

# THE PROBLEM OF CHOICE IN CONTRACT THEORIES

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Hereunder, I try to show, what roles an individual's choice plays in the traditional notion of social contract, that is, how certain thinkers approach and explain the fact, that the co-operant individuals choose the rules of their private alliances by free-will, and then, they undertake them voluntarily.

But first of all, I would like to see into the concept of „social theory”, searching for its general meanings. In the beginning, we can define society, as Rawls did. According to his definition, it is a more or less self-sustaining unity, in which the individuals, in their relations towards each other, consider certain behavioural rules obligatory and consequently obey them. The main question, however, arrives from the direction of the legitimacy of the all-time power: what makes it possible, that members of a society quite often act out of accordance with their supposed or real interests, and obey the rules supervised by the power, id est what precludes or preconditions does social order have?

One of the possible answers to this question is the concept of social contract: for the advantages of the institutional operation of the community, the individuals, keeping the concept of equality in their minds, lay down the realization of their free will, and eventually abdicate the entirety of their freedom. Thus, the social contract as such, has two parts. One of them is the initial state, which is often regarded, as a natural state as well; this is the nascent situation of choice, which derives from this early phase. The other one is the group of those potential rules and principles, from which the contracting partners choose the most suitable ones for the working of their community and for the definition of their place in it. We can see, that choice is a decisive element of both parts. But there is a difference between these two kinds of choice. In the first case, natural state and contracted state are the options which they have to choose from, and in the second one – beyond the choice of the contract alternative – they have to opt between the possible rules of the contract.

As their approach to the problem is concerned, the theories of social order and social contract can be divided into two groups: namely conflict orientated and consensual theories. The conflict orientated theory is based

on the notion, that for the antagonism of the interests, there are certain necessary, inevitable clashes between the individuals and the groups of the society. For that reason, the only assurance for the maintenance of social order can be achieved, if one of the parties – or perhaps a third party, an outsider – gets the others under control.

On the other hand, consensus orientated theories claim that the key to social order is nothing else, but the agreement in certain values and goals by the members of society. It means an abiding and immovable system of norms, which is absolutely holeproof from the point of the different interests. It is a common interest for all the individuals to act according to a „general will”, hence there is no need to apply any kind of force.

What does the problem of choice mean? Some theories of social contract assume, that the individuals of society form the rules of peaceful coexistence collectively, consequently, they can choose from the possible rules. But what are the factors, that motivate this choice, and what can guarantee, that this choice is the best possible one of all, provided, that this is considered to be a basic requirement? Furthermore, what kind of extra problems does it state, if the ethical dimension gets a crucial part in the creation of the judicial regulation, which is essential for the working of an ideal state?

In connection with the problem of the possibility of rational foundation of judicial norms, Karl-Otto Apel draws attention to the probability, that for example the mafia might also follow the expectable rational process of consensus creation, in a case for example, where the cooperative antipodes' main purpose is to fulfill a successful drug transaction without any disturbances. *Id est*, fighting with others is not always the best way to enforce our interests – as for example Hobbes and Rousseau also claim that – co-operation is often a much more advantageous way to do it. A further objection can be the clearly rational consensus making as Kant explains it, since according to Apel a person who thinks rationally, never – not even at the time of making the contract – can count on the fact, that his antipode follows the „categorical imperative”, and for instance the person will not tell lies to a potential murderer about the victim the criminal just searches for. Thus, from the ethical point of view, the norm-consensus reached by the people involved, is not a satisfactory model, so it is not a sufficient condition for the operation of the rightful state. From all of these, we can conclude, that the ethical fundament of a society cannot be explained in the way, most social contract theories suggest, that is, with the help of

rational choice, when all persons' interests can be taken into consideration, in the highest degree.

An unevadable elaboration of the question of choice is given by J. M. Buchanan, who studies the modifications of individuals' choices between different ethical rules depending on the ethical choice made by persons around the individual, with special emphasis on the size of the community. Scilicet, an important question of the theory of social contract is the character and the number of the contractants, not to mention the question of the impact made by the surrounding people, which occasionally – as Hobbes also claims – might cause force as well. Buchanan's theses provide useful standpoints in this respect, too.

According to Buchanan, an individual – and this is a special feature of his behaviour – can choose from two characteristically different ways. One of them is a rule, which is called moral law by the classical ethics. The core of it is, that like the Kantian model, it approaches all human activities towards the general, so it claims, that the maxim of any activity – through the actor's will – could become a general law. The other way would be the principle of privacy, which in all possible situations, surrounded by the actual circumstances, would be the most advantageous for the given individual. The two roads not necessarily lead to different directions, that is, in a given case, the pursuance of both principles might make the individual act in the same way – as it was noted by Apel as well – so the choice we are discussing now, in fact, is not the choice between *moral* and *amoral*, but a choice between the previously stated ethical rules.

As the possible orderliness of the world is concerned, Buchanan assumes, that there is an order, which is acceptable for most people. In this respect, the order here, means the relationship between the choice of the individual and the choice of other members of the society. According to this order, it is the bottom, for each person, where he places the worst possible world, where everybody follows the privacy principle, except for the person in question. In this world the person who sticks confirmedly to moral law will be exploited, deceived and trodden down by the others. We can imagine this constellation on the contrary as well. Let us assume, that there is the best possible world, where each individual acts according to the general moral law, except for our man, who, in this way, can delude and exploit his fellow-beings. Between these two conceivable extremes, Buchanan distinguishes four more possible worlds by the help of a simple mathematical formula, and he also ranges them according to the above

mentioned principles. Although they have not too much written about, social compact theories usually make it possible for the contractant person to set this order for himself, and if he is allowed to make decisions individually, he can draw the lesson and employ it in the process of decision making.

At the same time, Buchanan assumes, that the basic aim of each individual is to enjoy as high degree of freedom as possible and to expose himself to the less potential danger in his life. Everybody wants to achieve the best world for him, which could be done only at the expense of the others. But, as the individuals realize, if all people lived at the highest degree of freedom and acted according to his private principles, they could live in a world, which is just slightly better than the worst possible one, consequently their safety would reduce to the minimum. Nevertheless, all people can do whatever they want, thus they are inclined to compromise, which means that they partly give up their privacy principles.

Buchanan claims, that the rate of giving up privacy principles is mainly influenced by the number of the collective actors. The two factors are in inverse proportion: the bigger the number, the less they are inclined to give up their privacy principles. The question is: what can the reason for that be?

The principle says, that people are most likely to put their private principles to the forefront, if they think that their deeds have no- or little impact on the general moral law, and this is most typical in the case of a large number of them. In a small community, for example in a family, one person or the other has real impact on the norms formed in the community. If all members of a family have to sit around the table each Sunday at noon, and there is no excuse for staying away, then, in this family presence is a moral law, which nobody dares to offend, because it would raise the anger of the family members. Still, if someone should be absent, and this person misses to appear on the following week, and a week after too, than another member of this family could stay away, offending the norm much less than the first one, who influenced the norm with his action, namely he let it loosen. Of course, the first violator has to take the possibility into account that his action might respond to the situation, for example he will not be laid a knife and fork, even if he decently appears at the lunch table later. Accordingly, we can realize here, that with the above mentioned „violation of the law” he gains freedom, but at the same time, he loses part of his security as well. In the case of a larger number of people, this proportion is more advantageous for the individual. In a community of ten million people

for instance, following this privacy principle, which means to disobey the duty of paying taxes, causes much more good, than harm for him by decreasing the level of the community and consequently his financial security, for this reason, he will be ready to disregard the rules.

Nevertheless, Buchanan has a serious argument for defending social order: the violator does not act with a clean conscience. He can not be totally satisfied, because, despite the fact that he knows, that his deeds effectively do not change the state of the community, he would encounter the possibility that everybody might have the same way of thinking – as Buchanan refers to it – denying the Kantian categorical imperative, and in this way, a world comes into being, in which each man rejects moral law as a principle, and attempts to exploit the others. Buchanan calls this phenomenon „the dilemma of large number of people”. Each person lets his own action principle be loosen, just at the same level as he assumes this from the others, but that level should be certain, because his feeling of security requires it. Everybody tries to evade the burden of moral law, which restricts personal freedom. As a „passenger without a ticket”, everybody tries to be present at the distribution of community goods, in a way that he does not intend to give his due to the community, but he expects to have what all the other members – or his particular group of people – are given. (The typical sponge thinks, that he does not have to pay taxes, but he expects to use the roads bilt from the money of taxpayers.) I have to mention – as Buchanan also adds – that, the person, who refuses moral law is not aware of the fact, that he does harm to the other members of the society, and not to the state, which he considers to be far away from him. He does not know, that society consists of other people, and of him of course, and it is not a far away, abstract concept.

Furthermore, I also have to remark, that being a sponge is characteristic in large groups, and that is the feature of social theory itself. The cause of it is, that in a small community, in a family for example the violator of the moral law will realize automatically, how he affects – by his action – the other members, and consequently the stability of the family. He understands, that in the case of not giving his salary for example into the collective pay-box, the others will have less money, they will live in worse conditions, and that perceivable change reflects back on him immediately. On the other hand, in a large community, if the violator of law does not pay up his contribution to the society, the collective wealth of the people remains practically the same, or at least this default does much less harm,

than the quasi loss of the paid in money. This way, in the above mentioned community the concept of justice becomes quite relative, excluding the automatic predominance of ethical dimension.

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