation.

What about appealing to non-ideal or tacit consent as a way to justify the Ubuntu norms? This also appears problematic and not of much help in grounding Ubuntu. This is because the objection will be that participation in communal activities does not in and of itself suggest that one has acted voluntarily or that the actions are voluntary. This is because if the "I" is an "I" because of the "we" and what that means for the "I" to form humane relations is to do "X," then the X that the "I" does can only be said to be voluntary if it is the case that the "X" is what the "I" would have done or chosen to do. This way of putting it suggests not only that voluntariness is important in people's participation in communal activities or realizing the Ubuntu norms for such participation to count as one that a person has consented to, but also that the ground for the Ubuntu norms may be found in hypothetical consent. It is this form of consent that we now turn to.

Above, we specified hypothetical consent as one in which consent is said to be given if the norms or terms of agreement are those that people would have given under circumstances that are just and fair. Recall, that the notion of what is just or fair is understood in terms of mutual advantage. Moreover, we have already said that abstractly construed Ubuntu norms are representative of what it means to be truly human in the sense that they work out to benefit humans. If this is so and if we hold this claim to be constant, i.e. one that we assume to be the case or accept without needing any further justification, then the answer to the question of why the "I" should form humane relations or accept the norms of Ubuntu and seek to work with others in realizing communal benefits is that one ought to accept the Ubuntu norms because and insofar as one would have consented to the norms under circumstances that are just and fair. Put otherwise, the sort of consent implicated in Ubuntu and that grounds Ubuntu norms is hypothetical consent. This is because it captures the kind of consent that they would have given as humans that seek to found society on principles of fairness and justice.

Our proposal that the type of consent upon which Ubuntu norms derive their authority to regulate the behavior of people in particular ways is hypothetical might be challenged for a number of reasons.

One probable reason is that the notion of hypothetical consent being rather counterfactual fails to take into account the extent to which Ubuntu is a lived experience and consequently people's assent to Ubuntu norms is a feature of that ongoing, dynamic and real-world experience. Appeal to hypothetical consent, however, tends to remove Ubuntu from the world of experience and to represent people's relationship to the relevant norms abstractly. In addition, one might insist that although it is difficult to make the case for actual consent, it seems more plausible to construe the type of consent characteristic of an Ubuntu way of life as non-ideal or tacit. Thus, as people habitually and overtime come to adopt Ubuntu norms and values, aim to bring their behavior in line with it, and sometimes condemn and/or praise certain conduct in light of those norms and principles, they may be said to have consented, albeit tacitly, to these norms and values such that they have the authority to bind them in the relevant way. This should not be surprising at all. After all, it seems plausible to hold that social acceptance of norms in the manner we have just described can generate the required validity for those norms.

We believe that if one held the view of Ubuntu as a lived philosophy and construed it in some non-abstract and informal ways, it is likely that one would insist on something like non-ideal or tacit consent as the basis for the legitimacy of Ubuntu norms. For our present purposes, this is not a terrible outcome since our aim is to show that *some* idea of consent plays a key role in the Ubuntu normative system. Even so, our preference for hypothetical consent is based on a point we made earlier – specifically, the criticism that non-ideal consent does not quite capture the intuition that consent is supposed to be voluntary, rather than merely a routine or based on habit. Moreover, we also believe that although Ubuntu norms may have been born out of lived experience, the work of philosophy is in part to systematize those principles and to work out the most plausible version of it. In this regard, it seems to us that appealing to hypothetical consent is most plausible. Not only because it evinces the sort of voluntariness we believe is crucial for consent, but also it opens the possibility that the principles embodied in the idea of Ubuntu are potentially available to people who may not have experienced it but would have come to find it attractive. On this latter point, and

appealing to hypothetical consent, it becomes possible to determine whether and to what extent Ubuntu principles may be consented to rather than simply assuming that living in a society governed by Ubuntu norms would automatically evoke the required consent.

Ubuntu and Negotiation

One of the themes in social contract theory, negotiation, which can also refer to bargaining, is the actual process in contract or agreement formation.²⁷ Typically, in negotiation or bargaining certain assumptions are made such as the equal rationality of parties and being more or less in possession of similar information about the contract situation.²⁸ Broadly, negotiation can be taken to mean a dialogue or a give-and-take process between two or more people or parties with the aim of reaching some agreement or common goal/ground or a beneficial outcome over one or more issues. For negotiation to be initiated and effective, certain conditions must be present. Firstly, there must be dispute or a conflict with respect to the issue or issues for which agreement is sought. Secondly, each of the party in the negotiation must have its own aims, needs, and viewpoints in respect of the issues. Thirdly, the issues must be one of mutual concern. Fourthly, the process of negotiation must aim towards settling the matter of mutual concern. Finally, negotiation can only be said to be successful when an agreement or common ground has been reached.

Like consent with its various forms, we may say that there are a number of senses at play in negotiation. We will call the first sense or form of negotiation “actual negotiation,” which will refer to parties

²⁷ For discussion of bargaining and bargaining theories in the context of social contract theory see David Gauthier, *Ibid.*; David Gauthier, “Twenty-Five On,” *Ethics* (2013), 123(4): 601–624; Gerald F. Gaus, *Value and Justification* (Cambridge: Cambridge University Press, 1990); Ken Binmore, *Natural Justice* (Oxford: Oxford University Press, 2005); Ryan Muldoon, *Social Contract Theory for a Diverse World: Beyond Tolerance* (New York: Routledge, 2017).

²⁸ For discussion on the centrality of bargaining and distribution of benefits to a version of a moral contractarian theory, David Gauthier’s moral contractarianism, see Edwin Etieyibo, “Bargaining and agreement in Gauthier’s moral contractarianism,” *South African Journal of Philosophy* (2013), 32(3): 221-233.

actually and literally hammering out the terms of contract. On this view, everyone that is part of the contract is assumed to have or would at some point have negotiated the contract. This is implausible, as the very notion of actually negotiating the contract will imply that the negotiators or bargainers are in one physical space. If we suppose that there are 100 possible parties to an agreement or the terms of the contract, then, on the actual negotiation view, everyone that makes up the 100 would have to have negotiated with everyone else to reach the mutual outcome. If the 100 people belong to different epochs and generations, then there is no way that everyone could have negotiated with everyone else to reach the mutual outcome. As such, this notion of negotiation is not suitable to the social contract and Ubuntu frameworks.

Another sense of negotiation which we will call “hypothetical negotiation” takes parties to have negotiated with everyone else to reach the mutual outcome as long as the negotiation process is one that parties would have sanctioned in circumstances that are just and fair. This is the sense of negotiation that we think is implicated in Ubuntu. We spell this thought out more clearly below.

In many traditional African societies where Ubuntu and Ubuntu norms were supposedly practiced, negotiation is taken to be part and parcel of the fabric of such societies. As we have mentioned above, Ubuntu norms are norms that impose some obligations on everyone and given that they need justification if they are to have the force of obligation, an explanation has to be given as to why anyone would consent to them. This justification in terms of consent as we discussed above, was taken to be provided in virtue of hypothetical consent. In addition to justifying the norms which are the outcomes of the contract the process giving rise to the outcome must be justified too. In a contract situation an outcome can only be reached through some form of negotiation and generally the fairness and justness of the account is determined by the fairness of the negotiation process.

What form of negotiation then is at play in Ubuntu and which give rise to the Ubuntu norms and how does one justify the form of negotiation? The form of justification, we think, cannot be found in actual negotiation as we have indicated above. It seems reasonable to think that the form of negotiation at play in Ubuntu is hypothetical

negotiation. When we discussed Ubuntu and consent we settled for the view that if any consent is at play in Ubuntu it would have to be hypothetical consent. It is the same rationale that leads us to think that hypothetical negotiation is at play in Ubuntu. Simply put, for Ubuntu the negotiation of the terms of the contract or the negotiation process that gives rise to Ubuntu norms is one that is hypothesized and which will be and is justified on the ground that it is the negotiation process that parties would have accepted if they are or were to choose among various hypothetical negotiation processes that better represent their sense of humanity (or capture their sense of fairness and justice).²⁹

Conclusion

Ubuntu as a normative theory in ethics and political philosophy shares certain elements and issues with social contract theory. In this paper we have examined some of these elements and issues: mutual advantage, consent, agreement and negotiation. Beyond discussing these we have attempted to show that the norms and obligations of Ubuntu, like the norms of social contract theory require justification if they are to be accepted by people for whom they bind. To conclude, we want to quickly examine one issue – the issue of the divergence of Ubuntu and social contract theory in virtue of the fact that the latter is cashed out in individualistic terms and the former in communalistic terms.

Because of the *prima facie* divergence between individualism communalism one could take a fundamental difference between Ubuntu and social contract theory as implying different sets of ideas; so different as to undercut the supposed similarities. However, the

²⁹ Of course, given what we said above about consent, namely, that non-ideal or tacit consent may be implicated in Ubuntu (insofar as Ubuntu is considered a lived philosophy) one may claim that some form of non-ideal or tacit negotiation is at work here and this sense of negotiation resonate more with Ubuntu than any other sense, whether hypothetical or actual. However, given our reservations for this type of consent (that is, non-ideal or tacit consent) and our preference for hypothetical consent in virtue of the importance that voluntariness plays and ought to play in consent the plausibility of the claim that we ought to settle for non-ideal or tacit negotiation rather than hypothetical negotiation seems questionable.

fact that we may interpret social contract theory along the lines of individualism and Ubuntu along the line of communalism does not, in our view, detract or take away from what we have attempted to do in this paper. What is significant from what we have done in terms of drawing some connections between Ubuntu and social contract theory is the idea that the norms and obligations that they both impose are not sacrosanct, namely, norms and obligations that have to be accepted *fait accompli*. Because Ubuntu, as well as social contract theory appeal to some norms and obligations, because they both require compliance with these norms and obligations, and because these norms and obligations have wide-ranging effects on humans for whom they bind their legitimacy comes into question. And the justification – through the elements of mutual advantage, consent, agreement and negotiation, which we have examined in this paper – that is provided in order to legitimize the acceptance of the norms and obligations of Ubuntu and social contract theory is one, that for us, can be taken to be similar.

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The Council for Research in Values and Philosophy

Purpose

Today there is urgent need to attend to the nature and dignity of the person, to the quality of human life, to the purpose and goal of the physical transformation of our environment, and to the relation of all this to the development of social and political life. This, in turn, requires philosophic clarification of the base upon which freedom is exercised, that is, of the values which provide stability and guidance to one's decisions.

Such studies must be able to reach deeply into one's culture and that of other parts of the world as mutually reinforcing and enriching in order to uncover the roots of the dignity of persons and of their societies. They must be able to identify the conceptual forms in terms of which modern industrial and technological developments are structured and how these impact upon human self-understanding. Above all, they must be able to bring these elements together in the creative understanding essential for setting our goals and determining our modes of interaction. In the present complex global circumstances this is a condition for growing together with trust and justice, honest dedication and mutual concern.

The Council for Research in Values and Philosophy (RVP) unites scholars who share these concerns and are interested in the application thereto of existing capabilities in the field of philosophy and other disciplines. Its work is to identify areas in which study is needed, the intellectual resources which can be brought to bear thereupon, and the means for publication and interchange of the work from the various regions of the world. In bringing these together its goal is scientific discovery and publication which contributes to the present promotion of humankind.

In sum, our times present both the need and the opportunity for deeper and ever more progressive understanding of the person and of the foundations of social life. The development of such understanding is the goal of the RVP.

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