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SOCIAL CONTRACT THEORY OF JOHN LOCKE (1632-1704)

IN THE CONTEMPORARY WORLD

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Abstract

The 17th century period was marked by an attempt to erect effective safeguard against violations of natural law by governments. Law in this period was conceptualized as an instrument for the prevention of autocracy and despotism. Absolutism in Europe that was associated with governmental encroachments necessitated a strong shield of individual liberty. In this period legal theory placed the main emphasis on liberty, thus the law was to render governments capable of functioning as a guarantor of individual rights. This paper aims at examining the social contract theory of the 17th-century English philosopher, John Locke, its parameters, limitations and its essence in the contemporary world with a view as to why should we obey the law, the origin, essence and legitimacy of the government, the origin of the state and the law and more importantly how can we punish the government in case they fail to fulfill their functions.

Introduction

Some philosophers argue that the sovereign's power should be unlimited, because the state originates in a so-called social contract, whereby individuals accept a common superior power to protect themselves from their own brutish instincts and to make possible the satisfaction of certain human desires. In contrary it is also argued that sovereignty resides in the people for whom governments are trustees and that such governments can legitimately be overthrown if they fail to discharge their functions to the people. Therefore, the philosophical underpinnings behind social contract theory are the origin and legitimacy of the government, the origin of the law, the reasons as why to obey the law and how people can punish the government in case they fail to fulfil their functions.

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Defining Social Contract

Social contract is a convention between men that aims to discard the state of nature. Under state of nature people live without government or written laws. People live under principles of justice that all normal people can see through reason, they include right to life, liberty and estates. Most people seek to follow these principles but the problem is lack of explicit written laws that leads to uncertainty and difficulty to resolve disputes.

And a solution to the problems under state of nature becomes a social contract where people agree to obey the state, let the state make and enforce laws and people pay the state for its services. The state sets up legislatures, impartial judges and enforcers. The government's duty is to protect everyone's rights and if the government violates the social contract, people may overthrow it.

Social contract theory expresses two fundamental ideas to which the human mind always clings the value of liberty; the idea that "will" and not "force" is the basis of government; and the value of justice or the idea that "right" and not "might" is the basis of all political society and of every system of political order.²

The theory seeks to explain the formation of societies and governments. Despite the great variations on some points, the social contract theory mainly focuses on the voluntary consent that people give to the formation of the government.³ Moreover, the theory denotes an implicit agreement within a State regarding the rights and responsibilities of the State, i.e. the government and its citizens.⁴ It is an explicit or implicit agreement and it emphasizes the rights of citizens in their relationship to their government. The theory posits that rights of citizens are prior to and more fundamental than the organization of society under the government.⁵ The governed, in essence, should be the governors. The idea of self-government is posited as an end in itself. A political order offering opportunities for participation in the arrangement of public

²BARKER, E, (1960)Social Contract Essays by Locke, Hume, and Rousseau; Oxford University Press; USA; p. viii

³ BURKE, E (1971)"*State Formation and Social Contract Theory: Rwenzuru and the Southern Sudan*"; A Paper Delivered to the African Studies Association Conference; Denver;; p.8

⁴ Wikipedia; A Free Internet Encyclopedia; visit http://en.wikipedia.org/wiki/Social_Contract_theories

⁵ ZACK, N (2006)"*Philosophy and Disaster*" Homeland Security Affairs; Volume II; Issue 1; Homeland Security Affairs is an online academic journal of the Centre for Homeland Defense and Security (CHDS); visit <http://www.hsaj.org/hsa>

affairs should not just be a State, but rather, the formation of a type of society in which the affairs of the State are integrated into affairs of ordinary citizens.⁶

Kinds of Social Contract

We have explicit and implicit social contract of which an actual consent is required and on the other hand, we have hypothetical social contract in which even though there is no actual agreement to the social contract, you would agree, in some ideal circumstances. Locke thinks there was an explicit agreement at the start of most states though David Hume⁷ objected this idea of Locke by saying that origins of all or most actual governments is either usurpation or conquest. In implicit social contract one agrees to the contract through actions rather than words. Citizens implicitly consent through residence, acceptance of benefits and through political participation.⁸

Historical Development of Social Contract

Social contract theory developed at the transition period from feudalism to capitalism where the feudal system based on absolutism and the absolute right of kings was being fought. The theory came as a means of explaining and justifying the existence of governments i.e. governments should come from the will of the people. The theory was thus invented to challenge the system of absolutism that existed in the monarchies. Later, the theory was reflected in the English Revolution⁹, the French Revolution¹⁰ and the American Declaration of Independence.¹¹

⁶ WAMBALI, M. K. B, (1997) “*Democracy and Human Rights in Tanzania Mainland: The Bill of Rights in the Context of Constitutional Developments and the History of Institutions of Governance*” PhD Thesis; University of Warwick

⁷ David Hume (1711-1776), Scottish historian and philosopher, who influenced the development of skepticism and empiricism, two schools of philosophy. Scottish historian and philosopher David Hume unsettled 18th-century political thought with his argument that laws and leaders of government emerge in response to historical developments, rather than in accordance with divine sovereignty, which was then the prevalent view. In *Of the Original Contract* (1748) Hume outlines his views on how and why governments develop

⁸ Visit <http://www.wsu.edu:8080/~dee/AMERICA/DECLAR.HTM>

⁹ English Revolution also called the Puritan Revolution, general designation for the period in English history from 1640 to 1660. It began with the calling of the Long Parliament by King Charles I and proceeded through two civil wars, the trial and execution of the king, the republican experiments of Oliver Cromwell, and, ultimately, the restoration of King Charles II.

Proponents of the Idealism

The philosophical ideas of the social contract is dated back to Hugo Grotius (1583-1645), Thomas Hobbes (1588-1679), John Locke (1632-1704), Jean Jacques Rousseau (1712-88) and, more recently, John Rawls who wrote in the second half of the 20th Century. However, it is said that the use of social contract as a definite concept in political and legal controversy can be traced back to the Italian Marsilius of Padua (1270-1343) who fought against the supremacy of the church in other than spiritual matters. He developed the idea that the people are the source of all political power and government is by mandate of the people, and with their consent.¹²

Hugo Grotius (1583-1645) used social contract as a justification of absolute obedience of the people to the government and a basis for legally binding and stable relations among states. Grotius said that social contract had preceded the constitution of each state by means of people choosing the form of government which they considered suitable for them. However, Grotius believed that once they had transferred their right of government to the ruler, they forfeited the right to control the ruler however bad their government was.¹³ Grotius thus denied the concept of the government for the sake of the governed.¹⁴ To Grotius once the government is in power it becomes absolute and can exercise its functions in whichever manner.

Hobbes (1588-1679), argued that social contract evolved out of pragmatic self interest. People willingly came together and agreed to live under the rule of government that was strong to keep order i.e. security. The natural transferring of right was what Hobbes called contract in which he stressed governmental power. Hobbes argued that sovereign's power should be unlimited

¹⁰ French Revolution, major transformation of the society and political system of France, lasting from 1789 to 1799. During the course of the Revolution, France was temporarily transformed from an absolute monarchy, where the king monopolized power, to a republic of theoretically free and equal citizens

¹¹ Declaration of Independence, document in American history used by the 13 British North American colonies to proclaim their independence from Great Britain. The Declaration of Independence was adopted in final form on July 4, 1776. It can be divided into three parts: a statement of principle concerning the rights of man and the legitimacy of revolution, a list of specific grievances against England's King George III, and a formal claim of independence

¹² FRIEDMANN, W, *Legal Theory*, Universal Law Publishing CO. PVT. LTD, India, 1999

¹³ *ibid*

¹⁴ MIHYO, P. B, (1977), *The Development of Legal Philosophy*, East African Literature Bureau, at pp 50

because the state originated in a so called social contract whereby individuals accepted a common superior power for protection and made possible certain human desires.¹⁵

Social Contract Theory of John Locke

John Locke on the other hand accepted much of Hobbes social contract theory but argued that sovereignty resided in the people for whom governments were trustees and that such government could be legitimately overthrown if they failed to discharge their functions to the people. He attempted to erect effective safeguards against violations of natural law by the government. Locke said that the sovereign did not take all rights; the principal rights remained with the people. Locke's social contract was devoted to sovereignty and law. Sovereignty derived from the people's will. This will remained with the people. He argued that sovereignty did not reside in the state but with the people, and that the state was supreme, but only if it was bound by civil and natural law.¹⁶

Locke believed in the governed as the basis of sovereignty and the state as the guarantor of individuals' liberty. To Locke, under social contract power was surrendered not to the sovereign but to the community. He said there and there only was a political society where everyone in the society had quitted his natural power, resigned it up into the hands of the community. John Locke used the phrase "there and there only" to emphasize the importance of the WILL of the people in forming a political society. Thus, every member of the community surrendered his natural power with free will explicitly or implicitly and resigned it into the hands of the community in exchange for the discharge of functions to the people, hence a political society becomes with power to preserve property and punish offences. However, the power cannot be more than that the people had in a state of nature before they entered into a society and gave it to the community for nobody can give more than what he has. The term community as is used by John Locke above signifies the government of the people by the people for the people, thus community rights should prevail over individual rights and the rights are surrendered into community because the sovereign is the people and only comes from the people. Thus, hands of the community mean the governor who is governing by the WILL of the people.

¹⁵ KATZNELSON, I, (2006) "*Political Theory*", Microsoft (R) Student 2007 [DVD], Redmond WA: Microsoft corp

¹⁶ " John Locke", Microsoft ® Student 2007[DVD], *op cit*

Parameters of the Social Contract Theory

From the idealism of John Locke on social contract, one notes some important parameters that are closely associated with the government and its people. John Locke argued that, all men are created equal with natural rights and the purpose of the government is to protect these natural rights. John Locke contended more that the source of government authority is the consent of the governed (the people), and the right of revolution is reserved for the governed.

Thus, from a state of nature men have passed to a state of society, by means of a contract in which they undertake to respect each other and live in peace (*pactum unionis*). And the second pact comes in, people thus united undertake to obey a government they have chosen (*pactum subjectionis*). John Locke recognized both *pactum unionis* and *pactum subjectionis*. These parameters of social contract theory of John Locke denote that the government is the outcome of the people's consent and, thus, legitimacy of the government should remain in the WILL of the people.

The Constitution of a Country as a Social Contract

Hans Kelsen (1881-1973) regards a constitution as the basic norm or *grundnorm* in a legal system through which some other rules derive efficacy. The *grundnorm* has no rule behind it. A *grundnorm* is said to be accepted when it has secured for itself a minimum effectiveness. That happens when a certain number of persons are willing to abide by it. Thus, a constitution becomes effective through people's consent and willingness to abide by it. This is done through social contract, and as such, a constitution is considered to be a contract. It is often said that a constitution is a contract between the ruler and the ruled, however, there is no evidence that rulers and the ruled sit together and negotiate a contract called constitution.¹⁷

A Constitution of a country is the most important legal document, and has been described as the great law before which all other laws of a society must bow. It is a flame of dynamic power that infuses the nation's life, orders its being and moulds its future.¹⁸ All in all a Constitution is a political document crystallizing national consensus on the modalities of how the State is going to rule and within what limitations. It comprises a collection of the basic rules that govern a country

¹⁷SHIVJI. I. G. et al, *Constitutional and Legal System of Tanzania*, DSM, 2004 at pp 37

¹⁸JUMA, H. I, (1996) "*Constitutional-Making in Tanzania: The Case for a National Conference*" In: Oloka-Onyango, J., et al (eds); *Law and the Struggle for Democracy In East Africa*; claripress; Nairobi

and hence all other legal rules in the country derive their authority from it. All the laws, by-laws, rules and regulations find their legitimacy from the Constitution. In this sense, the legitimacy of State policy and sovereign existence emanates from the Constitution.¹⁹

Being the supreme law of the land, the Constitution of a country has also been regarded as the “social contract.” It is the contract between the rulers and the ruled and therefore it is more than just a document as it embodies the wishes and aspirations of the country.²⁰ As the Constitution of a country is a document that signifies the social contract between the rulers and the ruled, it must be voluntarily agreed upon by the country’s people for their common good and well-being.²¹ An ideal Constitution of a nation implies prior participation of the people in constitution making and therefore it should be a document that bears all the blessings of the people.²²

The former President of the United Republic of Tanzania Benjamin W. Mkapa in his speeches on the rule of law and good governance in Tanzania stressed on the will of the people to be ruled and ruler to respect that will of the people. To him, this agreement differentiates human communities from animal communities.

“ Na sheriamaana ni mkusanyiko wa kanuni na taratibu halali kwa lengo la kusimamia mahusiano kati ya mtu na mtu, mtu na jamii, mtu na serikali, jamii na serikali n.k..... .na uhalali wa sheria unatokana na ukweli kuwa katika nchi ya demokrasia kama ilivyo yetu, wanaotunga sheria ni wenzetu tuliowachagua kwa hiari yetu watuwakilishe ”²³

That may be freely translated into English to mean:-

The law...is the bundle of principles and customs regulating the relationship between individuals, an individual and the society, an individual and the government, and between the society and the government etc. And in democratic countries like Tanzania, the basis for the legitimacy of the law is the WILL of the people through parliamentary representatives.

¹⁹ OKOTH-OGENDO, W. H. O, (1991) *Constitutions without Constitutionalism: Reflections on an African Political Paradox*, In Shivji, I. G. (ed); *State and Constitutionalism: An African Debate on Democracy, Human Rights and Constitutionalism*; Series No. 1; Southern African Political Economic Series (SAPES) Trust; Harare-Zimbabwe;

²⁰ PETER, C. M, (1999), *Constitutional Making Process in Tanzania: The Role of Civil Organizations*, A Case Study Prepared for the Civil Society and Governance in East Africa Project (Tanzania Side)

²¹ Juma, I. H, (1996); *Ibid*

²² *Ibid*

²³ See MKAPA, Benjamin W, (2003) “*Utawala wa Sheria na Haki ya Kuishi*” Uwazi na Ukweli, Mkuki na Nyota, DSM, at p13

However, it is contended that most constitutions of African States; and especially former British colonies lack legitimacy, and are highly contested because, despite their facilitation of smooth transitions to administrations, they did not involve the people.²⁴

In a modern sense, a constitution may be defined to mean a product of national consensus forming the basis of the organisation of the people in their state. People decide on the basis for their co-existence which is then reflected in the constitution, based on the relationship of the state and the citizens on one side, and to communities in the other side.

The constitution must come from the people, the people are the authority, and thus, the constitution is the people themselves. The term authority may be ascribed into political legitimacy and legal authority. Political legitimacy means that a constitution must be accepted and respected by the people while legal authority means that the constitution is deriving from effective legal process and organs, thus, a national consensus.

Social Contract Parameters in the Constitution of the United Republic of Tanzania, 1977

Sovereignty of the People; in democratic countries like Tanzania sovereignty resides in the people. In other words the source of power is the people and that the state derives its authorities from the people.²⁵ In Tanzania, like in many other developing countries, the right to participate in national affairs is easily said than implemented²⁶. Sovereignty is imposed upon the people as they have the right to vote²⁷ for the leaders of their choice. However, the right to vote in Tanzania is not enforceable²⁸ and free will in voting may be influenced by some factors like bribery.

Also people are constitutionally given the freedom to participate in public affairs.²⁹ This may be done from the village level to state level. At the village level there is the village assembly and at state level people may participate through members of parliament from their constituencies.

²⁴ See MUKANGARA, R. Daudi, (1999), *Forms and Reforms of Constitution –Making With Reference to Tanzania*, UTAFITI [New Series] Special Issue, Vol. 4, 1998-2001

²⁵ This reflects the wordings of Article 8 (1) (a) of the Constitution of the United Republic of Tanzania, 1977

²⁶ Mongella, L. M, (2007), *Revisiting the Social Contract Theory: Its Relevance and Applicability in Tanzania*, LL.M Dissertation, UDSM

²⁷ As article 5(1) of our constitution, *op cit*

²⁸ See Article 7(2) of our constitution, *ibid*

²⁹ See article 21, of our constitution, *ibid*

People's Rights and Duties; chapter one part III of the Constitution of the United Republic of Tanzania, 1977 provides for basic rights and duties to citizens including the right to equality, the right to life and the right to freedom of conscience. The citizens are duty bound to observe and abide by the constitution and the laws of the United Republic of Tanzania.³⁰ These were also stressed by John Locke in his social contract theory.

State Obligations; the state organs of the executive, the legislature, and the judicature were created to serve the people of the United Republic of Tanzania. They hold their respective power in trust for the people. As trustees, the powers of these organs are limited by the constitutional provisions, principles and laws flowing therefrom. The primary objective of the government is the welfare of the people and it shall be accountable to the people.³¹

The authority of the government of the United Republic of Tanzania derives from and is concerned with the application and upholding of the Constitution of the United Republic of Tanzania.³² The constitution is the WILL of the people, and every person is entitled to the right to ensure protection of the constitution³³, protecting the constitution is impliedly protecting the people.

The Constitution is the *pactum unionis* of Tanzanians. In its article 28 (1), the Constitution of the United Republic of Tanzania enjoins every citizen of Tanzania to protect, preserve and maintain the independence, sovereignty, territory and unity of Tanzania as a nation.³⁴ This reflects *pactum subjectionis* concept of John Locke in his social contract theory.

Social Contract in the Modern World

Political power derived from social contract entails such power coming from the people and not from above, whether from divine law or the grace of God. Thus, social contract theory of John Locke is a forerunner of democratic theory i.e. the government of the people, by the people and for the people. Thus, the modern democratic governments adhering to free and fair election principles have their basis on social contract theory.

³⁰ See Article 26(1) of our constitution, *ibid*

³¹ See Article 8(1) © of our constitution, *op cit*

³² See Article 34 (2) of our constitution, *ibid*

³³ See article 26 (2) of our constitution, *ibid*

³⁴ See article 28(1) of our constitution, *ibid*

Parliamentary democracy existing in the modern world today is mainly influenced by John Locke's idealism. His ideas gave theoretical form to the reaction against absolutism and the preparation of parliamentary democracy. His greatest effect was upon the American and French revolutions.

John Locke's doctrines of liberty and equality have exercised a strong influence upon the bill of rights in modern constitutions in many countries including Tanzania. Liberty and equality of an individual are highly respected and thus protected by the governments. And sovereignty resides in the people as per John Locke's ideas.

Limitations of the Social Contract Theory

The parameters of social contract theory of John Locke in some instances fail to hold water like in cases where some states were formed through usurpation or conquest. In such cases there is no free will to be ruled and the obedience to the government is mandatory. For example, the recent cases in Kenya and Zimbabwe, there were formed coalition governments of which were not based on the will of the people but the will of the rulers. Moreover, in some jurisdictions like Tanzania rulers come into power by simple majority of the votes, but how will the WILL of the remained be protected? Will these persons who voted against the winner be part of the said social contract?

It is expressly provided in the Constitution of the United Republic of Tanzania, 1977 that: - ...the government and all its agencies provide equal opportunities to all citizens...³⁵ and that no person shall be discriminated ...³⁶ thus it is a simple majority rule-minority rights system whereby the Tanzanians have agreed in their constitution to form the government by simple majority votes but the government is for all citizens and the objective of this government is to protect the welfare of the PEOPLE³⁷ and not the simple majority voters. But in some instances members of a political party forming the government may be privileged because the rulers know that these are the ones who will give them power in future time.

Since the constitution of a country signifies social contract between the rulers and the ruled, it must be voluntarily agreed upon by the country's people for their common good and well-

³⁵ See article 9(g) of the constitution

³⁶ See article 13(4), *ibid*

³⁷ See article 8(1) (b), *supra*

being.³⁸ An ideal Constitution of a nation implies prior participation of the people in constitutional making and therefore it should be a document that bears all the blessings of the people and in this sense the WILL of the minority is also protected as they gave a prior consent to the simple majority rule system through their constitution. In a broad sense, a constitution is a social contract implying the aspirations of the people and their government to comply with constitutional norms. It encompasses constitutional and political ethos, defining democratic governance, guaranteeing human rights (the minorities being included in the phrase human rights), and empowering citizenry to use the constitution as a living document that reflects their needs and aspirations. And this is what constitutionalism means in its broad sense. Thus, from social contract we retain constitutionalism jurisprudence and human rights contents.

Conclusion

It is said that social contract theory is exercised through elections of some people to form the government, but the systems of many elections in the world do not reflect the reality. The major problem facing many countries is non adherence by the governments to the social contract principles as propounded by John Locke. The said principles require the government and the people to exist under *pactum unionis* and *pactum subjectionis* with due respect and adherence to the duties and rights arising there from. In every political community of people there is a constitution and the constitution is supposed to reflect the WILL of the people. And since the constitution is the WILL of the people, it then enjoins every person to abide the provisions of this constitution, that is, to live according to their agreed procedures and respect the community. The jurisprudence behind social contract theory is to promote peace and harmony and as that it is the bed rock of democratic societies.

³⁸ JUMA, I. H, (1996); *Ibid*

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