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The Status Quo in Contractarian Constitutionalist Perspective*

by

Viktor J. Vanberg

1. Introduction

That it favors the status quo is one of the most common and persistent objections that have been raised against the contractarian-constitutionalist approach and, specifically, against its emphasis on voluntary agreement as the fundamental legitimizing principle in social affairs. Early critics like B. Barry (1965: 243ff.), D.W. Rae (1975: 1273ff.), and W.J. Samuels (1976: 935, 941; Buchanan and Samuels 1975: 26f., 28ff., 34, 36ff.)[1] have objected that insisting on agreement and contractual change amounts to a protection of the status quo and, in effect, means to favor those who have to gain from its continuance (Mueller 2003: 144). Similar objections have been voiced by many others since.[2]

The purpose of this paper is to clarify certain ambiguities that have surrounded these objections and contractarian responses to them. Its main emphasis will be on separating two issues the differences between which have not always been sufficiently recognized in the debate, namely, on the one hand, the role of the status quo as the inevitable starting point of any change and, on the other hand, the issue of the normative evaluation of the status quo.

The paper is organized as follows. Section 2 discusses aspects of the contractarian constitutionalist perspective that are of particular relevance in the present context. Section 3 addresses the issue of the status quo as the starting point of constitutional reform. Section 4 is about the status quo as the object of normative judgement. The concluding section 5 reflects on the obstacles that demands for correcting the "injustices" of the status quo as a precondition for contractual reform put in the way of potential mutual improvement.

2. Contractarian Constitutionalism as Applied Science

The contractarian-constitutionalist enterprise can be, and has been, interpreted in different ways. In my interpretation it is intimately connected to the "mutual gains from trade"-paradigm (Buchanan) or, as I prefer to call it, the "mutual gains from joint commitment"-

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[1] For J.M. Buchanan's response to W.J. Samuels' charge see Buchanan (1977b: 142ff.) and Buchanan and Samuels (1975: 25, 27f., 33, 35f.) .

[2] J.L. Coleman (1990: 146f.): "Buchanan takes the status quo as the appropriate point of departure for social contract theory. This is a very different approach than one might be inclined to take since there is no reason to suppose that the status quo reflects a particularly fair distribution of holdings. ... This is simply status quoism of the worst kind. For its central claim, if true, is true regardless of the morality of the holdings."

paradigm. If constitutionalism can be defined as "the science of rules" (Buchanan 1977a: 83), *contractarian* constitutionalism can, in my view, be best understood as an *applied* science of rules, "applied" in the sense that it seeks, as any applied science, to contribute theoretical insights to the solution of a practical problem, in its case the problem of how people can improve their lifes by jointly committing to suitable rules of the game.[3] The theoretical core of this enterprise has been summarized by J.M. Buchanan (1999: 288):

> "The justificatory foundation for a liberal social order lies, in my understanding, in the normative premise that individuals are the ultimate *sovereigns* in matters of social organization, that individuals are the beings who are entitled to choose the organizational-institutional structures under which they will live. In accordance with this premise, the legitimacy of social-organizational structures is to be judged against the voluntary agreement of those who are to live or are living under the arrangements that are judged. The central premise of *individuals as sovereigns* does allow for delegation of decision-making authority to agents, so long as it remains understood that individuals remain as *principals*. The premise denies legitimacy to all social-organizational arrangements that negate the role of individuals as either sovereigns or principals. On the other hand, the normative premise of individuals as sovereigns does not provide exclusive normative legitimacy to organizational structures that – as, in particular, market institutions – allow internally for the most extensive range of separate individual choice. Legitimacy must also be extended to 'choice-restricting' institutions so long as the participating individuals voluntarily choose to live under such regimes."

Contractarian constitutionalism in the Buchanan tradition starts from a normative premise, namely – as stated in the quoted paragraph – the premise of individuals as sovereigns. It is based on a *normative individualism*, on the assumption that the desirability, and legitimacy, of constitutional arrangements is to be judged in terms of the preferences of, and the voluntary agreement among, the individuals who live under (or are affected by) the arrangements. To call it, therefore, a "normative" science is, however, in my view misleading. Science is about explaining how the world functions, not about proclaiming what should be. This is not different with contractarian constitutionalism. If it were "normative" in the sense of preaching instead of explaining, this field would discredit itself as a scientific enterprise. Its normative individualism implies that contractarian constitutionalism approaches the social world with a particular analytical focus. It affects the choice of questions that it seeks to answer. It is not meant at all to exempt contractarian constitutionalist conjectures and arguments from any of the ordinary standards of scientific validity, i.e. empirical testing and rational criticism. Social

[3] This interpretation is very much in line with J.M. Buchanan's characterization of his version of contractarian constitutionalism: "(I)t is nice to treat the world as if we were sitting in an observer's rocking chair and looking at its absurdities. But this is not enough. I think that I have, personally, some responsibility to do more than this. ... I go beyond this purely descriptive role in trying to find contractual improvements" (Buchanan and Samuels 1975: 28, 36).

reality can be examined from various kinds of analytical interests. As normative individualists contractarian constitutionalist are interested in examining constitutional arrangements in light of the question of how well they serve the common interests of the individuals involved, and how they might potentially be improved to serve these common interests better. The arguments themselves that contractarian constitutionalists pronounce in pursuit of their analytical interest need not be any more "normative" than those pronounced in any other scientific field.

Stated differently, contractarian constitutionalism, like any *applied* science, issues what philosophers would call *hypothetical* imperatives (as opposed to *categorical* imperatives). It is not about telling people *categorically* what they *should* do, according to some predefined, external standard and divorced from what they consider to be in their interest. Instead, it is about telling people what, in light of our theoretical constitutional knowledge, is *prudent* for them to do, *in terms of their own interests and purposes*. It provides advise on what people should do *if* they want to achieve certain aims, specifically, advise on what kinds of constitutional commitments are recommendable if they wish to capture potential mutual gains. The contractarian constitutionalist's conjectural recommendations are subject to empirical testing and rational critique in both their essential components, in their conjectures about the addressees' common interests, and in their conjectures about what would be suitable constitutional commitments *given* those common interests.

The contractarian-constitutionalist enterprise is, at the same time, quite general and quite limited in its ambitions. It is general in the sense of being applicable to whatever group of persons one has in mind as potential beneficiaries of a cooperative arrangement, from the most local groups to the most inclusive group, humankind at large. Mutual gains from joint commitment may be captured at all conceivable levels of social organization. Yet, the enterprise is limited in the sense that its principal focus is on *mutual gains*, on the issue of how *groups* of persons can jointly do better through constitutional means or, stated differently, how they can manage to play a *better game* for all involved. Where this is not the issue of interest, contractarian constitutionalism claims no relevance. It is, for instance, silent on the issue of what strategies participants in collective endeavors should use in order to maximize their unilateral gains in any given game.[4]

[4] Machiavelli, to whom Buchanan (Buchanan and Samuels 1975: 36) refers, was also practicing applied social science when, in *The Prince*, he offered strategic advise to the Prince. Yet the problem to the solution of which he wanted to contribute was, obviously, different from the contractarian constitutionalist's concern with mutual advantage. Accordingly, the addressee of his hypothetical imperatives was not the constituency at large but the Prince as a party in the collective enterprise.

The contractarian-constitutionalist argues from his expertise in constitutional matters, as an expert in the "science of rules." He does not claim any superior knowledge of what people's factual interests are or what their interests should be. His project is to identify constitutional reforms that are in the relevant constituency's *common constitutional interests*.[5] As noted above, his hypothetical proposals for mutually advantageous constitutional reforms are subject to two kinds of tests. On the one hand, insofar as they are based on conjectures about the factual working properties of alternative rules, they are subject to empirical testing and to the professional critique of other constitutional experts. On the other hand, insofar as they are based on assumptions about the *desirability* of the conjectured working properties of rules from the perspective of those who are to live under them, the contractarian constitutionalist's proposals are subject to an acceptance-test on the part of their addressees. The members of the constituency under consideration are the ultimate judges on whether or not the working properties of a rules-regime A serve their interests better than the working properties of a rules-regime B.[6]

In order to be effective as an applied science contractarian constitutionalism must, quite obviously, address people's *factual* interests, i.e. the interests that they do in fact harbor at the time advise on potential constitutional improvement is offered, knowing who they are or what position they are in. Hypothetical imperatives that tell people what would be prudent for them to do if they were to choose under different circumstances (e.g. behind a hypothetical veil), and if their interests were different from what they actually are, can hardly be expected to have much of an effect on self-interested agents.[7]

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[5] In terms of the game metaphor one can distinguish between a person's *constitutional* interests and her *action* interests. Her constitutional interests are about the rules that she would prefer to choose if she were to choose the rules for the constituency under consideration. Her action interests are about what, in any given choice situation, she would prefer to do, given the rules as they are and the manner of their enforcement. By *common constitutional interests* I mean the constitutional interests that the members of a constituency share and, accordingly, can agree on. For a more detailed discussion see Vanberg 2002.

[6] With regard to the role of the acceptance-test or agreement-test an important distinction between two kinds of constitutional conjectures needs to be considered, though, namely, on the one hand, conjectures about what rules are presumably in the common interest of all members of the constituency under consideration and, on the other hand, conjectures about which one among alternative procedures for the choice of rules is more likely to reflect the constituents' common constitutional interests. With regard to the first kind of conjectures the acceptance or agreement among the individuals concerned is, in the sense explained above, clearly a critical test for the validity of the contractarian-constitutionalist's hypothetical imperatives. The validity of the second kind of conjectures is, however, solely subject to empirical testing and critical professional discourse. It is not contingent on whatever interests the members of a constituency harbor. - To do justice to the true complexity of the matter one has to add, though, that these interests come into play again when it comes to the question of whether or not the members of a particular constituency *wish* to adopt procedures for choosing rules that, in the constitutional expert's judgement, are best suited to reflect the constituents' common constitutional interests.

[7] This has been amply demonstrated by the frustration of generations of economists who offered advice to politicians on what they should do in order to advance the "wealth of the nation." The proper addressee for hypothetical imperatives, saying what is prudent to do if one wants to advance the common good, is the constituency at large whose *common interest* is concerned, not politicians who can only be expected to be responsive to advise telling them how they can advance their own prospects of success in the political

By contrast to the pseudo-objectivist notions of *efficiency* that are implied in much of traditional welfare economics, the contractarian-constitutionalist concept of efficient rules or efficient constitutional reforms is explicitly subjectivist. It cannot be defined apart from the interests of the persons involved, as those interests are seen by these persons themselves. Just as we as observers have, ultimately, no other evidence for the efficiency of ordinary market exchanges than the voluntary agreement of the parties to the transactions,[8] we have, ultimately, no other evidence for the efficiency of rules-regimes or constitutional reforms than the voluntary agreement of the individuals involved. This does not mean, however, that people's constitutional interests, as they are voiced, for instance, in a constitutional referendum, are to be considered by contractarian constitutionalists as unquestionable ultimate authority. To be sure, the premise of *individuals as sovereigns* implies that the individuals involved must have the ultimate voice on the kind of constitutional regimes they wish to live under. It does not imply that the individuals involved must be considered the most competent judges on how alternative rule-regimes will affect their wellbeing, given their factual working properties. When faced with a choice among alternative constitutional proposals people's expressed preferences will be heavily influenced by their constitutional theories, i.e. by their expectations of how the proposed rule-regimes will work out in practice. And, quite obviously, their constitutional theories can be, and will often be, mistaken, leading them to opt for rules that they would never choose if they were properly informed about their actual working properties. In this sense, the contractarian constitutionalist's premise of individuals as sovereigns is perfectly compatible with the notion that people should be admonished to be skeptical with regard to their unrefined constitutional preferences, and that it is in their common constitutional interests to opt for procedures for choosing rules that account for the limits of their constitutional knowledge.[9]

3. The Status Quo as Starting Point

Before I turn to the main subject of this section, i.e. the status quo as starting point for constitutional reform, a few clarificatory remarks are in order. For the purposes of constitutional analysis it is essential to distinguish between two kinds of objections or demands of reform that can be raised with regard to the status quo. Stated in terms of the

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competition that they face. It is the mark of a well-ordered polity that it operates on rules that align, to the extent this can be achieved under earthly conditions, the politicians' interests with the common interests of the constituency at large. On this issue see J.M. Buchanan 1993.

[8] J.M. Buchanan (1977b: 145f.): "Even in the simplest economic examples a position is defined to be 'efficient' or 'optimal' when gains from trade have been fully exhausted. There is no objectively identifiable 'efficient' allocation apart from the observation of traders' unwillingness to engage in further exchanges."

[9] For a more detailed discussion of this issue see V.J. Vanberg and J.M. Buchanan 1991.

game metaphor, such objections may be targeted at the *rules of the game*, and they may be targeted at the *distribution of entitlements or endowments* that the players hold within the game. The often used phrase that the *distribution of property rights* in the status quo is at issue in demands for reform is somewhat ambiguous in this regard. It can mean that *property rights* in the sense of the *rules of the game* (i.e. the rules that define what it means to own something or, in other words, what bundle of rights the law bestows on the property-owner) are at issue, and it can mean that the distribution of holdings or property claims, i.e. the structure of ownership (who owns what?), is at issue.[10]

Both kinds of objections against the status quo may often come together, yet they can be, and should be, conceptually separated. Demands for reforms in the distribution of holdings or property claims (who owns what?) can be, and in fact often are, raised by people who do not call for a change in the rules of the game as such. Clarity of argument would require them, of course, to specify whether they consider the status quo distribution of holdings in need of correction because it resulted from objectionable rules of the game, or because holdings have been acquired unjustly by unfair play, - or whether they just wish to see a redistribution of holdings even if they find no fault with the rules of the game and have no evidence for foul play. If objectionable rules of the game are the principal concern, *constitutional reform* in the genuine sense is the issue. If foul play, i.e. violations of the rules of the game, are the principal reason for objections against the status quo distribution of property claims, reform efforts should properly be directed at a more effective enforcement of the existing rules of the game.[11] Probably many critics of the distribution of property holdings in market economies can be classified in the latter of the three cases distinguished above. They have no desire to live under a different constitutional regime and they may well acknowledge that the status quo distribution of holdings has resulted, by and large, from ordinary play of the game. They have just a desire to see the inequalities that have evolved over time being reduced. Here again, clarity of argument would require advocates of such demands to specify whether they wish to add a redistribution-rule (and, if so, what kind of rule) to the existing constitutional structure, a demand that would, again, amount to nothing other than a call for genuine *constitutional reform*, or whether they have something else in mind, and, if so, what.[12]

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[10] An implicit recognition of this distinction can be read into some of J.M. Buchanan's remarks on "Continuing Contract and the Status Quo" (1975: 74 ff., specifically p. 78).

[11] To speak of „those who seem differentially favored in the status quo" (Buchanan 1975: 85) raises the question of whether differences among players that reflect discriminating, privilege-granting rules are at issue, or differences among players that are the result of their differential success under non-discriminatory rules.

[12] People who have no desire to change the rules of the game, but who want to see the existing distribution of holdings "corrected," may be attracted to the idea of a one-time only redistribution of holdings, outside of the

My exclusive concern in this paper is with the *constitutional status quo* and with the issue of *constitutional reform*. To be sure, calls for constitutional reform, i.e. for changes in the rules of the game, may often be motivated by discontent with the pattern of distributional outcomes that result from status quo rules. But it is the concern with changes in the rules themselves, not in outcomes per se, that is of principal interest here. And it is the constitutional status quo, the existing "structure of legal order" (Buchanan 1975: 82), that Buchanan defines as the "*here*," [13] from which efforts at contractual improvement must start,[14] provoking the charge of conservative bias.[15]

To accusations that his contractarian-constitutionalist approach favors the status quo Buchanan has responded, time and again, that "any discussion of institutional change must embody the recognition *that we start from here*, and that *here* defines both time and place" (1986: 271).[16] It is, as Buchanan points out, a simple and indisputable fact that we cannot but start from here, the status quo. "We cannot jump out of our history and commence again" (ibid.).[17] In other words, we have no choice in this matter, as witnessed by the absurdity of the question: "Should we start from some place else than where we are?" If there is an issue here, it can obviously not be about the fact that the status quo is the starting point of any change. And, indeed, upon closer examination it becomes apparent that what is really at stake in the debate on the alleged conservative bias of contractarian constitutionalism is not the issue whether we should start from here but, instead, *how we should proceed from here*.[18] What the critics object to is the contractarian norm that change ought to be *contractual*, based on consent among the parties concerned. As W. Samuels (in Buchanan and Samuels 1975: 28f.) charges, to "apply the unanimity or consent rule to any change from the status quo" means to build "in the continuity of the status quo." It means, according to Samuels, to allow "the

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rules of the game. The difficulty with such "one-time only redistribution" is that there is no way to give credibility to the claim that the redistribution is a "one-time only" exemption, and that thereafter there will be no further interventions of this sort. What such "one-time" intervention in effect amounts to is a change in the rules of the game – namely the adoption of an additional rule, allowing for occasional redistributive interventions. The real issue, therefore, is, whether such constitutional change is desirable in terms of its prospective working properties. – On this issue see also Section 5 below.

[13] J.M. Buchanan (1977a: 92): "But 'here,' the status quo, is the existing set of legal institutions and rules."

[14] J.M. Buchanan (1977b: 144): "(T)he contractarian must acknowledge the status quo as the starting point for any agreement upon change."

[15] W.J. Samuels (in Buchanan and Samuels 1975: 27) objects against Buchanan's "proposed system" that "its functional role in this world is to protect the status quo."

[16] J.M. Buchanan (in Buchanan and Samuels 1975: 27): "The point I always emphasize is that we start from here not from somewhere else." - Buchanan (1975: 78): "Any proposal for change involves the status quo as the necessary starting point. 'We start from here," and not from some place else."

[17] J.M. Buchanan (in Buchanan and Samuels 1975: 25): "In my vision the status quo does have a unique place, for the simple reason that it exists, and hence offers the starting point for any peaceful (contractual) change."

[18] J.M. Buchanan (1975: 77) refers to the difference between these questions when he notes: "How can we get 'there' from 'here'? This is the appropriate question to ask in any attempt to assess proposed sociopolitical change."

privileged in the status quo to hold out and perpetuate themselves by being able to withhold their consent" (ibid.: 30).

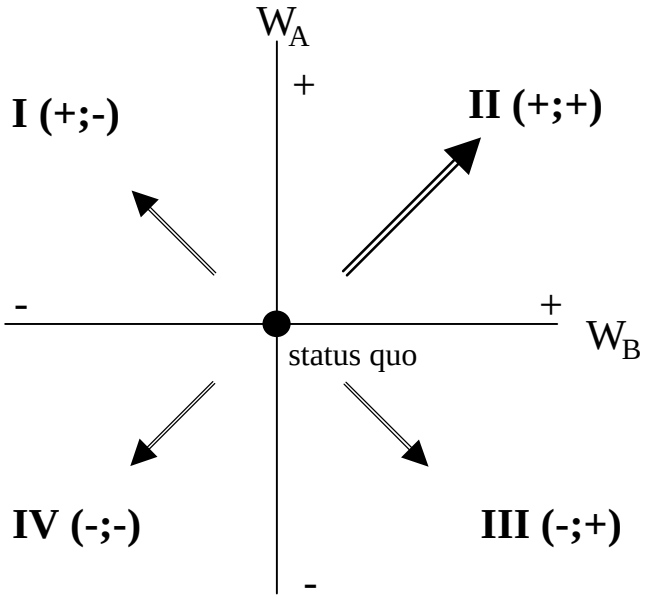
It is important to recognize that the issue of the status quo as *starting point*, and the issue of whether change from the status quo should be *contractual*, are *separate issues* and that the answer to the first does not imply the answer to the second. From the fact, indisputable as it surely is, that we start from here one cannot conclude per se that we should proceed from here in a peaceful, contractual manner only.[19] As Samuels (ibid.: 30) notes, "the fact that the status quo does exist does not mean that it ought to be defended by any rule like that of unanimity." The postulate that changes from the status quo should be contractual needs to be argued for on additional, separate grounds. The only consistent form in which contractarian constitutionalism, as an applied science, can pronounce this postulate is as a *hypothetical imperative.* And this means, it must provide arguments that tell the addressees of the postulate, i.e. the individuals subject to the constitutional regime under consideration, why it is in their common interest to commit to peaceful, contractual change. And it is surely not a convincing argument to tell them, that they should do so because they start from here.

Why should the members of a constituency jointly commit to seek contractual, consensual change only and to refrain from pursuing their interests by 'imposing non-voluntary changes' (Buchanan 1977b: 143) on others? What argument might convince them, including those who are most dissatisfied with the constitutional status quo, that such joint commitment may be in their own interest? Clearly, someone who sees himself - or, respectively, the group to which he belongs and in whose continued loyalty he perfectly trusts - in a position powerful enough to impose his (their) will by force on others, not only at the moment but for the relevant future, and who believes that the opportunity costs of such imposing are, and will be, less than the gains, such a person will be scarcely receptive to appeals that call for a contractual attitude. Yet, such beliefs may rarely be well founded in a world of constant change, in which each individual's long run fate is likely to be uncertain, and in which the prospects of socially wasteful and destructive fighting may make a commitment to contractual procedures attractive to all.

The graph below may serve to illustrate the argument for a simple two-persons world. A's welfare is measured along the vertical axis, B's welfare along the horizontal axis, the origin represents the status quo. Changes from the status quo into quadrant II are mutually advantageous for both agents. Changes into quadrant I benefit A at the expense of B, while

[19] That such conlusion can be drawn seems to be an implicit assumption in some of J.M. Buchanan's arguments. See e.g. Buchanan (1977a: 92): "I have argued that the contractarian or Paretian norm is relevant on the simple principle that 'we start from here.'"

changes into quadrant III benefit B at the expense of A. Changes into quadrant IV hurt both of them.



As a self-interested agent A prefers changes away from the status quo in the northern direction. And, in the absence of any direct concern for B's wellbeing, A does not care whether the move is into quadrant I or II. Conversely, B prefers changes in the eastern direction, and he is per se indifferent as to whether moves are into quadrant II or III. Accordingly, their self-interest would seem to provide neither A nor B any reason to abstain from moves into quadrant I and III respectively, i.e. moves that impose damages on the other agent. The problem is that the combined effect of A's and B's separate efforts to improve their lot at the other's expense may easily be (especially in prisoners' dilemma type situations of strategic interdependence) that they will jointly end up in quadrant IV, to the detriment of both. The insight into the mutually destructive dynamics of such unrestrained pursuit of their own interests may provide prudential reasons for both parties to jointly commit to a contractual regime.

The contractarian argument for peaceful, contractual change is not – and cannot be – derived from the mere fact that we always start from here. Nor does it imply a defense of the status quo.[20] It is an argument about how we should proceed from here, namely by peaceful,

[20] Although the distinction between the argument for peaceful change and a defense of the status quo is clearly drawn in Buchanan's constitutional economics, it is not always expressed as unambiguously as it could be. See e.g. Buchanan (in Buchanan and Samuels 1975: 19, 27): "I do not especially like the status quo defense that my methodology forces me into. ... I realize that my own position necessarily makes it seem that I am defending the

contractual means rather than by coercion and violence. It is not an argument for leaving things as they are. Nor is it an argument in terms of the merits of the status quo, but in terms of the merits of contractual change compared to its alternative, namely change by coercion and violence. As Buchanan has pointed out, the contractarian project of working out and proposing contractual reforms may be a much more laborious and much less romantic undertaking than the grandiose designs, popular among social reformers, of sweeping changes to be imposed on resisting interests.[21] Yet, in view of the destructive dynamics of coercive change, it offers a more productive approach to constitutional reform than its more impatient counterparts that call for imposing change, raising the question of who is to do the imposing.[22]

A common misinterpretation of the contractarian postulate, a misinterpretation that is behind many objections that are raised against it, results from the failure to distinguish clearly between unanimity as a *legitimizing principle* and unanimity as an *in-period decision rule*. It has, of course, been the central theme of J.M. Buchanan's and G. Tullock's *The Calculus of Consent* that individuals as sovereigns may well choose for prudential reasons to decide their in-period collective choices by decision rules that do not require unanimous approval, or that may even allow for the delegation of decision making authority to agents.[23] The in-period choices arrived at in such manner are perfectly legitimate in a contractarian sense as long as they properly result from rules that command the voluntary consent of all members of the relevant constituency. Accordingly, the contractarian postulate of consensual change does not rule out at all changes that do not command unanimous approval, as long as such changes are made according to rules that are legitimized by the consent of the relevant constituency. And this applies to changes in the rules as well, as long as such changes occur in accordance with

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status quo. ... But my defense of the status quo stems from my unwillingness, indeed inability to discuss changes other than those that are contractual in nature." – It may be of interest to quote, as an aside, a remark that K.R. Popper (1966: 110) has made on this issue: "The defence is one of a *status quo*, and the principle proposed amounts to this – that the status quo should not be changed by violent means, but only according to law, by compromise and arbitration, except where there is no legal procedure for its revision."

[21] Political economists and social philosophers, Buchanan (1975: 86), have often "felt themselves obligated to propose changes that are derived from external ethical criteria, changes that are presumably to be imposed on the existing structure. This sort of discussion has tended to distract effort and attention from the less romantic but more productive approach involved in working out possible compromise modifications that would be agreeable to large numbers of persons in the community." – Buchanan (in Buchanan and Samuels 1975: 27): "I can, of course, lay down my own notions and think about how God might listen to me and impose these changes on me, you, and on everyone else. This seems to me what most social scientists do all the time. ... It seems to me that our task is really quite different, that of trying to find, locate, invent, schemes of change that command unanimous or quasi-unanimous consent and propose them."

[22] J.M. Buchanan (1975: 82): "Why need a presumptive role of unanimity be adopted for genuine constitutional change? ... If imposed and non-voluntary changes in the structure of legal rights are to be made, *who* is to do the imposing?."

[23] As D. Mueller (2003: 146) rightly points out, according to the argument developed by Buchanan and Tullock the legitimacy of majority decisions is secondary to, or derived from, a unanimous approval of the majority rule. It is, therefore, not clear in what sense "one might question whether they can legitimately be characterized as champions of unanimity" (Mueller ibid.: 138fn.).

rules for changing rules that command unanimous approval. It is with regard to changes in the fundamental, constitutional rules themselves, i.e. for changes that have no established rules to rely on, that the contractarian postulate requires that such changes be made in a contractual, consensual manner.

A careful distinction between unanimity as legitimizing principle and unanimity as in-period decision rule can help to resolve, for instance, the issue of whether, as is sometimes suggested, the contractarian norm is only workable for one of the two "fundamentally different types of collective decisions" (Mueller 2003: 144), namely for allocation decisions only but not for redistribution decisions. To be sure, consensus can be reached only in cases where mutual gains are possible, and contractual solutions are not feasible where no such opportunities for mutual gain exist. Yet, critics who find the contractarian norm inapplicable to distributional issues may jump too quickly to the conclusion that, where such issues are concerned, "no mutually beneficial opportunities are available."[24] They tend to prematurely rule out consensual procedures where a more patient examination of the issue and a suitable redefinition of the relevant alternatives may unearth such opportunities after all, and they tend to overlook the fact that, even where zero-sum type choices are concerned, individuals who in their interaction recurrently face such choices may, to their mutual benefit, agree to adopt contractual procedures for handling them.[25] Even though in each particular incidence no mutual gains may be feasible, to adopt such consensual procedures promises mutual gains to all parties involved, compared to a regime of coercively imposed solutions and violent conflict.

The distinction between the legitimizing role of the unanimity principle and its status as in-period decision rule can also help to resolve an issue that Samuels (in Buchanan and Samuels 1975: 29) raises when he objects to Buchanan's approach: "The problem with the consensus-unanimity-consent rule is that it neglects non-Pareto optimal changes through the market. ... The thrust of part of your analysis would also apply the consent rule unequally or selectively: only to government and not to market changes." Implied in this argument is the charge that, if the contractarian norm were consistently applied, changes from the status quo that result from market transactions would appear to be in violation of the consensus requirement no less than non-unanimous collective choices, because they reflect an agreement

[24] D. Mueller (2003: 139): "(M)any advocates of majority rule envisage conflictual choices in which no mutually beneficial opportunities are available, as occurs when a community is forced to choose among a set of Pareto-efficient opportunities. ... Criticism of unanimity and defenses of majority rule often involve distributional or property rights issues ... ."

[25] As a simple illustration, consider the well known example of two persons who solve the zero-sum problem of sharing a pie by agreeing to the procedure of letting one party do the cutting and letting the other party choose which piece to take.

among the contracting parties only, not a unanimous approval by the inclusive community. The answer to this charge is, again, to be found in a careful distinction between unanimity as legitimizing principle and unanimity as decision rule. It is certainly true that the agreement among the contracting parties that market transactions enjoy must not be confused with a unanimous approval by the community at large. In this sense, changes from the status quo that result from market transactions are, indeed, consensual only as far as the contracting parties are concerned, but they may well be imposed on others in the community who would object if they were asked. Yet, again, according to the contractarian norm decisions or transactions qualify as legitimate as long as they are arrived at according to rules that enjoy unanimous approval.

Just as the members of a constituency may agree, on prudential grounds, to adopt non-unanimous decision rules for their in-period collective choices, they may agree, on prudential grounds, to adopt rules that allow pairs or subgroups within the community to enter into certain kinds of contracts without the need to seek the approval of the other members of the constituency. And just as non-unanimous collective choices qualify as legitimate, according to the contractarian norm, as long as they have been made in accordance with unanimously adopted decision rules, changes that result from market transactions qualify as legitimate as long as these transactions are in compliance with rules of the game that the relevant constituency agrees on.

The legal-institutional framework that defines the rules of politics and the rules of the market - or, more generally, of the private sphere - provides ample scope for non-unanimous change from the status quo that is perfectly compatible with the contractarian concept of unanimity as a legitimizing principle. What issues should be assigned to the sphere of political-collective choice and what issues should be left to private, market-coordination is itself a matter of constitutional choice, a choice that should be made in light of the relative merits of the working properties of the two arenas.

4. The Status Quo as Object of Normative Evaluation

As Buchanan has expressly stated, pointing to the indisputable fact that the status quo is the inevitable starting point for any reform "does not amount to a defense of the status quo,"[26]

[26] Buchanan (1975: 77): "The necessary recognition of this (that we cannot but start from the status quo, V.V.) does not amount to a defense of the status quo in any evaluative sense as is sometimes charged. ... There is nothing Panglossian implied when we insist that improvements must be worked out from the status quo." - Buchanan (in Buchanan and Samuels 1975: 27): "The status quo has no propriety at all save for its existence, and it is all that exists." – Buchanan (1986: 272): The recognition of the status quo as starting point "should not be interpreted as providing some ethical-moral defense of that assignment of rights and claims that exists."

(Buchanan 1975: 78), nor is any such defense or justification implied in the contractarian norm that changes from the constitutional status quo should be consensual.[27] Yet, not all of Buchanan's comments on this matter are free of ambiguity,[28] for instance when, in discussing the issue of whether a lack of consensus does "remove legitimacy from the status quo" (ibid.: 85), he argues: "Again, it is necessary to repeat the obvious. The status quo defines that which exists. Hence, regardless of its history, it must be evaluated as if it were legitimate contractually."[29] Quite obviously, there is a contradiction here between the notion that the contractarian perspective "does not amount to a defense of the status quo" and the argument that it requires us to evaluate the status quo "as if it were legitimate contractually." Not both of these views can be simultaneously held, and if a choice is to be made, it would seem that only the first is consistent with the overall thrust of Buchanan's approach.

The noted ambiguity draws attention to an issue that deserves closer examination but that I have bypassed so far, namely the question of what, if anything at all, can be said about the *legitimacy of the status quo* from a contractarian constitutionalist perspective. Surely, and as noted more than once, neither the argument on the inevitable role of the status quo as starting point nor the contractarian argument for consensual change imply or require any normative judgement on the status quo per se. But does this mean that the contractarian constitutionalist approach has to be neutral with regard to the status quo and must remain silent about the question of its legitimacy? As I will argue below, adopting a contractarian constitutionalist perspective does not require us to treat the constitutional status quo as if it were contractually legitimate, nor does it require us to be agnostic about the normative status of the status quo. I suppose, instead, that there is no reason why the same contractarian criterion of legitimacy – namely, agreement among the individuals concerned – that we apply to changes from the status quo should not be applied to the status quo itself.

As explained in more detail above (section 2), the essential ingredient of the contractarian constitutionalist perspective is its *normative individualism*, the premise that the preferences (interests, values, ...) of the individuals involved, and as understood by these individuals themselves, are to be respected as the ultimate standard against which the desirability or legitimacy of constitutional arrangements must be judged. In terms of this *internal* criterion of evaluation, constitutional arrangements qualify as legitimate to the extent

[27] Buchanan (in Buchanan and Samuels 1975: 25): "In my vision the status quo does have a unique place, for the simple reason that it exists, and hence offers the starting point for any peaceful (contractual) change. This is not properly labeled a defense of the status quo."
[28] See fn. 20 above.
[29] Critics like D. Reisman (1990: 43) have, justly I think, expressed doubts "as to whether it is genuinely realistic and acceptable that the *status quo* be 'evaluated as if it were legitimate contractually."

that they correspond to the common constitutional interests of the individuals involved, and the ultimate test for such correspondence is the voluntary agreement of the individuals involved. If modes of constitutional change can be judged against the internal criterion of voluntary consent, why should the constitutional status quo not be subjected to the same test? That the contractarian norm may be applied to existing constitutional arrangements no less than to constitutional changes, is recognized, at least implicitly, when Buchanan notes that "the legitimacy of social-organizational structures is to be judged against the voluntary agreement of those *who are to live* or *are living* under the arrangements that are judged" (Buchanan 1999: 288; emphasis added).

The same criterion that lets the contractarian constitutionalist question the legitimacy of non-consensual, imposed changes from the status quo would seem to require him, as a matter of consistency, also to doubt the legitimacy of a constitutional status quo that does not pass a relevant or appropriate agreement test.[30] This is what W.J. Samuels (in Buchanan and Samuels 1975: 30) seems to imply when he objects to Buchanan's treatment of the status quo: "Your analysis seems to accept the status quo when it was not contractually produced or adopted, a major restriction upon your own principle." To be sure, that the constitutional status quo may have to be judged as normatively deficient in terms of the contractarian standard of legitimacy does not alter in the least the fact that the status quo is the inevitable starting point for efforts at reform, nor does it diminish in any way the relevance of the contractarian argument for peaceful, contractual reform. How we judge, from a contractarian perspective, the legitimacy of the constitutional status quo, and what we judge, again from a contractarian perspective, to be legitimate procedures for constitutional reform, are two different issues that have to be assessed separately on their own terms.[31] It is perfectly consistent for a contractarian constitutionalist to criticize an existing constitutional regime for its lack of consensual approval and to insist, at the same time, that constitutional reform should be contractual. Neither is such critique of the status quo an invitation to change things in a non-contractual manner, nor does the contractarian argument for contractual change imply that we should ignore deficiencies in the legitimacy of the status quo.

[30] The attributes "relevant or appropriate" are added here as an implicit reference to an important issue that cannot be adequately discussed in the present context, but that should at least be mentioned, namely the obvious fact that not all possible forms in which people may express their approval or disapproval of the constitutional regime under which they live (e.g. verbally expressed dissatisfaction, organized political opposition, exit from the jurisdiction) represent equally reliable indicators of what, in an informed and reasonable assessment, would qualify as the constitutional interests that are shared by all members of the constituency.

[31] W.J. Samuels (in Buchanan and Samuels 1975: 29) seems to ignore this distinction when he argues: "As for the status quo, it is not contractual and there is no justification for giving it such preeminent status simply because it is in existence and requiring contractual and only contractual (consensual, etc.) change from now on."

A contractarian critique of the status quo would appear to be called for especially in the case of constitutional regimes that are characterized by *privileges* in the sense of discriminating rules that must be viewed as unjust by those who are discriminated against. Such critique can be based entirely on internal criteria, i.e. the evaluations of the individuals involved in the arrangement, without any need to appeal to external normative standards. There would seem to be no need, therefore, for Buchanan to take issue with W.J. Samuels' (in Buchanan and Samuels 1975: 30) talk of "existing systems of privilege," as long as such judgement does not imply recourse to external criteria.[32] We can surely criticize systems of privileges or discriminating regimes without imposing "our private values as criteria for social change" (Buchanan ibid.: 33), as regimes that violate the individualist norm that "each man's values are to count as any others" (ibid.) and that do not command agreement of all individuals who are living under them.[33]

The contractarian constitutionalist ideal of an institutional order voluntarily agreed upon by all parties necessarily implies a critical view on all privileges embodied in the status quo, and it clearly suggests the direction into which constitutional reform should go, namely the elimination of privileges and the creation of a privilege-free constitutional order.[34] To be sure, the contractarian's plea is for *consensual* elimination of privileges, but *elimination* of privileges is clearly what the contractarian norm demands. While maintaining that the status quo system of rights is the only one that can be enforced,[35] the contractarian constitutionalist can expose, at the same time, the deficient legitimacy of privileges embodied in the status quo, and he can call for contractual reforms that aim at eliminating these privileges. In fact, exposure of the deficient legitimacy of privileges in public discourse would seem to be one of the major forces that can induce the beneficiaries of privileges to agree to peaceful reform. Such exposure would typically mean to demonstrate how and why certain discriminating rules contradict, and are incompatible with, more general rules or ethical principles that are publicly

[32] In reference to Samuels' talk of "systems of privilege" Buchanan (in Buchanan and Samuels 1975: 35) notes: "This implies that you, somehow, have already introduced some standard, some external criterion, to determine whether or not privilege exists. My approach requires, and allows, no such external criterion to be introduced." – As argued above, I do not find this objection justified. One can speak of privileges in ways that are perfectly consistent with a contractarian constitionalist perspective, as Buchanan himself has done, of course, on many occasions. See e.g. J.M. Buchanan and R.D. Congleton 1998.

[33] To be sure, any classification of constitutional regimes as "systems of privilege" remains subject to the qualification that it "can be appropriately used only to provide inputs in a discussion that might lead to agreement upon change" (Buchanan 1977b: 145).

[34] In this sense, to the contractarian constitutionalist position should apply what F.A. Hayek (1972: ixf.) says about the liberal position: „The essence of the liberal position, however, is the denial of all privilege, if privilege is understood in its proper and original meaning of the state granting and protecting rights to some which are not available on equal terms to others."

[35] Buchanan (1975: 78): "These rights are the only ones that the agent could possibly enforce since no others exist."

shared in the respective constituency, such as, for instance, the ideals of democracy and the rule of law. That for contractual departure from the status quo one must gain the consent of those who are privileged by the status quo does not mean that one cannot employ the "moral pressure" of public political discourse as a legitimate tool.[36]

5. Conclusion: Rectification Concerns and Constitutional Reform

W.J. Samuels' (in Buchanan and Samuels 1975: 30) complaint that, "as attractive as the consent (unanimity) rule is, it places too much power in the hands of the already privileged," reflects an ambiguous feeling about the contractarian approach that seems to be shared by many of its critics. While such critics are prepared to acknowledge that the consensus principle may be attractive *per se*, in and by itself, they object to the idea that it can be applied to a status quo that is, in their view, normatively unacceptable. They do not quite demand that we start "from someplace else," they demand, however, that we move from "here," the actual status quo, to a different, preferred structure *before* we bind ourselves to contractual procedures for further change.[37] They want to postpone the adoption of consensual procedures until a just starting point has been established, something that, they think, cannot be achieved in a contractual manner.

The notion that the inequalities or "injustices" inherent in the status quo need to be eliminated first by an initial, one-time act of rectification before a commitment to the consensus principle is justified appears to be not only a major, explicit or implicit, argument in many of the standard objections against the contractarian paradigm.[38] It is an argument that can be found already in Knut Wicksell's early statement of the contractarian perspective. Qualifying his plea for "the principle of unanimity and voluntary consent as the basis of just taxation" Wicksell (1967: 108; 1896: 143) argued that "justice in taxation tacitly presupposes justice in the existing distribution of property and income" (ibid.). Where the status quo distribution does not pass the justice-test, Wicksell noted, an initial correction or revision in the existing property structure is required, and this initial correction, he thought, must be

[36] Consider, in this context, Buchanan's (1975: 85) comment on the reluctance of "those who are or may be differentially favored in the status quo" to agree on constitutional change: "Especially if they can control the activities of the enforcing agent, the government, they may consider their relatively advantageous positions invulnerable. They may be unconcerned about the alleged illegitimacy of the structure of individual rights in existence. It is this sort of setting that invites breakdown into disordered anarchy and revolution."

[37] G. Brennan and J.M. Buchanan (1985: 141): "This distribution of entitlements may not be acceptable to many persons as the appropriate starting point from which genuine constitutional reform is to be made."

[38] The argument, mentioned above (p. 6), that inequalities in the status quo distribution of holdings need to be eliminated before consensual procedures can be adopted, is an obvious example.

allowed to be decided by majority rule if it is to come about at all.[39] Wicksell recognized that to allow the majority "to make decisions concerning the justice of the existing property structure" (1967: 109; 1896: 144) may seem to contradict his fundamental principle of voluntary consent. He maintained, though, that no contradiction need to arise because the exception to the unanimity principle that he wanted to allow for was meant only as an initial, one-time act of rectification, not as a license for continued interference. As he put it, "it is one thing to abrogate once-and-for-all certain property titles and privileges, and quite another to interfere with them arbitrarily from time to time and piecemeal" (ibid.).[40] He also stressed that the initial, "once-and-for-all" correction in the constitutional status quo should be handled with great caution and on the basis of a qualified majority only.[41]

Notwithstanding its seeming plausibility, the notion that the adoption of contractual procedures should be postponed until after a new, more adequate status quo has been established must be questioned on several grounds. Some of the arguments that are of relevance here have been discussed already, directly or indirectly, in this paper, such as, in particular, the difficulty – or, indeed, the impossibility – of giving credibility to the claim that the initial correction in the structure of rights is a one-time-only, once-and-for-all rectification, carried out before the consensus-game starts, and not to be repeated at later stages of the game. If such exception from consensual change is allowed for at all, what should prevent it from being reactivated at later stages when, after the contractual game has been played over several rounds, new inequalities will, inevitably, emerge again?

The most serious problem with the call for an initial rectification of deficiencies in the status quo would seem to be, however, that it tends to prevent people from ever getting to the point where they feel ready to commit to contractual procedures. Because of their obsession with rectifying earlier "injustices" people can easily get locked in the mutually destructive dynamics of continued conflict, preventing them from capturing opportunities for mutual

[39] K. Wicksell (1967: 109; 1896: 144): "If, however, this presupposition does not correspond to the facts, if there are within the existing property and income structure certain titles and privileges of doubtful legality or in open contradiction with modern concepts of law and equity, then society has both the right and duty to revise the existing property structure. It would obviously be asking too much to expect such revision ever to be carried out if it were to be made dependent upon the agreement of the persons primarily involved."

[40] D.C. Mueller (2003: 145) seems to interpret Wicksell's argument somewhat differently when he attests Wicksell to have "recognized not only that the distribution and allocation issues would have to be decided separately, but also that unanimity would have to give way to majority rule to resolve the distribution issue."

[41] K. Wicksell (1967: 109; 1896: 144): "In any case, decisions on far-reaching questions of property rights need not, and in my view should not, ever be taken by a narrow majority. This too is a clear case for a qualified majority."

improvement that may clearly exist.[42] The long lasting and continuing conflicts in Northern Ireland and Palestine may be cited here as deplorable evidence.

It is probably one of the most important messages of the contractarian constitutional paradigm that, compared to its feasible alternatives, seeking to explore potential gains from cooperation, i.e. gains from exchange as well as gains from joint commitment, is the socially more productive strategy, in politics no less than in the market, and no matter where we start from.[43] Even if it may not always satisfy our sense of justice, by directing our attention to the prospects for *future* gains it helps to protect us from getting dragged into the perverse dynamics of mutually destructive fighting that is too easily triggered by backward looking concerns for "corrective justice."[44] If, as the contractarian constitutionalist argument implies, consensual procedures represent a superior social technology, they should be practiced here and now. There can be no prudent reason to postpone their adoption.

[42] As Buchanan (1977a: 92f.) notes, by focussing on issues of rectification "we are necessarily precluding and forestalling the achievement of potential structural changes that might increase the size of the pie for *all*. Too much concern for 'justice' acts to insure that growth will not take place." – See also Buchanan (1975: 80).
[43] This is in contrast to the message implied in B. Barry's (1965: 313) statement: "But a *politica*l situation is precisely one that arises when the parties are arguing not about mutually useful trades but about the legitimacy of one another's initial position."
[44] As Bruce Ackermann (1992: 70) notes in an essay on "The Mirage of Corrective Justice": "Corrective justice is concerned with the past. ... Constitutionalism faces the future. ... (C)orrective justice focuses on particular individuals; constitutionalism on institutions and general principles."

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