SOCIAL CONTRACT IN PUBLIC AND CORPORATE GOVERNANCE

Metaphor or New Morality?

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ABSTRACT

The term ‘social contract’ is increasingly present in public and corporate governance discourse relative to social policy, sustainability goals and human rights. For instance, to promote corporate social responsibility (CSR), the call is made for a ‘new social contract’. Are these references to the social contract mere slogans or do they express a new ideal and perspective on governance, whether public or corporate? How to qualify this discourse in light of the classic social contract theory and human rights? This contribution compares the calls for a ‘new social contract’ to the main positions in social contract theory and concludes that these calls express a normative ideal featuring a morality of reciprocity, shared responsibilities and recognition. Other than in some social contract theories,
human rights are a core element of this call for a social contract. And while the classic social contract is based on the idea of a bargain, the modern social contract discourse's valuation of recognition and reciprocity reflects values inherent to the notion of the gift and the social contract of hospitality. However, a short analysis of the morality of hospitality shows its potential vulnerability for parasitism. Further research is therefore needed to assess the meaning of this vulnerability for modern social contract discourse in public and private governance.

1. INTRODUCTION

The term ‘social contract’ is increasingly present in public governance and corporate governance.¹ The discourse presents the social contract primarily as an ideal of shared responsibilities between state and civil society or between big companies and society in the execution of social policy, sustainability goals and human rights. For example, in 2017, Putters presented the term ‘social contract’ to indicate the desired relationship between government, societal organisations (in his case health organisations, like welfare organisations, hospitals, insurance companies) and citizens in the context of a changing Welfare State.² The proposed ‘social contract’ should ensure the rightful execution of policy goals tied to social rights like proper health care. It is presented as part of a new paradigm of public administration and governance to ensure cooperation and solidarity based on responsibility in the context of complexity and change.

The term also appears in business circles³ and in legal debate related to company law, as can be illustrated by the following.⁴ In the middle of the

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⁴ J.W. WINTER, J.M. DE JONGH and J.B.S. HIJINK et al., ‘Naar een zorgplicht voor bestuurders en commissarissen tot verantwoorde deelname aan het maatschappelijk verkeer’, (2020) 86,
COVID-19 crisis, a group of legal scientists specialised in company law argued that companies should be considered as partners in a social contract with society. Instead, big companies like Booking.com and Air France – KLM claimed large amounts of public funds in order to prevent these companies from going bankrupt. The public funding facilitated these companies to offload their entrepreneurial risks to the public domain. Briefly said, the profit is private, the losses are public. In line with developments in other countries, the proposal puts forward that companies, especially large companies, should demonstrate corporate social responsibility (CSR) and commit themselves to the effectuation of social and environmental sustainability goals. These goals are tied to human rights, like the right to a healthy environment, promotion of diversity, combating poverty and respecting participation rights. To this aim, the proposal is to make this social responsibility a formal objective of the company, a societal ‘mission’, for the execution of which board members should be held accountable. To this end, CSR should be codified in corporate law, stipulating that board members should act responsible in view of societal concerns. The proposal fits into a broader movement of stimulating companies to act in a more responsible way, observing long-term societal and environmental interests.\(^5\) The proposal was inspired by the recently adopted French Loi PACTE, instigating companies to include a societal responsible purpose within their core statutory objective.\(^6\)

1.1. ATTRACTIVE, BUT REALISTIC?

In short, the proposals in public and corporate governance offer the model of a social contract in order to ensure the meeting of social rights, sustainability goals and human rights. They call for responsibility, shared commitment and cooperation. From the perspective of human rights and sustainability, the proposals only seem to deserve full acclaim. However, the calls may also raise


some sceptical questions, of a practical, technical legal and more theoretical nature. The latter ones will be the focus of this contribution.

A critical question could be whether these calls for a social contract are realistic, certainly when viewed in light of earlier neo-liberal public governance approaches. From the 1970s onward, governments tried to counter the heavy bureaucracy, administrative ineffectiveness and inefficiency that resulted from their extensive welfare systems by resorting to a neo-liberal approach focused on efficiency, the so-called new public management (NPM). Governmental obligations were considered as products and services, to be paid for and accounted for financially. Together with horizontalisation and decentralisation of government, this financial and organisational rationality has led to a very dense and complex structure of governmental and semi-governmental institutions, governed by procedures of accountability. It also led to a cutting-down on social security claims. This contributed to feelings of public distrust and diminishing legitimacy of governmental and non-governmental welfare institutions. The public governance calls for a social contract between the state and civil society aim to counter this distrust, to break with the former utilitarianism and to control complexity by appealing to responsibility, solidarity and social justice. However, the recent COVID-19 crisis raises doubts as to whether the idea of a social contract will be strong enough to revolve the existing governance structure. The freedom-limiting COVID-19 measures were instigated by the need to uphold a health care system that suffered cut downs on intensive care (IC) facilities for reasons of cost efficiency. So, the ideal of a social contract based upon solidarity seems attractive and legitimate, but will it be able to stop instrumental reason? Isn’t it merely symbolic?

The call for a social contract between ‘big companies’ and civil society may raise criticism as well. Some of this criticism may be of a technical legal nature. For example, from the perspective of company law, the explicit mentioning of CSR in the board obligations might have negative side effects of enlarging liability claims, which might stifle investments and innovations. I leave this criticism for a more specialised company law debate. Other arguments might be that the implementation of CSR in company law is merely symbolic – certainly since the proposals are phrased in very broad terms. Implementation of CSR in company law might only lead to a practice of window dressing.

Nevertheless, the idea of a social contract is interesting enough to examine its potential implications. What is the theoretical basis of this call for a social contract?

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contract? How does it relate to classic social contract theory? The questions are justified, since the governance discourse presents the social contract primarily as a normative model for relations of reciprocity and responsibility with regard to societal goals. In classic social contract theory, however, the social contract functions as a theoretical construction to account for and to legitimise (state) authority. It explains and theoretically justifies authority without having prescriptive value per se. Secondly, the modern social contract discourse calls for a morality of shared responsibilities and commitment to further human rights and the general interest. However, in classic social contract theory, the social contract is generally based upon a bargain founded in self-interest. The idea of a bargain supported by self-interest does not seem to chime well with human rights.

1.2. QUESTION AND METHODOLOGY

In short, the calls for a social contract in the context of public and corporate governance seem to be attractive, but may disappoint as being too idealistic, too vague or even theoretically uncertain. The question thus arises as to how this call for a social contract in public and private governance relates to classic social contract theory and to what extent this discourse may be expected to truly further the case of human rights – and if so, what challenges and risks this would imply.

To answer this question, I will first qualify these calls for a social contract in light of the main classic political theoretical social contract positions and their relationship with human rights. In light of the confines of this contribution, I will limit myself to a comparison with the three main positions. The comparison will show that these calls for a social contract differ from the classic theoretical positions by their appeal to a morality of shared responsibility in a context of uncertainty. In order to explore the potential implications of this social contract of uncertainty I will draw a comparison with the concept of hospitality – since, as we will see, there are some interesting similarities. For this, I will draw upon some literary and anthropological insights. Within the limits of this contribution, I cannot be exhaustive. My aim is merely to offer food for thought. Further, my approach will be theoretical and critical, leaving technical legal issues to a more specialised public policy and legal debate. My contention is that the argument of a social contract of shared responsibilities opens up promising perspectives, but also raises some serious questions as to its implications.

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8 The classic theories are frequently indicated with capital letters, ‘Social Contract’ in contrast with informal uses such as calls that are discussed in this paper. In this paper the difference will be clear from the context.
2. THE NEW SOCIAL CONTRACT IN LIGHT OF CLASSICAL SOCIAL CONTRACT PHILOSOPHY AND ITS RELATION TO HUMAN RIGHTS

For classic social contract theory, a social contract is a construction to account for a political and/or legal order. The contract is hypothetical and is generally not meant as prescriptive. The social contract is held as a cooperative undertaking for mutual benefit. In its horizontal dimension, it is supposed to be closed between citizens regarding an authority or a specific political or social order. In some contexts it also has a vertical dimension. It is then the contract as closed between the people or society on the one hand and the political authority on the other. Social contract theory is broad and multifarious. For our purposes a short survey of the three main positions has to suffice. 

2.1. CLASSICAL VISIONS ON THE SOCIAL CONTRACT

According to the interest-based tradition (contractarian) going back to Hobbes’ *Leviathan*, the contract is based on a rational choice by the agreeing ‘parties’. This choice is based upon considerations of ‘personal’ interest. These interests can be various, such as personal gain, protection of property and safety or the protection of personal views, such as religion. The interest-based vision does not take it as evidence that cooperating parties act out of a common morality. The only thing that binds the cooperating parties is the shared need for protection of personal interests. For this, the parties are willing to moderate their proper interests and hand over some of their interests to a common authority that is deemed to offer this protection. By ‘creating’ this authority and handing over some of their interests, the parties assume they will be better off than just defending their private interests on their own. In the Hobbesian tradition, the contract has a horizontal and a vertical dimension. Without the authority protecting their

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12 Compare: ‘I Authorize and give up my Right of Governing my selve, to this Man (…) on this condition, that thou give up thy Right to him (…)’, Hobbes, *Leviathan*, ibid., p. 227.
interests, this state of nature would lead to brutish circumstances, a permanent war of all against all.

A second tradition goes back to Locke. Other than the Hobbesian tradition of an interest-based social contract, the theories standing in the tradition of Locke depart from a moral standpoint and are therefore qualified as contractualist and right-based conceptions. The constructed state of nature is based upon the natural law assumption that people have specific rights and are endowed with reason, not just interest-weighing rationality. By reason and awareness of their rights they consent to a social contract that protects and reflects these rights, and they thereby institute the authority to protect and promote these. This morality is self-evident (Locke) or can be deduced from principles of practical reason (Kant). For Locke, Rousseau and Kant, these rights are the right to equal freedom, life and property and the equal capacity to choose entrance in the political community by giving consent to the political authority instituted by the contract. 13 It therefore also has a horizontal and a vertical dimension.

The assumption of well-reasoned consent implies that the Lockean authority must be a legitimate authority, thereby underscoring the vertical dimension of the contract. In other words, a political authority is only legitimate and rightful because it can be reasoned that consent to handing over some of one's freedom to it could have been given on a reasoned basis. Locke's social contract theory legitimises a liberal constitution with political powers that can be evaluated upon whether it respects constitutional rights. For Locke, this authority could be a monarchy. For Rousseau, however, the political authority should be taken to embody the general will to make laws for the common good, a republican construction that may even force its laws upon the public to be free. While for Locke, the social contract legitimises the constitutional authority, for Rousseau, it constructs and legitimises simultaneously the democratic authority of the people as embodying the general will. In the Rousseauist position, the horizontal and vertical dimension could be said to be fused. 14


14 Rousseau speaks of the individual making the contract, 'with himself' and 'bound in a double relation; as a member of the Sovereign', he is bound to the individuals, and as a member of the state, to the Sovereign. J.J. Rousseau, ibid., pp. 175–176.
For Rawls, who – due to his moral starting position\(^\text{15}\) – also stands in the
Lockean rights-based social contract tradition, although in a more limited
sense,\(^\text{16}\) it is primarily justice that is justified (or theoretically explained) by the
social contract. Contrary to the aforementioned thinkers, Rawls’ social contract
results from a hypothetical situation, conceived as the original position without
representing anything like ‘natural’, in which ‘parties’ do have rationality to
choose, but do not have specific knowledge as to what this state amounts to or
what the future holds.\(^\text{17}\)

A third tradition consists of the empirical tradition that follows Hume. He
did not believe in any social contract construction to justify authority (Hobbes)
or to legitimise it as the rightful authority (Locke). The social contract as such
never happened.\(^\text{18}\) Hume admitted that a social contract may exist in empirical
reality and a qualification of a specific situation as one of a social contract thus
may help to recognise and explain political and economic practices. In other
words, Humean social contract theory explains a certain institutional and
societal order by understanding this as based upon a tacit agreement that people
mutually agree to on the condition that others agree to it as well. This is not a
theoretical justification by deduction from a construction, but a qualification
of a situation perceived as empirical reality. The main rationales for people to
come to such a tacit agreement may lie in habit, out of fear for disorder caused
by the downfall of government or a certain concern for justice out of reflection
and of public utility. The norms that are expressed in social practice and may be
construed as part of the social contract consist of conventions of justice thought
to be in everybody’s interest. The Humean tradition stresses the horizontal
dimension over the vertical. Due to its conventional and realist character, the
Humean position is relativist. Its legitimising and prescriptive force depends on
actual practice, not on some theoretical construction from which principles are
deduced.

Summing up, the main social contract positions can be distinguished
according to their theoretical function. In the Hobbesian and Humean tradition

\(^{15}\) I.e. that the contracting parties are morally obliged to accept regulatory social principles,
foundation of this supposed morality is doubted by R. DWORKIN, Taking Rights Seriously,

\(^{16}\) I.e. primarily equal respect and concern related to the procedure of stipulating the kind
of justice and ensuing political institutions, see RAWLS, ibid., p. 118 referring to ‘pure
procedural justice’; cf. DWORKIN, ibid., p. 182.

et. seqq.

\(^{18}\) D. HUME, ‘Of the Original Contract’, in E.F. MILLER (ed.), Essays Moral, Political, and Literary,
Liberty Fund, Indianapolis 1963 (originally 1741), pp. 465–487. ‘In vain, are we asked in what
records this charter of our liberties is registered’ (p. 468). Authority is not based on consent,
but on necessity and custom. Society could not otherwise subsist’ (p. 481).
the social contract is a means to explain and account for political authority and, for Hume, the normative practises people agree to. For Locke, the social contract is certainly explanatory, but also prescriptive, as it offers a framework for distinguishing constitutionally fit government from unconstitutional government. For Rawls, the social contract is meant as a justification of an order that meets certain principles of distributive justice.

In short, an analysis of present-day social contract discourse should pay attention to the objective of the discourse (whether it is meant as justification, descriptive or prescriptive), its relation to private or public interest, the kind of agreement that is implied (rationality, reason), the implications of the core dynamics of bargaining and whether it is focused on authority, distributive justice, democracy or something else. Finally, once a social contract is descriptively presented as a conventional agreement, critical scrutiny is needed as to the conventions and normative practises it is said to represent.

2.2. HUMAN RIGHTS IN CLASSICAL SOCIAL CONTRACT THEORY

Before I pursue evaluating the present social contract discourse in public and private governance, it is important to explore the relation between social contract thought and human rights. This relation is not evident, as we will see.

Human rights are generally considered as naturally tied to the human person. They are taken as reflecting universal, a-temporal and inalienable moral rights that are tied to equality of personhood and the human being as such. Compare the recognition of the ‘inherent dignity and (…) the equal and inalienable rights of all members of the human family’ in the Preamble of the Universal Declaration of Human Rights (UDHR) to which the European Convention of Human Rights (ECHR) refers.19

At the same time, human rights are part of a political and legal practice that constitutes the individual as a subject of law and a political subject. As declarations of pre-existing moral rights, human rights treaties create legal entitlements to be directed, first of all, to the state, although this does not exclude other addressees.20 The state is pivotal for the protection and promotion of human rights. This protection consists of the obligation not to deprive people of their rights, but to protect human rights and to aid in realising these. The


20 Due to horizontal effect.
distinction between the classical liberal rights and political rights on the one hand and the social rights on the other is related to this obligation of the state to respect and to aid. Today we may notice an enlargement of entitlements and an extension of the circle of subjects liable for respecting human rights. By way of interpretation and adaptation, these rights have given implications that extend widely the ideas and images they were taken to stand for at the moment of their adoption in treaties and bills of rights.\footnote{A good example is the concept of the right to family life (Article 8 ECHR). Other than may have been foreseen in 1951, it now includes stepparents, grandparents, and informal family members within its scope of protection.}

Human rights seem not to fit very well in the interest-based position of the Hobbesian tradition. Following a moral rights vision, not a contract, but human dignity itself should be taken as the first and final foundation for human rights.\footnote{P. Tiedemann, \textit{Philosophical Foundation of Human Rights}, Springer, Cham in Switzerland 2020, p. 60.} Dignity cannot be bargained for – it should be recognised and taken as a self-evidence. Many human rights cannot be reduced to interests, but demand recognition per se – for instance the right not to be discriminated against.\footnote{Cf A. Buchanan, ‘Human Rights’, in D. Estlund (ed.), \textit{The Oxford Handbook of Political Philosophy}, Oxford University Press, Oxford 2012, p. 288.} Human rights might even be endangered in a Rousseausitic vision of the social contract. Rousseau’s \textit{volonté générale} can be taken as legitimising to force people to be free, and this may hurt foundational individual freedom rights.\footnote{J.J. Rousseau, \textit{ibid.}, p. 177: ‘Whoever refuses to obey the general will shall be compelled to do so by the whole body’.} Even in Rawls’ theory, human rights flow only from the contract. They are not part of the original position as such, since the basic rights are limited to basic political liberties and procedural ones of equal respect and concern.\footnote{See J. Rawls (1999), \textit{A Theory of Justice, supra} note 15, pp. 10, 56 (basic political freedoms).} Instead, human rights should be thought to be presupposed to a social contract, which is not the case.\footnote{R. Dworkin, \textit{Taking Rights Seriously}, Harvard University Press, Cambridge MA 1978, pp. 169, 177: these rights are so strong and fundamental that they trump rationalities of general utility and interest.}

The position of human rights is stronger in social contract conceptions standing in a Lockean or Kantian tradition. In this position, human rights are presupposed to the contract and are taken to be decisive for the legitimacy of a political authority.\footnote{I. Kant, ‘Perpetual Peace’, \textit{supra} note 13, p. 380: ‘The rights of men must be held sacred, however great the cost of sacrifice may be to those in power. Here one cannot go halfway …’.} This conception of the social contract supports a normative political conception of human rights. Finally, in the empirical tradition, the position of human rights depends on the practices themselves. They can be taken as part of and legitimised by the social contract in case and as long as they are effectively taken to be included in this contract. This shows that, from a
theoretical point of view, this empirical, realist perspective offers human rights a foundation that is less strong than in the normative perspective of the Lockean position.

In short, human rights do not fit well with any non-normative and purely power-justifying and interest-based conceptions of the social contract. They are tied to normative visions and/or conventional understandings of the social contract. As we have seen, however, if a social contract is presented as a convention and a practice, a critical view is needed regarding the actual scope of this social contract in relation to these fundamental rights. This is relevant with respect to the current social contract discourse in public policy and corporate governance.

3. THE CALLS FOR A NEW CONTRACT PUT TO THE TEST

How, then, ought we to qualify the present calls for a social contract in public policy and corporate governance in light of classic social contract theory, and what do such calls imply for human rights?

In the classical theories the social contract first of all has an explanatory and/or legitimising function regarding a division of power (Hobbes), a constitutional order (Locke), rights, social justice (Rawls) and democracy (Rousseau). Some modern theories of business ethics use the social contract in comparable ways. For instance, to support his vision on corporate social responsibility, Donaldson applies the methodology of the state of nature to a state without productive organisations and concludes that ‘from the standpoint of society, the goal of a productive organisation may be said to be to enhance the welfare of society through a satisfaction of consumer and worker interests.’  

Palmer justifies companies’ adherence to national laws and sustainability by applying Hobbes to companies. Claassens also uses Hobbes to justify his concession theory of companies. Corporations are not merely aggregates of shareholder interests, nor are they mere legal entities of their own. They owe their existence to the fact that the state, representing the general interest, has conceded corporations the power and means to maximise wealth in the general interest. This is done in two ways: first by instituting companies as corporations, in other words, by giving companies legal personhood; and second by creating and maintaining

30 See below section 3.2.
a legal system that allows companies to pursue their interests and claim their rights in courts. In other words, corporations cannot exist outside a legal system that allows them to protect their interests. In their turn, they may be expected to act in the general interest: ‘When it grants incorporation, the State allows corporations to have private purposes, but requires that these purposes should be compatible with a specific public purpose.’ Others apply social contract to come to a Rawlsian vision on social justice.

However, the calls for a social contract in public and corporate governance to which I referred above, take another approach. They do not work out a new theory, but argue that businesses and governments actually adhere to a tacit social contract or should do so. With this, these calls seem to follow a Humean empirical perspective focusing on describing and/or prescribing a practice. It is this kind of discourse that is of interest here since it gives an indication of changing views on the relation between companies, society and government. What then are the general features of the social contract in public and corporate governance discourse?

3.1. A SET OF PROSPECTIVE IDEALS OF COOPERATION AND RECIPROCITY

The social contract in current public policy and company law discourse generally functions as a set of broadly formulated prospective ideals, principles and norms meant to enhance the legitimacy of public authority and companies. The social contract provides a framework for value-based action guided by considerations of social justice, cooperation and responsibility. It is not a theoretical construction, but a broad ideal of a ‘living social contract’ that functions as a call for action.

This living social contract offers certain features that stand out if compared with the bargain for self-interest that is common to the classic theories. In summary, it promotes cooperation on a level of equality among various actors in conditions of uncertainty. So, first of all, this social contract in public policy includes governmental, non-governmental, societal organisations and citizens together in one horizontal network. It stresses the horizontal dimension of the social contract. In light of traditional, vertically organised control and accountability relations in the public domain, this horizontal character reflects a novel way of looking at responsibilities that is in line with the present horizontalised structures of public governance (at least in The Netherlands).

Connected with this horizontal feature of the social contract in current discourse is a second feature of reciprocity. Other than the bargain underlying the Hobbesian tradition, the reciprocity resides in a mutuality of interests and of shared responsibilities that are not carved in stone. The current discourse on social contract is rather vague as to the exact equality of responsibilities, as well as their interdependence and application. The social contract asks its adherents to take responsibility.33

This notion of reciprocity points to a third feature of the social contract in current discourses: to know its open and dynamic character. It is open for change. Tacit agreements may change into explicit ones. Power relations may shift and obligations may develop, as continually happens in health care or any other domain of governmental policy. The social contract is something that develops over time and, due to its vague circle of participants, also in space. In this way it should be able to cope with changing circumstances in the context of complexity.

In the fourth, as a call for action, this social contract has a strong symbolic and expressive function. The ideal expresses and creates a worldview and is meant to inspire. It is not harking backwards to some hypothetical contract underlying the current order, but is oriented towards the future.

A final feature of this social contract is the pivotal position of human rights. I will expand on that in the following section.

3.2. LICENCE TO GOVERN AND LICENCE TO OPERATE

In line with the above, the social contract in modern discourse is considered as a means to enhance the legitimacy of governments and companies. In other words, for their ‘licence to govern’ or (for companies) to operate it is not sufficient they can refer to a theoretical basis of authority or any other claim. Governments and companies have to continuously prove their legitimacy. Human rights play a pivotal role in this respect. Recent case law is illustrative of this. I discuss two cases.

The first case relates to the state’s liability for the human right to a safe environment. A landmark case is the Urgenda climate case.34 In 2018, the Dutch state was held liable for not following up sufficiently on the demands of the Paris Treaty. The state defended itself by referring to its discretionary power to decide on the measures to be taken. It should be held accountable to the Parliament,

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not the judiciary. The judiciary would exceed its powers under the Trias Politica by judging the rightfulness of the state’s implementation of the Paris Treaty. However, the Supreme Court did not follow the state’s argumentation. Measures to prevent climate change are too important to be decided by arguments of formal power division. Furthermore, it would be inconsistent if on the one hand, a state binds itself to treaty obligations, while on the other hand it refuses to account for its execution of these treaty obligations. The court held the state liable for infringing the active obligation it has to protect and aid the right to life and the right to privacy (and safe home) as laid down in the Articles 2 and 8 ECHR. The case confirms that actively protecting the human right to a safe environment is an integral part of a state’s ‘licence to govern’. Human rights treaties in particular function as a permanent critical lens for the duties of governments towards society as part of the ‘living social contract’ to which it is subject.

The second case relates to the enhanced liability of companies to protect and aid human rights. In principle, states are the primal party to which the responsibilities are assigned to maintain respect for human rights and implement social rights. However, recent case law confirms that it is no longer sufficient for companies to merely pay lip service to the law while focusing on serving the interests of their shareholders or affiliated stakeholders, such as employees. Recent cases witness enhanced liability for companies to take responsibility in respecting and aiding human rights. Two years after Urgenda, Shell, the British-Dutch oil company, has been held liable for societal and ecological damage in Nigeria under UK law as well as Dutch law. The Hague Court of Appeal judged that Shell might be liable for torts committed by one of its affiliates in Nigeria. These torts may consist of infringements on important human rights regarding the environment, health and equitable treatment. As is true for states, following up on human rights is an integral part of the licence to operate, thereby confirming society and the environment are, to a certain extent, to be considered as stakeholders.

The call for a CSR implementation within company law fits in a broader development of holding companies publicly accountable for environmental issues, equitable labour circumstances, consumer law, governance, compliance and human rights. The call for a social contract and social responsibility is supported by sources of hard law (ECHR, general principles of law and national

35 M. LOTH, ‘Eenheid in gelaagdheid, over formele en materiële rechtseenheid in een meergelaagde rechtsorde’, 2018 Ars Aequi, pp. 335–342, referring to the importance of consistent interpretation, p. 337.


bills of rights, regulations of the European Union (EU) calling for equitable employment protection, UK Modern Slavery Act) and follows in the footsteps of soft law such as corporate governance codes, the guidelines of the Organisation for Economic Co-operation and Development (OECD), Declaration Principles of the International Labour Organization (ILO), rules of the International Chamber of Commerce (ICC) and, indirectly, from the Paris Treaty. The voluntary CSR approach tends to ‘harden’ by way of EU directives and national law.

This development of hard law and soft law regarding CSR and the pursuance of human rights shows that companies cannot limit themselves to just making profit on their own behalf or on behalf of their shareholders or stakeholders. Merely obeying the law and following up on legal obligations seems to be insufficient to make them legitimate. The call for a social contract therefore underscores that a state’s legitimacy and a company’s licence to operate depend on their active responsibility-taking for the many obligations and principles as laid down in international law and codes of soft law, of which human rights form an important part.

In summary, the social contract as referred to in public and corporate governance distinguishes itself from the classic social contract theory by its open, dynamic and relational character, capable of coping with changing circumstances and uncertainty. The social contract does not function as a hypothetical bargain that accounts for legitimacy. Instead, the social contract is an ideal that must be followed up in order to prove legitimacy, be it by public or private institutions. Respecting and aiding human rights is not merely a consequence of this social contract, but the crucial element of the normative claim of this social contract. The calls set the framework for a living social contract that is meant as a normative guide for action. Due to this openness, flexibility and calls for actively taking responsibility in conditions of uncertainty, this living social contract shows certain similarities with, as will appear below, the social contract of hospitality. Although I cannot give an overview of all the strands and variations within this current of thought, I want at least to draw a few comparisons in order to probe the meaning of this social contract paradigm and the challenges and risks it offers for human rights.

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4. RECIPROCITY AND PARASITISM IN THE SOCIAL CONTRACT

4.1. HOSPITALITY: A DANGEROUS RELATIONSHIP

The idea of hospitality is one of the most ancient kinds of social contract. For insight into its potential meaning and scope, the ancient myths offer some help. They make things concrete that we might otherwise forget. Think of the Ancient Greek sailors sailing the coast riddled with islands and cliffs to fish for a living, to transport goods and to investigate the world while searching for new land serving their economic and political needs. As nature and the gods confront man with bad surprises, these sailors have to seek a temporary safe haven on foreign grounds in strange households. Since those receiving the stranded men would be conscious that the same token, the same storms, could befall them, they would provide this hospitality, knowing that as long as each member of this imaginary community of hosts and sailors would conform to this social norm, the invisible chain of hospitality stands. Sooner or later, or maybe never at all, they or any of their descendants or village members or even no one directly connected could get their gift back. The stories show that providing hospitality is one of the oldest existing social norms rooted in religion and connected to the development of civilisation. Frequently hospitality comes in the form of a theoxeny (a god in disguise visiting the house of a human being, thereby testing his hospitality).  

Infringement on this ‘non droit’ of hospitality is severely punished by, for instance, inundation or illness. The religious element confirms the universal and symbolic character of the relational laws of hospitality. Action is steeped in meaning.

The social contract of hospitality therefore revolves around notions of exchange and reciprocal recognition in conditions of uncertainty and is symbolically tied to the continuity of a group and humanity as a whole, subject to inscrutable nature. I will discuss each of these features briefly.

Reciprocity can take different forms. It covers the range among vengeance, the bargain and the gift. In other words, it can be vicious or virtuous.  Hospitality follows the logic of the exchange of gifts, a total social fact, according to Mauss in his seminal *Essai sur le don*.  

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in reality. It cannot be asked to be returned (as is reflected in positive law) but creates an obligation to return it, if not an hierarchy of nobility. The gift may also not be declined. Still, the reciprocity is set in uncertainty as to conditions of time, place, equivalence and participants. It is part of a cyclical perception of time and asks to be continuously renewed and reconfirmed. The chain must not be broken. The social contract of hospitality realises itself in interaction. It is the doing that keeps the whole together.

Although hospitality is tied to communities, it also revolves around recognition of the other. The frame of hospitality admits recognising the other as fully human, while it simultaneous admits that the other is not and cannot be identical. Hospitality does not demand that the stranger is considered as a member of a community. The stranger is an uncertain friend who should be accepted for what he or she is: similar, equal and yet different. Hospitality recognises the uniqueness of people and withstands the idea of total integration. The idea of offering hospitality to a stranger is part of the philosophy of recognition that is proper to human rights. For Kant, hospitality is ‘the right of an alien not to be treated as an enemy upon his arrival in another’s country’ and fundamental to his ideas of perpetual peace. Hospitality offers a temporary solution to a potential conflict. The notion of hospitality is therefore relevant to human rights, if not the core of it. For instance, the notion of hospitality is laying at the basis of offering citizens right to the city as promoted, for example, by Cities of Refuge.

Hospitality happens at the brink of spheres (inner/outer, common/strange). The social norms and ethics regulating this social contract of hospitality are finely tuned, but essentially unwritten and ambiguous. They are ‘founded upon ambivalence’. They consist in providing shelter in one’s own house for a limited

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43 See for Article 175 3:175 Dutch Civil Code, following the Code Civil Français, the gift is a one-sided agreement; it can also only be retracted under strict conditions, cf. for a general overview A. FOUBERT, ‘Don’, in D. ALLAND and S. RIALS (eds.), supra note 33, pp. 417–420.
44 Ibid., p. 10.
49 M. AGIER, supra note 46, p. 3.
amount of time. At the same time, the host definitively stays the master of the house. As to the guest, it is upon him or her to behave in a certain way, to 'respect the laws of the house', to be content with the shelter and food, not to complain, not to venture uninvited into the private part of the host's house and to leave after a certain while. In short, the guest must be respectful and maintain his or her distance from the host.52

Finally, as the old myths might be interpreted, the invisible contract of hospitality may potentially include more than just men. It is social, for sure, but nature and the gods participate in a certain way as well: nature as raw fact and a symbol of fate; and the gods as messenger, punisher and the bringer of redemption. They symbolise that man is to a certain extent a guest of nature and could be said to return the grace by being a host to society.

However, the myths show that the contract of hospitality is very vulnerable. The chain can be broken easily, certainly due to the ambivalent and unwritten norms. Furthermore, hospitality is potentially dangerous.53 The host can turn out to be a cyclops intent upon murdering his guests (Ulysses and Polyphemos), or the guest can turn out to be a parasite, never to leave the house, exploiting his host for private profit and thereby introducing the logic of instrumentality within this vulnerable logic of the gift proper to hospitality. The comic tragedy of Tartuffe by Molière offers a good illustration of the many aspects that come into this phenomenon of parasitism. One of these is surely the naivety of the host himself. In short, parasitism always looms around the corner of hospitality. It is ingrained in the unwritten and flexible character of its norms, the 'non-dit' of hospitality – the tension between open house and privacy to be respected, between the search for familiarity and the confrontation with strangeness.

How does this social contract of hospitality behave if compared to the classic social contract (section 4.2), and what insight might this provide in the calls for a new social contract (section 4.3)?

4.2. A HIGHLY DEMANDING SOCIAL CONTRACT

If I compare the social contract of hospitality to the classic social contract, I come to the following. First of all, the classic social contract is generally grounded on the notion of the bargain that is theoretically assumed and is taken as a firm base for theoretical deduction. The mutual performance is a condition

for the contract (and for the theory to hold). This frame of theoretical certainty stands in contrast with the notions of uncertainty and dynamic reciprocity of hospitality, for which returning the gift is a demand that may come true in the future. Secondly, other than the hospitality which is engrained in social reality, the classic social contract is based on an agreement between fictive and abstract individuals. In the third place, other than for hospitality, the social contract is instrumentalist. The fictive individual parties are instrumental to each other and to the agreement to hold. Recognition does not play a role. In other words, in the classic social contract solidarity is approached from an instrumentalist perspective, so to say to pacify a parasitism that is though inherent to man (following Hobbes). Fourthly, although the social contract is meant as a basis for society, the foundation of society is one of logical necessity, not of reciprocity tied to the existence of a social community or humanity as a whole. Society, peace and power are interest-based, not based on reflexive responsibility supported by values. The mediation is logical and devoid of the religious symbolism that is inherent to this social contract of hospitality. Finally, in contrast with the cyclical conception of time proper to hospitality, social contract thought is set in a linear and rational frame. It is not a ‘living social contract’ that asks to be renewed, reinterpreted and confirmed continuously, but a logical construction that supports claims for authority and reciprocity.

These features result in a different conception of authority and legitimacy. In the classical social contract, the state is entitled to the authority that it has been given by the contract. In the context of the living social contract of hospitality, there is no sole tangible entity to claim authority. There are only deities asking to be offered hospitality, in remembrance of the holy value of solidarity in the context of unpredictable nature that hosts man. The classic social contract theory, however, excludes nature and any (explicit) religious notions.

I admit that the comparison is schematic and somewhat speculative. It neglects the many differences between the several positions of social contract theory, as set out before. The comparison also neglects the Lockean and Kantian positions that offer a basis for recognition of rights and it ignores ideas of general interest as is present in the Rousseauist version of the social contract. However, although sketchy, the comparison between the classic social contract and hospitality shows that the classic social contract is the result of a reduction by rationalistic individualistic thought of the fragile and complex mixture of exchange and mutual recognition that is part of the tradition of the social contract of hospitality. What does this imply for our understanding of the social contract in public and corporate governance discourse?

4.3. THE ‘NEW SOCIAL CONTRACT’ AS A FORM OF HOSPITALITY

If we compare the social contract discourse in public policy and company governance to the social contract of hospitality, we may discover that the former shows certain parallels with the latter. Just like the social contract of hospitality, the social contract in public policy and corporate governance discourse revolves around reciprocity, mutuality and taking of one’s responsibility, without expecting a one-to-one return of the act. The focus is thus on tacit obligations and counter-obligations under the condition of potentiality and willingness. The living social contract discourse also focuses on horizontal obligations and responsibilities.

Like the social contract of hospitality, the social contract in current public and corporate governance discourse potentially includes a wide circle of participants. The circle of participants and stakeholders might even include more stakeholders than the familiar ones. Sustainability goals, physical and societal goals, may be interpreted as confirming that in some respects nature might be considered a stakeholder of the contract. For illustration I refer to the granting of legal personhood to rivers (i.e. the Whanganui River in New Zealand). This stands in contrast with the biblical perspective on nature as subjugated to man. With this open character, the social contract discourse contrasts with the imaginary lying behind the classic social contract philosophy, in which nature is excluded.

In short, the living social contract discourse reflects many of the features of the living social contract of hospitality. It is as if the modern discourse tries to reconnect with this older underlying tradition that has been forgotten by modern political thought. However, the comparison of both also makes us aware of some of the vulnerabilities and risks of this modern social contract discourse.

4.4. VULNERABILITIES OF THE SOCIAL CONTRACT DISCOURSE

Just like the contract of hospitality, this new social contract as used in modern public and private governance discourse might be very vulnerable. What are...
these vulnerabilities? I first go into the social contract in a public governance context. The first threat comes from parasitism or free ridership. As I analysed in the introduction, the public policy social contract discourse is a direct reaction to the utilitarian logic of effectiveness and risk management in public policy which led to a strong focus on accountability and protocols. Merely promoting a social contract does not automatically imply saying goodbye to this utilitarian logic. An open and living social contract as proposed in public and corporate governance may be vulnerable to the parasitism of free riders feeding on the open and flexible relation. As said, parasitism looms around the corner of every act of hospitality.

A second vulnerability may resort in loss of state authority and legitimacy due to the changing role of the state from guaranteeing authority into a participant. This may also be relevant for human rights. Although the call for a social contract in public policy is meant to serve social rights, a diminishing state authority may also endanger the position of these rights. An aggravating factor lies in the current secular context. As was shown by the comparison with hospitality, symbolic mediation is very important to uphold the contingent solidarity proper to the act of hospitality. The role was formerly fulfilled by mythical deities. However, although in some respects, the secular state is the successor of these deities, it lacks the persuasive (narrative) power to uphold the shared morality of reciprocal solidarity, certainly if ‘brought down’ to the position of a participant, instead of abstract guarantor. So, we have to be aware that a weakening of the state may also touch human rights.

Going now into the vulnerabilities of a social contract in corporate governance, the risk of being challenged by the utilitarian logic of ‘parasitism’ may be even greater. Although nowadays a company has to take the interests of a wide circle of stakeholders into consideration, and although a social contract with society may add to its ‘licence to operate’, a company still has to pursue its own interests and is part of a global playing field that is set in the logic of winners and losers. This shows that a societal mission is at least in tension with the economical mission of the company itself. With regard to human rights, a weakened position of the state – for example, if taken as partner to a social contract with a big company – may also potentially endanger the position of human rights.

In other words, after comparison with the living contract of hospitality, the social contract discourse of public policy and corporate governance comes forward as a promising retrieval of elements of a venerable tradition. The comparison however also demonstrates some of the vulnerabilities that come with that tradition, aggravated by secularity and utilitarianism. This makes that the calls for a new social contract, both in public policy as in corporate governance, offer promising perspectives, but may also turn out to be a mere metaphor.
4.5. A PROMISING BUT VULNERABLE SOCIAL CONTRACT

The modern social contract discourse in the context of public and corporate governance aims explicitly to advance human rights. Public governance is aimed at the execution of social rights. The idea of a social contract between big companies and civil society is inspired by human rights as laid down in several treaties, soft law regulations and increasingly in hard law. The question we asked was whether this social contract discourse can be qualified as an honest step forward in the advancement of human rights or whether it is primarily a metaphor covering an ongoing utilitarian logic.

To examine this question, this contribution first compared the modern discourse with the main classic positions in social contract theory with respect to human rights. As for classic social contract theory, the relation with human rights is somewhat dubious, since social contract theory is generally built upon the notion of a bargain made out of self-interest. Bargains and self-interest do not seem to chime well with rights which demand recognition for dignity’s sake, not for self-interest. By comparison, the social contract as promoted in modern governance discourse diverges structurally from the classic social contract frame, as it stresses reciprocal responsibility of a wide circle of participants in a horizontal relationship, instead of limited relationship between fictive individuals acting out of self-interest. The public and private governance discourse offers the normative framework for a living social contract, instead of merely justifying a given order or authority. The modern contract offers a critical lens to evaluate a company’s licence to operate or a government’s licence to govern on a ‘daily basis’. Due to these features of reciprocity and responsibility, the modern social contract discourse is a promising step forward for human rights.

But what risks and challenges does this modern social contract entail? To investigate the implications, I took inspiration from the social contract of hospitality. The comparison with hospitality reveals the ‘high morality’ of this modern social contract discourse. It is set in a morality of responsibility for the general interest, shared among a wide variety of stakeholders, among whom potentially nature.

However, the comparison of the social contract as promoted in public and corporate governance, also reveals some potential risks. The open and informal features of this living social contract make it vulnerable to parasitism. A morality of reciprocal respect hinges on the willingness of every participant to reflexively respect the unwritten code. This fragility is aggravated by the loss of symbolic mediating institutions like religion and the instrumentalist and utilitarian logic that is inherent to the public policy focus on effectiveness and the corporate logic of profit. These vulnerabilities should be taken into account by legal theory.

Still, COVID-19 as well as the climate crisis show that there is no society, nor public administration, nor any commercial activity that is free of charge.

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Nature – supported by awareness of the vulnerability of societal ties – forces us to take responsibility. The climate crisis and the call for recognition and social justice show that reciprocal recognition as expressed by human rights is paramount and suggest that man ought to start to consider himself as a guest of nature instead of the reverse.

In short, the calls for a social contract in public and corporate governance should be taken very seriously, but also deserve to be critically analysed. With regard to human rights, such calls beg further exploration of issues like the meaning of recognition in the context of change, time and contingency and an ongoing utilitarian logic tied to globalisation.