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## **Establishing Contractual Relationships: an Antropological Approach**

**Tatyana S. Volchetskaia and Tatyana K. Primak\***

*Immanuel Kant Baltic Federal University  
14 A. Nevskogo Str., Kaliningrad, 236016, Russia*

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*Scientific research of contractual relationships represents not only an interesting aspect of learning about the past of human civilization, but also a necessary component of the creation and improvement of new forms of state-public structures. This component implies consent as a basic element of the interaction system.*

*But many questions remain insufficiently researched for the following reasons: the dominant view on the contract as subordinate in relation to the state and law; the lack of integrity of positions on the origin and composition of the elements that determine the contract's nature.*

*To get new ideas and perspectives of study it is necessary to reconsider traditional points of view on the emergence of norms, exchange, individualism, property, to use new approaches, especially anthropological one.*

*Based on scientific research, the authors concluded that the agreement (contract) appeared simultaneously with the emergence of the human community; the agreement (contract) does not need to be recognized by the state, it can be considered as a natural regulator of social relations. The general and private levels were identified in the process of forming the contract, and there were indicated contracts' features, components and the principle of interaction through the individual person.*

*Keywords: contract (agreement), norms, rules, language, exchange, individual, consent, anthropology, property, state, law, individualism, person, regulator.*

*Research area: law.*

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## **Introduction**

Development of new approaches to the study of contractual relations can be explained by the following reasons.

Firstly, nowadays the government activity is no longer seen as a hierarchical centre with the alongside strengthening of civil society, creation of new structures for self-regulation, interaction, including contractual elements. Reaching the consensus is the basis for governmental and public structures functioning.

Secondly, there is the dominant need for understanding of social relations, whose cause is the relationship between people rather than the legal norms. The problem of a thing is not only an economic problem, the problem of law is not only a legal problem. These are the problems of people who want to unite their actions, to force the thing serve themselves. As a result, today the contract cannot be considered only within the positivist framework (legal fact, legal relationship, document); rather it is a source of regulation, a means of conflict resolution, the basis of integration processes, etc.

Thirdly, the intensification of the study of the problems of the contract is due to the fact that for the public there is a tendency to undervalue the authority of the law; when solving practical cases, people tend to devaluate positivism in general, while the earlier hope for powerful authorities, which were previously perceived as almost the only means of ensuring “impeccable law and order” and “strict legality”, exists no more. In the system of social regulation there is an obviously gradual movement of the law from the centre to the periphery, followed by an active search for new norms and regulations and their implementation, among these new forms the contract occupies a significant place, as it promotes the creation and implementation of new public relations without the state structure involvement.

Fourthly, the change of ideological paradigms and the radical reassessment of values set forth the creation of new views on the essence of the contract (agreement), which should be based on cultural and anthropological aspects, because its elements permeate all spheres of human life, from intimate relationships (Wightman, 2000: 93–131) to the social contract as a necessary constituent of any social structure functioning, including socialist and post-socialist (Cook, Dimitrov, 2017: 8–26). These circumstances expedite attributing the contract to the phenomena embedded in the socio-cultural system of statutory regulation of public relationships.

## **Theoretical framework**

In philosophical teachings, the creation of contractual relationships is associated with the appearance of private property (see G.W.F. Hegel, J.J. Rousseau and others),

or the state, which stemmed from the unification of people on the basis of agreements as a product of human reason and will to ensure order and justice (B. Spinoza, A. Radishchev, T. Hobbs, J. Locke and others); contractual relationship is described within the framework of the modern concept of the social contract against the problems of the societal integration, the achievement of the necessary consensus, the creation of open channels of communication, etc. (see A. A. Auzan, J. Buchanan, D. Gauthier, R. Dvorkin, J. Rawls, F. Pettit, etc.).

Such a fundamental element of contractual relationships as *consent* is the subject of linguistic research, centred on the theories of speech acts (J. Austin, J. Searle), language games (L. Wittgenstein, P. Winch), universal grammar (N. Chomsky), the basic provisions of which are rooted in the fact that the natural language contains basic rules or principles that have a conventional origin, so the words are used in a certain context (inbreeding a distinctive meaning in these words) only in accordance with the agreements adopted in the “linguistic community”. For example, for any natural language it holds true that it is pointless to say that “number three is delicious” because it contradicts the basic rule that taste cannot be attributed to numbers.

Legal anthropology explores contractual relations not only in a legal but also in a social context. But it is worth mentioning that for a long time there prevailed a position, according to which it is the status which dominates in traditional societies, while in modern societies it is the contract (H. Maine); then the ratio between the status and the contract was revised, which made it possible to assert that any society is both statutory and contractual, but to varying degrees (E. Durkheim, E. Adamson Hoebel, M. Mouss, P. Juvelin, N. Rulan, etc.); moreover, admitting the contract being the most ancient regulator of social relationships, describing and classifying contractual relations in primitive and archaic societies; legal anthropology does not pay due attention to the mechanism of formation of contractual elements, it eliminates the individual level from the perception of the contract and does not take into account the related spheres of research.

The process of formation of contractual relationships is not generally studied in the Russian legal science, whose main focus is on the state and law, which are the main sources of creation and establishment of contractual relations, therefore, it is quite logical to emphasise that before the emergence of the contract there arose only torts being a negative state reaction to deviation from the established criteria of due behaviour (Braginskii, Vitrianskii, 2005: 9).

On the whole, the existence of disparate points of view on the origin of the contract does not facilitate identifying the common trends in the creation and

development of contractual elements, nor does it lead to the formation of a coherent system of ideas about the processes accompanying the emergence of the contract as it is. That is why it is advisable to take an interdisciplinary approach, which will ensure deeper understanding of the essence of the contract and assist in tracing the processes of the contract's establishing and functioning, also, this approach is able to facilitate distinguishing contract's levels and foundations. The contract as a social phenomenon has its own history, so by studying its past, we learn about its present and future.

### **Statement of the problem**

Applying an anthropological approach in a broad sense (philosophical, economic, social, cultural, etc.), as well as data obtained by ethnology, ethnography, archaeology and other disciplines, we can come to the main conclusion that is prerequisites for the emergence and development of contractual relationships date back to the moment when people started to unite to live together, as these relationships are inseparably linked with daily life, consciousness, communication and human actions. These circumstances make it easier to classify the contract as a natural regulator of public relationships, whose appearance and functioning is connected with human nature and social interaction instead of law and state. The rules of conduct inspired by natural regulators are imposed not from above, rather they are developed in the processes of human interaction, which is regarded as a positive undertaking, as the individuals involved in this process recognize the norm as their own and comply with its instructions willingly. Natural regulators generate social ones in the form of purposeful human activity, which culminates in the establishment of restrictions, prohibitions, means of coordination of human behaviour.

The process of forming contractual relations includes both the general and private levels. At the general level, the contractual elements contribute to the formation of common rules of conduct, which are manifested in the regulations and exchange. These contractual elements are clearly visible in the sphere of everyday life, religion, traditions, rituals, norms, which cement public and private life, which in turn requires the inclusion of an individual component. At the private level, contractual elements permeate the life of the individual and are supported by the pillars of individualism and property.

The general level is indispensable for the creation of a normative system, whose values are shared by the majority of the representatives of the given community; the

private level is a set of personal internal connections and relations, human existence in the objective and subjective reality, which fosters the assimilation of stereotypes of behaviour, values, norms, which have a conventional origin, and the subsequent recognition of these behavioural patterns as their own.

### **Methods**

If we use traditional basic approaches (formational, philosophical, formal-legal), it is self-evident that the contract is a product of state will, which is subordinate to the law. For centuries, since the times of ancient law, this relationship has been defined quite disconcertingly: laws are kings, and contracts are gentlemen (*kyrioi* in Greek) — holders of law (*dikaia*) (Novitskii, Pereterskii, 1999: 296).

As a consequence, it is advisable to use an anthropological approach to solve the problem. First, this approach allows for interdisciplinary research. For instance, it is used in the cultural analysis of legal phenomena with a pronounced social and historical orientation (see works by L. Mamford, S.P. Singh), in the study of legal phenomena from the point of view of spirituality (G.J. Berman, M. Heidegger, O. Spengler), in the phenomenological and socio-cultural approaches in the field of legal genesis and the concept of law (N.N. Alekseev, P. Berger, T. Lukman, L.N. Gumilev, P. Sorokin, S.L. Frank), in the description of psychological, political, social, economic aspects of legal phenomena (M. Buber, S. A. Drobyshevsky, M. Merlo-Ponti, M. Moss, J. Ortega y Gasset, L.I. Petrazhitsky, M. Foucault). Secondly, anthropology has long since moved beyond one area of research. Today it incorporates a list of different scientific disciplines, which is constantly expanding (philosophical, theological, cultural, psychological, biological, social, cognitive, historical, economic, legal dimensions, etc.), which authorise touching upon various aspects of contractual relations and understanding their essence better.

### **Discussion**

1. At the general level, contract elements are present in: a) normative rules of behaviour; b) exchange.

A) The main role in the normative rules is played by the category “consent”, which is a necessary attribute of human communication, language, joint residence, and also the main element of the contract, the component of various concepts (exchange, consensus, communicative action, etc.). This category is built in the mechanism of creation of normative obligatory rules of behaviour, without which society cannot exist.

In our opinion, this mechanism was most successfully described by J. Habermas, according to whom, linguistically meaningful denotations (normative consensus), which have a moral basis recognized conventionally by the members of the community, attain the “veil” of the sacred. Being repeated, they beget normative significance, compulsoriness; become the primary rules, the content of which includes the most significant for this particular society meanings and concepts. Their main purpose is to consolidate the ideas about the normatively correct actions, to organize people’s activity, to accumulate experience, to reveal and interpret the new reality (Habermas, 2000).

The concept of the contract presupposes the category of “consent”; it proceeds from communication, conversation between people, leads to a certain result — the coordination of actions, values, meanings, sense, perceptions, etc. Language and religion are the tools of coordination, they generate a common interpretation of the situation; meanings (unified and shared by all participants), and then form the fundamental rules, normative system, and organized structures.

B) The contract implies not only communication or conversation, but also actions, the actual performance of which takes place through exchange, which was the basis for the development of the theory of primitive economy, the main element of which is exchange for free (gift economy) acting as a universal means of redistribution of material and non-material goods. In a holistic form, this direction was presented in the works by Marcel Mauss (Mauss, 2011), actively developed by field anthropology (studies on the life of Aboriginal people in Australia, traditional societies in Africa, North America, India, etc.)

The received data allow us to ascertain that the sphere of use of exchange relations in archaic and primitive societies was wide enough (household, commercial, marriage, ceremonial), though it was reduced to the organization of exchanges between groups. In the most general form, exchange is the process of establishing relationships, leading to the transfer of certain material and non-material goods on the basis of agreements. The origins of this mechanism can be seen in the fact that food-getting was an individual matter. The individual act of getting the food and giving it to a group became more and more individualized over time, as it was believed that the “breadwinner” had the right to dispose of the kill and harvest and he was supposed to give it away, but precisely as a gift for gaining prestige in exchange (Vasil’ev, 1983: 16).

Over time, exchange (contractual) relations become universalized, acquiring obligatory, morally prestigious nature, where the legal side is diminished to mutual obligations. Thus, according to M. Mauss, F. Boas, B. Malinovsky, etc., evasion

from one of the three related duties (to give, to take, to reimburse) entails serious consequences. For example, a person who fails to fulfil his or her obligations falls out of the system of exchange relationships and loses his or her social status, which can be perceived as a punishment.

The theory of gift economy made it possible to revise traditional notions and develop new approaches. First of all, economy was no longer considered as an independent phenomenon, it was accepted that in traditional societies it could not be separated from the social sphere, which led to the development of a new methodological approach based now not on the means of production (C. Marx), but on the means of distribution (K.P. Polanyi). Secondly, it is believed that the type of society and its further development are governed by the relation of two ways of distribution: redistribution (vertical exchange characterised by one-sidedness, lack of equivalence and agreement) and reciprocity (horizontal exchange marked by mutuality, equivalence, agreements). These two ways coexist, but one of them usually dominates. Thirdly, exchange relations presuppose the inclusion not only of groups, but also individuals in these processes. D. North writes about this tendency as such: “Personal exchange is determined by people’s innate thinking abilities”. These inherited properties create a framework for exchange and serve as a foundation on which the structure of interaction between people is built, determining the individual traits of all known historical societies (North, 1997: 144–145).

2. At the private level, contractual elements are propagated through: a) individualism, b) property.

A) For a long time, it was stated that there was no individuality in the early stages of human development, in primitive and archaic societies, and it was believed that the group absorbed the individual. Today, most of the researchers substantiate that a person without an individual position is a fantastic fiction, which is confirmed by ethnographic data. For example, field research leads to the conclusion that there are no two individuals with identical combinations of social roles, as each individual is socially unique (Belik, 2005: 243–258). Individuality is expressed in communication, language (language does not function without the individual, one’s own self is reflected in the name, as to the name has always been attached great importance, etc.); it can manifest itself in different ways, vary according to the cultural context, but it is always present, coexisting in relation to the collective basis and integrating into it

The process of creation of contractual relations cannot go through without an individual component. First and foremost, the rules of behaviour without their

assimilation and consolidation by the individual, without the individual being aware of them, cannot function successfully at the level of regulatory, social, and exchange systems. Secondly, social norms are not always able to regulate diverse life situations; they do not possess internal homogeneous unity, so an individual often faces a choice of contradictory requirements, which accounts for the development and use of contractual procedures. For example, O. Iu. Artiomova writes that the high level of conflict in Australian Aboriginal society is evidence of the inconsistency and imperfection of its norms. On the one hand, customs aimed at peaceful resolution of the conflict are being developed, on the other hand, these customs are in constant contrariety with the norms that require mandatory revenge for any damage (Artiomova, 1987: 43–44). Thirdly, there is always a certain zone of personal freedom, which is manifested in individual variations of behaviour (character traits, upbringing, temperament, age, life experience, sex, etc.), various forms of coexistence between people. This gives individuals the opportunity to set out the conditions of their interaction in some areas at their own discretion.

B) The contract and the property are inextricably linked. For example, according to Hegel, the appearance of private property is the main motive for people driven by reason to enter into contractual relations (Hegel, 1990: 101). Yet, it has always been argued that in the “natural state” collective ownership dominates, or that property objects cannot be appropriated (as land) or accumulated (as game or fruits) by individuals, so contractual relations concerning property have not received sufficient coverage.

Modern research is based on the fact that there has never been a society without the knowledge what property is, thus, the scientists cite examples of people considering not only things their personal property but also the objects of intellectual legacy (songs, magic spells, etc.) that are no longer valid if they are learned or used by others in violation of the proper order of giving presents or exchange (Paips, 2000: 120). The formation of property has taken place as the isolation of personal property from nonproperty; historically the first form of ownership was personal property, while collective ownership was the sphere of its development. The emergence of personal property marked the individualization of a person within a community, the attribution by the individual a certain subject as “their own”, and another object as “alien, someone else’s” (Inozemtsev, 1999: 67).

For centuries, the contract has been a mandatory factor of the transfer of ownership to its new owner. Historically, the first necessary condition for such a transfer was the fact that the thing was transferred, which was justified by the evidentiary value of



the fact of ownership. Therefore, it is no coincidence that the earliest characteristic of contractual relations in Ancient Rome was denoted by the words “actum, gestum, contractum”. The general word is “actum”, which is implemented by means of the handing over of a thing or the pronunciation of words; “gestum” refers to a transaction carried out without words; “contractum” names only transactions which give rise to a bilateral obligation. Counterparties are bound not by the contract itself as an agreement, but by a consistent, formally defined system of actions where external signs of expression (symbols, oaths, ceremonies) ensure security. Later on, the contract itself became a legal fact enabling transfer of the property to the new owner, thus creating, changing and terminating the ownership relationship, which significantly diversified the options for transferring the property to the new owner.

### **Conclusion / Results**

Today, the most acceptable technique is to use an anthropological approach within the interdisciplinary analysis. This makes it possible to eliminate many traditional notions, for example, the lack of individuality or property in primitive societies, to take into account the involvement of human consciousness in all processes, to assign the status of significance to everyday reality, to acknowledge the integrity of social life.

Anthropological approach to the study of the process of the contract formation allows us to discover its new facets and properties, to understand its essence better, which brings an opportunity to reconsider the views prevailing in the Russian legal literature on the processes of its emergence, without connecting them with the state legal structures.

Our analysis culminates in a conclusion that preconditions of the contractual relations were present even at the moment of formation of human joint residence, which is shown in language, dialogue, actions of people and which allows attributing the contract to natural regulators of public relations, allocating the general and private levels in the course of its formation. The general level is represented by normative rules of behaviour and exchange, which include contractual elements (agreements; actions aimed at exchange). At the private level, contractual elements are fixed through individualism and property.

In past, as well as in present, the scope of applying contracts was extremely broad. The contract has the properties typical of any social phenomenon, and from this point of view it is examined within the context of various theories, social and cultural values of people, and their ideas about justice, about the purpose of norms and regulators.

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## **Формирование договорных отношений: антропологический подход**

**Т. С. Волчецкая, Т. К. Примак**

*Балтийский федеральный университет имени И. Канта  
Россия, 236016, Калининград, ул. А. Невского, 14*

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*Исследование договорных отношений является не только интересным аспектом познания прошлого человеческой цивилизации, но и необходимым компонентом становления и совершенствования новых форм государственно-общественных структур, включающих согласие как базовый элемент в систему взаимодействия. Но многие вопросы остаются малоизученными в силу доминирования позиции о подчиненном положении договора по отношению к государству и праву, наличия разрозненных взглядов на происхождение, состав элементов, определяющих его природу. Чтобы получить новые представления, ракурсы изучения, необходимо пересмотреть традиционные точки зрения по вопросам возникновения норм, обмена, индивидуализма, собственности, использовать новые подходы, прежде всего антропологический. На основе проведенного анализа сделаны выводы, что договор возник одновременно с появлением человеческого сообщества, он не нуждается в признании со стороны государства, может рассматриваться как естественный регулятор общественных отношений; в процессе его формирования выделены общий и частный уровни, обозначены их особенности, составные элементы и принцип взаимодействия через индивида.*

*Ключевые слова: договор, нормы, правила, язык, обмен, индивид, согласие, антропология, собственность, государство, право, индивидуализм, человек, регулятор.*

*Научная специальность: 12.00.00 — юридические науки.*

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