

**The Social Contract Revisited**

# The Social Contract Revisited: The Modern Welfare State

OVERVIEW AND CRITICAL REPORT

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## Introduction

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This report is intended to provide both a record and a critical assessment of the Foundation for Law, Justice and Society's programme on *The Social Contract Revisited: The Modern Welfare State*. The programme's seven workshops were held bi-annually in Oxford from 2007 to 2010, with a final, summary session held at Gray's Inn, London, on 7 July 2010. The first workshop included papers that dealt with the historical and theoretical perspectives of the social contract; the outputs and inputs of the modern state – income support and taxation – formed the subjects of the second and third workshops, respectively; the fourth workshop focused on labour and employment issues; the fifth addressed the way the social contract relates to equality and personal responsibility, with a particular focus on health and education; the sixth workshop, organized against the background of the financial crisis, dealt with the effects of 'hard times' on the social contract; and the seventh brought the programme to a conclusion with an appraisal of its achievements.

The issues presented during the programme covered a wide array of social and economic activities, including income support, the labour market, education, health, immigration. The issues were addressed by over ninety scholars from ten countries, employing theoretical and pragmatic perspectives, across disciplines that include history, philosophy, law, economics, sociology, and political science. Needless to say, the agenda offered by the presenters were far from unified, and the conference discussions encapsulated considerable differences of opinion, whether stemming from ideology, from discipline, or from a different national ethos. In an effort to address as many of the ideas raised as possible, this report is organized in a thematic fashion that does not necessarily align with the original structure of the programme.

## Historical and Theoretical Perspectives

### *From the Historical to the Modern Social Contract*

The social contract refers to the understandings and conventions within a society that help to explain and justify its legal, political, and economic structures. The content and purpose of the social contract are naturally given different interpretations in different jurisdictions and among different people. Some policymakers and academics tend to ascribe clear and unproblematic meanings and significance to the concept, and to rely on it in justifying their policies. Others question whether the notion of a social contract serves any useful purpose.

Over the past decade or two, political philosophy, social policy, and legal relations between citizen and state have been caught 'in the grip of contractual thinking'.<sup>1</sup> What is the allure of the concept of the contract, and the social contract in particular, that has granted it such prominence in social policy discourse? To fully answer this question, one must distinguish clearly between early and modern social contract theory, since the two have very different objectives. Early social contract theories, such as those proposed by Hobbes,<sup>2</sup> Locke,<sup>3</sup> and Rousseau,<sup>4</sup> are centrally concerned with investigating the ideas of social cooperation and, to a greater extent, of political obligation. Social contract arguments were used originally as a way of justifying the obligation to obey the law or, more generally, the acceptance as authoritative of government decisions. Modern social contract theories, on the other hand, take the existence of the modern state as a given. The modern social contract, then, is employed as a mechanism for identifying proper social institutions and policies that reflect justice as the basic virtue in society. In light of these differences, what do these theories have in common that merits the common title, social contract theories? It would seem that the central attribute of social contract ideas is to perform an important *legitimizing* function.

Before turning to inquire how this legitimation is assessed, it is important to query how, in early and modern social contract theory, legitimation is achieved? For some early contractarians, justifying social cooperation and political obligation through a contractual mechanism is possible if it can be shown that a *historical* contract to that effect actually existed,<sup>5</sup> or if it is possible to discover an *implicit* contract that mandates such schemes.<sup>6</sup> These theories portrayed a certain 'state of nature' as a starting point for the theory, and suggested that citizens of the time contracted, or should be seen as if they contracted, an understanding to which they can and should be held to. The very different characterizations of the state of nature in Hobbes, Locke, Pufendorf, and Rousseau indeed lead them to very different conclusions as to the expectations from the state, the conditions for rebellion, and the rights of individuals.

Amongst critics of early social contract theory, David Hume is probably best known.<sup>7</sup> Three strands of Hume's critique are relevant here. First, he argues that *historically*, no such contractual moment existed. Second, *arguments of reason* detect flaws in the logic of social contract. His contention against Locke's attribution of tacit consent to citizens illustrates the point. Locke suggested that individuals who do not leave the country should be seen as providing tacit consent to its government's actions. Hume responded by drawing a parallel with passengers on a ship who are invited to jump to sea if they are unhappy with the conditions on board. And, third, *arguments of experience* suggest that people 'are born to obedience' through education and habit, rather than through consent. Hume, like Hegel,<sup>8</sup> finds consensual theories of political agreement too weak and unstable to serve as the justification for as important and necessary an entity as the state. Following these critiques, many had thought that the era of contractarian methodology

had come to a close. Jeremy Bentham observed: 'As to the Original Contract ... I was in hopes ... that this chimera had been effectively demolished by Mr. Hume. I think we hear not so much of it now as formerly'.<sup>9</sup> And so, writing in 1957, J. W. Gough observed that Kant 'brings us within the end of the history of contract theory'.<sup>10</sup>

*The latter part of the twentieth century has witnessed a tour de force of social contract theory in treatises emanating from constitutional theory, civil society, and morality itself.*

However, only a decade and a half later, the social contract tradition was revived by John Rawls's *A Theory of Justice*.<sup>11</sup> Indeed, following Rawls's seminal book, the latter part of the twentieth century has witnessed a tour de force of social contract theory in treatises emanating from constitutional theory, civil society, and morality itself. Instead of an historical or implicit contract, Rawls proposes a *hypothetical social contract*, a contract at which rational people, reasoning about their position behind a veil of ignorance, would arrive. This form of social contract is used to justify social institutions and policies that reflect justice as the basic virtue in political society.

Rawls and his followers made the social contract a powerful platform for the construction of rights and responsibilities in the modern welfare state. Even if 'we are now well beyond the stage when "political philosophers now must either work within Rawls's theory or explain why not"',<sup>12</sup> Rawls is credited not only with reviving the social contract tradition, but also with refocusing the objective of political philosophy to 'social justice – the way in which the major social institutions distribute fundamental rights and duties and determine the division of advantages from social cooperation'.<sup>13</sup> Half a century after Gough concluded that the history of the social contract has come to a close, contract theory has gained such a formidable stature that history may well have to be rewritten.<sup>14</sup>

***Three Levels of Contract, and their Problems***

An analysis of social contract policy and rhetoric reveals the need to distinguish between three levels of the social contract: the macro level, the intermediate level, and the micro level. At the macro level we find the philosophical, rhetorical, and symbolic uses of the social contract. Philosophically, the social contract suggests a focus on agency rather than structure; on individual rights and responsibilities rather than on collective responsibility and solidarity. Rights themselves, it is argued, become contractual, dependent on personal responsibility.<sup>15</sup> Rhetorically, it is arguably no coincidence that the central theme for welfare reform in the United States and Britain was the vision of the contract ('Contract with America', 'A New Contract for Welfare', respectively). The contract here suggests a justificatory dimension of reciprocal, mutual obligations.

But the macro level of the contract has much more to offer than rhetoric. As noted, John Rawls explains that the original position, his version of the state of nature, 'is understood as a purely hypothetical situation characterized so as to lead to a certain *conception of justice*'.<sup>16</sup> From here on, be it through the metaphor of a veil of ignorance, a desert island,<sup>17</sup> a spaceship approaching an uninhabited planet,<sup>18</sup> or 'a view from nowhere',<sup>19</sup> social contract methodology revolves around counter-factual thought experiments. Philosophers and policymakers suggest an ideal construct from which legitimate decisions may be derived, and translate these conclusions to non-ideal scenarios by assessing current practices or offering new ones.

However, it has been argued that a hypothetical contract cannot easily justify political institutions for it 'is not merely a pale form of an actual contract; it is no contract at all'.<sup>20</sup> This argument presents the more serious version of the quip according to which a hypothetical contract is not worth the paper that it is not written on. Though theories of an explicit or implied contract are prone to difficulties of their own, they enabled the contract itself to serve as a

separate justification for demanding obedience. But when we place an ideal contract in place of an actual one, we are also substituting idealized contracting agents (free of coercion, endowed with full information, etc.) for the actual consent of individuals. The significance of such a slide from the ideal to the actual becomes apparent when we then impute idealized consent to real people, or, in other words, expect the consent of idealized persons to bind the real ones. Rawls referred to this as 'the problem of stability'.<sup>21</sup> The problem of stability is indeed a problem, D'Agostino explains, because an idealized social and political theory is based on a state of affairs that is quite different from the one that exists at the moment.<sup>22</sup> In order to avoid such a result, the models and the assumptions they depend on should be tested empirically, to the extent that is possible.

At the intermediate level, the social contract refers to the institutional dimension. Notable examples are the British post-War settlement between capital and labour and the agreements between social partners in Sweden and Germany. This dimension emphasizes fair reciprocity at the structural level and has important implications for the concrete policy decisions that are made. In addition, serious attention is given to policies that outsource and privatize social services, especially since their justification is couched in contractual terminology.

At the micro level, the social contract refers to issues of implementation. Taking a cue from the commercial contract, the new model embraces a reciprocal relationship between the citizen and the state in the fields of welfare, home-school agreements, and with respect to youth offending. The fact that individuals are required to sign a 'contract' suggests an interesting link between the macro, intermediate, and micro levels. On the face of it, the contractual apparatus is, indeed, only a 'tangible manifestation'<sup>23</sup> of contractual welfare. In reality, the relationship between the claimant and the authority is a hierarchical one, and the sanctions for 'breach of contract' are administrative, not commercial. The conclusion is that the ceremony serves as a veil of

mutual obligation for a reality of 'illiberal processes ... which are arbitrary, oppressive or one-sided in character'.<sup>24</sup>

The analysis suggests an uneasy relationship between the three levels of the contract. A neoliberal, narrowly contractual exchange relationship is in tension with the Republican form of solidarity as a governing principle. While couched in inclusionary rhetoric, the institutional and field-level layers of the social contract may have significant exclusionary consequences.<sup>25</sup>

And yet, more positively, the move between the three levels of contract has much in common with Rawls's 'reflective equilibrium', which enables us to formulate philosophical positions and devise suitable institutions which can then be tested and corrected on the basis of practical, real-world experience. The 'circle of legitimation', as proposed by Fred D'Agostino, embraces a similar idea of returning back to the contractual moment and refining the social contract emerging from it. There are, however, differences between the two approaches. While Rawls is concerned with the application of justice in social institutions, D'Agostino's focus is on the capacity of real people to engage in the contracting process. By seeking to close the gap between such people and their imagined surrogates, between the naturalized and normative contexts, he shows how the social contract, if constructed properly, may acquire one of the most illusive of public virtues: legitimacy.

### ***The Legitimizing Function of the Social Contract***

It is plain that, following Rawls, contractarian methodology has gained prominence because it offers a method to assess objectively whether particular policies are *legitimate*. There could be two different avenues to assess legitimacy. The first focuses on the normative role of the state; the second on the needs of the individual.

The first avenue has much in common with early social contract theorists, who sought justification for the existence and power of government. The inquiry

is similar because, by delineating the normative role of the state (i.e. what it *should* do), one can decide if it is *justified* in holding the powers it holds. In the modern era, the state power most relevant to our purposes is the power to tax earned income or profits. This power has increased several times across the various countries from the mid-nineteenth century to the mid-twentieth century, and where welfare transfers are concerned, has continued to increase since then. While classic 'public goods' such as defence, law enforcement, public order, and local administration have remained at about 30% of the United Kingdom GDP, for example, the vast bulk of expenditure was used to fund social security and housing (33%), health (17%), and education (15%).

So what, indeed, is the justification for doing so? Avner Offer, for example, argues that the state should intervene in the economic markets only when serious market failures are detected.<sup>26</sup> These may take the form of psychological or social biases. With respect to psychological biases, people are understood to be myopic. In David Hume's words, 'There is no quality in human nature, which causes more fatal errors in our conduct, than that which leads us to prefer whatever is present to the distant and remote'.<sup>27</sup> To put it simply, people tend to make bad choices for immediate rewards. The reasons for this, as Kahneman and Tversky have famously articulated,<sup>28</sup> stem from cognitive biases and the intractable nature of the calculations required to assess present sacrifices and future rewards. If all psychological biases are aggregated, we encounter a serious problem of social commitment. People have a difficult time constructing complete, long-term contracts that demand an impossible level of detail and costly management and regulation.

The state, then, acts as a *commitment agent*. First, it identifies long-term market failures or (relatively) short-term crises, articulates their nature, and creates the institutions necessary to address them.<sup>29</sup> For example, since the average child would not commit themselves to twelve years of education, since it is clearly beneficial for their future and for society's progress to do so, the state creates a

school system, funds it, and even makes attendance compulsory. It forces its citizens to commit. This is an important justification for the role of the state, one that fits well with the early social contract tradition. Unlike contemporary theories, early formulations did not claim to detect the principles of justice that underlie the modern state. Instead, they employ the contractual methodology while performing an inquiry into the role of the state.

Similarly, the contractual element has regained importance in this new and original construction. To paraphrase Rousseau, people are forced to (contract so they can) be free. Moreover, the unique role and power of the state are addressed directly. The state is not simply a derivative of the theoretical conceptualization of justice, as in most modern theories. Rather, it is expected to use its power to enforce an equilibrium, to renegotiate the terms of the long-term, pay-as-you-go contract if the need arises and, through the democratic process, to reflect society's priorities and balance of powers.

From the individual perspective, contractual reasoning seeks to enhance the fairness and justice of social arrangements by way of targeting illegitimate preconditions for contractual legitimacy. Some of them, such as ignorance or coercion, are familiar from commercial contract doctrine. Here then, it is important to focus on a unique precondition: the need to ensure what may be termed *social contractual capacity*.

Before explaining the concept of social contract capacity, the reasoning behind the social contract methodology should be clearly articulated. As noted earlier, social contract theory must satisfy two stages of legitimation: *ex ante*, the contracting parties are imagined to negotiate the basic structure of society; *ex post*, the actual parties inquire whether the hypothetical contract lives up to its promise. These two stages are not unconnected from each other; indeed, it is crucial that surrogates and stakeholders not only initiate an original contract but are participants in a continuing process. The underlying assumption is that today's stakeholders are

influenced, even transformed, by the terms of the hypothetical contract. They are meant to become more and more like their idealized surrogates. They are supposed to become freer, better informed, and better equipped with social-contract capacity. This is how stability between the ideal and the real is created. The social contract is meant to be a process which produces better contractors, that is, parties who are better equipped to consider, discuss, and construct a social order based on justice. If the state fails to do so, those who are worse off 'will interpret the social contract as no more than a giant swindle perpetrated by the well-to-do'.<sup>30</sup>

Linking the two avenues of legitimacy together – the normative role of the state along with the legitimate needs of the individual – we find that society is obligated to increase the individual's capacity to participate, not only in current institutions, but also to advance the construction of better institutions in the future. It has the obligation, in other words, to move stakeholders closer to the position of the ideal surrogates. The aim of the state, then, is to bridge the gap between the naturalized (i.e. real-life) social contract and the 'normative' (i.e. ideal) social contract. If this is done, the mechanism of the contract can be employed with legitimacy. The converse is also true, however: Stuart White explains that where the state *cannot* guarantee fairness and reciprocity, 'the pretence of contract in government policy should be abandoned'.<sup>31</sup> White and Peter Vincent-Jones note the following 'threshold requirements'<sup>32</sup> for contractual rationalization: the guarantee of a decent share of the social product; state responsibility for promoting productive participation; equitable treatment of forms of participation; and the universality of reciprocity. If these preconditions are met, then a contractual relationship may enhance autonomy, respect for the individual, and personal choice.

The difficult matter to determine is how to formulate a just social contract when the background principles are either not in place or only partly so. This difficulty is far from theoretical. Welfare claimants and young offenders, for example, are now required to fulfill a series of new social obligations, justified on the

grounds of reciprocity and individual responsibility. Needless to say, these demands are placed while the background conditions just noted are far from satisfied. Should the principle of proportionality lead to the conclusion that the nearer society is to fulfilling the background conditions, the greater the obligations? Should there be a 'critical mass' of background conditions to attain before *any* individual responsibility is demanded from benefit recipients?

*Welfare claimants and young offenders are now required to fulfill a series of new social obligations, justified on the grounds of reciprocity and individual responsibility.*

In addition, bridging the gap between the real and the ideal also has dangers. Instead of increasing the capacities of stakeholders to bring them closer to their theoretical surrogates, a danger is that the theory will be redefined, so that the vision of the surrogates will be adjusted to resemble that of the real-world stakeholders. The gap between the naturalized and the normative contracts will be narrowed, but in the wrong way, resulting in the wrong kind of contract. In other words, current policy will be elevated to the ideal by insisting that certain measures, which may be oppressive, coercive, and reactionary, are necessary in order to advance towards an idealized account of the social contract. This is seen as a danger in Rousseau's theory, some arguing that he 'provided the theoretical support for despotism'.<sup>33</sup> To take a contemporary example, it may be asked whether contemporary American welfare reform is moving the naturalized social contract towards the normative by increasing the capabilities of beneficiaries; or is it redefining the normative social contract itself and thus idealizing problematical policies? This is, perhaps, the danger intimated by Robert Goodin, when he argues that the social contract's role in the disempowerment of the most vulnerable may be a 'perversion of [the] cherished ideal'. However, as a policy (rather than as a philosophical) matter, the issue is moot. The current interpretation is now firmly installed in public

discourse, and the 'language of social contract is simply no longer available for a kinder, gentler application to social welfare'.<sup>34</sup> In other words, he is willing to agree with White and Vincent-Jones's theoretical prescriptions, but since the 'thresholds' or 'preconditions' are unlikely to materialize in the real world, Goodin suggests that it is best to abandon contract rhetoric altogether.

### ***Do Facts Matter? Between the Normative and the Empirical***

In pondering a hypothetical, or ideal, society, social contract philosophers and policymakers constantly ask 'what if' as a preliminary step towards an argument for principles to govern a fair and just society. But this methodology of hypothetical or counterfactual moves risks relying on controversial assumptions about human behaviour and social dynamics. Arguably, the very structure of social contract arguments encourages these tendencies.

According to Lord Plant, the social contract sets out the political and constitutional framework for institutions and policymaking in a given society.<sup>35</sup> This is done by laying down the normative and empirical foundations that govern the matter. In assessing the normative claims, each society should decide what demands values such as justice, need, freedom, equality, and the rule of law may legitimately make on the state and the relative priority of each. Normative conclusions then need to be related to empirical reality, in order to determine the likely effects of a given policy on society.

In reality, however, the analysis is more complicated. In addition to a fairly straightforward division between normative and empirical matters, there are also hybrid claims which tend to fuse or at least inter-mix the two. John Rawls's account of the social contract provides an example: the contractual parties will know certain things about the state,<sup>36</sup> about society and about the behaviour of individuals. They will have some empirical knowledge. But when does empirical data run out and when do our normative notions take over? One may ask, for example, how immigrants and guest workers should be treated

before they had the opportunity to build the 'credit' necessary to enjoy certain social benefits. Should they be allowed to enjoy access to benefits, and if so, on what terms? While some may argue that the policy decision should be based on the financial stability of the host state or on evidence that further immigrants will follow, others may argue that the provision of benefits should not discriminate amongst legally established residents, irrespective of the period of their residency. We find, then, that normative, empirical, and hybrid claims all have a role in devising a social contract and should guide the parties within a given society to consensus.

By combining social contract methodology and welfare state literature, we see more plainly the difficulties in mixing normative and empirical arguments. Since human actions are influenced by many factors, including culture, history, geography, social structure, constitutional structure, human rights enforcement, and so on, it would be rash to assume that a policy P1 will necessarily lead to a result R1, or policy P2 to result R2. Regardless of the background factors mentioned, it is predictable that P1 (say, child benefits) will have unpredictable effects on the way policy P2 (say, workfare) will impact on behaviour and incentives structure. Added to this is the fact that not all people are rational in all their actions and that not all react to external factors in the same way.

The conclusion may be, therefore, that in examining these matters we should confine ourselves to the normative claims, since the addition of empirical claims taints them with contingencies. From this conclusion it follows that the normative values (equality, liberty, autonomy, etc.) a given society wishes to promote, and their ranking, should govern the implementation stage.<sup>37</sup> But, almost as easily, the converse case may be made: disregarding the empirical aspects may render the normative arguments rather empty, an exercise in philosophy for philosophy's sake. Philosophical analysis of course has its interest and importance. But, arguably, in employing the device of the social contract, our purpose is to reach particular conclusions, such as the

character of the welfare state, which is ultimately of very practical concern in the real world. The beauty, and the challenge, in articulating the philosophy behind the welfare state, lays precisely in the need to move from empirical fact finding to armchair philosophy, and back again, a process neatly captured by Rawls' notion of the reflective equilibrium.

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## The Social Contract and Social Institutions

### *A Breakdown of Institutions? A Breakdown of the Social Contract?*

A decade or two of unparalleled affluence in most industrial, capitalist countries has been accompanied by the dwindling of the social contract, also known as 'welfare state retrenchment'. Arguably, the two are quite related. Against the background of increasing stability and prosperity, and improvements in personal security, social order, general health, and so on, the wealthy were motivated to opt out of collective arrangements and to establish institutions that cater to their own needs, while neglecting to fund the needs of the less fortunate.

An even more sensitive issue is that of overuse and abuse. Increasingly, citizens do not like 'free riders' and do not enjoy feeling as if they are the only side living up to their end of the bargain. John Rawls wrote, '[People] may suspect that some are not doing their part, and so they may be tempted not to do theirs. The general awareness of these temptations may eventually cause the scheme to break down'.<sup>38</sup>

The threat of 'breakdown', it should be noted, is often used in reference to the 'social contract', referring to a perceived reduction in the collective will to work together, in solidarity, to express empathy, and to act in a manner that alleviates the burden of a fellow citizen. And so, if abuse is such a significant threat, it should indeed be dealt with vigorously.

But not enough attention is given to the fact that abuse is centrally tied to the structure and administration of policies and institutions. Theda Skocpol's discussion of nineteenth-century pensions for war veterans shows that the more complex the system and the more discretion given to its administrators, the more opportunities there are for corruption and clientelism. Moreover, the lasting effect of this experience, *pace* Skocpol, was crucial for the (lack of) development of the American

welfare state. In effect, it led to its political delegitimization: 'the party-based "corruption" that many US reformers associated with the implementation of Civil War pensions prompted them to argue that the United States could not administer any new social spending programs efficiently or honestly'.<sup>39</sup>

We find that social risks and institutional trust are an important element in the structure of the social contract. Introducing the 'Quality of Government' as an important factor in welfare state analysis, Bo Rothstein argues that 'for wage-earners and their representatives to turn to the state to solve their demand for protection against social risks, they have to have a high degree of confidence in "their" state'.<sup>40</sup> The converse is made manifest in a vicious circle: individuals refuse to pay (high) taxes because the government is viewed as corrupt and fails to deliver basic services, but government institutions are not going to improve if they do not have the necessary funds. This dynamic is made clear in the fields of health and education, discussed below. In an effort to avoid the delegitimization noted by Skocpol, Rothstein explains, Swedish social reformers decided to move away from targeted social policies and towards universal ones, thus creating a positive feedback mechanism: less opportunity for fraud, corruption, and clientelism would mean more support for the system, for its preservation and its enhancement.

Finally, and notwithstanding the general trend, it is a commonly held view that crises bring people who once sailed separately into the same boat. The indiscriminate nature of some crises (such as terrorism and war) may lead to a reassessment of the social contract and the institutions that underlie it. The paradigmatic example is the Second World War, a watershed event that precipitated the golden age of the welfare state. Among the prominent explanations

are the growing tolerance of higher taxation and social spending because of the war; the positive effect that the war had on national solidarity, a precondition for a robust welfare state; and the increased emphasis on rights-discourse that evolved in the aftermath of the war and all that this entailed. These explanations complement each other, leading Frank Castles to note that it would have been 'truly astonishing' if an event of such social and economic proportions would not have had a significant effect on subsequent social policy.<sup>41</sup>

And yet, some 'general' disasters are actually more discriminate than others, and may thus have different effects. Different 'types' of hard times (war, environmental calamities, different economic crisis) may sway public policy in different fashions. Michael Katz, for example, argues that when hard times are exceptionally detrimental to the poor, the welfare state contracts. However, when a crisis affects the middle class, the welfare state expands.<sup>42</sup> A striking example to that effect is the immediate ineffectual response to Hurricane Katrina, which victimized poor minorities.<sup>43</sup>

### **Change the Institutions or Change the Contract?**

Notwithstanding the importance of the normative foundations of the social contract, the implementation of the social contract must take into account the change in the characteristics of the relevant institutions and the dynamic inter-relationships between citizens and the institutions. Public policy cannot disregard the significant changes welfare states are undergoing. While some may wish to redesign state institutions against preconceived notions of the social contract, others suggest that a new vision of the social contract should be offered. The most significant changes are as follows:

- i. Demographic:* a rise in the ratio of people over the age of sixty-five to the number employed from 1:3 to 1:1.6;
- ii. Spending:* social spending as a percentage of GDP has nearly doubled from 1960 to 1980;
- iii. Globalization:* its effect on social solidarity and the

consequent reduction of labour rights and welfare benefits;

- iv. Normative:* changing public attitude towards single mothers, towards benefits in general, and towards the market.<sup>44</sup>

To what extent can these factors lead to changes in the format of the social contract? Three approaches are suggested: the first of these is effected by revisiting the social contract and incorporating the *new information* into its structure, which would remain unaltered. Thus, for example, the idea of membership and citizenship, a foundational concept in social contract theory, has changed significantly since the Second World War. One option would be to incorporate the new conceptualizations into the structure of the social contract. Recurring demands of immigrants to receive benefits upon their arrival from their host country or to export benefits from the country of origin, show that the question of immigration is still a very live one, insofar as distributive questions are involved. Thus, global interdependence may be the greatest challenge for the social contract, and perhaps – 'the greatest moral challenge of our time'.<sup>45</sup>

According to the second approach, social contract *theory* has to be radically reformulated. It is argued that if the social contract is to increase both social goods and individual utility, it must take into account interpersonal goods that cannot be adequately confined to the cost-benefit analysis of the economic model. Interpersonal connections create immeasurable goods such as a public ethos and a democratic structure, none of which are given due weight in social contract thinking.

Finally, the third approach would require (re)structuring institutions to fit a preconceived idea of justice, derived from our understanding of the social contract. This possibility may be more theoretical than practical. Notwithstanding the fundamental institutional reform following the Second World War, it is quite possible that those days are gone, for various reasons, not least because the relevant welfare state institutions are by now, firmly

established. There is, in other words, no reason to invent them anew. When fiscal, environmental, or military crises occur, the states turn to the authorities in charge. If they fail to operate as expected, personal sanctions may follow, but no real structural changes result. Secondly, and somewhat connected, is the fact that welfare state institutions have grown in number and in size over the years. Reform, *ex hypothesi*, does not originate in a vacuum. Theda Skocpol has popularized the terms 'path dependence' and 'policy feedback' to highlight the fact that 'policies, once enacted, restructure subsequent political processes'. Policies may 'affect the social identities, goals, and capabilities of groups that subsequently struggle or ally in politics'.<sup>46</sup> The size of contemporary institutions, along with the momentum they created, reduce the capacity of institutions to change structure, ideological predispositions, or the way they operate.<sup>47</sup> They are, according to Hinrichs, 'elephants on the move',<sup>48</sup> impervious to events that, while perhaps unexpected, are not unpredictable. Health systems, emergency services, and environmental agencies are expected to operate when such events occur. And yet, it is interesting to note that Hinrichs introduces a qualification to only include welfare institutions that 'enjoy high esteem and support among citizens'.<sup>49</sup> Returning to the issue of trust, this explanation raises the question whether severe dissatisfaction with the emergency performance of certain welfare state institutions, extensive and well-funded as they may be, could lead to serious restructuring.

This quandary leads to another difficulty with the thesis that the formative period of institution building is over. Take, for example, the expansion of unemployment programmes which, at least in Piven and Cloward's classic account, may be connected to

riots and social unrest.<sup>50</sup> In Germany, reunification motivated the government to initiate significant institutional and financial reform.<sup>51</sup> More recently, the Obama administration initiated a \$787 billion stimulus package which, on some accounts, saved or created between 1.1 and 3.5 million jobs,<sup>52</sup> without it being seen as a 'restructuring' of the welfare state. On the other hand, European countries turned to favour education and equality of opportunity over equality of outcomes and poverty, reducing social assistance benefits for the working age population by 10 per cent to 20 per cent.<sup>53</sup>

The general point, then, is that although the modern state has moved beyond the traditional redistributive social welfare agenda into what is now commonly referred to as the 'social investment state',<sup>54</sup> changes *within* social institutions, even significant in form, substance, and funding, are not captured in contemporary institutional analysis. At most, states are described as 'recasting' or recalibrating their social institutions.<sup>55</sup> Such recalibration emphasizes unemployment, activation programmes, targeting and means-testing, and attention to 'new social risks', including low education levels, divorces, and the changing nature of the family, combining work and family and care for the elderly.

But the institutional, or bureaucratic-sounding recalibration may have serious effects on the social contract. Michael Katz explains that the structure of benefits and payments as insurance based, means-tested, or tax breaks has significant consequences for the risks that different sectors of society are exposed to. Tax breaks, for example, which include deductibility of home mortgage and medical benefit exemptions, has become a major source of American middle-class welfare.<sup>56</sup> Opting for a reduction in benefits as opposed to a cutback in tax breaks reflects, in other words, a contraction of the social contract and a redrawing of lines between different sections of society. The structure of benefits that are in place will also dictate, to some extent, the nature of an institutional response when that is necessary. Katz finds, for example, that the current economic crisis has created a unique opportunity to push

*The Obama administration initiated a \$787 billion stimulus package which, on some accounts, saved or created between 1.1 and 3.5 million jobs, without it being seen as a 'restructuring' of the welfare state.*

forward health insurance that has failed every Democratic president in America since Harry Truman. As home values eroded, pensions became devalued, millions of people lost their jobs, and tens of millions began to view the escalating cost of health care as an emergency that demanded attention. Against this background, which affected the American middle class more severely than any other in over seventy years, fundamental institutional reform became more viable.

### ***The Social Contract and the Family***

Arguably, the most significant single change in the social structure in Western nations over the last century concerns the status and rights of women. Needless to say, this change has widespread implications, of which only a few can be mentioned in this context. This subsection focuses on the interconnections of family and the workplace, while the following subsection will note the changing role of, and demands from, the family with respect to a child's education.

The emergence of women in the labour market has led to a replacement of the post-War male-breadwinner model with the 'dual earner' family model. The new model is advanced not only (or even predominantly) by women, but rather by governments as a social goal of widening the pool of talents available to the labour market.<sup>57</sup> The state is implementing, through its administrative and legal organs, a normative, disciplinary, and value-laden agenda that has an effect on the structure of family and its role with regards to the labour market.<sup>58</sup>

Nowhere is this policy more apparent than in the widespread 'activation' programmes, initiated in all OECD countries since the mid-1990s.<sup>59</sup> The dominant new rhetoric of welfare reform employs the contractual language to reconceive welfare rights not as an entitlement but as conditional on the fulfilment of certain responsibilities, including, preeminently, the obligation to work.<sup>60</sup>

However, women's increased participation in the workforce creates a real social and economic problem

of a 'care deficit' or 'care gap'.<sup>61</sup> Somewhat paradoxically, women's entry into the labour market is fulfilling the traditional feminist agenda of 'defamiliazing' care. However, family-friendly policies in the workplace, along with the reduced support for women who choose to care for children, move care solutions from the family directly to the market.<sup>62</sup> The state, then, is subject to little pressure to offer a publicly funded care strategy of its own. But should care be defamiliazed? In other words, is it in the best interest of the family and the state to move child care outside the family? When considering this question, it should be noted that child care is only one instance of an array of possible 'care' scenarios. Others include care of the elderly and care of the disabled. The tendency is to outsource both to the market, although it is less than clear that this benefits all those involved.

A new social contract must take into account the advantages of a parent (not necessarily a mother) spending more time with his or her children, and the role of the state in realizing this goal. In so doing, it should address the growing problems of neglect and restore a more positive work-life balance.

### ***The Social Contract for Education***

Education is a key factor in guaranteeing equal opportunity for citizens. Though not exclusively so – family support and community environment, among others, are important factors – a comprehensive state-school system is a fundamental dimension of a truly equal-opportunity society. How can social contract theory assist in constructing a viable and just system of education? One possibility is to suggest that enhancing the 'social contractual capacity', discussed above, demands the assignment of differential funding to schools in less advantaged communities. Indeed, one of the most important contemporary debates concerns where and how much funds should be distributed and to what extent should students be held responsible for their failure to take advantage of opportunities offered to them.

A different approach is to assess a child against the relative advantages and disadvantages that they

encountered during their school years in terms of the background institutions and opportunities available to them. This agenda is opposed by some modern contractarians, who perceive it as absolving students from responsibility for their own achievements and failures. Notwithstanding the general, and important, discussion regarding the role of personal responsibility within the role of the social contract in general, the issue of personal responsibility in the field of education is problematic if we assume that children should not be held entirely responsible for their own failure(s). Generally speaking, children are excluded from the discourse of responsibility, since they have yet to develop the capabilities and moral intuitions that are a precondition for assuming responsibility. As Yuli Tamir notes, responsibility should be viewed 'as an outcome rather than as a precondition for education'.<sup>63</sup>

Those who wish to burden children with responsibility understand this, and often turn to those who can, morally, bear the burden: the child's parents. Here, then, is where the tension lies, because equality demands ensuring that children will not suffer from their parents' ill choices and that their opportunities will be on par with each other.

And so, the social contract for education has three main players: the state, the parents, and the child. It is notable that US President Barack Obama chose to state in his inaugural address that parental responsibility does not end with the duty to send a child to school. Parents are asked to take an active role in their child's life, and in their child's education. They should act in a responsible way towards their children because families play an important role in the structure of society, in its social contract. The collapse of the social contract is often viewed as contiguous with the collapse of the institution of the family. Society, therefore, has an interest in strengthening these social bonds. This notion, it is acknowledged, is quite conservative in its basic values. It preserves the class structure and does not wish to undermine it. But if the social contract is based, *inter alia*, on concentric circles of care, the family is a fundamental building block in its structure.

This does not mean, however, that the entire burden should be shouldered by the parents, or that equality has no role in education policy. Quite the opposite is true. It is now patently clear, for example, that children who are raised by families from a higher social-economic stratum and who have more years of higher education will perform better in school.

A simple solution is that each actor should play his part to the best of his abilities: parents should take advantage of the opportunities afforded to them, and the state should compensate for different starting points by investing more resources in lower class families, schools, and neighbourhoods, so as to equalize opportunities. But there are two obstacles to realizing this state of affairs. First, to what extent are these roles interdependent? In other words, what is the sanction for parents who do not fulfill their responsibilities? Is the state, then, entitled to pull back its own investment?

The second point is closely related. Middle-class parents are much more ready to make claims (and more effective when making them) that the state broke the social contract with *them*.<sup>64</sup> They live up to expectations, invest in their children, but are still 'rewarded' with a smaller percentage of the social funds when compared to parents who are less successful as parents and therefore, as citizens. This insight, which stems from years of policy experience, also bears on the practicality of John Roemer's suggestion to invest much more in poorer, or less educated, families.<sup>65</sup> The justification may well be sound, but the political reality may prove to be too great an obstacle.

### ***The Social Contract for Health***

As technology advances, the reasons for poor (or good) health become increasingly demystified. It is now more possible to attribute a person's actions (or lack thereof), diet, or behaviour to his or her health. The result is that more and more policymakers and commentators are advocating the exclusion of individuals from the social contract for health care, if it can be shown that they are responsible for their ill-health. In doing so, they are (perhaps

unknowingly) voicing the 'luck egalitarian' intuition, that suggests equalizing only matters outside an individual's control, that has become increasingly prevalent in public health since the 1970s.<sup>66</sup>

Breaking from the post-Second World War public health agenda, the contemporary 'personal responsibility' rationale suggests that if three out of the four top risk factors contributing to the burden of disease can be attributed to an unhealthy lifestyle,<sup>67</sup> there is justification to penalize the recalcitrant individuals who will not adhere to advice as to how to lead a healthy life. We find, then, another interesting link between the factual aspect of the social contract and the normative aspect: the advancement in our understanding of the causes for diseases has led to changes in public perception. A majority of Americans now think that it is fair to ask individuals leading unhealthy lifestyles to pay higher premiums for health insurance or higher co-payments for treatments when compared to individuals who lead healthy lifestyles.

This agenda, however, ignores the complexity of factors that affect an individual's health. The example of dental health provides a good insight into the limits of the approach. Dental health is commonly viewed as related, to a large extent, with dental hygiene. This provides a good reason for governments to leave dental care to the provision of the market, which allows individuals to limit the cost of dental care by brushing and flossing regularly. However, poor dental health can also be attributed to diet during childhood. This would mean that a child's diet derives, at least to some extent, from her (or her parents') choice. However, it is also heavily influenced by the vigorous marketing campaigns of 'junk' foods with little or no nutritional value, governmental failure to regulate advertising and enforce healthy food in school cafeterias, and certain subsidies (e.g. corn farmers) that lead to production of cheap, unhealthy products that are consumed liberally (e.g. corn syrup).

This example of control over a diet illustrates a phenomenon known as 'attribution mistake'.

### *A majority of Americans now think that it is fair to ask individuals leading unhealthy lifestyles to pay higher premiums for health insurance.*

Individuals often have an exaggerated feeling of how much control they have over their behaviour. If will power is, in Wikler's words, 'virtually worthless', then what are the real gains from policies that sanction individuals for matters over which they have limited control? One may even suggest that a more common attribution mistake is assuming that *others* have more control over their behaviour than they actually have. A more positive alternative would be to increase the knowledge available by distributing information and to protect individuals from temptation through limits placed on corporations.

### *The (re)Birth of Civil Society*

As noted, the early and, to an extent, modern social contract focused on the relationship between the individual and the state. The amorphous entity of 'civil society' and its mediating institutions, such as family, community, and churches, are often excluded from the analysis. Politically, however, libertarians are quite vocal in arguing that government should 'get out of the way' to allow mediating institutions to fulfill their role in society, and social conservatives promote the funding of such organizations, as exemplified in George Bush's Faith Based Initiatives.

The associations of civil society, including trade unions, churches, charities, and friendly societies, may play a part in preserving equality and in assisting individuals and governments to meet their responsibilities. However, such an assertion should be tested empirically to provide answers to questions such as: what are the effects of engaging civil society associations in the cultivation of the capacities of individual persons to enter the contractual process? What are the consequences of removing such responsibilities from the preserve of government and turning them over to such associations? Although the state should create the environment to help such organizations flourish,

problems may arise. First, as a result of co-optation by the state, civil associations may be compromised and their ethos damaged. Individual liberty may also be threatened, if such associations (faith groups, for example) are permitted to discriminate in the provision of services that were originally the responsibility of the state.

Notwithstanding the positive, or even romantic, perception of civil society institutions, Edelman is right to observe that 'communities can be inclusive and empowering but, like governments, they can be overbearing and intrusive, too. In the name of demanding that individuals fulfill obligations to the community, they can overreach. One person's strong "community" can be another's repressive influence'.<sup>68</sup> This was precisely the problem with welfare provision under the poor law prior to the development of the welfare state and its bureaucracy. Charitable bodies, churches, and others routinely regarded the dole as having behavioural strings attached. Edelman agrees with communitarian Amitai Etzioni that communities form concentric circles of families, schools, neighbourhoods, professional associations, sport teams, and so on, each of importance to an individual.<sup>69</sup> But should they also be burdened with the task of fulfilling a basic public role?

### ***Globalization: The Social Contract and the State***

For the marginalized, the poor, and the sick of the world, the boundaries of the social contract and the welfare state are all important. The first years of globalization scholarship were concerned with economic issues, such as the actions of corporations and the effects on labour markets. Contemporary research investigates the way globalization has an impact on social and cultural structures, and in turn on the character of domestic social contract.

On a global level, social contract terminology may be employed in dealing with two distinct phenomena. Firstly, international competition has made it increasingly difficult for employers in developed countries to provide social benefits such as health and pensions. Companies have responded by moving

to countries where lower wages are paid and benefits are less generous. Secondly, foreign workers who migrate from less developed to developed countries pose a challenge to a host nation's solidarity and homogeneity. Host countries often respond by excluding guest workers, at least to some extent, from the domestic social contract and depriving them of rights and status. Both these issues raise the question of the boundaries of the social contract and the feasibility of constructing a 'global social contract'. In addition, both have interesting and important legal aspects.

As for the first issue, it has been argued that, far from exploiting employees in developing countries, US employers, for example, adhere to standards that are much more onerous (from their perspective) than the comparable standards that control US-based industries. These include paid leave, maternity leave, recognition of unions, health insurance, and so forth. Some American employers even offer higher pay than their domestic competitors so as to attract local talent.<sup>70</sup>

But while it may be the case that most American employers abide by the letter of the law (and even above it, if it increases their chances of attaining good workers), this does not necessarily absolve them of behaving in an exploitative fashion. Though employers may be 'playing by the rules', they are often rules that were the product of their own influence.

The argument thus presented also begs the question: if labour standards in developing countries are so generous, why are US enterprises relocating to these countries? Two possibilities arise: one is that there is a significant gap between the law on the books and the law in action, and that these employment rights are not manifested in reality; another, is that labour standards may be more generous but *pay* is very low. These possibilities are not mutually exclusive, and both are of general interest. The first, concerning problems of implementation, is not uncommon in the field of employment and labour relations. The second point shows that the conflation of 'pay and

conditions' should be disaggregated, for the two may require a very different analysis.

The second, mirror issue under the global social contract concerns not multinational enterprises (MNEs) moving out of developed countries, but rather labour migration into those countries. These immigrants face the danger of being excluded from the social contract, entrance to which is often gained only via economic participation. This would mean, then, that it is necessary to assess the terms of entry, conditions of stay, and integration policies concerning newcomers. In particular, terms of entry are increasingly associated with the individual's ability to contribute to the host country's economy. This policy has been criticized as a form of 'economic eugenics'.<sup>71</sup>

A comparison of the two aspects of the global social contract that is currently in force leads to a troubling conclusion: the legal structure created by a variety of free trade agreements grants MNEs the freedom and the incentives to move to less developed countries. But allowing movement for one actor (MNEs) while restricting movement for another (the migrants) also distorts transnational labour markets by creating a context that facilitates the individuals' exploitation, both in developed and in less developed countries. The reason is that MNEs draw on technology and capital superior to that of the local competitors operating in a developing country and may thereby disrupt existing social and economic arrangements, bringing about displacement and unemployment. But immigration laws prevent individuals from responding to these changed circumstances, as classical economic theory would expect. They are held immobile by national borders of the states, and serve as a pool of cheap labour.<sup>72</sup>

Moreover, whilst some people may leave the developing country and enter, illegally, a developed nation in search of employment, their illegal status significantly reduces their bargaining power in the labour market, exacerbating the disparities between employer and employee, and allowing for employee exploitation that in turn drives down wages of local, legal workers.

To frame the argument in social contract terms, while labour is confined within a domestic social contract, MNEs can operate within a global, borderless social contract. Against this background, Karen Bravo argues in favour of an increased overlap of the two social contracts by granting persons the same, almost absolute freedom granted to MNEs. As attractive as this solution is, it seems politically impractical. While MNEs carry no immediate cultural or national identity, immigrants are seen to enflame the politics of national identity and to endanger feelings of solidarity and local culture.

However, history may provide some basis for optimism that this situation may change over time. Over a period of several centuries, the social contract developed from a very localized concept to a national one. The move to a global social contract may be an extension of this trend. And yet, a legitimate worry should be addressed: will the opening of borders lead to the global social contract supplanting the domestic contract?

This will not necessarily be the case. People are motivated not only by the prospects of higher income, but also by family ties, community relationships, and cultural norms that lead them to stick to the familiar and the convenient. A telling example is provided by Britain's decision to allow free movement for nationals of the eight central and Eastern European countries that joined the European Union in 2004. Though there were worries that this decision would lead to mass immigration and to eventual unemployment in Britain, a Department of Work and Pensions study revealed that, 'there was no sudden flood of migrants from the new EU Member States, but rather a steady flow to sectors where labour was in demand'. The research concludes that, 'the economic impact of accession on the UK labour market appears to have been modest, but broadly positive'.<sup>73</sup> To what extent, then, is an intermediate, regional social contract possible?

### ***A European Social Contract?***

The institutional developments in Europe serve as an important case study for the development of a social contract beyond national borders.<sup>74</sup> Analysis reveals

that the values underlying a European social contract are developing in two manners: top-down, and bottom-up. First, through legislation, administrative action, European Treaties, and decisions of the European Court of Justice, the European Union has managed to improve gender equality, reduce discrimination based on nationality, and increase access to health and education across Europe, thus dictating, quite clearly, 'European' values. In addition, the 'liberal' ethos is somewhat attuned by a burgeoning European Social Model, with its emphasis on 'solidarity'. The Charter includes protection of traditional welfare state principles, such as workers' rights, collective bargaining, protection against unfair dismissal, prohibition of child labour and social protection, health care, environmental and consumer protection, as well as access to services of general economic interest. It also makes reference to solidarity between generations, sustainable development, and market competitiveness.

At the same time, bottom-up action is taking effect through the individual member states with a process of *convergence* that enables domestic welfare regimes to remain intact.<sup>75</sup> In addition, citizens are moving across Europe, starting new lives, building families and businesses, acquiring education, and so on. The European Court of Justice is developing a jurisprudence that fits a mobile population, suggesting that the benefits of welfare will be available on the basis of residence and work, rather than origins or domicile. The European social contract is thus being interwoven by the realities of modern European life and its legal and constitutional recognition, while the European, supra-national welfare state provides the bureaucratic structures necessary for its implementation. Indeed, as Schulte notes, 'Europe will not be made all at once, or according to a single plan but that it will be built upon concrete achievements, which first create a de facto solidarity'.<sup>76</sup>

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## The Social Contract and the Market

The social contract as understood and practiced in developed, Western societies has two main features: a commitment to provide material support for various groups from public funds alongside recognition that a flourishing market is essential to social prosperity. Each society forms its own way of reconciling the inherent tension between the two features and of translating them into a social contract.

Against this background of shared values and a shared commitment to some level of redistribution of economic resources, two major paradigms are identifiable. The first, with its roots in a particular version of economic liberalism, places emphasis on personal endeavour within a relatively free market economy, with public support residual and exceptional. The second, with its roots in socialism, has reversed the emphasis: public support is prevalent and the market heavily regulated and taxed.

### *A more dynamic aspect of the social contract involves the changing character of, and approach to, risk.*

A less obvious, and more dynamic, aspect of the social contract involves the changing character of, and approach to, risk. The role of risk in relation to the social contract, and to the relation between the individual and the market in particular, is immediate. One may observe, for example, that the tripartite life course of education (and training), work, and retirement is no longer as applicable as it used to be.<sup>77</sup> Therefore, the social contract should demand the development of financial schemes that bridge the gaps in normative life and work courses. Periods of work and non-work do not align as closely as they did in the past with formal age-based life stages. People may opt for a 'second career' after the age of forty; a parent in mid-career may take substantial

leave from work following the arrival of a child to the family; families may break up at one stage and may form (again) at what used to be considered a very late stage. Accepting different life trajectories as equal would mean expanding the welfare system 'beyond employment'<sup>78</sup> risk and towards securing individual itineraries.

And so, an analysis of interrelation between the social contract and the market is, to a great extent, an overview of the way society addresses certain risks that an individual may face over his or her life course. Following a theoretical discussion concerning the relation between the commercial and the social contract, this section will discuss three central 'types' of risks: old age, disability, and unemployment. Though all are forms of risks, there are important distinctions between them, particularly with respect to the way society tends to view its obligation to meet the relevant risk. Thus, pensioners are viewed as *deserving* assistance because they are no longer expected to work, and their grants should somehow relate to their pre-retirement income. The rights of the able-bodied unemployed to income support are contested because many think that they should be earning their maintenance. The truly disabled should be provided for, while the fraudsters (i.e. those who actually can work) should be exposed and forced to enter the labour force. The section concludes with a suggestion that avoids these categories altogether: the basic income guarantee.

### *Between the Commercial and the Social Contract*

When considering the impact of social contract theory on the market, it is of fundamental importance that contractual terminology is employed. Indeed, some have argued that 'the general social contract cannot be completely dissociated from private ... contracts'.<sup>79</sup> And yet, others have suggested that

*the social contract is always a distinct and special contract, which cannot and must not be put on a par with the everyday contracts of buying and selling with which everyone is familiar ... Ordinary contracts leave the personality of the contractors intact ... The social contract ... aims always at giving practical effectiveness to a common will regarding the fundamentals of human coexistence shared by the contractors.<sup>80</sup>*

The question, then, is: to what extent are the basic features of the commercial contract transferable to the *social* contract? Michael Freeden explained that the New Liberals, such as Hobson and Hobhouse, worryingly observed how social contract tenets, such as the term 'natural rights', became the bastion of ideological protection for the well-to-do.<sup>81</sup> They sought, then, to reformulate the term 'natural' to entail what was essentially necessary to human well-being. Arguing that 'any genuine right is one of the conditions of social welfare',<sup>82</sup> the New Liberals suggested by 'genuine' that it is the *de-contractualization* of rights and their unconditionality that paved the way for welfare thinking. This precise thought has led critics of the social contract to contend that the device of the contract should be left to the commercial sector, while basic rights should be unconditional. The problem identified is that a contractual approach supposedly legitimates the conditionality of rights on the fulfillment of certain obligations, which are only remotely related to the interests that the rights are to advance. For example, the concept of a contractual right to welfare may be conditional on good moral behaviour, on relinquishing the right to privacy, on the signing of loyalty oaths, and so on. Conversely, in the early days of the Aid to Families with Dependent Children programme in United States, *unconditional* welfare was said to free women from arbitrary decisions made by welfare authorities.

## **Pensions**

Entitlement to old old-age pensions is one of the cornerstones of public policy. The elderly have been perceived from time immemorial as 'deserving' of assistance, and conditions for entitlement tend to be relaxed, when compared to other groups. But questions remain. Firstly, what should be the level of support awarded to pensioners? It seems a given that a pension system should relieve retired workers from poverty and destitution, but how much beyond that? How large a grant should systems be striving for, and how much is realistic to achieve? The ideal of 60% pre-retirement income for all pensioners no longer seems feasible for many countries.<sup>83</sup> Secondly, asserting a right to pension support still leaves unresolved the question of who holds a duty. Responsibility could lie with the government, the employers, or the retirees.

When designing the parameters of this aspect of the social contract, one cannot ignore the wider political context where a paradigm shift in risk-sharing is discernible. Employers are freezing or terminating their participation in pension schemes. Governments are increasingly adopting a 'personal responsibility' narrative that adds to the burden that workers are expected to shoulder in saving for their own pensions. The most significant policy change in this direction is the shift from Defined Benefits (DB) schemes to Defined Contribution (DC) schemes. DB plans are typically employer-sponsored where employee benefits are calculated based on a formula using factors such as salary history and duration of employment. Investment risk and portfolio management are entirely under the control of the company, and it bears the risks for funding shortfalls. In DC plans, a certain amount or percentage of money is set aside each year by a company for the benefit of the employee, but the yield for the employee upon retiring is undetermined. The amount contributed is fixed, but the benefit is not.

This paradigm shift, however, relies heavily on an informed and responsible approach by employees to invest in their old age funds. And yet, many workers

cannot be trusted, or expected, to make the informed and rational decisions to assure themselves a retirement period free of economic concerns.<sup>84</sup> In fact, the average DC saving in the United States is \$60,000, well below the amount needed for a decent retirement package. What can be done to change this state of affairs?

Educating employees to be prudent in their savings may be important, but it does not suffice as a central pillar of public policy. One possible alternative policy approach concerns retirement age. Current pensions systems were designed to fit a working life that is very different from the current one. Instead of a working career of over forty years and a retirement period of five to seven years, the retirement period for many is now approaching twenty years in most industrialized countries. Only forty years ago a person was expected to work for fifty years out of a life expectancy of sixty-eight. These numbers have changed significantly: life expectancy at birth in OECD countries was 79.2 in 2009,<sup>85</sup> while an average person worked for less than thirty-nine years. These demographic changes have immediate fundamental effect on pensions. To the demographic changes one should add changes in individual aspiration, as the trend increases for individuals to retire early. The threat of a crisis is plainly present.

Different countries have addressed the matter in different ways. An extreme example was provided by Chile. Highly influenced by Milton Friedman and the Chicago school, Chile met the challenges of pension reform with the market solution: privatization. This meant abandoning the pay-as-you-go (PAYG) model in favour of pension funds that are invested in the economy. The immediate advantage was apparent in the first decade following the reforms: the funds invigorated the economy and led to a very high yield on pension portfolios (averaging 13.8% during the period from 1981 to 1994). However, privatization exposes social security to the vicissitudes of the market, and, indeed, the yield on Chilean pensions dropped during the following decade to 4.6%, including two years of negative returns on investment.

What can be learned from the Chilean experiment? It seems safe to assume that some sophisticated employees-cum-investors will manage to take advantage of the schemes. Others, due to imperfect knowledge of their rights or the best way to maximize them, may lose coverage completely. Lastly, privatization may increase competition, but it may also lead to monopolies or oligopolies. In the case of Chilean pension funds, for example, competition was very limited, the portfolio was hardly diversified, and transaction costs were very high.

Though the Chilean solution was far from perfect, the problems it identified were very real: the moral hazard of workers taking early retirement without being penalized for their decisions; the employers' tendency to prefer less costly and sometimes more adept young workers over the experience of older workers; and the political inability to force people to stay at work for longer. The quick-fix solution in Chile was to shift responsibility from the government to individuals. Faced with very similar problems, Western countries are reforming their system to increase financial stability and actuarial viability. Sweden, for example, is experiencing new social pressures since the late 1990s, putting the Swedish welfare state to the test.<sup>86</sup> It responded by a sophisticated, part-privatization scheme. In this scheme, the annuity is split into two: one part continues to follow a PAYG scheme, while the second is a defined contribution scheme, managed with a pension fund. Even with respect to the market-based scheme, the government did not withdraw completely from the regulation of the privatized funds. These funds are supervised by a government agency that helps the insured in dealing with their investments, thus creating 'a unique combination of competitive market and government regulation and intervention'.<sup>87</sup>

Finally, a discussion of the pension scheme cannot be complete without an account of other social programmes. Most pertinent, since the retired have a greater need for more expensive and more frequent health care, their expenses on such matters will be higher. If the purpose of the pension system is to guarantee a decent life through retirement, it should

take into account such spending. And so, either the grants should be proportionally higher or health care coverage should be guaranteed through other means.

### *Disability Benefits*

The fact, already noted, that 'objective' data is subject to interpretation by social rules is also clearly exhibited in recent reforms in the field of disability benefits.<sup>88</sup> Encountering exceptional growth in the numbers of individuals drawing disability benefits (an analysis of OECD countries exhibits a median of 5%, and a maximum of 13%) and in the related public expenditure (more than 1.5% of GDP, 11% of public expenditure), many countries are restructuring the rules that govern the system. Trends are visible in three areas: (i) changing the definition for disability so as to make eligibility more difficult; (ii) tightening conditions for continued receipt of benefits; and (iii) improving the almost nonexistent outflow of beneficiaries (back) into the labour market.

The first trend seems to be the most striking, for it signifies a clear break from a very long tradition of viewing the disabled as 'deserving' of assistance and as exempt from entry into the labour market. Moreover, the methods currently used to deter disabled individuals from joining the welfare rolls have a familiar antecedent: they are the same methods that were, and still are, used to deter able-bodied unemployed individuals from receiving income support. The idea was that relief should be made so disagreeable to the recipient that s/he would be persuaded or forced to devise some means of self support in order to get off the list as swiftly as possible.<sup>89</sup> To achieve this, benefit rates are reduced and the process for determining eligibility has become more complicated and more onerous (including degrading physical examinations). The contribution of a strict process, termed 'a bureaucratic design in deterrence',<sup>90</sup> to reducing claims from (otherwise eligible) beneficiaries is now being widely documented.<sup>91</sup>

It is important to understand the background to this trend. It not only explains the paradigm shift, but also has implications for a wider set of trends that lie

at the heart of recent social policy reform. It is, indeed, a change in the social contract with the disabled community. First, greater medical knowledge paradoxically brings about claims, such as mental illnesses and back pains, that are difficult to evaluate and difficult to deny. Such claims may be fraudulent, but may also be brought by a person in serious, and even debilitating, pain.

Directly related is the ideological, or normative, trend: increased targeting in the distribution of benefits, a much stronger emphasis on labour market integration, and higher importance attributed to preserving fiscal austerity. Though these trends are much more visible where unemployed individuals are concerned, it is important to note that they have pierced the veil that was thought to grant immunity to disabled individuals.

### *Unemployment Benefits and Income Support*

In contrast to the normative underpinnings of income support to the elderly, income support for the able-bodied has always been controversial, and is increasingly under threat. While retired workers are perceived as entitled to unconditional income support, the unemployed who can work are often referred to as 'undeserving'. When dealing with income support for the unemployed, the question of financial sustainability becomes secondary to the question of desert.

### *Denying benefits on grounds beyond an individual's control is punitive and defies justification.*

Policymakers from Elizabethan times to the present acknowledge that a humane society must make sure that its members do not suffer the indignity of extreme poverty due to circumstances beyond their control. Denying benefits on grounds beyond an individual's control (e.g. on grounds of nationality or race) is punitive and defies justification. An individual, in other words, should not be made the victim of

'brute luck'.<sup>92</sup> Less clear is the appropriate policy towards people who are judged to be doing less than enough to achieve a life of productive work and self-reliance.<sup>93</sup> The problem is that, arguably, the distinctions between poor and pauper, between deserving and undeserving poor, are socially constructed and ever changing?<sup>94</sup> Tocqueville, for example, expressed his reservation about an endeavour that presumes to detect 'nuances that separate unmerited misfortune from an adversity produced by vice'.<sup>95</sup>

Scholars critical of contemporary welfare programmes suggest that there is very little factual basis to the distinction between deserving and undeserving poor. American cash assistance programmes, for example, were designed to assist single mothers to fulfill the woman's role of the homemaker. The programmes constructed women as 'deserving' by virtue of their status.<sup>96</sup> And even then, the image of the recipient was that of the 'worthy white widow'.<sup>97</sup> Joel Handler reports that while white widows were helped, the 'vast majority of poor mothers and their children' who were 'divorced, deserted, never married, of color, or engaged in questionable behavior' were denied aid.<sup>98</sup> Of course, sixty years later, the 1996 Personal Responsibility and Work Reconciliation Act (PRWORA) resituated the whole category of single mothers as 'welfare queens' and as paradigmatic undeserving recipients. But some scholars are arguing that government focus on programmes to integrate individuals into the workforce paradoxically reinforces the 'free market' discourse and immunizes it to social and political critique.<sup>99</sup>

### **The Surprisingly Persistent Call for Basic Income Guarantee**

Within the framework of the social contract, the matter of income support raises particularly interesting questions. Who is entitled to income support from the government? Under what conditions? What should be the level of such support? What is the justification for the grant?

The movement away from conditionality in income support is most clearly articulated by those

supporting a basic income guarantee. According to this scheme, government should award every person, regardless of income or work effort, a periodical sum at the highest possible rate each society can afford. This grant should be given in addition to needs-based, means-tested support currently distributed. The idea of a Basic Income Guarantee (BIG) is not novel: Thomas Paine's 1796 pamphlet *Agrarian Justice* is noted as an early pronouncement of the idea. And yet, notwithstanding the widespread view that it is normatively and politically infeasible, the BIG scheme has recently received strong support from prominent scholars (including several Nobel Prize laureates) of very different political leanings.<sup>100</sup> Some of those differences will be described below.

But before assessing the scheme's details, the *idea* of basic income forces us to reassess the social factors that we hold as valuable to the design of income support policies. Should the main motivation for income support schemes be fiscal austerity, the enhancement of personal freedom, or some combination thereof? Does the government have an identifiable obligation to (re)distribute wealth to all citizens *qua* citizens? Should governments encourage a particular family structure? These are just a few fundamental questions that are raised. Since it is possible here to investigate only one such theme, let us consider the most obvious one: the social attitude towards work and the duty to work. Following one of the main themes of this report, two central strands of investigation can be identified: the first is factual, and the second is normative.

The factual strand of the argument concerns the future of work or the future of work as we know it. Sociologists and economists have noted, over the past decade, the loss of over 50 million manufacturing jobs.<sup>101</sup> Moreover, while some have initially hoped that an increase in service jobs will make up for this loss, the technological changes that are having a major impact on manufacturing industries are beginning to have a similar effect on services. Michael Opielka argues that 'internet banking, voice recognition services, automated supermarket checkouts and internet traders ... all

indicate that the service sector will show possibly an even more dramatic collapse in number of jobs than the manufacturing sector'.<sup>102</sup> To this one should add that the trend towards greater flexibility in the labour market has resulted in a majority of workers, in an increasing number of jurisdictions, working in part-time, temporary and often low wage jobs.

Assuming this description is accurate and that no change in direction is foreseeable, the normative question must be raised: what is the justification for holding work as a central personal obligation owed by individuals to society at large? More directly: what is the justification for continuing to attach work requirements as a precondition to income support? The answer to this question may be helpful when assessing not only *if* we should favour basic income, but also (assuming arguments for such schemes are convincing) *which* basic income scheme we should prefer. Basic income supporters sometimes mean a form of wage subsidy or 'negative income tax'. Far from removing the obligation to work, negative income tax schemes, preferred by libertarians such as Milton Friedman, Friedrich Hayek, and Charles Murray, attempt to perfect the incentives to work. Here the level of basic income would be low enough so as not to create severe disincentives to work. The libertarian support for this model rests on a crucial factor: such schemes will, per Murray, 'replace the welfare state'.<sup>103</sup> Though the sum will not be very high (around \$10,000 per year), it will be enough to allow

every individual to invest in his or her preferred health and pension plan, and still leave a limited amount for maintenance, such that work incentives will not be undermined. The realities of the changing nature of the labour market, noted above, are left unanswered by this approach.

A more traditional basic income scheme completely decouples work and income support. Taking into account the nature of the modern labour market, it provides assistance to those who do not wish to make themselves available to the labour market. Such schemes are currently discussed (and partially implemented) in Germany. An interesting justification for this model is offered by Philippe van Parijs. He argues that as jobs are becoming a rare commodity, job holders should be paying an 'employment rent' that will be used to support those outside the labour market. Indeed, by supporting 'surfers off the coast of Malibu' pressure to push down wages is relaxed, to the advantage of job holders.<sup>104</sup> Needless to add, since the justifications for such schemes are very different, they do not entail abolishing other forms of assistance, such as education, health care, job training, disability benefits, child care, pensions, and so forth. While basic income, under this scheme, wishes to increase autonomy and repair some failures in the modern labour market, it does not seek to encourage government to wash its hands of those who need it the most by simply offering them money in place of welfare.

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## Distributive Justice under the Social Contract: Poverty, Employment, and Taxation

### *What is Deprivation?*

Poverty is an elusive phenomenon. A look at the global arena could suggest a very low common denominator: the lack of tangible things necessary for survival, such as food, clothing, shelter, safe drinking water, etc. These are, most commonly, problems that afflict developing nations, and are best addressed through international instruments. Within developed nations, there are two distinct approaches to measuring poverty: absolute and relative poverty. The United States is now alone in employing an absolute measure of poverty, created in 1963. It is based on the dollar costs of the US Department of Agriculture's 'economy food plan' multiplied by a factor of three. In contrast, the main poverty line used by the rest of the OECD nations is a relative poverty measure based on 'economic distance', a level of income set at 60% of the median disposable household income. As may be expected, measures will differ depending on the definition of poverty. Thus, based on absolute measures of poverty, the poverty rates in the US are slightly lower than those in the EU (about 12%). However, based on relative measures of poverty, the US has significantly higher rates than the EU (24% versus 16%).<sup>105</sup>

So, very early on, we find that different definitions of a social problem (e.g. poverty) will affect the way certain policies (e.g. taxation) are assessed. It is quite clear that, when assessing the situation in developed countries, 'we are not', in Doug Besharov's words, 'in the terrain of subsistence poverty'.<sup>106</sup> And yet, *relative* poverty has proven to have serious consequences for the well-being of children and adults, bearing as it does on their cognitive capabilities, educational attainments, the probability of being a victim of crime and of being a perpetrator, as well as on other aspects of social inclusion. Relative poverty, in other words, seems much more relevant for an analysis that has a social contract

paradigm as its background, notwithstanding the fact that there is an inherent danger in social contract theory that by defining a contract between parties, certain groups will be excluded. Indeed, many governments view tackling relative poverty and great disparities in wealth as a vehicle towards social inclusion.<sup>107</sup>

*An individual's satisfaction may decrease even when his material situation remains unchanged, simply because the situation of others has improved dramatically.*

The important concept, therefore, should be that of *relative* deprivation.<sup>108</sup> Because our desires and pleasures stem from society, they are relative in nature.<sup>109</sup> Therefore, an individual's satisfaction may decrease even when his material situation remains unchanged, simply because the situation of others has improved dramatically. The relevance to taxation, insofar as it affects distributive justice, should be apparent: if growth is not accompanied by a just allocation of its fruits, it may worsen the situation of those at the bottom rungs of the social structure. Women and racial minorities began to experience feelings of increased deprivation the more they perceived themselves, and were perceived by others, to be equal participants in society. Their social reference group was significant in the way they felt about their own situation, even when it did not change in absolute terms. Only when women entered the labour market on equal terms did they start feeling deprived when studies showed their wages to be lower than those of men performing comparable work.

### *The Tax System*

Though many writers on welfare initiatives and the policies deriving from social contract paradigms focus on just spending, surprisingly few, tax scholars and libertarian constitutional law scholars being the exception, have written on just takings. However, a complete portrayal of the social contract demands attention not only to what the state must provide, but also to the financial burden these provisions entail and the way they will be funded. This is, then, the first motivation for including taxation within the scope of the analysis.

The primary purpose of taxation is to collect government revenue; however, it is not the only purpose. Taxation also has an important role in achieving equality and distributive justice. What constitutes justice and how it is achieved is, of course, a matter of some debate. Matters become even more complicated when we consider a third purpose of tax policy: the creation of incentives and disincentives to regulate certain social and economic behaviour.<sup>110</sup> How are all these purposes, and the values underlying them, to be determined and implemented? Here the concept of the social contract may be helpful. It has been noted that while people reject taxes that are unfair or excessively levied, fair taxes are generally viewed as a responsibility that we all should share and accept. If they are based on consent (a central, albeit evasive, concept in social contract theory) then taxes are viewed as a desirable good, not a necessary evil.

Taxation discourse is thus closely related to social contract concepts and methodology. A theory of taxation demands identifying the relevant rights and obligations that a modern society should recognize, the relevance of certain moral principles in the design of a tax system and the effect that such a system may have on social and economic incentives, which can possibly be referred to as the 'reflective equilibrium'.<sup>111</sup>

The first purpose of collecting revenue may be governed by two principles of justice: one is the benefit accruing from the tax; and the other is the

ability to pay the tax. These approaches could be phrased in social contract terminology, where the benefit approach would reflect a narrow understanding of the contract, while the ability to pay would reflect a broader, vague conceptualization of the contract. The benefit approach requires individuals to pay only for those goods that they themselves enjoy. An immediate, practical objection to this approach relates to the finance of pure public goods, such as public order or clean air, identified by the ability of everyone to benefit from them without decreasing their quantity or quality. But pragmatic objections may lead to pragmatic solutions, and we can simply agree on a mechanism for the allocation of the burden. For example, we may agree that all residents benefit similarly from public goods or that richer people benefit more from public order, because they have more to lose.<sup>112</sup>

But a more fundamental objection concerns the idea of justice underlying the benefit approach. In a 'strict contractarian' approach, people are expected to give (and receive) 'something for something'. As noted, reciprocity is indeed central to modern contractarian thinking. It is reflected in the idea that 'those who willingly share in the social product have a corresponding obligation to make a reasonable (albeit proportional) productive contribution to the community in return'.<sup>113</sup> But how closely should we tailor the relation between the 'share' and the 'contribution'?

T. H. Marshall, for example, argued in favour of a vague notion of reciprocity, which consists of a wide array of rights in return for the most general obligations.<sup>114</sup> Such a position has the advantage of creating a sense of solidarity, of a mutual endeavour. 'Earmarked' taxes, on the other hand, break down society, reducing it to a sophisticated mechanism for market coordination, where individuals purchase certain goods as distinct groups. This mechanism would be more acceptable against a background of just distribution of economic resources. Otherwise, poorer individuals may be excluded from certain goods due to their inability to pay. On the other hand, the benefit principle may be a fair and

legitimate way to provide for publicly provided goods, such as higher education, highways, and public service pensions. Arguably, if such services are financed by the public purse, the real effect would be to subsidize services that those with the highest ability to pay benefit from the most.

And so, perhaps fair taxes should be apportioned according to an individual's ability to pay? John Stuart Mill is an early advocate of this approach, arguing that 'equality of taxation, therefore, as a maxim of politics, means equality of sacrifice'.<sup>115</sup> But what does 'equality of sacrifice' really *mean*? The problem here combines normative and empirical assessment. Relying solely on earnings seems to arbitrarily excuse from contribution individuals who derive property-based income. Personal wealth, then, could be a measure of ability to pay. And perhaps even easier to administer would be a sophisticated consumption tax.<sup>116</sup>

The second purpose of income tax, regulation of social and economic behaviour, is clearer in theory than in practice. David Duff argues that the fairness of a tax that seeks to regulate behaviour depends upon the justice of the regulatory goal (reducing smoking, pollution, etc.), the relationship between the tax and the goal, and the distributional effects. But while the first two seem straightforward, a large part of the conclusion rests on the 'distributional effects', or, perhaps a better term, 'the law of unintended consequences'. Thus, an environmental tax may seek to make business less profitable for major oil companies by forcing them to internalize the pollution they create. But such industries may impose the burden of the tax (as well as the burden of pollution) on the drivers, who may often be low-income earners.

The third and final purpose of taxation is that of distribution. This purpose may be hopelessly difficult to realize, in light of the widely different approaches to distributive justice (including the position that no such concept exists).<sup>117</sup> Even within the modern social contract tradition there are significant disagreements. Rawls and his followers argue that justice is served when measures are taken to limit the occurrence and

consequences of social and economic inequalities and when the circumstances of the least well-off are elevated.<sup>118</sup> In contrast, others embrace the Hobbesian strand of the social contract, arguing that the market is a moral-free zone of self-interest and rational choice. Memorably (and controversially), contractarian David Gauthier argued that '[t]he rich man may feast on caviar and champagne, while the poor woman starves at his gate. And she may not even take the crumbs from his table, if that would deprive him of his pleasure in feeding them to his birds'.<sup>119</sup>

Disparate as even social contract theories of distributive justice are, it seems implausible that an agreement may be reached in a manner that could be transferable in an encompassing way to the tax code. And yet, all tax policies affect distribution and redistribution. Distributive justice paradigms, including those rooted in the social contract tradition, are helpful to inform the debate on the intended and unintended consequences of particular tax policies, to critique them against a background of broader notions of fairness, and perhaps to have an effect on the nature and details of some tax measures.

### ***A Closer Look: Consumption and Estate Tax***

A great deal of the public debate concerning tax levels focuses, as a matter of course, on only one aspect of the tax structure: income tax. Though obviously of importance, income tax does not cover the extent of the tax base. Moreover, two other tax schemes, consumption tax and estate tax, raise theoretical issues that serve as interesting case studies for the social contract paradigm.

Beginning with consumption tax, Ed McCaffery finds that the tax structure currently in force differs from the ideal type that would have been chosen under a Rawlsian veil of ignorance.<sup>120</sup> He finds two central bones of contention: first, the current tax system is largely a wage tax, with little tax on financial capital and no tax of wealth. And second, the estate tax, which is supposedly the most progressive, ironically encourages high-end consumption by the wealthiest.

His response to these matters follows Rawls, who concludes, in a rare prescription for concrete policy, that 'a proportional expenditure tax may be part of the best tax scheme'.<sup>121</sup> This assessment is interesting, because both Rawls and McCaffery advance a progressive agenda that seeks to limit inequality and its consequences by objecting to what is commonly seen as the most progressive tax (estate tax) and arguing for what is often viewed as the most regressive tax (consumption tax).

The axis for the argument in favour of a consumption tax is the Haig-Simons definition, which is essentially:  $Income = Consumption + Savings$ . A simple rearrangement of this equation would result in:  $Consumption = Income - Savings$ . Therefore, by taxing consumption, the state *does*, in fact, tax income. It does so, however, while excluding savings from the tax base. The important advantage of this suggestion is related to a matter mentioned earlier: most individuals are not saving enough in general, and for their pensions in particular. Moreover, because most individuals do not save, the current income tax is, arguably, for most taxpayers, a consumption tax. However, if savings are excused from taxation, it may well provide incentives for much needed savings. It also, in McCaffery's words 'smoothes out labor market earnings' for those whose earnings are uneven throughout their lifetime. This objective is consistent with the change in the life cycle, previously noted: individuals move in and out of the labour market more often than in the past. The current policy prescribes taxing high incomes at high rates for one year, while the next year there could be no income at all.

When the individual withdraws money for private consumption, the state takes its share. And because the tax is progressive, the greater the private consumption, the greater the public share. While not necessarily creating an incentive against consumption, this structure creates a strong incentive against *waste*. Positing it against the current state of affairs, we find that the estate tax creates an incentive *to waste*, because the more a wealthy individual leaves behind, the more is taxed by the state.

Turning to estate tax, we find that arguments in favour of this scheme follow the value principles noted above: some are justified as the most proper way to finance the state; some were based on the moral preference for equality of opportunity, or meritocracy over dynastic wealth that could lead to political power; and some were based on a perception that the estate tax could be a vehicle for distributive justice, transferring money from the rich to improve the living conditions of the poor.<sup>122</sup> Each of these principles stems from a different aspect of a country's social contract, and so its effect (or lack thereof) on the nature of the inheritance tax is indicative of the character of a particular country's contractual foundations.

Beginning with the economic aspect, the argument that the estate tax is vital to generate income was paramount during war times and fiscal crises in the United States. And yet, it is illuminating to learn that in the United States, France, and Germany, the estate tax never generated more than 2% of the total tax revenue. This could suggest that the security and fiscal crises simply presented pretexts for a tax that seemed justified for other reasons.

One such reason is the liberal concept of equality of opportunity, which is closely related to the preference for meritocracy. Warren Buffet linked the two when he stated that a 'progressive and meaningful estate tax is needed to curb the movement of a democracy toward a plutocracy'.<sup>123</sup> This statement is supported by the data provided by the American Internal Revenue Service. The data shows that, unlike the past, in 2004 only 19,000 American estates, or less than 1% of annual deaths, were subject to estate tax payments. Moreover, more than half of the revenue from estate tax came from only 7%, or 1366, estates. And the 510 largest taxable estates paid just under \$8 billion. The greater portion of the estate tax, in other words, is paid by the super rich. However, this conclusion also suggests that equality of opportunity, on a broad scale, cannot be derived from a tax that captures such a small portion of families. Conversely, it may be the case that justification for the tax rests on the supposition that tax should be levied on those

who can pay (recall the 'equality of sacrifice'). While this may or may not be a legitimate moral principle, Rawls's reflective equilibrium demands that we visit the practical implications of the model. If the tax leads to increased consumption because the testator prefers to spend it rather than to give it as tax, the case against waste becomes quite relevant. Moreover, a dynastic concentration of wealth could indeed result in dynastic political power. However, the consequences could be quite reversed. As McCaffery notes, Ross Perot, Mitt Romney, and Michael Bloomberg can be seen as examples of superrich individuals who prefer to spend their money and gain political power rather than be subject to the estate tax. Lastly, the estate tax could provide incentives not for increased consumption, but rather for very generous public donations. In most cases (hospitals, universities, cultural centres) this is probably a positive result. And yet, contributions may also go to less favourable causes, making the comprehensive moral argument contingent on matters such as the testator's preferences.

### **The New Social Contract for Work**

The employment relationship may be a significant contributor to positive social relationships and personal fulfillment, but can also be a source of subordination and exploitation. Nonetheless, work is seen as a social panacea to many of society's ills by writers of very different political positions. Thus, Edelman views the best way to get more people into long-term, lasting relationships is to get more people employed in safe and satisfying jobs. This is not too far from Charles Murray's position, who wrote that 'young men who don't work don't make good marriage material'.<sup>124</sup>

For these reasons, it became important in market economies at the beginning of the twentieth century for the opposing forces of labour and capital to reach a form of social contract or constitutional settlement, to provide a framework for collective bargaining between employers and unions. The terms of this social contract were founded on a mutual recognition: trade unions recognized the legitimacy of private ownership of the means of production, and

employers would concede both an input into the management of the enterprise and the right to bargain as a cartel on behalf of their members for better wages and conditions. The outcome of the procedure would be regarded as a just settlement, a fair distribution of wealth and power. This agenda, known as 'industrial pluralism', remained intact throughout the twentieth century, despite frequent changes in the law.<sup>125</sup> Scholars are almost unanimous in arguing that this social contract is fragmenting.<sup>126</sup> Paul Davies has argued that recent changes amount to a 'revolution in governmental policy relating to the collective representation of workers vis-à-vis their employers'.<sup>127</sup> Hugh Collins sheds light on the way contemporary employment policies form a fundamentally new social contract, devoid of a Rawlsian pursuit of a just end-state such as a more egalitarian society, and closer to a Hobbesian conception of guaranteeing procedural justice necessary for society's self-preservation.<sup>128</sup>

### *An interesting consequence of increased individualization of the workplace is the 'constitutionalization', or 'juridification' of employment relations.*

A complementary element to this portrayal of employment policy is the increased importance granted to *flexibility* of labour. Traditionally, trade unions generally produce greater rigidities in the labour market, but their aim of securing sector-wide collective agreements is in inherent tension with, and is being superseded by, the corporate interest in reaching particular, decentralized, and even individualized contracts with employees.<sup>129</sup> An interesting connection may be observed between this ideology and the growing popularity of a managerial trend, which emphasizes human resource management (HRM). If collective bargaining served as the platform for the traditional social contract at work, the HRM model may be seen as setting the conceptual and organizational platform for the individualized, modern contract. The implications of this model have yet to be studied, but it is a clear

possibility that HRM increases the divide between core and periphery workers. HRM has the potential, through the use of targets and indicators, to erode the working relations between 'insiders' and to 'performance manage out' groups of workers.

An interesting consequence of increased individualization of the workplace is the 'constitutionalization', or 'juridification' of employment relations. Workers who formerly turned to trade unions are now turning to courts. Litigation between employees and employers is a growing phenomenon, resulting in negative externalities, including lawyer fees, instability in the workplace,

and an adversarial atmosphere. These externalities have replaced the positive goods supplied by the traditional social contract at work.

All this begs the question: can this trend be reversed? In some countries, such as Finland, Ireland, and the Netherlands, successful efforts have resulted in the creation of 'social partnerships' between unions and employers, which grant unions a positive role in restructuring the firm.<sup>130</sup> Maintaining traditional concepts, while adjusting to modern circumstances: that is the challenge of the social contract for work, and for the social contract in general.

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## Conclusion

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Originally, the social contract sought to conceptualize the justification for governmental power itself. It resurfaced in modern political thought in the early 1970s, and has now become a central concept in philosophical, legal, and policy discourse. It is the aim of the Social Contract Revisited programme, and this report, to shed light on its strengths and weaknesses; on the potential for social contract discourse to draw attention to our presuppositions and to encourage a reassessment of our institutions.

In particular, the greatest strength of social contract methodology, as constructed first by John Rawls, lies in its attempt to distinguish empirical claims from normative assertions. Each has its role, and each should be assessed with scrutiny. The framework of the 'reflective equilibrium' makes clear that the two types are not hermetically distinct. Normative claims cannot be made in a vacuum, and empirical analysis must not be blind to society's cherished values.

The fact that avowed contractarians hold opposing views on policy matters – including taxation, health policy, education funding, work, and welfare – suggests that social contract *methodology* does not lead to predetermined policy conclusions. It may, however, allow for a more productive debate, laying a framework of theoretical engagement while allowing for differences of perception and prescription. That, in itself, cannot be belittled.

The idea of a (genuine) basic income seeks to obviate many such divisions, and that is one of its obvious appeals. It is not yet clear, however, whether such a scheme is economically or politically feasible, and whether it is normatively advisable. And so, until such schemes are implemented, it is important to address the structure of current income support schemes, such as those that cater for the needs of the unemployed, the disabled, and the elderly. Such programmes have undergone radical reforms encompassing privatization, increased targeting of benefits, a move from state to personal responsibility, and stronger emphasis on the fiscal viability of the schemes. What is the effect of these trends? Do they further enhance or further weaken the original intent of the programmes?

First, and most obviously, taxation sets the mechanism that provides the funds for the role of the state as designated by the social contract. But much more than that, understanding the principles of a particular tax system grants insight into the notions of fairness and justice that drive the social contract, much beyond economic considerations.

A series of interesting questions, then, derive from this enquiry into the relations between two distinct systems: on the one hand, a particular tax structure, and on the other, a particular social structure, encompassing notions of solidarity, heterogeneity, gender relations, and so forth.





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The mission of the Foundation is to study, reflect on, and promote an understanding of the role that law plays in society. This is achieved by identifying and analysing issues of contemporary interest and importance. In doing so, it draws on the work of scholars and researchers, and aims to make its work easily accessible to practitioners and professionals, whether in government, business, or the law.

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