

TOPIC 6: SOCIAL CONTRACTS

Part 1: Introduction: All societies have some sort of social contract

All orderly and unified societies and countries have a 'social contract.' This can be understood as an agreement of covenant between citizens and their motherland. Or fatherland.

This contract may be spelled out in key laws, a formal constitution or a code of expected behaviour. However, it is often an informal understanding about two-way obligations and rights.

A social contract, therefore, sums up the obligations of individuals and groups to work with each other for the good of a parent. Whether that parent is a clan, a regional grouping, a city- state or an identified country is of little importance. What is important is the difference it makes to survival, order and unity of societies.

All good agreements are two-way and fair in their obligations. They sum up the obligations of a parent-clan, a parent-country or a parent-state to provide services like safety and access to justice. And they sum up the obligations of communities and their children-citizens/clan- members to know and meet them.

What is the value of using the term 'social contract?'

The value of using a phrase like 'social contract' is that it can focus attention on what is needed to make them work. And why their demands, their terms, can change. Or need to change. If individuals need to band together to protect each other or to develop fully, one of the functions of social contracts is to spell out the exact nature of obligations and expectations. This includes where and when action is required and what sort of roles are demanded of whom.

Social contracts require education

Like all reciprocal agreements with rights and obligations, social contract need to be educated for. Even when unstated, they work best when their terms are clearly understood and commitment to them is renewed on a regular basis. Politicians with a good grasp of how social contracts have developed can ensure citizens stay committed to the social contract(s) which affect them.

They can do this by:

- educating themselves about their obligations
- promoting to citizens the ideal of engaged and participating citizenry
- working to ensure they themselves meet these obligations
- speaking out when terms are broken or dishonoured
- speaking out when contracts need renegotiating
- discussing with communities what contracts are suitable

Working for the common good – or against it

In return for meeting basic needs, clans and countries governing bodies expect obedience to laws and contributions towards 'the common good'. These include such obligations as putting time into education and playing the adult roles that contribute to the survival, order and unity of the group.

For larger modern societies this may involve activities such as

- paying fair taxation
- informing oneself about issues affecting your community
- undertaking military/public service in times of emergency
- behaving safely in traffic vehicles

Like the parent-children relationship, social contracts can be honoured, dishonoured, neglected or broken.

If security is not provided – or itself becomes a source of exploitation and violence – the social contract has been dishonoured. If unresolved, a contract may be no longer valid and/or need renegotiating.

‘Where it is well, there is one’s country’

Over centuries communities, clans and sub-clans have developed customary practices. The aim of these is to make clear the obligations on all to ensure the care and protection of all. Such practices and expectations underpin all relationships between these groups and the state. And contain agreed-on sanctions and penalties.

The 2000-year old saying ‘Where it is well, there is one’s country’ (‘Ubi bene, ibi patria’) recognises that loyalty to a country goes both ways. Under terms of a just social contract, appeals for individuals to honour patriotic obligations are matched by state obligations to individuals and groups.

In modern understandings of social contract, the obligations of the more powerful state to intervene to guarantee security are accepted by all who enjoy their advantages. Provision of food, shelter and security – including an independent police force and military – have developed since humans began living in cities 10, 000 years ago.

And the development of independent, salaried police forces (invented only after the 17th century in industrialised cities) meant that a community-enforced, [revenge-based justice was kept in check by written laws and an independent judiciary.](#)

The right to security is basic

Security against threats by more powerful external (or internal) forces often requires a high degree of organisation. These threats can involve health, welfare or warfare.

Solving these insecurities may involve a mix of gathered information and organised activities, including:

- payment of sufficient salaries to security agents (to prevent corruption)
- providing education and facilities for people to help themselves
- co-ordination of social agencies to address complex issues
- the use of enforceable sanctions for those who refuse to obey

Purposes of social contracts

Social contracts, then, perform many legitimising functions including to:

- limit or exclude the power of exploitative individuals or organisations
- give leading figures or governments lawful authority over others
- ensure protection of, and rights for, groups of citizens
- enable public acceptance of the right of authorities to impose sanctions or penalties

Rule by general consent, for the general good

If a majority of citizens understand and accept a social contract, then a government is legitimate. That is, it can rule by consent, despite particular cases of rule-breaking.

This consent is achieved through the two-way acceptance of – and commitment to – responsibilities and obligations. For example, if tax is understood as necessary to pay for security, most people will pay for its benefits on that basis.

Such agreements recognise that humans are both social and political animals. They emphasise individuals and groups need for others. They also rely on an awareness of the fragility of human lives when confronted with superior forces of nature – or of others.

Examples of common need are the just distribution of wealth for medical and educational needs. For countries where there is a reliable tax take, this can take the form of socialised medicine and welfare payments (retirement or sickness benefits as ‘transfer payments’ from contributing taxpayers to others in need). For rural communities common need can mean access to affordable education and medicine.

Part 2: Permanent records of contracts can ensure equal treatment

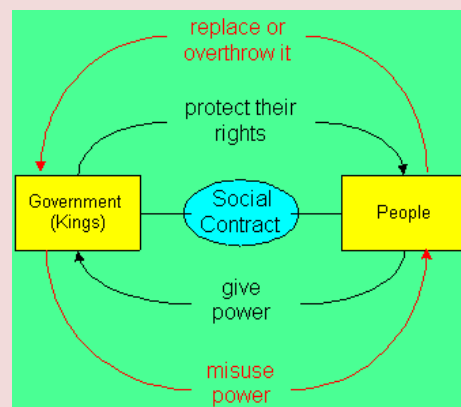
Oral history can also preserve the terms of social contracts. However, both city-states with scattered rural communities have felt the need to record them on tablets, pillars, cylinders, parchment, pottery or some permanent material. These were then erected publicly to ensure both public knowledge, respect, and equality of obligation.

Social contracts are preserved in many of the world’s oldest records. Many are inspired by religious ideals and some come from arguments emphasising their basis in wisdom, logic and mutual human advantage.

[The authority of pre-European African tribal chiefs](#) came from, and was checked by, orally preserved contracts with the common people. And when the basis of social contracts is customary laws (such as *Xeer*), or based on instructions by inspired individuals in writings accepted as divine (the *Quran*), then [greater acceptance of its obligations usually results](#).

Recorded history of social contracts

The 2400-year old dialogue *Crito* is regarded to be one of the first recorded expressions of the idea of a social contract. In *Crito* the Greek Plato cites the words of his teacher Socrates who refuses to bribe his way out prison in his city-state to escape a death sentence. Despite what he and his friends regarded as an unjust guilty verdict, he calls the city’s laws his moral ‘parents’. His obligation to those who had brought him up in the way of truth and his obligation to give a moral example of to others of keeping law and order – was greater than the obligation to save his own life. And for him to live in any other city without such laws would leave him a morally stunted orphan – as well as give bad example to his sons



Epicurus declared 2,300 years ago there was no such thing as absolute justice but only agreements that are made to prevent the infliction or suffering of harm. The 2000 year-old Buddhist vinaya spells out the behaviour for the common good expected of monks, including not chopping down trees that had a social function for other villagers.

The Quran spells out the obligation to respect treaties and contracts. This obligation is mentioned specifically in often quoted verses. It is also in many chain hadiths and [reasoned interpretations that have helped over centuries to make moral obligations clear.](#)

Role of scholars' interpretations

Scholars and thinkers since have explored when obligations are fair, how they should be applied, and what sanctions would help keep them. And when and why they apply.

For example, how much tax is a citizen obliged to pay? Is it permissible, under conditions of war, to pay more than the Quranic 2.5 percent zakat? And can an unjust state be ignored or even disobeyed (civil disobedience)?

And more recently, whether a Muslim in a non-Muslim majority-state can participate in democracy – or in that country's wars.

Abuse of power can make contracts invalid

After decolonisation of African states in the 1960s and the collapse of Russia and socialist states in the 1980s, Africans have had plenty of reason to question governments' abuse of power.

When regions are deprived of their ability to produce food for their people, or when inhabitants can no longer use traditional pastoral lands, social contracts involving 'citizens' lose validity. And relevance. There is little advantage in citizenship when centralised government cannot provide services.

For politician, then, the language of social contracts may be necessary and useful to counter arguments of those who try to impose invalid contracts and obligations. This is because invalid contracts can be imposed in various ways by:

- those who demand obligations without services
- those who insist on contracts through force or psychological coercion
- those who abuse the language and historical concept of contracts to try to confuse moral with political obligations; for example, fighting for unjust wars
- those who apply contracts unequally or hypocritically (they do not keep them)
- those who use unnecessarily harsh sanctions or punishments no longer required for moral or civic enforcement
- those who use selected texts and concepts out of context to justify exploitation

Part 3: What makes a valid contract?

To know the language of contracts and obligations – like knowing the language that describes how ideas can be twisted and minds forced – is an important part of representative politics.

Debates which seek, on behalf of the people, to renegotiate new terms for the social contract between state and citizen, need to know that makes contracts valid. People, politicians and law enforcers should have a basic knowledge of previous contracts and be able to use the language of valid contracts.

When a state fails, independent courts no longer apply the same using principles for all. Therefore, a recovering state begins with principles agreed to by consensus. Communities revert to customary laws but for larger concerns IPU identifies the following: a constitution, a representative law-making parliament, and sufficiently-salaried, independent judges to interpret them.

Contracts entered into freely are longest lasting, the best kept

Valid contracts usually begin with groups feeling secure enough to put into words their felt injustices and/or ideas for a better life. When laws are made in national and state debating chambers, and when fair taxation system provides money for security and equal enforcement of laws, citizens can enjoy the fruits of a larger community.

Parliaments are the best-known device to achieve consensus about what most people want. The IPU lists the many advantages of centralised government. This includes the power to enact and ‘execute’ laws that will improve people’s lives.

Valid social contracts made at the local level by consensus politics can then translate the general will into the common wealth.

One-sided contracts exploit others

In times of regional conflict, militant groups sometimes attempt to reinforce their claims to state status by promising a social order previously weakened by war and/or injustices. They can do this by drawing up one-sided social contracts. These can make taxation demands seen to be excessive.

Such contracts can be shown, over time, to lack the freely-given consent which gives legitimacy.

Parliaments can reflect the people’s will – and ensure it

Parliaments, as the law-making institutions representing all people, are one of the best test of consensus for what is called ‘the general will of the people’. In its law-making role parliaments can write or rewrite a social contract regarded to be fair on – and to – all citizens. Parliaments that are run well can therefore be representative of all sectors of a society. And can achieve agreement for policies from all sectors through their debate-and-vote system.

The ‘general will,’ therefore, is best assessed by a truly representative. When wisdom and common agreement come together in this way, it has been shown that governments can rely on a high degree of ‘buy-in’ from the general public. Laws, constitutions, or customary practices that are seen to be both necessary and fair will be more generally followed – and can be more easily enforced.

Therefore, the development of parliaments (see Topic 2) has ensured the people’s will is both informed by, and reflected in, values agreed to be important. As a result, such things as fair taxes, fair wages, better security and welfare for all, are possible to achieve. And to be improved.

Social contracts can change – and have

The history of parliaments shows how social contracts have changed over decades. Changes in social contracts are a reflection of changes in societies, in economies and in improved understandings of what motivates – or prevents – human behaviour. We no longer have monarchs whose ‘divine right to rule’ mean they only listen to nobles’ advice on occasions, or when they want to tax more.

Social contracts demanding obedience while exploiting public resources are not uncommon in post-colonial Africa. As are companies who pay as little tax as possible. The refusal to grant aid until on-the-ground security can be guaranteed can also be seen in the light of international social contracts.

Such cases have motivated thinkers to re-examine both divine texts and natural arguments in the light of shared principles of [social justice, equal treatment and compassion](#).

Democracy has the capacity to self-correct

The 125-year-old Inter-Parliamentary Union (IPU) states in its principles of democracy that it is the ‘only political system with the capacity for self-correction’. According to their guide democracy can create a society that promotes and strengthens:

- the economic and social development of the community
- the togetherness of the society
- national tranquillity
- a climate favourable for international peace
- the fundamental rights of the individual
- social justice

This independent parliamentary union, which regularly draws on the freely offered experience of its member states, sums up its findings: “peace and economic, social and cultural development are both conditions for, and fruits of, democracy”. According to the union, therefore, for good governance a social contract drawn up by a state should include these state responsibilities:

- a commitment to education to all groups and minorities
- a special commitment to civic education and awareness
- the shaping of responsible citizenry through involvement programs

For maximum participation, IPU maintains, the state should ensure: ‘the enjoyment of civil, cultural, economic, political and social rights.’”

IPU’s formula for effective social contracts

The IPU has found that for rights to be enjoyed in a modern social contract, governments – including all smaller units of civic organisation – should be:

- effective
- honest and transparent
- freely chosen
- accountable for their management of public affairs

In its guide to good governance the IPU states that [the rights of citizens to justice can be effectively guaranteed by the rule of law](#).

- strong judicial institutions
- independent and effective oversight mechanisms

- access by all to administrative and judicial remedies
- respect for administrative and judicial decisions by all
- removal of obstacles to the lack of genuine choice and alternatives
- measures designed to redress imbalances or discrimination based on social grouping, culture, religion, race or gender

When states are recovering

[But what happens when a state is too fragile to protect individuals or groups](#) without the patronage of powerful non-government groups?

When the state cannot protect its citizens without the help of outsiders (often with unpredictable agendas), there is a reversion to a mix of customary law and Shariah. Or complete anarchy.

In such situations, [the way forward may require a mix of old and new](#). Social contracts involving international agencies need to be negotiated until such time as central government and its security arms can be re-established.

UBUNTU: Progress without revenge

[Back to top](#)

[Back to previous](#)

The specifically African word of ubuntu, 'regard for common humanity,' has much to offer the future prosperity of those suffering from past injustice in all parts of Africa.

Where militant political groups still seek single-solutions to complex problems, governments representing development for all have special responsibilities to promote alternative solutions. One of these is the African idea of ubuntu which refers to a specific kind of 'African humanism', humanity towards others. Or: 'the belief in the universal bond of sharing that connects all humanity.'

It emerged from a 1960's trend to Africanisation by political thinkers rebelling against colonisation. This idea was written into the very constitution of South Africa in 1993:

There is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for ubuntu but not for victimisation.

Rightly or wrongly, political commentators came to regard this attitude as a specifically African (originally South African) kind of socialism or humanism, to be often found in indigenous blacks but often lacking in colonising whites. The term was often used in the context of the transition to black majority rule in Zimbabwe and South Africa.

This circuit-breaker way thinking, ubuntuism or regard for humanity, takes into account the need to address the past in the light of the need to progress freely into the future. And to do so without victimisation.

'Bottom-up government,' customary law or even religious law solutions may be ineffective when communities are traumatised, confused or have lost knowledge of reasonable alternatives. Tribal or national grievances can lead to traditional solutions of Xeer, or vendettas fuelled by revenge ethics. These traditional ways may work as balancing mechanism but also lead to an inability to enjoy the fruits of cooperation. Or result in progress-crippling victimisations.

Ubuntu is a concept that fits the 'Horn of Africa' as well. There is everything Islamic about the concept of forgiveness and virtue for the sake of a common humanity.

Scholars who grapple with seeming contradictions of textual calls to jihad have resolved these by reference to later hadiths pointing to the higher obligation to the broader jihad of education or communal peace. Or a justice which is obliged to respect solutions which no longer need literal solutions to ensure citizen security, especially in non-Muslim majority nations.

Democracy – African style

[Back to top](#)

[Back to previous](#)

African democracy before European colonisations

In his 1959 classic African Nationalism,¹ Ndebele Sithole argued ‘it is bad history and bad civics’ to deny African democracy before European colonisation. And if the essence of democracy is the will of the people (‘intando yabantu’), Sithole went on, his research proved African people had it ‘since the dawn of their history.’

A call for self-rule and self-determination

He concluded his book with a call for the right to ukuzibusa (self-rule) and kuziwitonga (self-determination) in a way that showed ‘the will of the majority of the people.’

After giving colonisers credit for some improvements to native African democracy, Sithole cites a number of examples from differing parts of Africa to contradict the idea ‘democracy was European-introduced to Africa.’

‘European dictatorship’

In fact, according to Sithole, since Europeans ruled ‘not according to the voice of the majority, but according to that of a minority’ the African did not ‘come into contact with European on a democratic but on a dictatorial level.’ Therefore African nationalism, Sithole maintains, is simply a stand against ‘European dictatorship.’

And while European leaders at the time were self-appointed to their positions of authority, the African ruler on the other hand owed his power to the people themselves ‘who dismissed him from office if they were dissatisfied with him.’

The king is the people

Declaring it typical of African history, Sithole quotes his own tribe’s view that the Ndebele big chief or king embodied clearly what was in his people. And that if the king failed to reflect this, the people defied him. Ndebele asserts, therefore, the king’s only true voice was that of his people. He quotes a Ndebele saying:

‘The King is the people. To respect the King is to respect oneself. He who despises the king despise us. He who praises our king praises us. The King is us.’

Using other examples from Ghana’s customary law, and from Nigeria’s Yoruba people, Sithole says the people had real power against tyrants – and against abuse of power. A Ghanese chief who abused his power would be warned by elders that his behaviour was ‘alienating his subjects and bringing his stool in disrepute.’

‘We do not wish his ears to be hard of hearing’

Sithole cites from the Ghanese chief-making ceremony the enstooler’s chant on behalf of the people: *we do not wish greediness ... we do not wish his ears be hard of hearing ... we do not wish that he should act on his own initiative ... that it should ever be said, ‘I have no time. I have no time ... We do not wish personal abuse.*

Chiefs were dependent upon advice for their office

According to Sithole, it was obvious from the way elders dealt with the usual complaints against a chief: ‘excessive drinking, going after other men’s wives ... neglecting the advice of elders’ that the chief was dependent upon for his office. And the elders were also dependent upon the common people for theirs.

Among the Swazi and Bechuana too, Sithole claims, a chief could be tried by his own council if he broke the law. And among the Yoruba, declaring war was such a grave responsibility that a king was expected, under the laws of his

country, to die before his defeated army returned home – and if he did not, the people saw to it this law was executed.

Real authority comes from the people

Good government, therefore, was popular government. A headman who had more persons in his village was regarded with envy by other headmen. And a chief with more villages under his jurisdiction than other enjoyed greater social and political prestige. Almost all the tribal institutions Sithole examines owe their real authority to the people and not to the office-holders.

Also, Sithole asserts, European powers had preserved the shell of kingship and chieftainship but emptied them of their real content.

Will of the people versus will of a foreign power

Thus such African kings and chiefs no longer represented the will of the people, but the will of a foreign power. Accordingly, Sithole wants not just to honour a pre-European native democracy, but also to make a claim for a real democracy all the peoples of Africa once enjoyed.

The Quran and hadith at on honouring contracts

[Back to top](#)

[Back to previous](#)

A well-known series of Qur'anic verses exhort Muslims to honour any contract which they enter into, including: "Fulfil God's covenant when you have entered into it and break not your oaths after asserting them, for you thereby make God your guarantor." [Q. 16:91] And "Fulfil every contract for contracts will be answered for [on the Day of Reckoning]" [Q.17:34].

There is also a famous **hadith**, reported through multiple chains and in multiple forms, about the sinfulness of breaching contracts:

When God gathers all earlier and later generations of mankind on the Day of Judgement he will raise a flag for every person who betrays a trust so it might be said that this is the perfidy of so-and-so, son of so-and-so. (Muslim 1998, 3: 1094).

Aman, trust or security, is the value and most common present-day Islamic justification, in both Sunni and Shi'ite sources, for honouring non-Muslim interests while residing in non-Muslim lands.

The idea that Muslims should not ally themselves with non-Muslims or non-Muslim polities is often argued by quoting Q: 3:28:

Let not the believers take the infidels for their allies in preferences to the believers – for who does this, has nothing to do with God – unless it be to protect yourselves from them in this way. God warns you about Himself and the final goal is to God.

Also, a series of other verses including 60:1, 3:118, 4: 139 4:144 and 5: 80-81 – which seem to prohibit 'loyalty,' 'friendship,' or 'alliance' with non-Muslims – have all been used by some to prohibit residence in non-Muslim states, contributions to non-Muslim welfare, and cooperation with non-Muslims in common ventures.

However, Faysal Mawlawi addresses the question of solidarity and civic friendship, raised by these loyalty verses, by stating that secular solidarity is universal. He claims Muslims can feel a form of 'innate love' [*hub fitri*] for non-Muslims, meaning affection based on shared humanity and common interest, to be distinguished from 'creedal love' [*hubb 'aqa'idi*] shared among Muslims.

In essence arguing for a common, neutral ground of secular space, Mawlawi argued in 1994:

Islam would prefer to be expressed through a community where politics and metaphysics are fused. But given the reality of sharing political space with non-Muslims, it is preferable to limit solidarity and political power to that which all humans have in common.

Mawlawi seems to affirm the neutrality of that space as it has developed in the western practice of the separation of church and state, while acknowledging that there are times when it may be difficult:

If non-Muslim states made wider claims to metaphysical truth, then it might be more difficult for Muslims to affirm citizenship within them. (Mawlawi 1999, 210-19)

March, A. F.. (2007). Islamic Foundations for a Social Contract in Non-Muslim Liberal Democracies. *The American Political Science Review*, 101(2), 235–252. Retrieved from <http://www.jstor.org/stable/27644443>

IPU REPORT ON WORLDWIDE PARLIAMENTS

[Back to top](#)

[Back to previous](#)



Inter-Parliamentary Union
For democracy. For everyone.

***'Parliament is the heart of a well-functioning democracy.'* - IPU**

Parliament: no single model is best but good practice can be shared

Parliament in a democracy is the name given to the place where a nation debates and decides how best to run itself, rule itself and use its resources. But as the Inter Parliamentary Union (IPU), a facilitator of parliamentary good practice since 1889, reminds its readers 'there is no single model of democracy.'

However, according to IPU, there is value in providing a framework outlining a clear sense of direction and a set of criteria. Its website includes results of a good-practice survey sent out each year to parliaments worldwide to show not only that parliaments are diverse and constantly evolving but also that they need to respond to different circumstances and challenges. That is, if parliaments are to be at the heart of a responsive government.

Parliaments have developed to meet changing needs

The way the debating chamber is organised and the actual practices of Parliaments, have been adapted over many hundreds of years to meet the needs of various and changing societies.

Although parliaments are at the heart of democracy, IPU points out that whenever members of any group decide what sort of policies and rules will govern them – and insist on being treated as equals in doing so – they are practising democracy. (*Demos* means 'people' in Greek, and *kratein* means 'rule').

Parliament's workings should be open, trustworthy and understandable to all

To ensure good decision-making parliaments decide on formalities and procedures to help them run smoothly. The IPU emphasises the physical places used by Parliaments should be accessible for public scrutiny – and that their workings should be open to all. This inspires trust and recognises the importance of honesty.

And the traditional ways of acting, deciding and carrying out decisions – which are part of the procedures or 'institutions' of Parliament – should be expressed in language understandable by all citizens.

Good parliaments institute inclusive practices – and guarantee rights

Good institutions or ways of organising government include:

- a guaranteed framework of rights for all citizens (most often in a constitution)
- ways to represent large numbers of citizens
- ways to make those in power accountable;
- ways to inform and include citizens, especially by the use of the news media and through the formation of political parties.

The 120-year old Inter-Parliamentary Union says **civil society** or an active citizen body is one of most important parts of parliaments' complex set of institutions and practices. These have evolved over time and will continue to do so.

Parliaments are more than buildings – and have many roles

Parliaments, then, are not just the buildings or offices where the debating and deciding of important issues takes place. Parliaments are also a set of practices and institutions that mediate between the will of the people and decisions made for their common good.

And as the IPU points out, Parliaments have other roles or dimensions which include:

- promoting civil society
- upholding the rights of a free press
- making themselves accessible and accountable
- protecting the rights of the judges and court system (the judiciary) which acts as one of the checks on their own power.

The IPU reminds us these roles or dimensions are what makes parliament the central institution of democracy. They offer examples of good practice submitted regularly to it from parliaments worldwide.

Good parliaments can be judged by these features – and activities

The IPU sums up the characteristics of truly democratic parliaments in five words. Such parliaments will be:

- representative
- transparent
- accessible
- accountable
- effective

And to be effective, the IPU says, good democracies should include:

- citizen rights
- institutions of representative government
- institutions of accountable government
- an active civil society
- active political parties
- active communicating media.

<http://www.ipu.org/dem-e/guide.htm>

- [Setting standards and guidelines](#)
- [Strengthening representative institutions](#)
- [Promoting inclusive parliaments](#)
- [Promoting and defending human rights](#)
- [Partnership between men and women](#)
- [Promoting knowledge of parliaments](#)
- [International Day of Democracy](#)
- [Global Parliamentary Report Guide on parliament and democracy](#)
- [Key documents](#)
- [Cooperation with the UN](#)
- [Peace and security](#)
- [Sustainable development](#)
- [What is the IPU?](#)

Land rights and social contracts in Somalia

[Back to top](#)

[Back to previous](#)

Studies reveal that contested land rights are the core issues in African conflicts involving social contracts.

These studies have also detailed the impacts that 'unstable loyalties of underfunded militaries' have on the security of local communities.

A number of studies point out that there are often two social contracts are operating:

- 1) ones that community governance structures have with local families
- 2) ones the state has with these community structures.

The situation is further complicated not only by the fact that these contracts can be in conflict with one another but also by bargains made with international agencies or with the military.

Rather than top-down solutions, recent studies advise countering the excesses of patronage politics by channelling aid into non-state governance bodies. As long as these are effective and sustain order, their small size or lack of official status is not important.

While the power of state protection is essential to counter exploitation against 'protectees' by militia or business 'patrons,' flexible funding using government as a kind of non-residential trust can establish responsible local relationships.

Otherwise society becomes fertile soil for 'the implantation of ideologies that can promise civil order' but descend into the even worse politics of greed¹. And are even more limiting than the politics of kinship.

References:

- Leonard D.K & Samantar M.S. 2011: What Does the Somali Experience Teach Us about the Social Contract and the State? Institute of Social Studies, The Hague.
- Leonard, D. K., Mushi, F. M., & Vincent, J. (2011): Social Contracts and Security in Sub-Saharan African Conflict States: The Democratic Republic of Congo, Sierra Leone and Somalia; Paper for presentation to the African Studies Association, Washington, D.C. November, 2011.
- March, A. F. 2007: Islamic Foundations for a Social Contract in non-Muslim Liberal Democracies Yale University American Political Science Review Vol. 101, No. 2, May.

Sharia as a basis for the rule of law

[Back to top](#)

[Back to previous](#)

Good social contract as covenants

Social contracts that offer a fair deal to communities are ones which are widely accepted and require the least oversight. Historically, these are ones which have high 'stakeholder input.' To summarise: social contracts have four major uses:

- They legitimise governments – that is, they give governments authority to act on behalf of all sectors of society
- They constrain government – that is, they put limits on the authority and actions of governments and military so they don't abuse power. Especially executive power.
- They secure rights for citizens – that is, they ensure freedoms and services citizens can possess or enjoy simply because they belong to a country or region
- They secure protection for citizens – from, for example, other citizens, invaders, exploitative business interests or intrusive militaries

Constitution can express social contracts – and can be amended

One of the key roles of the general laws and codified constitutions that make up the terms of a nation's social contract is to define for everyone the limits of power. Constitutions which limit power and make distinctions between unity (allowing order and progress) and uniformity (forbidding creative dissent) can be written in stone. However, as contracts that reflect relationships between groups and the state they can – and in most constitutions have been – subject to change or 'amendments'.

Debate about social contracts in modern countries is therefore not evidence of division or the weakening of a rule of law seen to be divine (or 'written in stone' in that unalterable sense.)

Challenging terms of contracts helps keep them relevant

And not all division is negative. In the golden age of Islam, between the 8th and 12th centuries, *ijtihad* (use of intellect and independent thinking) meant that 135 schools of interpretation flourished in Arab Spain. With up to 75 libraries per city. This process was only stopped, history reports, when fanatics from Morocco crossed to Spain in the 12th century.

Collapsed or 'failed' states, however, are unique. For Somalia, the state under Siyad Barre was not a protector but ended up being an extraordinary predator. Studies have found that in British Somaliland, states protect urban dwellers from violence better than other forms of political organisation. They also found that for pastoralists in the savannahs of the Horn of Africa, neither colonial nor modern states have been able to protect.

When a predator state collapses, power elites offer protection – at a price

Following the Barre state collapse, neither the state nor clan elders could stop the shift from protection based on sub-clan communities to patron-client ones. In the major urban areas, warlords in conflict zones have resulted in an impoverished general population – as well as a wealthy elite. The removal of state controls created a class of businessman with great wealth able to buy and offer protection. And to pay for access to trading ports.

In such situations there have been calls for a social contract based on a rule of law that applies equally to everyone: urban or pastoralist, wealthy or impoverished, great or small. Hopes for Shariah law centre on the belief that it can be the equivalent of a 'rule of law' that everyone is bound to and reflects the core values of society.

Sharia as rule of law – and guarantee of it?

Islamist political parties which promise Shariah law are generally well supported in Muslim countries, as results and exit polls reveal. Their reasons for wanting Shariah include:

- it will guide rulers in the way of wisdom and virtue
- it will herald a new golden age of Islam where rights are respected which can come only from religion
- it is an alternative and antidote for what is regarded as a permissive or secular West that does not have these values
- it will bring a respect for contracts and a basis for unity not found in secular societies
- it will function as some kind rule of law and therefore check excessive executive power, weak if not absent especially in Arabic countries.

However, the history of Shariah shows that the ideals of the rule of law need the existence of effective institutions reinforced by regular practice.

Civic institutions are the test of a rule of law

This regular practice, as history also shows, needs to be backed by a recognition that citizens and residents have more to gain by remaining faithful to state rules than by disobeying or ignoring them

As has been often pointed out, Shariah is more a value system than a fully developed rule of law. However, in countries where Shariah has been implemented, it is as a the legal primarily penal code (hudud) with severe punishments for adultery, theft and blasphemy which gravely disadvantage the women, the poor and the religiously deviant. And this has no constitutional component.

The scholars role as a check on power has been reduced

The traditional Islamic constitution rested on a balance of powers between a ruler subject to law and a class of scholars who interpreted and administered that law. Yet the governments in most contemporary majority-Muslim states have lost these features. Rulers govern as if they were above the law, not subject to it, and the scholars who once wielded so much influence are much reduced in status. If they have judicial posts at all, it is usually as judges in the family-law courts.¹

Long before the coming of Islamism and Islamic political ideologies arguments for making the Shariah a limitation on government and a source of law were made before the writing of the civil codes of Iran in 1928 and 1935. And again before the writing of Egypt's civil code in 1948. This role for Shariah was accepted and Egypt's code served as the model for most other Arab countries of the Middle East.

The rule of law as qanun not Shariah

The 150-year struggle by Muslims in the Middle East for the rule of law have not used the word 'Shariah' for it. Reformers recognised important distinctions in language should reflect distinctions in thought. Instead of Shariah the word in slogans and mottos was 'the rule of law (qānun),' 'limited government (mashrutiyya[t])' and 'government limited by law (qānun)'.

In the nineteenth and early twentieth century the key term for reformers was not Shariah or divine law. Qanun, public law or state law, is essentially the same as the Greek word 'canon' used for church law in the West or as a word for an established or agreed-on list of classics.

Rulers guided by Shariah – as scholars interpreted it

For Shariah to function as the equivalent of the rule of law today it needs to establish a check on the power of executive. And that is the role of an independent judiciary. The scholars has this role during an age when Shariah was associated with the rule of law.

Although the ruler had to obey God's law mediated through the Shariah, it was God's will as the scholars interpreted it.

As 'agents of stability and predictability' the scholars therefore controlled and administered the law according to well-settled rules.

The scholars as a check on executive excess – and a force for fair taxation

By this control they could limit the ability of the executive to take the property of private citizens. This was crucial in societies where the transition from one ruler to the next could be disorderly and even violent.

This, in turn, induced the executive to rely on lawful taxation to raise revenues, which itself forced the rulers to be responsive to their subjects' concerns.

When Shariah, as interpreted, was a check on power

The scholars and their law were thus absolutely essential to the tremendous success that Islamic society enjoyed from its inception into the 19th century. Without Shariah, there would have been no Haroun al- Rashid in Baghdad, no golden age of Muslim Spain, no reign of Suleiman the Magnificent in Istanbul.²

But a comprehensive legal code derived from or dictated by Shariah has never existed in Islamic history. And the application of the law allowed a lot of leeway which explains why modern advocates of Shariah as the source of law are not recommending the adoption of it as such.

Separation of religion and state in Muslim-majority countries

Both Indonesia and Turkey are countries where they do not see prefer a separation of the religious and political spheres, do not see 'secular' as anti-religion but the common ground upon which all ideas can meet. Between 1999 and 2002 the Indonesian constitution was amended to uphold the separation of and state as a result of representations by Muslim organisations representing more than 30 million members.

In Turkey where the military is staunchly secular and there is a tradition of state-centred secularism, Islamist are focusing on establishing a rule of law to counter excesses of executive power. Sharia has been left to be an influence on personal and political morality. Egypt Muslim Brotherhood has abandoned its pre-ideological position and is pushing for Qanun with the shariah as a source of reference.

Judges as agents of the law not agents of the state

Constitutional lawyer and author Professor Feldman concludes in his book *The Fall and Rise of the Islamic State*³ that the future for societies where there is a 'demand for law-based government embodied in Koranic law' lies in the ability of parties to put pressure on executives.

If this leads to a transformation of the judiciary, he maintains, a fairer, more inclusive society must result as judges 'come to think of themselves as agents of the law rather than agents of the state.'

When contracts fail: lack of trust and vicious circles

What makes leaders in executive positions unresponsive? Why do citizens begin to disengage from the state? Obviously, if contracts fail to deliver security or services, citizens soon disengage from them.

The vicious circle then begins: lack of participation weakens the state, the state then becomes less responsive. Citizens give only what is directly punishable, executives hear only what they want to hear and citizen feedback, through fear or uncaring, is little different.

How can political institutions be developed that foster feedback and response?

Flawed leadership patterns – reliance on personal morality or strong institutions?

Sometimes basic attitudes or a flawed leadership model is as much at fault as lack of real consultation processes. A study of previous leadership traditions, *The Islamic Middle East, Tradition and Change 4* describes how an 'ethic of masculine self-assertion dominated always by plotting against the victor to recapture lost honour' can be destructive of trust essential for two-way contracts.

It points to the un-obvious result of 'a reliance on personal morality to provide order instead of developing political institutions.'

Exploiting circular reasoning: where does political virtue actually reside?

Making historical comparisons throughout the region the author says the result is a kind of mental paralysis. What leaves reform-minded citizens unable to think practically about civic life, the study maintains, is the circular reasoning: 'no Islamic state without virtuous Muslims, no virtuous Muslims without an Islamic state'.

The resulting reform paralysis is usually then exploited by 'ambitious groups united by self-interest ... led by opportunistic power-seekers.'

Those in power will always be flawed - but who will criticise them in virtuous states?

This circular thinking is based on a perception that the realms of citizenship and the state are mutually exclusive. When this thinking is also driven by a 'masculine' ethic of competitive individualism it results, in the study's conclusion, in neglect of any moral condemnation of tyranny.

Then, because claims to sacred authority "are always bound to be rendered questionable by the usual outcomes of secular power, the inevitable political failures led to an even greater disillusionment with government."

The study looks at examples in language, at centuries-old proverbs and actual leadership examples. It finds that reliance on personal morality to provide order is never as effective as the slower process of developing civic institutions.

Civic institutions can remain powerful when individuals are weak

When such institutions are developed, it can soon be demonstrated to citizens the state is indeed their servant, not the instrument of any ruler or rulers. This is backed up by comparative examples.

The study concludes by highlighting the advantage of strong institutions over 'strong' rulers. When reliable measurement and delivery mechanisms are in place, the state can function with integrity in its own sphere "despite the ever-present imperfections of fallible humans."