The Social Contract Tradition(s): Agreements and Reconstructions

I. ONE LABEL, SEVERAL TRADITIONS

The idea that a society or a government or moral principles can depend on consent or on a voluntary individual act (or rather on a concatenation of voluntary individual acts) in order to exist and be binding in the sense of providing sufficient reasons for compliance can indeed be found as a recurrent motif in political and moral thought throughout the History of western philosophy. This conventionalism constitutive of a normative realm emerges in such disparate sources that include the writings of classical Greek Sophists, of certain medieval Christian authors, of the Protestant and Catholic monarchomachi of the sixteenth century, of the most notorious members of the Catholic Counter-Reformation movements, of the most renowned authors of modern political thought, and of those contemporary moral philosophers dealing with the value of agreements for the public domain. Names such as those of Antiphon, Hippias, Thrasymachus, Glaucion, Epicurus, Engelbert of Volersdorf, John of Paris, Nicholas of Cusa, M. Salamonio, Théodore de Bèze, Jean Boucher, Junius Brutus (Philippe de Mornay), George Buchanan, Richard Hooker, Juan de Mariana, Francisco Suarez, Johannes Althusius and Hugo Grotius, generally appear as precursors of the most renowned authors associated with the social contract, namely Hobbes, Pufendorf, Locke, Rousseau and Kant, who in turn are identified as the inspiration for contemporary perspectives on the emergence of normativity that arose in the works of John Harsanyi, John Mackie, David Gauthier, T.M. Scanlon, James Buchanan, and especially John Rawls.

The basic reason why all these names seem to emerge frequently from the literature on the social contract seems simple: in some way, they all assume that agreement or consent of the individuals subject to collectively enforced social arrangements is relevant to the fact that those arrangements have some normative property. But from such a formal beginning, histories of the social contract tend to be archaeologies of conventional voluntarism in the emergence of normativity, whether civil, moral or constitutional. This simple association between social contract and normative conventional voluntarism, however, is not bereft of problems. On the one hand, many who discuss how voluntary actions and free will can become the sources of normative elements do not speak about contracts per se – they talk about agreements, conventions, accords, deals, arrangements, associations, collective decisions, and associated terminology, but not necessarily of pacts and contracts. The assumption that conventionalism is synonymous with contractarianism in such a way that both terms can be used interchangeably without loss (or gain) of meaning entails the dubious claim that there is nothing specific about the terminology of contracts that makes it relevantly distinguishable from other types of agreement. On the other hand, there are those who
use the terminology of contracts in order to explain the origins of social and political normativity, and yet seem more interested in adopting a preference towards intellectualism rather than voluntarism as the adequate sources of normativity, or in taking a positive attitude towards necessitarianism in such a way as to dismiss the will as a relevant normative concept.

Furthermore, even in those who do engage directly with the terminology of contracts, the idea is used for all sorts of purposes and disciplines, and generates quite contrary conclusions. The agents involved in social contracts may be individuals, groups or the heads of families, corporations or cities, the people as a body, a ruler or king. The contents agreed upon may be to create society, a civil community, a sovereign, a specific kind of political regime, procedural rules of justice, or morality itself. The choice of contract may bind in perpetuity or be renewed with each succeeding generation; it may be historical, ideal or hypothetical, its expression explicit or tacit. The contractees’ motivations may be personal security, economic welfare, religious duties, moral righteousness, the cultivation of arts and sciences, or the mere exercise of natural rights. So, even if there was a social contract tradition, one could hardly deem it a coherent body of doctrine. Historians of the social contract avoid this difficulty by claiming that there are different kinds of contracts involved in the theory; however, they do so while tracing historically the evolution of the idea of legal conventionalism (either with regard to the origin of the state or to the legitimate forms of government) without providing explanations concerning the reasons why passing reference to political (or moral) agreements is deemed sufficient for membership of a heterogeneous classification of contractarianism (rather than of normative conventionalism or any other form of ‘agreementism’).

Nevertheless, there does not seem to be any inescapable reason why making the point that contractarianism never constitutes a tradition in the sense of a coherent body of doctrine, even in the early modern period, entails adopting a concept of the social contract under which may fall any given kind of conventionalism constitutive of normativity. Contrariwise, common sense seems to dictate that the elements of a theory are to be ascertained before attempting to write its history, and these elements are to be found in those writings that actually employ the terminology of pacts and contracts explicitly in order to systematically explain the emergence of normativity (whether civil, moral or constitutional).

In this sense, the literature on the social contract (rather than on conventionalism or on ‘agreementism’) is more adequately described as constitutive of a genre in political and moral philosophy characterized by the attempt to account for politics and morality by means of specific juridical concepts that were derived from Roman law and its medieval and early modern commentators. Such concepts were those of pact, contract, treatise, obligation, right, and their many subdivisions. But this apparatus of juridical concepts was in the service of fundamentally different philosophies, and one

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1 Following Gierke, see Gough (1936), pp. 2-3.
may say that the tradition was as much characterized by disputes between opposing theoretical standpoints as by the coherence of its concepts. On the one hand, this means that the semantic incoherence of such a conceptual frame of reference precludes the existence of a unified school of thought called contractarianism – the social contract ‘tradition’ is thus an artefact even when it follows from the attempt to describe the development of a theoretical background that emerged in the seventeenth and eighteenth centuries in Protestant Europe. On the other hand, the fact that there is a specific conceptual framework derived from Roman law is exactly what justifies the existence of a common ground to social contract theories – the framework establishes a sort of formal unity. The essential characteristics of the social contract are to be analysed inside this conceptual frame of reference established by the terminology of contracts, rather than the other way round.

Thus, ‘legal voluntarism in agreements’ or ‘conventionalism constitutive of normativity’ are to be established in accordance with this framework if they are to be understood as elements of a social contract theory. The concept of an agreement that is simultaneously social and contractual will necessarily involve a convention constitutive of a given type of normativity; but this does not mean necessarily that any notion of a convention constitutive of a given type of normativity can be qualified both as social and as contractual. A proper history of the concept of social contract must have this methodological order in mind before it can begin to assess its various components. For even though all contracts are agreements, not all agreements are contracts; and even if they were, their grounds for existence should derive from the concept of social contract rather than from the mere idea of ‘concurrence of wills’.

It is true, however, that a full account of such a framework requires much more than a conceptual analysis, for the different usages of the social contract ended up being potent weapons in a variety of moral, religious and political battles and they were, in large measure, shaped for such purposes. The usage of the language of contracts, as well as the specific characteristics and the different applications thereof, is required by different motivations and contexts that might help determine different trends in social contract theory. The outline of social contract thought remains the same – that of inserting voluntarist elements (such as consent and agreement) into the public realm that bind rulers and ruled alike in legal or moral dimensions by absorbing the characteristics of conventions typified by Roman private law – but the specificities of the models of agreement change in accordance with the setting and the purposes served by different authors. Such a line of thought allows for the consideration of at least four different trends in the conceptual frame of reference of the social contract, even if the authors in each trend remain unable to form a coherent body of doctrine: the Iberian Catholic trend of the Counter-Reformation; the Protestant individualist trend of the mainstream Enlightenment; the almost dialectical trend of radical Enlightenment; and the contemporary trend of public morality to political institutions.
II. THE IBERIAN CATHOLIC TREND OF THE COUNTER-REFORMATION

A detailed list of proto-contractarians is more likely to include any author who ever sustained that the origin of law and justice is conventional. But this is far from being a list of social contract theories insofar as it fails to acknowledge the use of the conceptual tools of conventionalism associated with private law in order to legitimize law and justice by means of consent. For classical Greek sophists such as Antiphon and Glaucon, for instance, the suggestion is that moral constraints are simply the result of the equilibrium of forces between agents whereby the strong are refrained from crushing the weak and the weak perform a confidence trick upon the strong. This is very far from being anything resembling a conventional enforceable status as such, albeit the explicit voluntarist preferences displayed by the Sophists.

Until the later medieval thinkers, the idea of a constraint on ruler and ruled arising from a common arrangement seemed to reflect the social relations and practices of the time and had little bearing on the broader question of the constitution and legitimacy of the political authority itself. There was, however, implicit in medieval politics the principle of a convention concerning government, which ended up stimulating the more speculative inquiry about how the community which established the government could come into existence out of a mass of individuals. This view was developed during the fourteenth and fifteenth centuries by such writers as Manegold of Lautenbach (1030-1103), Engelbert of Volesdorf (1250-1311), John of Paris (d. 1306) and Nicholas of Cusa (1401-1464); but they never explicitly stated that there is such a thing as an agreement among individuals constitutive of the community and of the obligations arising thereof, and to which we can call a contract.

The thesis that the community is nothing more than a partnership created by the agreement of its members only appears in the writings of M. Salamonius. But even then, it appears as an alliance between the community and its ruler, without further explanations of how both the community and the ruler come about. Even in later thinkers such as Richard Hooker or Huguenots like François Hotman, Théodore de Bèze, Philippe de Mornay (the author of the famous Vindiciae contra tyrannos), or George Buchanan, for whom political society was both natural and a human artefact, the idea of emergence by common consent falls short of actually becoming a contract theory per se. Even though the agreements limited the claims of the rulers, they were to be perpetually renewed in the coronation oath as a result of God’s commandment; the choice of government may have been at the discretion of the people, but those upon whom the office was conferred would still hold it by divine right. What prompted these authors to value consent and agreement in relation to the community and its ruler were mostly the religious controversies of European sixteenth century – concurrence of wills was invoked then in various degrees to vindicate the freedom of religious worship for different denominations and to establish legitimate claims of resistance to tyrannical ruling.

2 De principatu (1512-1514).
Notwithstanding, the conceptual setting adopted throughout still belonged to the Aristotelian tradition developed by Scholastic thought. People were still inclined to being social animals by nature, which made it difficult to conceive of pre-political life; moreover, all power was believed to be bestowed by God, as St. Paul established in ch. 13 of his Letter to the Romans, which made it difficult to recognize the deliberate creation of society by the volition of free and equal agents. It took a fair amount of ingenuity to strike a balance between these Scholastic requirements and the in-built historical pressure to develop constitutive consent theories.

Attempts at such ingenuity, though, can be found in the writings of the Thomist revival of the sixteenth-century Iberian theologians arising out of the academic axis of Salamanca-Évora-Coimbra. What is peculiar about these writings in comparison with previous endeavours involving political and moral conventionalism is that they make use of specific legal terminology associated with the regulation of private relations in order to introduce and legitimize a novel kind of regulation vis-à-vis public relations. So, expressions such as status naturae (which is used by Molina, for instance), societatis foedere (used by Juan de Mariana), contractus aut quasi contractus, primaeva institutione, morale vinculum, transferre potestatem (all used by Suarez), which are to be so common in later works on the social contract, begin to appear repeatedly.

With the exception of Suarez, none of them sets out to elaborate a systematic account of the social contract, but they do begin to incorporate the legal terminology of conventions with regard to a common theme: the lack of legitimacy of the imperialist claims of the Hispanic crowns towards the native peoples of the Americas. Consent theory, which seemed to prove more and more influential either in arguments towards freedom of religion or in arguments for or against divine right monarchy, now served a new purpose – that of regulating the relations between conquistadores and the American Indian without contradicting the religious expectations of expansion of the papal camp. These authors (theologians and missionaries) wanted to demonstrate that political society was the immediate creation of men and served purely temporal ends, whereas religious communities were created directly by God and served purely spiritual ends. They still believed that the urge that prompted men to form a society of any kind might be the product of nature and divine inspiration, yet it remained the case for them that the people were logically and chronologically prior to their rulers and possessed the capabilities of participating in their appointment. Spiritual power was bestowed by God directly to the church; but temporal power was bestowed by God directly to the communities, which in turn, by means of election or any other form of collective appointment, could organize it at will regardless of its religious commitments.

4 Mariana, De rege et regis institutione, 1605, p. 16.
5 Defensio fidei III, cap. 2, 17; Id. III, cap. 19; De legibus II.XVII.9, and III.iii.6.
6 Theologians include, in Spain, Francisco de Vitoria, Domingo de Soto, Diego Covarrubias y Leyva, Melchor Cano, Alonso de Veracruz, Juan de la Peña, Serafim de Freitas; and, in Portugal, Martín de Azpilcueta (Dr. Navarrius), Martín de Ledesma, Fernando Pérez, Luis de Molina, Pedro Simões, Fernão Rebelo, Francisco Suarez. Missionaries include Bartolomé de las Casas, Manuel da Nóbrega, José de Acosta, Juan Zapata y Sandoval, and António Vieira.
These Iberian authors seem to believe that there is a distinction between a people and a political community. Peoples are natural and present beforehand in Creation, but their political arrangements are instituted by election or consent. Agreements are then constitutive not of society, but rather of the political order. Therefore, communities precede political societies, which means that these agreements by which rulers are appointed are not formed between the king and the people but rather between the elements that comprise the people. Molina, for instance, tried to identify these elements.

By the simple fact that men agreed to constitute the body of the state, it is only by their natural right that this state has power over them on matters of government, legislation, and administration of justice and punishment.

And Bartolomé de las Casas, even more explicitly,

It is clear and evident that there is no power on Earth with sufficient authority to deteriorate and make less free the natural condition of the free man, since liberty is the most precious and supreme form of good in the temporal world. … And if such consent is not the outcome of the free, spontaneous and unforced will of free men, then all power is nothing but force, violence, injustice and perversity, and, according to natural law, worthless.

It seems clear that these statements lack a proper systematic treatment that is able to make the neo-Thomist interpretation of natural law coherent with a novel consent theory, since communities are created by God and pre-exist their individual members, who in turn agree to constitute a political power that binds their communities. However, the proposition remained contentious that political and moral normativity should be compatible with some form of consensus, even if simply based on custom. The difference between authoritative ruling and consent of the governed, though, would only be reduced by detecting explicitly a contractual element even in law that emanated from the ruler’s will as a deduction of natural law – a task to be undertaken by Suarez.

Suarez began from the Aristotelian commonplace that men naturally crave to live in communities who are bestowed with power directly from God; still, a political organization of power remained dependent upon human volition; not until men were bound together by some compact did they form a political community as distinct from a mere multitude. Thus,

Men come together by individual will and common consent in one political body, under the single bond of society to aid each other through mutual organization for a single political end, and by that means to bring into being one mystical body, which in moral

7 A mistake often reproduced in the literature: see, for instance, Gough (1957), pp. 68-71.
8 De iustitia et iure, I, bk. I, disp. XXII.
10 De legibus III.i.3.
11 De legibus I.vi.19
terms can be called an entity for its own sake and consequently needs a single political head.\textsuperscript{12}

Despite this, Suarez is not straightforwardly a voluntarist insofar as political obligation derives from consent only in the sense that consent follows from natural law and therefore political power emanates from communities by means of natural resultancy through consent. Also, he is far from being an individualist insofar as men consent to live socially in pre-existent societies and their agreements beyond mere consent are constitutive only of that ‘mystical body’ beyond the ‘natural body’ of the people.

But this does not entail necessarily that his efforts are unfit for a theory of the social contract in the formal sense. On the one hand, the Thomist tradition of natural law is never fully dismissive of a voluntarist element when determining the exact contents of human law. The mechanism of \textit{derivatio per modum determinationis} requires that the human will adds certain contents to the natural law, and there is no reason why this voluntarism cannot consist of a concurrence of different wills. More explicitly, he states

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the person’s designation is not sufficient – nor is it separable from a donation or from a human contract (or something resembling it) – in order to obtain the effect of a transference of power, given that natural reason alone does not bring about the transition of power from one man to another by merely designating the person, without the consent and the effective will of the one through which power is to be transferred or bestowed. Therefore, one cannot make sense of a transference made directly by God through succession, election, or any other similar institution, except when it is a succession deriving from a positive divine institution. However, royal power has its origins not in a positive divine institution, but rather in natural reason alone by means of a free human will – consequently, it must be bestowed directly by man rather than by the mere designation of a person.\textsuperscript{13}
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On the other hand, his communitarianism shows in his concerns to dispel the idea that the pre-civil condition implies a solitary existence and that the power exercised over the community has its source in individuals;\textsuperscript{14} as an attentive reader of cardinal Bellarmine and of his Iberian precursors, he always traces political power back to God via the people and that is exactly his main contention with James I’s \textit{Apology for the Oath of Allegiance} developed in his \textit{Defence of the Catholic and Apostolic Faith against the Errors of Anglicanism}. But communitarianism is also a reliable expediency when invoking contract theory to limit the power of Hispanic sovereigns vis-à-vis indigenous peoples overseas – if all communities are natural and their political orders

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\item De legibus III.ii.4.
\item Defensio Fidei III.ii.17. He insists further on: ‘the king’s power is grounded on a contract or on something resembling it – the fact remains that the just punishment of an offence functions exactly as a contract with regard to the effects of transferring authority and power, and that is why it must be observed’ (Defensio fidei III.ii.20).
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freely contracted, then Hispanic sovereigns are expected to deal with them as equal sovereign communities. Rather than opening the path to a universal language of the rights of man, this opens the path to a universal law of peoples via the mechanism of the social contract.

In fact, with regard to their use of contract terminology, it might be misleading to simply consider this trend as part of ‘Catholic Counter-Reformation’ due to the fact that its primary addressees are not the writers of the Reformation movements but rather the officials of the Portuguese and Spanish crowns that intend to legitimize their conquest and dominion over the newly-found lands of the Americas by means of theological and political arguments. Unlike what occurs in the remainder of Europe, these theologians seem far from the heart of the debate on religious conflict and toleration; rather, they employ the language of contracts with the purpose of providing sufficient theological and political grounds to the indigenous peoples’ rights to self-determination, thereby limiting the contemporary Iberian aspirations towards imperialism.

By doing so, this trend ends up producing two historical curiosities. On the one hand, consent theory is presented as enforceable in the creation of political authority and normativity through a conceptual frame of reference pertaining to private law; thus, political obligations arising thereof acquire a similar status in the public and in the international realms, which entails that there is a law between nations (jus gentium) consistent with natural law and which is also part of positive law binding all nations alike, for no political sovereign is recognized as having the authority to bind peoples that instituted their own authorities. This entails a sort of pre-Westphalian conception of international public law. On the other hand, the appeal to contracts as constitutive of normativity rejects the existence of divinely-ordained temporal sovereigns, which means that the first appeals to secularism in politics (more specifically, in the creation of constitutional limits to the sovereign power) within the social contract framework emerged out of a theological setting. Correlatively, the origins of the conceptual framework of the social contract lie in the striving to cut the connection between God and temporal rulers.

III. THE PROTESTANT INDIVIDUALIST TREND OF THE MAINSTREAM ENLIGHTENMENT

Regardless of disputes about which essential characteristics define a social contract as well as about which names fit into the category of social contract theorist, there is little or no doubt in the literature that the golden age of contractarianism came about in the seventeenth and eighteenth centuries of Protestant Europe. The causes for this emergence that have been singled out are myriad: increasing interest in biblical exegesis and in the study of Old Testament history; the ideas and practices of the Reformed Churches; the legal arrangements of the German Empire, Aragon, Switzerland, Poland, and Holland; the rise of capitalism; the gradual breakdown of the
extended family; the increasing appeal of urban life in detriment of rural areas; the rise of individualism and of rationalism; and the impact of the scientific revolution. Whether all or only some of these occurrences contributed to the growing popularity of a novel theoretical terminology derived from civil law with the purpose of explaining the origins of politics and morality constitutes the heart of a different matter. What seems relevant in such a discussion concerning historical causes is that religious conflict and political turmoil bring forth the need to address issues of toleration and normative legitimacy under a new frame of reference.

The demise of a feudal organization of society is established with the birth of the modern Nation-State that sprung from the Peace of Westphalia in 1648: a popular-based sovereignty confined to a certain territory and exercised only by national citizens, with the exclusion of all others. The Westphalian Nation-State presupposed the possible coexistence of different sovereign powers, for its four grounding principles consisted in the possibility of self-determination by each state, in the legal equality between states, in non-intervention in internal affairs of state, and in mutual non-aggression. In addition, theoretical reasoning about this new reality was somehow forced to adopt methods of analysis inherited from scientific experimentation, more specifically the resolutive-compositive method whereby the existence of wholes was explained from the standpoint of the constitutive activities of their parts.

The first references to social contracts in seventeenth-century Protestant political thought predate these two events. Both Althusius and Grotius, for instance, talk about pacts and conventions as the source of political authority and obligation, but their motivations and theoretical backgrounds differ little from the language of conventions used in the previous century since they still aim at establishing the grounds for an international public law and they still remain subject to Aristotelian conditions of science whereby wholes precede their parts logically.

However, the conjunction of an effort to develop a philosophical comprehension of the newly-born State-Nation with the resolutive-compositive method of study almost requires necessarily the usage of conventionalism by means of the language of contracts. So, despite all their differences, authors such as Hobbes, Pufendorf, Locke, and later Rousseau and even Kant, will expound their social contract theories by means of common principles derived from their shared frame of reference.

The first is the ‘baseline principle’, or the idea of institution: political authority stems (and can be explained) from a hypothetical and ahistorical description of pre-political human individuals agreeing to leave a state of nature and submit to some form of government. This entails that political power derives neither from God nor from

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16 Grotius, for instance, mentions pacts between men already inserted in families and clans as the onset of political authority, always in the course of a natural appetitus societatis that drives humans towards each other. See De jure belli ac pacis I, ch. III, 16; and ch. IV, 14. However, it is important to note that, for Grotius, it is men rather than families that institute civil society; Grotius stands in-between the neo-Aristotelian communitarian standpoint and a novel individualist view of natural rights.
Nature, but is rather a human construct – a normative artefact. So, not only is power instituted; it is instituted by the action of human individuals that are conceivable as \textit{corpora simplicissima} in a pre-societal whole. The second is the ‘reciprocity principle’\textsuperscript{17}, or the idea of \textit{limitation}: political power is sovereign not because it is the absolute condition to do whatever it can or wants, but because it is the actualization and representation of the power transferred from individuals and is thereby limited by their consent. The social contract institutes political power by establishing what the latter can do, must do, and cannot do; and, almost paradoxically, such a reciprocity of responsibilities between government and governed is not simply grounded in morality but is part of the very process of strengthening that which is instituted, since limited power in this sense (because more effective in producing obedience) is more powerful than unlimited power.\textsuperscript{18}

With regard to a common conceptual frame of reference, the reason underlying the use of contractual language is not dissimilar from the one found in the Iberian Catholic trend: that of transferring the characteristics of pacts and contracts typified in private law into the public sphere. Despite the differences they are able to ascertain between pacts and contracts, their classical model of legal convention is the one shared by most contracts of Roman private law: consensual contracts (\textit{contractus ex consensu}) to be found in such contracts as sale, partnership (\textit{societas}) or mandate (\textit{mandatum}), as opposed to real contracts (or contracts \textit{in re}).

Firstly, the consensual contract deriving from Roman law is a legal agreement whereby different deliberative agents concur in mutual promises. From the viewpoint of modern contractarianism, this characteristic entails that the contractees are thus human individuals in the context of rationalism. The contract is the instrument through which at least two different entities share a common rational process. In this sense, the contract’s stipulations can also be considered requirements of reason – voluntarism is thus hand in hand with intellectualism.

Secondly, this type of contract presupposes the existence of those distinct entities that concur in their deliberations. The contracting parties necessarily pre-exist the contract itself. This entails that the coexistence (whether stable or unstable, but always ephemeral) of individual entities prior to the contract is in fact a condition of the validity of the contract. These entities must be beforehand capable of deliberating, promising and verbalizing – and they must be beforehand endowed with something that they can give up, transfer or perform. The contract turns naturally pre-existent human individuals into contracting parties (members of a society). Individualism is thus the starting-point of the social contract, and therefore it is necessarily natural. Even in versions of methodological individualism according to which causal accounts of social


phenomena explain how they result from the motivations and actions of individual agents, the contractual device is artificial in the natural process of individualism. So, the contract is constitutive of society and of citizenry, not of human individuals per se.

Thirdly, the contract comes about in a unique foundational moment that establishes specific contents and the corresponding effects. In general, some form of ritual (whether through gesticulation, speech or writing) setting the exact moment of consensus is required in order to consider that a contract has been formed and is binding; but consensual contracts were formed whenever mere consent occurred or was expected. Social contract theories tended to interpret the mechanism of transferring rights by means of this model. The contract becomes valid in three steps: formation (consensus); contents (normative stipulations, or obligations); and effects (performance). There is already a contract from the very first moment of consensus; the contents inherent in the contract are enforceable even if performance has not yet begun. The contract is hence a collective promise that, when stated, inscribes through a unique moment in the present the continuous demand for the performance of a future action – it resembles a fiat since it sets here and now what was not here before and it establishes effects that are to extend in time beyond that primary concurrence of volitions. The contract therefore conditions a future situation and remains binding until the contents agreed upon are performed in full. The contract’s binding force is independent of its actual performance.

III. CONTRACTARIAN RADICAL ENLIGHTENMENT

If there was an alternative fringe in the high Enlightenment to the mainstream versions of the social contract, it should be found unmistakeably in Spinoza’s writings. The defence of a ‘radical Enlightenment’ that has Spinozism as its backbone is sufficient reason to impel the historian of social contract theories to review the status of this conceptual tool in Spinoza’s political theory.

In fact, many Spinoza scholars claim that his use of the social contract tends to fade away in his writings as he drifts further away from mainstream Enlightenment. He mentions it in his earlier political work, the Theological-Political Treatise from 1670; much less in the Ethics; and only slightly in the Political Treatise, published posthumously in 1677. This led to the generalized belief that Spinoza progressed from being a social contract theorist towards being something else entirely. In this sense,

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20 Cf. Jonathan Israel, Radical Enlightenment (Oxford: Oxford University Press, 2001). According to Israel, radical Enlightenment comprises several views and tendencies in the realms of science, theology, and politics. In matters of science, it embraces naturalism, mechanism, and materialism; in matters of theology, it denies a moral order to the universe, a providential god, the monotheistic account of creation, miracles, and reward and punishment in an afterlife; and in matters of politics, it supports republicanism and democracy, as well as the necessity of toleration and the ‘freedom to philosophize’. For those who know Spinoza’s philosophy, this ought to sound familiar.
his conception of the social contract would not be altogether different in its general outlines from the one adopted by the Protestant individualist trend – the only difference is that in certain writings he seemed to adopt it, whereas in later writings he seemed to reject it.

Nonetheless, there are reasons to discard this interpretation. On the one hand, even Spinoza’s contractarianism in the *Theological- Political Treatise* has something distinctly peculiar about it, since it already fails to provide a notion of the social contract fully compatible with the general characteristics identified in the mainstream version. On the other hand, both the *Ethics* and the *Political Treatise* still include the language of contracts – expressions such as ‘natural agreements’, ‘contracting parties’ and ‘contracts or laws’ are often included in these texts when he addresses the origins of power and legitimacy. This means not only that Spinoza’s so-called earlier contractarianism must be reconsidered, but also that Spinoza’s so-called later non-contractarianism can only be concluded from a prior consideration of his contractarianism.

In the *Theological- Political Treatise* there are explicit references to pacts as constitutive sources of politics, albeit with substantial differences with regard to Hobbes, for instance; in the *Ethics*, there are explicit references to contractual mechanisms of formation and performance (such as promises and transferences), even though the doctrine of mimetic affects seems to moderate the importance of contracts; and in the *Political Treatise* the multitude emerges as a new constituent concept that seems to emphasize the power of plurality in detriment of the contract’s unity, which explains why the term ‘contract’ never really appears in the text except in paragraphs regarded as poorly revised or in small excerpts about international relations. But before qualifying these changes as ‘an evolution’, it should be noted that Spinoza always seems to drift away from the Protestant individualistic version of the social contract even when he mentions it explicitly in the *Theological- Political Treatise*. For instance, he says explicitly that contracts are a concurrence of affects and imagination rather than of wills or of reason.

it is not the case that all men are naturally determined to behave according to the rules and laws of reason. On the contrary, all men are born completely ignorant of everything
and before they can learn the true rationale of living and acquire the habit of virtue, a good part of life has elapsed.\textsuperscript{27}

Even though reason is the kind of knowledge through which common ideas emerge, since most men are not guided by reason in their everyday lives what is in fact common to all men is their experience of bodily affects. In addition, experience also shows that men can always develop a certain sphere of common social consensus even though most of them are not guided by reason. This means that a specific orientation of the interplay of affects between men reproduces in the realm of the imagination that which the dictates of reason produce necessarily. If there is social agreement, it must be necessarily conformed to reason since reason constitutes a common ground for life between men, even though this contract’s prime-matter is mostly passionate and imaginative rather than rational. When the \textit{Theological-Political Treatise} states that men ‘had to make a firm decision, and reach agreement, to decide everything by the sole dictate of reason’\textsuperscript{28}, there is no display of a rational–deliberative model of contract, but rather the effort to achieve compatibility between a historical condition of the social common and the idea of the common produced by the dictates of reason. Spinoza’s contract is imaginatively produced and necessarily reasonable, but only seldom rational.

But there are other peculiarities in Spinoza’s understanding of contracts. More specifically, he tends to change his attitude towards the state of nature. In the \textit{Theological-Political Treatise}, he conceives of a state of nature where men live in isolation, as if each were a sort of Adam in an anti-Garden of Eden; in the \textit{Ethics}, men act inside a hostile environment as ‘adult children’; and the \textit{Political Treatise} claims that the state of nature is the actual genesis and unfolding of political societies.\textsuperscript{29} The language of contracts in the \textit{Political Treatise} coexists with the concept of the multitude, which requires a coincidence between agreement and cooperation. This means, on the one hand, that individuals are simultaneous with the multitude; and, on the other hand, that any ‘transferences’ empowering the political sphere must be \textit{continuous} and based upon a \textit{continuous} constituent power, rather than performed in a unique moment. These transferences must be permanently renewed and cannot have a single foundational moment. Even in the \textit{Theological-Political Treatise}, the pact remained binding only insofar as men continued to regard it as useful; it became valid not in a single foundational moment of passionate circumstantial and imaginative consensus but rather through a continuous renovation of the affects inducing such judgements of usefulness.

Unlike what occurred with the Protestant individualistic trend of modern contractarianism, Spinoza’s model of contract is not a consensual contract but rather a contract \textit{in re}. In these contracts, the moment of formation is inseparable from the moment of performance, that is, the contract is formed only when at least one of its parties performs one of the obligations inherent in it. The threefold sequence of formation–content–effects typical of consensual contracts gives away to a single

\textsuperscript{27} \textit{TTP} XVI, 196; in ed. Jonathan Israel (Cambridge: Cambridge University Press, 2007).

\textsuperscript{28} \textit{TTP} XVI, 198.

\textsuperscript{29} Cf. my \textit{Spinoza’s Revolutions in Natural Law} (2012), pp. 112-117.
moment of formation whereby actual performance coincides with the act whereby agreement is formed. In these contracts (such as the loan for consumption \([\text{mutuum}]\), the loan for use \([\text{commodatum}]\), the deposit \([\text{depositum}]\), and the pledge \([\text{pignus}]\)), an action is always required in order to consider that the contract has been formed in the first place – typically, the transference of a given asset. Hence, the deposit is formed only when the thing in question is deposited, the loan is formed when the actual amount is loaned, etc. For Spinoza, agreements must come from actual transferences of power since the act of promising in a contract is not enough to preserve its validity and binding force – something \([\text{re}]\) has to be transferred in order to form agreement. Spinoza’s social contract resembles in its formation the generalized position of one active party in contracts \(\text{in re}\).

Spinoza always thought that political societies derive ultimately from the consent of individuals. If this is considered to define contractarianism, then it might be generally agreed that Spinoza was always a contractarian. However, this is not the predominant perception of modern social contract theories. Contractarianism is typically associated with any doctrine according to which the conclusion of an agreement creates by itself alone an irreversible political obligation, regardless of any subsequent fluctuation in the interplay of forces between individuals. In this sense, it might be generally agreed that Spinoza was never a contractarian, not even in the \(\text{Theological-Political Treatise}\). The only way to consider as a contractarian someone who believed that political societies derive ultimately from individual consent and inside a variation in individual relations of forces is to accept that he inaugurates a novel trend in social contract theory.

Consequently, he rejects specific traits to be found in consensual contracts albeit still using the contractarian conceptual framework. More specifically, his final excursus on the origins of political power excludes the methodological sequence from existent individuals to constituted political authority; unity; and transcendence. Spinoza strives to explain the contractarian framework entirely inside a project of imaginative productions of common political spheres, and that is why he interprets it as a process of plurality and immanence in which man and society develop simultaneously. The contract is thus not the constitution of a political unified structure of transcendent power, but rather the name given to the development of common processes for projecting the imagery of unity through which common individual empowerment occurs. But it is still a social contract.

IV. THE CONTEMPORARY TREND OF PUBLIC MORALITY TO POLITICAL INSTITUTIONS

The revival of social contract theory during the second half of the twentieth century displays an effort to trace the grounds of normativity back to the consent of its addressees supposedly in the same terms used by the modern Protestant trend. And in some cases, the reason for using the language of the social contract boils down to this
alone. However, even though contemporary uses of the social contract are not necessarily connected to an eventual decline of the traditional Nation-State, it is interesting to note that what prompted modern political theorists to adopt the contract as a model for explaining the origins of power and authority ends up being very difficult to reproduce.

Obviously, just as Hobbes’s social contract differs fundamentally from Rousseau’s, also Gauthier and Buchanan conceive of contracts very differently than Rawls and Scanlon, for instance. But the motivations inherent in these contemporary theories seem to be generally dissimilar to those found in modernity because the level of agreement being discussed plays mostly in the realm of morality rather than of political society tout court. The difference between both trends is qualitative in a theoretical sense – whereas modern contractarians developed ideas of civil contracts, contemporary contractarians are mostly concerned with moral contracts, even if they apply mostly to the public sphere.

In the modern trend, the role of the social contract was either to legitimize coercive political authority or to evaluate coercive constraints independently of the legitimation of the authority from which they derive; so, there was no question of agreements creating morality, although agreements could generate moral or political obligations. Seventeenth and eighteenth-century social contracts were tools in a theory of the origin and legitimacy of political obligation and sovereignty rather than attempts to ground morality in mutual consent. For instance, in Hobbes it was actually the denial of the possibility of morality by agreements that made the sovereign necessary to impose it. On the contrary, in the contemporary revival of the social contract there is an attempt to distinguish the question of what generates political obligation from the question of what social institutions are mutually beneficial and capable of justification vis-à-vis their addressees (or subjects). The general notion of contractual agreement functions as a framework for justification in ethics.

From this common setting follow very different ways of understanding the role of justification by means of agreement. Some authors simply attempt to ground morality in the rational agreements of utility maximizers who from their different bargaining positions negotiate mutual constraints – they thus ground moral principles in the creative self-interest of individuals who adopt constraints on their behaviour in order to maximize their own benefits.30 Other authors tend to focus their efforts on the design and justification of political and social institutions as a matter of agreement pertaining to public morality rather than as individual consent – in their view, justifying social arrangements is equivalent to showing that they have the requisite normative property both for individuals and public institutions, and this requires showing that all citizens

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have reasons favouring the arrangements. 31 In both versions, the emphasis falls on the
disposition of providing reasons for these arrangements rather than on establishing how
they are binding in the first place.

What seems determinant in contemporary uses of the social contract is not so
much consent to exercises of authority, but rather agreement in the sense of providing
reasons for endorsing specific social arrangements. Agreements are thus reason-giving
experiences – the act of agreement is indicative of what reasons citizens have inside
specific social and political relations. 32 Consequently, the contract does not merely
determine which acts are right and wrong; it establishes mostly what reasons and forms
of reasoning are justifiable. Even Rawls announced that the aim of his conception of the
social contract was to settle ‘the question of justification … by working out a problem
of deliberation’. 33 Posing the problem of justification in terms of a deliberative or
bargaining problem is thus a kind of heuristic: the contract is not so much a binding act
(a performative that somehow creates obligation) as it is a litmus test on the reasons
revealed by individual agents when deliberating about social arrangements. The real
issue is no longer the origin of normative authority but the procedures of deliberation
about what principles (substantive and/or procedural) can be justified to all reasonable
citizens.

Notwithstanding, despite the chronological gap, what ultimately substantiates
the consideration of contemporary social contract theories as a novel trend distinct from
other historical uses of the concept is the fact that the focus on principles of justice
rather than on the origins of society and political authority mitigates the connection with
a specific terminology of contracts. Preference for agreements as reason-revealing
instances in detriment of agreements as constitutive sources of binding normativity
leaves room for considering the latter as artefacts belonging to ‘the Museum of
Eighteenth-century Thought’ 34 and to limiting the age of the social contract to the years
between Hobbes’s Leviathan and Rousseau’s Du contrat social. 35 Even a superficial
overview of contemporary social contract theory finds it difficult to discern the reasons
why the concept is actually social and contractual since it is neither constitutive of the
former nor necessarily binding as the latter. Rather, it comes about as a conceptual tool
in theories of ‘moral agreementism’ that follow the basic premise according to which
precepts for living together are not ‘handed down from on high’ 36. The fact that it is
inserted into a conceptual frame of reference comprising the terminology of contracts

accrues from an assimilation of the baseline and the reciprocity principles underlining the modern Protestant trend of social contract theories, which nevertheless are insufficient as exclusive essential characteristics of any notion of the social contract whatsoever.

CONCLUDING REMARKS

The extensive literature on the idea of the social contract is myriad and, ironically, full of disagreement. Disputes tend to be threefold. They revolve around the essential characteristics that comprise an actual social contract theory; the accurate historical origins of the concept; and which writers or writings properly belong in a history of the social contract. Obviously, the three types of dispute are intertwined in so far as assertions and judgments concerning the proper ingredients of the social contract work as criteria for solving problems concerning sources and membership.

In the light of such an array of opinions spreading to issues of origins, causes and names associated with the social contract, it is difficult to maintain that there is a single unified tradition or a single model of the contract doctrine. Aside from consensus on the centrality of contractarian arguments to early modern political thoughts, there are few elements unanimously regarded as constitutive of a theory of which one can begin to attempt to write the corresponding history. So, from such disputes, it is fairly easy to sustain that we are not confronted with one social contract, but with a variety of traditions and uses, each adopting a specific notion of contractarianism for its own purposes.

However, the arguments presented developed two claims that stand in-between the direct identification of one tradition of the social contract (usually resumed to the discussion of who belongs to which teams) and the utter refusal to accept any given common denominator between different social contract theories. The first is that there is an essential characteristic inside which all serious attempts at analyzing the idea of the social contract will fall: a common formal conceptual frame of reference. And the second is that different theories of the social contract share certain properties that allow the identification of at least four different trends inside this general framework.

In the end, the arguments disproved some assumptions that have become commonplace, such as that the birth of social contract theories lies in the seventeenth and eighteenth-century Protestant political thought; that there is only one mainstream version of the social contract in the Enlightenment; and that contemporary versions of contractarianism owe their ancestry to the theoretical mechanisms employed by authors such as Hobbes, Locke, Rousseau and Kant. Three different contentions; but all following from the same conceptual framework.