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HARMONISING THE SOCIAL CONTRACT THEORY WITH CONTRACT LAW

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ABSTRACT

Exponents of the social contract theory claim that the theory offers the philosophical and political platform for advancing the legitimacy of State and the bindingness of criminal law. Not much work has been done to ascertain the extent to which the social contract answers the description of a contract according to contract law. This paper concedes that the social contract can be distinguished from ordinary commercial contract. However, it contends that for the fact that it is called a contract of any sort whatever, the social contract should answer the description of a contract according to contract law. The paper analyses the social contract theory side-by-side relevant principles of contract law and finds that the social contract does not possess the characteristics of a contract; it does not have the essential elements of a contract; and it does not fit into the types of contract known to contract law. For failing to answer the legal descriptions of a contract, the term 'social contract' is a misnomer. This anomaly strangles the theory and

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robs it of capacity to justify the legitimacy of State and the bindingness of criminal law. The paper recommends that the history and tradition of the people of each State may be substituted for the social contract for advancing the legitimacy of State and the bindingness of criminal law.

Key words: Bindingness of criminal law, contract law, history and tradition, legitimacy of State, social contract theory.

1. INTRODUCTION

A contract is a promise the performance of which the law will enforce, and for the breach of which the law will grant a remedy. A contract is formed when the promisee accepts an offer made to them by the promisor to do or refrain from doing an act.[1]This paper makes a basic claim that the social contract, for the fact that it is called a contract, should have the descriptions of a contract in fact and in law. The social contract is a theory that attempts to explain how human beings in the state of nature entered into a contract whereby everyone surrendered their rights to the common will, which in turn took up the responsibility to ensure order and the peaceful co-existence of all. The social contract supposedly gave birth to State and made criminal law binding on all the citizens of State at the pain of sanctions.[2] In the literature, it is almost taken for granted that the social contract was indeed made among members of the society and that it forms the basis for the legitimacy of State and the bindingness of criminal law.[3] Hardly has any of the exponents of the theory analysed it vis-à-vis the

[1]Contract Law, Cap 26 *Laws of Enugu State* 2004 s 3. This paper relies on provisions of the Contract Law cap 26*Laws of Enugu State* (the Contract Law of Enugu State 2004), case law ,as well as principle of common law and equity on contract.

[2]Fred D'Agostino, *Free Public Reason: Making It Up As We Go Along* (Oxford University Press 1996) 23.

[3]Hugo Grotius, *On the Law of War and Peace* (De Jure Belli ac Pacis) Translated by AC Campbell, (London: 1814) Book I Chapter 2; Immanuel Kant, 'Theory and Practice', 8:297, 6:318, in *Stanford Encyclopedia of Philosophy:* 'Kant's Social and Political Philosophy'<plato.stanford.edu/entries/kant-social-political/> accessed 29 December 2022; Thomas Hobbes, *Leviathan,* (Andrew Crooke 1651); See also T Hobbes, *Leviathan* (South Australia: University of Adelaide e-Library,2015)<ebooks.adelaide.edu.au/h/hobbes/thomas/h68l/index.html>accessed 27 December 2022; John Locke, *Second Treatise on Civil Government*<ebooks.adelaide.edu.au/l/locke/john/l81s/index.html> accessed 21 May 2022; Jean Jacques Rousseau, *Le Contract Social (The Social Contract)* (1762) Translated by GDH Cole<ebooks.adelaide.edu.au/r/rousseau/jean_jacques/r864s/index.html>accessed 13 September 2022.

characteristics and elements of contract according to contract law or clarified the type of contract it really is. It will appear that everyone has been contented with the bare assertion that there was or is a social contract that is binding and shall remain so for all times.

This paper discusses the validity of the social contract in terms of how it fulfills the requirements of contract law. Whether one sees the social contract as a historical fact, like Hugo Grotius and John Locke do, or as a construction of legal reason, like Immanuel Kant and Thomas Hobbes do,[4] it is worth considering exactly what sort of contract it is. Since it is called a contract, it is worth investigating whether the social contract indeed possesses the essentials and characteristics of a contract.

Obviously, a commercial contract differs from the social contract in as much as their end-products are not similar. While a commercial contract results in a binding agreement between the parties; the social contract theory seeks to offer justification for the legitimacy of State and the bindingness of criminal law. However, this paper contends that the social contract (theory) ought to satisfy the basic characteristics of a contract for it to legitimise State authority. A hypothetical contract cannot justify political institutions for it 'is not merely a pale form of an actual contract; but it is no contract at all'.[5]

The objective of the paper is to ascertain the essentials of the social contract and what type of contract it really is. The paper probes into the formation of the social contract to find out who made the offer? Who accepted it? Who paid what consideration? Since the social contract theory is used to justify the legitimacy of State, this paper attempts to verify it and, failing which, it endeavours to offer an alternative justification for the legitimacy of State and the bindingness of criminal law. Justification in this connection is the reason individuals have for accepting the social contract theory.[6] Though the paper speaks generally to the jurisprudence of statehood and the legitimacy of criminal law, it uses the Nigerian situation as a case study.

This paper is presented in four parts, including Part 1, this Introduction, which describes a social contract and distinguishes it from a

[4] Hobbbes (n 3).

[5] R Dworkin, 'The Original Position' [1973] 40 *University of Chicago Literary Review* 500, 501.

[6] Stanford Encyclopedia of Philosophy, 'Contemporary Approaches to the Social Contract' (First published 3 March 1996; substantive revision 27 September 2021) <https://plato.stanford.edu/entries/contractarianism-contemporary/> accessed 30 April 2023.

commercial agreement. Part 2 examines the theory of social contract and the writings of its exponents. Part three analyses the principles of contract law to ascertain three things, namely: whether the social contract possesses the characteristics of a contract; whether the social contract possesses the elements of a valid contract; and what type of contract is the social contract? Part four concludes the paper.

2. THE SOCIAL CONTRACT THEORY

As indicated in the introductory section, the social contract theory claims that human beings who originally lived in a state of nature agreed among themselves to form an organised political society governed by law. Grotius was one of the earliest social contractarians who prepared the ground for the secular, rationalistic version of modern natural law.[7]Grotius believes that there was an in-born sociability in human beings, which enabled them to live peacefully together in society. Whatever conformed to this social impulse and to human nature[8] as a rational, social being was right and just; whatever opposed it by disturbing the social harmony was wrong and unjust.[9]For Grotius, the social contract is a fact of human history.[10]Grotius prepared the way for Thomas Hobbes, who subsequently gave a detailed analysis of how human nature made the social contract both inevitable and possible.

Thomas Hobbes[11] wrote in the first era of classical natural law when the focus was on maintaining a balance between the claims of natural law and the need for state policy, and he tilted the balance in favour of state policy: governmental power. He proceeded from anthropological and psychological assumptions quite different from those of Grotius. While Grotius believes that man is an essentially social and gregarious being,[12] Hobbes pictures the human being as intrinsically selfish, malicious, brutal and aggressive.[13] It is the view of Hobbes that in the state of nature, man was a wolf unto his fellow, and in a perpetual atmosphere of hate, fear and

[7]Grotius (n3) Book I Chapter 2.

[8] The noun 'man', 'woman' or any of their derivatives and the pronoun 'him', 'her' or any of their derivatives are used in a gender-neutral sense in this paper.

[9]Grotius (n3)Book I, Chapter 2.

[10]Grotius (n 3)Book I, Chapter 2.

[11] Hobbes (n 3) Book 1 Chapter 2.

[12]Grotius (n3)Book I, Chapter 2.

[13] BO Okere, 'The Classical Era of Natural Law', unpublished lecture note on Jurisprudence at the Faculty of Law, University of Nigeria, on file with this another 37.

natural distrust. Everybody is at war with everybody else.[14] According to Hobbes, everybody has a right to everything else and profit is the only measure of lawfulness; there is no right or wrong in the moral sense in the state of nature.[15] Everybody possesses the natural right to preserve his life and limbs against the aggression of others. This situation, Hobbes says, made life in a state of nature solitary, poor, nasty, brutish and short and necessitated the formation of the social contract.[16] In Hobbes' formulation of the theory, only the people were parties to the contract. They vested in the *Leviathan* the common will of the people, to govern over them and the *Leviathan* was not a party to the contract.

Later writers, like John Locke, had since emphasised the need to attenuate Hobbes' preference for absolute power with necessity to safeguard human liberty. Locke wrote in the second era of the classical natural law, when the focus was to erect effective safeguards against violations of the law of nature by government and he placed emphasis on liberty,[17] as against Hobbes who emphasised security. Locke begins his treatise with the assumption that the natural state of man was a state of perfect freedom in which men were in a position to determine their actions and dispose of their persons and possession as they saw fit; it was a state of equality marked by absence of subjection to the will or authority of any other man. It was Paradise Lost, a state of 'peace, goodwill, mutual assistance and preservation',[18] where no one harmed the life, health, liberty or possession of another. As long as the state of nature existed, everybody had the power to execute the law of nature and punish offences against them with their own hands.[19]Locke concedes that the situation he describes of the state of nature had disadvantages, inconveniences and dangers. In the first place, the enjoyment of the natural rights to life, liberty and property was uncertain and constantly exposed to the invasion of others. Second, in punishing infractions of the law of nature, each man was a judge in his own cause and was liable to exceed the rule of reason in avenging transgressions.[20] In order to end the confusion and disorder incidental to

[14] Hobbes (n 3) Book I Chapter 2.
[15]Hobbes (n 3) Book I Chapter 2.
[16]Hobbes (n 3) Book I Chapter 2.
[17] Locke (n 3) 34.
[18]Locke (n 3) 40.
[19]Locke (n 3) 39.
[20]Locke (n 3) 41.

the state of nature, human beings entered into a compact by which they mutually agreed to form the social contract.

Jean Jacques Rousseau wrote in the third era of classical natural law, when the emphasis was on popular democratic sovereignty and protection of the rights of the people.[21]Rousseau asserts that the fundamental political problem of society was 'to find a form of association which will defend and protect with the whole common force the person and goods of each associate and in which each individual must by a social contract alienate all his natural rights without reservation to the whole community'.[22] Rousseau is worried that 'man is born free but is everywhere in chains.'[23] Rousseau's philosophy led him to the conclusion that if all members of the society contribute their rights and powers and thus constitute the general will in whom they vest supreme sovereignty, this will solve the problem of society. Rousseau defends his philosophy by denying that the alienation of all the natural rights of the individual to the community would result in the sublimation of the individual and his loss of the cherished liberty.[24]

Later on, the focus of social contract thinkers was to find justification for theory. For Rawls,[25] seeking justification for the social contract theory leads the parties to deliberate about 'common practices. Later, Rawls[26] took the object of agreement to be principles of justice to regulate the 'basic structure'. Accordingly, the fundamental structure is seen as how the main institutions of society fit together to form a whole, how they assign fundamental rights and obligations, and how they define the distribution of benefits that results from social cooperation. As a result, the fundamental structure includes the legalized forms of property, the economy's structure, the family's makeup, and the political constitution.

The search for justification for the theory led much later writers to draw a direct nexus between the social contract, State and criminal law. Claire Finkelstein's 'Punishment as Contract'[27] attempts to consider a direct nexus between the social contract and punishment in criminal law. Other

[21]Rousseau (n 3) 10.
[22]Rousseau (n 3) 12.
[23]Rousseau (n 3) 14.
[24] Rousseau (n 3) 20.
[25]John Rawls, 'Justice as Fairness' [1958] 67(2) *Philosophical Review* 164, 194; reprinted in *John Rawls, Collected Papers*, Samuel Freeman (ed.) (Harvard University Press 1999).
[26] John Rawls, *Political Liberalism* (Columbia University Press 1996) 258.
[27] C Finkelstein, 'Punishment as Contract' [2010] 8*Ohio State Journal of Criminal Law* 319, 340.

contractarians will deliberate somewhat superficially on the need, essence and general import of the social contract theory, but Finkelstein rejects retributivism and utilitarianism as theories of punishment and insists that punishment is justified solely on the basis of social contract, a theory she calls 'rational contractarianism'.[28] Finkelstein argues against dominant theories:

> To summarise the argument thus far: I have argued, against retributivists, that a theory of punishment that gives no weight to considerations of deterrence is unable to serve as a guide for actual questions of criminal justice reform. And I have argued, against utilitarians, that a theory that is unable to provide an individualised justification to the criminal for his punishment and instead seeks to justify *his* treatment by its effects on another agent is morally unacceptable. The contractarian approach to punishment holds out the hope of a conjoined solution to these problems: It combines the social aim of deterrence with an individualised approach to the justification for imposing punishment on a particular agent, thus providing the criminal with an argument for his own punishment that *he* can accept, at the same time that it establishes a realistic basis for institutional planning.[29]

She goes ahead to consider in detail how a contractarian theory may accomplish these aims. Finkelstein provides a sketch of a contractarian approach to punishment, according to a version of contractarianism that she calls 'rational contractarianism'.

Also creating a nexus between the social contract and criminal punishment is Richard Dagger who examines, within the prism of the social contract theory, the claim that criminals consent to their own punishment.[30]Dagger thinks that neither the contractarian nor the contractualist arguments provide sufficient justification for criminal

[28]Finkelstein (n 27) 325, 330.
[29]Finkelstein (n 27) 330.
[30]R Dagger, 'Social Contracts, Fair Play and the Justification of Punishment' [2011] 8:341*Ohio State Journal of Criminal Law* 341, 368.

punishment.[31] He holds the view that in as much as it may be plausible to justify criminal punishment using social contract argument; it is far more convincing to offer such justification relying on the principle of fair play.[32]Indeed, Dagger argues that whatever plausibility the contract-based theories possess is largely owing to their implicit reliance on considerations of fair play. It has been contended that the social contract theory as a philosophical and political platform for advancing human development has been grossly defective, especially in securing global justice.[33]Viewed as a moral code, the social contract theory can be useful only if it can demonstrate that all the obligations it suggests are firmly supported by each person's reason.[34]

The question that arises and compels the writing of this paper is whether the social contract theory is indeed a contract that answers the description of a contract in law, and if it is not, whether there is no need to seek alternative justification for the legitimacy of state and the bindingness of the criminal law.

3. THE SOCIAL CONTRACT AND CONTRACT LAW

1.1 Does the Social Contract possess the Characteristics of a Contract?

A contract possesses certain characteristics[35] and if the social contract is indeed a contract it ought to possess these features. If the social contract is found not to possess these attributes, then, it is not actually a contract. As a general rule, all contractual obligations are based ultimately upon agreement or promise. There is no empirical evidence to show that every member of the state of nature agreed to form the social contract to bring forth State. Society comprises those who hold the conflict view of State: that State is formed by those whose interest it is aimed to protect against the interests of others. There are also anarchists who hold the view that the law is unnecessary for society to function, as human beings are capable of relating freely and well with one another. These dissimilarities in human view make it important to treat individual differences of opinion in modern

[31] Dagger (n 30) 341.
[32] Dagger (n 30).
[33] MC Nussbaum, 'Beyond the Social Contract: Capabilities and Global Justice' [2004] 32(1)*Oxford Development Studies* 3, 18.
[34]David Gauthier, *Morals by Agreement* (Clarendon Press 1986).
[35] IE Sagay, *Nigeria Law of Contract*, (2nd edn, Spectrum Law Publishing 2001)1-8.

society seriously.[36] These claims will appear to show that at least not all the citizens of State are in agreement for the social contract.

Even if all members of State are in agreement on the social contract that does not necessarily mean that there is a social contract. While every contract is based ultimately on agreement, it is not every agreement that is a contract.[37] To give rise to a contract, an agreement must be one that is both intended to create and is capable of affecting legal relations. Critics will doubt that if persons with contractual capacity join with infants, lunatics, illiterates and drunks, for instance, and agree to donate their natural rights to the common will for the governance of State, that agreement will amount to a contract, as the essentials of a valid contract will be absent. A contract, thus, connotes much more than an agreement, as an agreement may be contractual or non-contractual.

The only form of promise which gives rise to contractual obligation is one that (i) has an outward or visible manifestation of intention to create legal relation and (ii) is made in such a way or in circumstances which justify a conclusion that a commitment has been made. It is not an easy task to locate the visible manifestation of intention to create legal relation for the social contract. The visible manifestation of that intention does not seem to be in the constitution of the State, nor in its statutes. It will appear that the social contract is an agreement or a promise, which lies only in the minds of its proponents. Parties to a contract are not judged by what is on their minds, but by what they have, or may, as reasonable men, be deemed to have said, written or done. The way the social contract is conceived, the fact that not everyone believes in the legitimacy of State nor feels obligated to be bound by the criminal law,[38] fail to justify a conclusion that a commitment has been made. Thus, the social contract may not actually be a contract. If the social contract is an agreement of any sort whatsoever, it is not such that can give rise to contractual obligation.

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[36]Gerald Gaus, *The Order of Public Reason: A Theory of Freedom and Morality in a Diverse and Bounded World*(Cambridge University Press 2011); Gerald Gaus, *The Tyranny of the Ideal: Justice in a Diverse Society*, (Princeton University Press 2016); Michael Moehler, 'The Scope of Instrumental Morality' [2014] 167(2) *Philosophical Studies* 431, 451;Michael Moehler, *Minimal Morality: A Two-Level Contractarian Theory (*Oxford University Press 2018);Ryan Muldoon, *Social Contract Theory for a Diverse World: Beyond Tolerance* (Routledge 2017).

[37] EO Ezike, *Nigerian Contract Law*(LexisNexis 2015) 10-11;*BFI Group v Bureau for Public Enterprises* [2012] 18 NWLR (Pt 1332) 209; *Balfour v Balfour* [1919] 2 KB 571; *Jones v Padevatton* [1962] 2 All ER 616; *Weeks v Tybald* [1605] Noy II.

[38] Rawls, *Political Liberalism* (n 26)

The absence of contractual obligation opens up holes on the legitimacy of State based on social contract and on the bindingness of the criminal law. This paper will later exploit these holes to call for the substitution of history and tradition as the justification for the legitimacy of State and the bindingness of criminal law.

1.2 Does the Social Contract Possess the Essentials of a Valid Contract?

For the social contract to form the basis for the legitimacy of State and the bindingness of the criminal law, it must have the essentials of a valid and enforceable contract. There must be an offer and acceptance, for instance, which form the agreement for the social contract.[39] It will be interesting to find out what the offer for the social contract and the terms thereof are and who made them. It is often taken for granted that the offer was made to members of the state of nature, when life therein allegedly became solitary, poor, nasty, brutish and short.[40] But the pertinent question, which no one has attempted to clearly answer, is: who made the offer and to whom? It could not have been the *Leviathan* who made the offer, because the *Leviathan* emerged only after the formation of the contract and had not existed hitherto. It could not have been the king or ruler, who made the offer, as none had existed, according to the social contract theory, before the formation of the contract. Theories of the exponents of the social contract suggest that the members of the state of nature made the offer to one another to be a pact for the union of all where one is subject to the general will of all for the common good of all. If, as the exponents of the contract theory have tended to suggest, the offer was made by the people to one another, and they agreed to it, that agreement may be sufficient to constitute acceptance; it may as well be a case of cross-offer or counter-offer. If the offer was ever made, who accepted it, how and when?

Again, there ought to be an intention to create legal relations among the members of the state of nature for the social contract. Nothing seems to show with certainty that this intention existed. The members of the state of nature had presumably been told that if they surrendered their rights to do harm to others to the general will, the general will in turn

[39]Ezike (n 37) 23-60.
[40] Hobbes (n 3) Books I and II.

would protect the common good of all. It is doubtful whether those members were told the detailed composition of modern criminal law, nor did they expect a situation where the ruler could apply the criminal law selectively to favour his friends and maim his foes. It is doubted whether those members were told, as part of the terms of the offer, that the criminal law will forbid common place human conducts like handling animals even if cruelly, begging for alms even if in public, marrying a second spouse even if the first is still alive, critiquing government even if it is harsh and perhaps embarrasses the government, *etc*. If the members of the state of nature had been told about these details, they might not have evinced intention to create legal relation to form State and make the criminal law binding.

The social contract theory may not fail the contract law test on the grounds that non-disclosure of details robbed parties of intention to create legal relations. The mere fact that parties did not know the extent of the powers of the State may not *ipso facto* suggest that there was no intention to create legal relations. They surrendered their rights to the State and clothed same with the authority to act on their behalf. Even in modern commercial contracts, there are occasions when parties enter into agreements without knowing the fullest extent of their obligations under a given contract. A bank customer, for instance, who takes a facility from his bank without first reading the terms and conditions of the loan will not plead lack of intention when it is obvious that he agreed to the arrangement.

For the social contract to be a valid contract, it is required that there is a written document or other formality evincing the terms of the contract. One has wondered frantically at what the form of the social contract is. The temptation is high to relapse to the view that the Constitution of a State represents the form of its social contract. When, for instance, the question is asked: what is the form of the social contract of the State of Nigeria? One will answer: the Constitution of the Federal Republic of Nigeria 1999 (CFRN) as amended. In the same vein, assuming there is a social contract for the World-state, then the Charter of the United Nations (the UN) 1945 will be the form of the global social contract. To try to pigeonhole the social contract into formal documents such as these serves one vital purpose. It removes the possibility that the agreement for the social contract is oral, which prospect engenders

dangerous leeway for manipulative additions and subtractions to and from the supposed terms of the social contract.

However, the requirement of form also has disadvantages. It removes the uncertainty of time from the conception of the social contract. For instance, if the social contract for the Nigerian statehood and that for the World statehood are pinned down to 1999 and 1945 respectively, it will empower those Nigerians born after 1999 to deny the legitimacy of the State thus formed and to assert that they were not party to the contract and thus not bound by the concomitant criminal law. If one pins down the social contract for the statehood of Nigeria to 1999, then one opens a window for the contention that the State will grow with the growth and strengthen with the strength of pre-1999 Nigerians and die away with the death of the last of that age and then cease to exist. When this happens, the post-1999 occupants of Nigeria will be in their state of nature and at liberty to form a new state, perhaps by another social contract. It will equally empower states formed and recognised after 1945, such as Israel, South Korea, South Sudan, Kosovo, Croatia, Macedonia, Serbia, Slovenia, Montenegro, Bosnia and Herzigovina, etc to deny the legitimacy of the authority of the UN and the bindingness of international criminal law.

Again, for the social contract to be a valid and enforceable contract there ought to be a consideration for the parties' agreement to be bound. However, it is not easy to determine who the offeror and the offeree of the offer for social contract, if any, are. It is equally difficult to determine the nature and value of the consideration for the agreement for the social contract. Members of the state of nature allegedly submitted their rights to the general will, excluding, according to Locke, the natural rights to life, liberty and property.[41] Perhaps, that is the consideration they paid for the promise of protection made by the State thus formed. The State, on its part, perhaps, furnished consideration in the sense that it henceforth has to protect the life, liberty and property of all for common good. If the State fails in this solemn responsibility to protect the life, liberty and property of the citizens that may well be a breach of a fundamental term of the social contract, which empowers the citizens to repudiate the agreement and treat the same as at an end.

[41] Locke (n 3) 17.

Since 2010 a radical Islamic group called 'Boko Haram' has overrun Nigeria with terrorism, bombing, killing and maiming the very lives, liberty and properties of the citizenry. This sect has gone ahead to grab land and assert political authority in some towns in Northeastern Nigeria, like Mubi, Gwoza, etc. If this translates to the Nigerian state's inability to perform the duty of protection or a repudiation of that duty, then the citizens are at liberty to repudiate the social contract on the grounds of breach of fundamental terms. If the Nigerian State uses force to compel the citizens to continue to obey and be bound by the criminal law in these circumstances, then, the State has declared war on the people and returned the society to the state of nature. It is then that one can say that the people were in a state of war. If, on the other hand, the Boko Haram is able to form a social contract with the people resident in the towns thus captured, then a new State emerges, capable of recognition.

It has to be repeated here that the capacity of the parties is of essence in the formation of the social contract. Unless all the members of the state of nature sought to be bound by the social contract have capacity to so contract, they may well not be rightful citizens of the State formed and thus may not be bound by her criminal law. On this ground, it may be argued that infants below the age of eighteen at the time of the social contract do not form part of the contract, unless they attain maturity and affirm the contract. Perhaps, this is why immature age or infancy is a defense to the commission of crime.[42] Drunks and insane persons too lack contractual capacity, except for contract entered into during their sober moments.[43] They could not have been parties to the social contract, for lack of capacity. No wonder insanity[44] and intoxication[45] are also defenses to crime.

It is equally essential that for the social contract to be valid and enforceable there ought to be genuineness of consent by the parties to the terms thereof. It should not be taken for granted that all members of the state of nature gave genuine consent to the terms of the social contract. Where members of a society cannot reasonably be expected to have similar conceptions of good, it becomes difficult to understand the

[42] Criminal Code s 30; Penal Code s 50; ICC Statute Art 26.

[43] Drunks here refer to persons who become involuntarily intoxicated with drug, alcohol or similar substance.

[44] Criminal Code s 28; Penal Code s 51; ICC Statute Art 31(1)(a).

[45] Criminal Code s 29; Penal Code s 52; ICC Statute Art 31(1)(b).

justification for the social contract.[46] This explains why modern contractarian accounts put greater weight on heterogeneity.[47]The question that exponents of the social contract theory should answer is: when and how was the purported consent given? Evidence of absence of such consent abounds. There exist, as stated earlier, anarchists and proponents of stateless society, who obviously do not consent to the social contract.[48] It will seem unfair to assume that these persons gave genuine consent, in the face of obvious protest by them against the social contract. This is especially so, for as Rousseau puts it: 'when the State is formed by means of the social contract, the general will is expressed by unanimous consent of all citizens.[49] The proponents of the social contract are not in agreement as to the condition of life in the state of nature, which could have necessitated or compelled the transition from the state of nature to State. The bleak picture of life in a state of nature painted by Hobbes[50] is refuted by Locke, who says that life was not altogether desolate.[51] Rousseau has a different view of life in the state of nature.[52] If the factor that motivated the giving of consent by the parties was the fear of the condition of life in the state of nature, on which all is not in agreement, it follows that the said consent is doubtful and not one to be regarded as genuine, for the people may have been misled as to the extent of threat available in the state of nature.

Some will say that consent to the social contract is given by votes at (general) elections. Even so, elections are sometimes borne out of dangerous propaganda and perhaps fraudulent politicking. Elections can be skewed by the incumbent. Consider how the National Security Adviser[53] to President Goodluck Jonathan used security threat to procure shift in the 2015 general elections in Nigeria proposed for 14 and 28 February, 2015, when the ruling party feared that it may lose if the polls were not shifted.

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[46] Rawls, *Political Liberalism* (n 26).

[47]Robert Sugden, *The Community of Advantage: A Behavioural Economist's Defence of the Market*(Oxford University Press 2018); Moehler (n 36).

[48]Muldoon (n 36).

[49] Rousseau (n 3) 49.

[50] Hobbes (n 3) Book 1 Chapter 2.

[51] Locke (n 3)40.

[52]Rousseau (n 3)10.

[53] The then incumbent president Goodluck Jonathan lost in the election and Sambo Dasuki was arrested and prosecuted by the next administration for allegations of graft with respect to funds budgeted for arms purchase. See *Federal Republic of Nigeria v Sambo Dasuki* Charge No FCT/HC/CR/43/ 2015.

Consider also Nigeria's general elections of 2023 where local and international observers agree that the election was marred by lack of transparency, widespread vote buying, violence and intimidation.[54] Election results are often rigged. Generally, elections are won by majority votes. Maybe, it is true of democracy that the majority will have their way while the minority have their say but election victory won by simple majority of votes appears to detract from the unanimity and genuineness of consent to the social contract, as quite a large number of members of that society express effective dissent.

Lastly, it is essential that for the social contract to be valid and enforceable, it ought not to be contrary to public policy. In connection to the legitimacy of State and bindingness of the criminal law, public policy speaks to the need to maintain and protect the life, liberty and property of the citizenry. If the State formed out of the social contract and the concomitant criminal law are such that the government can manipulate according to its whim and caprice, if the State is one that condones or is helpless about the wanton killing of innocent citizens, if the State is one that shows no respect for the human rights of its citizens, if the government is such that is unable or unwilling to protect the property of her citizenry, then, the social contract is contrary to public policy. The effect is that the social contract is invalid and unenforceable. Hence, the citizens can repudiate the State thus formed and disobey her criminal law.

1.3 What Type of Contract is the Social Contract?

It is common to classify contracts into two types: formal contract or simple contract. If the social contract is a contract under seal or a contract made by deed, then, it is a formal contract. Otherwise, it is a simple contract. This manner of classification is not useful for the purposes of identifying the type of contract that the social contract is, because it is difficult to pinpoint the exact form or terms of the social contract. Rather, one may classify contract in this connection in terms of the parties that formed it, its contents and bindingness thereof. The social contract does not seem to be a formal contract because it is not signed, sealed and delivered. Even if one

[54]International Republican Institute, 'Preliminary Statement of the Joint NDI/IRI International Observer Mission to Nigeria's 2023 Presidential and Legislative Elections' (27 February 2023) <https://www.iri.org/resources/preliminary-statement-of-the-joint-ndi-iri-international-observer-mission-to-nigerias-2023-presidential-and-legislative-elections/> accessed 28 February 2023.

assumes that the Constitution of a State or the Charter of the UN or any other written document for that matter is the social contract, it will still not follow that the social contract is signed, as it is obvious that not all the citizens of the State or any number of them sign the Constitution or the Charter. It is a requirement of the law that a formal contract must be signed.[55]

Again, a formal contract must be sealed.[56] Flipping through the pages of the CFRN 1999 as amended,[57] one does not find a seal. Well, if the Constitution was to be a formal social contract the requirement of a seal could be waived. In *First National Securities Ltd v Jones,*[58] the court held that a document could be regarded as a deed even though it is not sealed, where the parties clearly intended it to operate as a deed. Still, it is not easy to determine whether or not Nigerians intended the Constitution to operate as a deed. The doubt raised earlier on the genuineness of the consent of the parties to the social contract also applies to the issue of the parties' intention to let the Constitution operate as a deed. If it is doubtful that the citizens gave genuine consent to the social contract, then, it will be much more unlikely that they intended their Constitution to operate as a deed.

In addition to signature and seal, the social contract must fulfill the requirement of delivery in order to be a formal contract. Delivery may be (i) actual, where the deed is handed over to the other party; or (ii) constructive, where the party delivering the deed touches the seal with his finger and says: 'I deliver this act or deed'.[59] Actual or constructive delivery makes the deed operative. One wonders how the delivery of the Constitution, if it is deemed a formal contract, was made. At this point, it must be the government, whose press publishes the Constitution that delivers it.

Government, in the prism of the social contract theory, did not exist before, but came into being after, the formation of the social contract. Government, represented by the *Leviathan* is a notco-contractant in the social contract.[60] In any case, it is not the practice of government or

[55] Property and Conveyancing Law of Lagos State s 97.
[56]Ezike (n 37) 11-13.
[57] Cap C23 *Laws of the Federal of Nigeria (LFN)* 2004.
[58] [1978] 2 All ER 221.
[59]Ezike (n 37) 6.
[60] Hobbes (n 3) Book II Chapter 3.

anyone else on its behalf to deliver copies of the Constitution to the citizenry, at least, as experience shows in Nigeria. So, the delivery of the deed, whether actual or constructive, is not done in the scheme of the social contract as to make it a formal contract. Delivery of any kind is, however, not necessary for a formal contract to be binding on those who signed it. In *Xenos v Wickham,*[61] the court held that actual delivery was not necessary but that any conduct indicating intention to be bound was enough. So, the government can keep the Constitution in its custody or website after publishing the same and have it pass as a deed. Government can also hand copies of the Constitution to sellers from whom the citizenry will buy and this will constitute delivery. This notwithstanding, the facts that the Constitution is not signed and the obvious lack of evidence of any conduct indicating the intention of the citizenry to be bound may make the Constitution in this circumstance incapable of operating as a deed.

If the Constitution was the formal social contract for statehood, the contract would enjoy three special features which other contracts lack: (i) It will derive its binding force solely from its form. (ii) It will be valid even without agreement. (iii) And it will be binding whether there is consideration or not. In *Macedo v Stroud,*[62] the court held that a deed derives binding force from its form, not from agreement or consideration. Accordingly, it is binding even if the person in whose favour it is made is not aware of it, but the Constitution is not a formal contract and these features are absent in the social contract. Having found that the social contract is not a formal contract, the inquiry now turns on whether the social contract is an informal (simple) contract.

Perhaps, it is a simple contract. However, in order for a simple contract to be binding, there must be consideration.[63] It is only a party who furnishes consideration that can bring an action to enforce a simple contract. The forbearance of the rights of the people, which they donated to the general will and the promise of security and good governance made by government can pass as mutual consideration for the social contract. Indeed, when the State prosecutes a citizen accused of committing an offence, it does so as an act to enforce the social contract because it has furnished consideration: the promise of security and good governance.

[61] [1867] LR 2HL 296;*Doe v Knight* [1826] 5 B&C 671.
[62] [1922] AC 330;*Hall v Palmer* [1844] 3 Hare 532.
[63]Ezike (n 37) 13-14.

Finkelstein writes that this is justified merely on the contractarian nature of the social contract.[64] Whereas Dagger justifies it on the grounds of fair play, for those who agree to be bound by an agreement beneficial to all deserve to be punished for breaching it.[65]There should also be consequences when the State breaches its promise of security and good governance. In this connection, it seems impossible for the citizen(s) to prosecute the State likewise or the State to prosecute itself, for the State is an abstract entity. The citizen(s) can however, obtain mandamus for the prosecution of any human agent of the State found responsible for the breach, or repudiate the entire social contract and deny the legitimacy of State.

The terms of the social contract are not expressed or stated in very clear modes, either under seal, in writing or orally. So, the social contract is not an express contract. It does not also seem to be an implied contract. The existence of the social contract, as an implied contract, may be inferred by law from the conduct or act of the people in living together in a State and obeying the criminal law. It may also be inferred by the fact that some citizens accept punishment for committing crime.[66] In *Brodgen v Metropolitan Railway Co,*[67] the court held that in order to uphold an implied contract, the circumstances surrounding the transaction must be such as to make it reasonable or even necessary to assume that a contract existed between the parties by tacit understanding. It remains to be seen whether the circumstance of life in the state of nature warrant an implied contract. At worst, what Hobbes saw in the state of nature was a population gripped in fear of what might happen in the future. It was a state of fear, not a state of war and that made it neither reasonable nor necessary to imply a contract, where none really existed. Society comprises millions of consenters and dissenter almost in equal number[68] and this robs the situation of the reason or necessity to imply a contract.

The social contract may be a bilateral or multilateral contract depending on how one looks at it. In as much as the social contract appears to be characterised by correlative obligations, it does not seem to

[64] Finkelstein (n27) 330.
[65]Dagger (n 30) 364.
[66]Dagger (n 30) 364.
[67] [1877] 2 AC 666.

[68] Sugden (n 47).

be a bilateral contract, because it is not a contract between two parties only. The social contract looks more like a multilateral contract, as the multitude of persons who compose society are seen to contract with one another. If one conceives of the social contract as a bilateral contract between each citizen and the government then one runs into the difficulty of creating as many contracts as there are citizens of the State, with each of the citizens on the one part and the government on the other. If these individual citizens' contracts with the State are put together into a conglomeration of contracts, one will still have a multilateral contract in the sense of being a contract, which when taken together, involves many persons. Indeed, the social contract will more conveniently be a bilateral contract involving all the citizens on the one part and the government on the other part.

The social contract is definitely not a unilateral contract. It is of the essence of a unilateral contract that it initially binds only the promisor; the promisee is free to choose whether or not to perform his part of the contract.[69] Offer of unilateral contract is made to the whole world. It is only when the prospective offeree accepts the offer that a contract is formed between him and the offeror.[70] The social contract is not conceived as a unilateral contract, as it is envisaged and purports to be binding on all the parties involved (except the *Leviathan,* in the Hobbesian conception) right from the moment it is formed.

It rather seems to be a joint contract. If one assumes that the government is the offeror of the social contract, then the entire citizenry or a great number of them form joint promisees, who hold themselves jointly entitled to perform the obligation. The doubt remains however, as government which came to being only after the formation of the social contract could not be deemed the offeror thereof. If, on the other hand, you assume that the entire citizenry or a great number of them make the offer of social contract to one another and accept the offer as such, then they hold themselves jointly bound to fulfill its obligations and jointly entitled to demand the performance of its obligation. It is thus a joint contract. In addition to being a joint contract, the social contract seems also to be a several contract. This is because the two or more persons, who

[69]Ezike (n 37) 15.
[70]*Carlill v Carbolic Smoke Ball Co* [1893] 1 QB 256.

are parties to the social contract, are not only jointly bound but also individually or severally obligated by it. It is the fact of being a several contract that makes it possible for the State to prosecute one out of many suspected offenders and refuse to prosecute the others. The one or more suspect(s) who is or are prosecuted out of the many suspects cannot argue that they are treated unfairly for reason that the other suspects are not tried.

The social contract seems to be an entire contract, in the sense that the entire or complete fulfillment of the promise by either party is a condition precedent to the performance of the other party's obligation. A citizen who accepts the legitimacy of State must completely and entirely perform his obligation to obey the law before he can call on government or the other party to perform its or their own obligation. Thus, if a citizen in breach of the promise to obey the criminal law commits a crime, the State will prosecute him in consequence. Having agreed to be bound by the social contract, a citizen who commits a crime deserves and should accept the consequent punishment as fair.[71]Such punishment manifests of the essence and efficacy of the social contract.[72] If, on the other hand, government does not entirely and completely perform its obligation to provide and ensure security and good governance, then the citizens, as parties to the social contract, will be at liberty to deny the legitimacy of State and the bindingness of the criminal law.

A consequence of being an entire contract is that the social contract is neither severable nor divisible. The persons who come together to contract for security and good governance for the common good of all, if they ever do, must intend an entire contract. The social contract is not one intended by the parties to be divisible and enforceable in half measures. Those who get themselves bound by a social contract do not envisage that parties will be at liberty to pick and choose which obligations or terms of the contract to perform and which to ignore. Those who agree to be bound must perform the entire obligation of the contract. Any attempt by a citizen to denigrate a term of the social contract ought to be resisted by the State and this perhaps is the basis for the punishment for the crime of treason and treasonable felonies. In the prism of the social contract, the State is conceived as an inviolable, whole and entire political

[71]Dagger (n 30) 364.
[72] Finkelstein (n 27) 330.

unit that cannot be severed or divided, nor can its integrity be derogated from.

Though a joint contract, the social contract seems also to be a conditional contract. This is because there are conditions precedent and conditions subsequent to the validity and enforceability of the social contract. The enforcement by government of the social contract is conditional upon the citizens submitting their rights to the general will and sticking to the pact. This is a condition precedent, as it suspends the effectiveness of the social contract and prevents it from taking effect unless and until the condition occurs. On the other hand, the performance by government of its obligation to provide security and good governance operates as a condition subsequent, as the social contract begins to be effective from the time of formation but it is contemplated by the parties that it will come to an end if security and good governance fail.

Again, in some sense, the social contract resembles a collateral contract, for it appears to be a preliminary contract which is oral and forms the reason or the inducement for the making of a related contract: the Constitution. The Constitution is the main or principal contract in this scenario. The importance of the social contract operating as a collateral contract in this regard is that if the Constitution for reason of a revolution fails, the collateral contract continues to stand, to sustain and midwife the drafting or formation of a new Constitution. The court in *Andrews v Hopkinson*[73] held that this indeed is the effect of a collateral contract.

The social contract is not an executed contract, as parties are continuing to perform their obligations under it. State remains in existence and the criminal law continues to be binding and enforceable. The people remain under obligation not to commit crime. The social contract has not been completely performed on both sides, as something remains to be done by either party. If the social contract were an executed contract, it will in fact be no contract at all because it would have been discharged by performance. Rather, the social contract is an executory contract; it is the opposite of an executed contract. The performance of the social contract, as an executory contract, is ongoing with parts thereof that lie in the future

[73] [1956] 3 All ER 422; [1957] 1 QB 229;*City of Westminster Properties Ltd v Mudd* [1958] 2 All ER 733; *Armels Transport Ltd v Coker* [1969] 3 ALR Comm 363 for pronouncements of the same principle.

on both parties. Both parties are in the process of performing and none has completed the performance of the terms and obligations of the contract. It is, like they say, business in progress.

Being executory, the social contract will seem more of a voidable than a void contract. Those critics who hold the view that the social contract was never formed in point of time and space may well contend that it is a void contract. For them, the social contract is completely empty of any effect. It is a *nudum pactum,* which means that it is a completely ineffective bargain. If they are right to say that the social contract is a void contract, it follows then that it is no contract at all. However, the view of this paper is that the social contract is merely voidable, being thatit was originally valid and binding, but the parties have a right at their option to set it aside. Even if the social contract was originally binding, it is liable to be rendered void in certain circumstances. It will continue to be valid and enforceable only if none of the parties takes any step to void it. A citizen effectively voids the social contract if they deny the legitimacy of State or violate the criminal law. The citizenry as a whole can void the social contract by staging a successful revolution and abdicating the existing legal or political order. The government too can void the social contract if it fails to provide security and good governance or if it waives the correlative duty and power to punish crime.

Finally, the social contract looks like a quasi-contract. Even if the people did not give genuine consent for the social contract, this may not stop it operating as a quasi-contract. This is because a quasi-contract does not necessarily arise from the agreement or intention of the parties.[74] On the contrary, a quasi-contract can arise against the will of the parties. As a quasi-contract, the social contract can come around as an obligation imposed by law on persons in order to prevent the violation of order in society. It will operate as a variant of Hart's primary rule of recognition, change and adjudication.[75] The principle on which the law imposes quasi-contractual obligation is that everybody benefits from the co-existence of all in an orderly society and it will be unjust to allow anyone to take the benefit of that order and in the same breath violate the order to the

[74]Ezike (n 37) 21.

[75] HLA Hart, *The Concept of Law* (Postscript, ed. by Penelope A Bullock and Joseph Raz) (2nd edn, Clarendon Press 1994) 18.

detriment of others.[76]In other words, to deny the legitimacy of the State set up by the social contract and to commit a crime will, in this connection, tantamount to a violation of order. It is in this conception of mutual rights and obligations that the social contract closely approximates a quazi-contract.

2. CONCLUSION

This paper set out to investigate the propriety of using the term 'contract' to qualify the 'social contract theory'. It sought to ascertain whether the theory of social contract answers the legal description of a contract. It found that the social contract is made to pass as a contract even though it does not answer the legal description of a contract. The social contract possesses neither the characteristics nor the essential elements of a contract in law. The social contract hardly fits into any of the known types of contracts. The offer, acceptance and consideration of the social contract do not fulfil the requirements of these all-important aspects of a contract. It is not clear who the parties to the social contract are nor is it easy to ascertain its form and terms. It is not clear whether the parties, if any, had the requisite contractual capacity, gave genuine consent and intended the social contract to create legal relations.

Having established that the social contract theory does not answer the legal description of a modern contract, the paper recommends that a social contract, worthy of its name, must bear the legal qualities and characteristics of a contract; otherwise, the term is a misnomer, incapable of justifying the legitimacy of State and the bindingness of criminal law. It therefore recommends that this justification can be sought in the history and tradition of the people of each State, which should be adequately integrated into the constitutions or other founding documents of states, often regarded as the basis of the social contract between the government and the governed. In the absence of such integration, the constitutions are destitute of legal force and therefore liable to be disobeyed by the citizenry at will.

[76] Dagger (n 30) 362-363.