

**The Social Contract Revisited: The Modern Welfare State**

Empirical and Normative  
Claims in Social Contract  
Arguments: Historical and  
Theoretical Perspectives

REPORT AND ANALYSIS OF THE INAUGURAL WORKSHOP OF  
*THE SOCIAL CONTRACT REVISITED*, RHODES HOUSE, OXFORD  
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## Introduction

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This report is intended to provide both a record and a critical assessment of the first workshop of the Foundation for Law, Justice and Society's programme on *The Social Contract Revisited: The Modern Welfare State*. The workshop was held in Oxford on 18th to 20th April 2007.

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 by different jurisdictions and peoples. Policymakers are prone to ascribe clear and unproblematical meanings and significance to the idea, and to rely on it in justifying their policies, as contemporary practice in relation to welfare shows. Others question whether the notion of a social contract serves any useful purpose.

The objects of this first workshop were to identify and scrutinize the normative principles that lie at the foundations of social contract thinking, and to examine the relationship between them and modern welfare state practices. In doing so, participants addressed their attention to facets and trends which are both prominent in contemporary societies and relevant to the social contract and the welfare state. These include issues of membership, such as gender, race, and immigration; they also include issues of privatization, globalization, ageing of the population, and demographic changes. Considering the diversity of backgrounds and disciplines from which they were drawn, the participants were well placed to conduct a searching examination of these issues.

## Contract, Obligation, Rights, and Reciprocity in the New Modern Welfare State

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Keynote Lecture by **Professor Lord Raymond Plant**

Chair: **John W. Adams**

Lord Plant described two contractual approaches to the welfare state: the comprehensive and the particular. According to the first, the social contract is used to justify the welfare state *in general terms*, while conversely, in the second, it is used to justify a *particular element* of the welfare state, such as the relationship between rights and responsibilities.

In the comprehensive sense, the social contract sets out the political and constitutional framework for institutions and policymaking in a given society. The question then arises: is the contract a useful instrument in constructing the framework? The answer depends on different models of the welfare state, since the amalgam of normative and empirical claims on which any model is based varies from one to another. In terms of normative claims, the values of justice, need, freedom, equality, and the rule of law should be given their place. Each society should decide what demands these values 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.

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In reality, however, the position 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' account of the social contract provides an example. The contractual parties will know certain things about the state. They will have some empirical knowledge. But how far can this assumption be taken? 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 are given 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.

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. An element of the contract will be the character of the welfare state. However, quite removed from this ideal, one can describe three distinct welfare state 'types': the Libertarian Welfare State, supported by Hayek and Nozick; the Insurance-Based welfare-state, which William Beveridge imagined; and the Citizenship-Based Welfare State, which T. H. Marshall envisioned. Although the three are very different from each other, each depends for its legitimacy on a mix of empirical, normative, and hybrid considerations.

Throughout his lecture, Plant declined to pass judgment on the feasibility of this approach in arriving at a social contract, his purpose being to demonstrate its structure. Nevertheless, the question may be posed: is the combination of empirical and normative claims a sound way of constructing an acceptable social contract?

Another related issue is that social contract arguments are always *hypothetical*. Social contract philosophers constantly ask 'what if?' as a preliminary step towards an argument for principles to govern a fair and just society. This raises the issue of whether such hypothetical or counter-factual moves rely on assumptions about human behaviour and social dynamics that are significant and can be controversial. This applies equally to arguments for and against welfare policy that are often based on unsupported intuitions rather than facts. Examples of this tendency appear when academics and policymakers try to estimate the effects of policies on dependency, atomization of society, family structure, workforce participation, and educational achievements. The very structure of social contract arguments encourages these tendencies.

By combining social contract methodology and welfare state material, 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. It is prudent on this argument to state the normative values (equality, liberty, autonomy, etc.) a given society wishes to promote, and their ranking, and to be concerned with empirical claims at the implementation stage.

The converse case is that disregarding the empirical aspects renders the normative arguments rather empty – an exercise in philosophy for philosophy's sake. Philosophical analysis of course has its interest and importance. But in employing the device of the social contract, our purpose is to reach particular conclusions, such as the character of the welfare state, which are ultimately of very practical concern in the real world. The beauty, and the challenge, in articulating the philosophy behind the welfare state, lie precisely in the need to move from the drudgery of empirical fact-finding to the sanctuary of armchair philosophy, and back again, a process neatly captured by Rawls' notion of the reflective equilibrium.

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## SESSION ONE:

## The Social Contract: The Resurrection of a Concept

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**Dr Celeste Friend**, Hamilton College, New York: 'Sketching the History of the Contract: From Socrates to the Present'

**Professor Fred D'Agostino**, Queensland University: 'The Promise of Social Welfare: New Foundations for the Social Contract'

**Dr Dario Castiglione**, University of Exeter: 'Social Contract Paradigms: Political Obligation, Social Justice, and Public Accountability'

Chair: **Professor Denis Galligan**

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The purpose of the first panel was to investigate the historical appeal of social contract approaches, its use in contemporary philosophical and political discourse, and the practical applications that may be derived from it.

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. The character of social contract theories is highly determined by the way the theory views two distinctive elements: human nature and the state of nature.

Firstly, social contract theories would surely differ if one theory assumes that people are social animals who cannot escape their own psychological egoism; while another would view the individual as a rational calculator of ways to best achieve his own goals; and the third would view him as an individual who is part egoistic man, part social citizen.

The second element relates to the state of nature, the situation that, hypothetically, precedes social life.

Would life in such a state be 'solitary, poor, nasty, brutish and short', as Hobbes claims; a state of relatively peaceful, perfect, and complete liberty, though burdened by enforcement problems, as in Locke; or a peaceful period, in which people lived solitary, uncomplicated lives, as in Rousseau.

Amongst critics of classical social contract theory, David Hume is probably best known. Three strands of Hume's critique are relevant here. Firstly, he argues that *historically*, no such contractual moment existed. Secondly, *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, thirdly, *arguments of experience* suggest that people 'are born to obedience' through education and habit, rather than through consent. Hume, in a manner similar to Hegel, finds consensual theories of political agreement too weak and unstable to serve as the basis for such an important and necessary 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'. However, two centuries later, in 1971, the social contract tradition was revived by John Rawls' *A Theory of Justice*. 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.

What role, then, does the contract now hold in philosophical and social reasoning? It is plain that, following Rawls, contractarian methodology has gained prominence because it leads to results perceived by many as *legitimate*. Contractual reasoning addresses the three conditions which disqualify as illegitimate certain social arrangements. These conditions are ignorance, coercion, or taking advantage of those who lack the necessary capacity for meaningful consent. The exclusion of such factors is fundamental to the fairness and hence to the justice of social arrangements. Their exclusion is, in effect, a precondition of contractual legitimacy. The third of these preconditions is especially relevant here. To distinguish it from 'classical' contractual capacity, it may be labelled: *social contractual capacity*.

Before explaining the concept of social contract capacity, the reasoning behind the social contract methodology should be clearly articulated. Social contract reasoning includes a move from uncontroversial accounts of what stakeholders *did*, in fact, agree to, to hypothetical accounts as to what they *would* agree to if asked, and on to an ideal account of what stakeholders *should* agree to if the necessary preconditions apply.

This process of reasoning, however, raises concerns. In substituting an ideal contract for an actual one, we are also substituting idealized (free of coercion, endowed with full information, etc.) contracting agents in place of real persons. 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'. This is a problem because an original position is based on a state of affairs that is ideal, and thus starkly different from the actual one. Too great a distance between the psychological, ideological, or moral construction of our idealized people in the original position, and that of people living in today's society, risks creating a utopian vision. In order to avoid such a conclusion, theoretical models and the assumptions they depend on should be tested empirically, to the extent that is possible.

### *What role, then, does the contract now hold in philosophical and social reasoning?*

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 question whether the hypothetical contract lives up to its promise. Those espousing the hypothetical contract justify their approach in this way: if the principles they have chosen will, over time, come to be accepted and in fact regulate the society, then they will be validated *ex post facto*. The prior idealization is necessary because the members of society are too diverse, uninformed, and subject to coercion and subordination to be able to negotiate an actual contract. At the same time, retrospective validation is essential simply because today's stakeholders, and not their surrogates, have to live the contract.

The two perspectives, *ex post* and *ex ante*, are not unconnected from each other. Indeed, the crucial element is 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.

**Response: Professor Fred D'Agostino, Queensland University**

This approach has much in common with Rawls' '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 elusive of public virtues: legitimacy.

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We may ask, however, why is it important that individual persons be better contractors? The answer is simple, provided we remember that we are dealing with a metaphor. The terms 'contract' and the 'ability to contract' appear to some writers as soulless due to their commercial connotations. However, it is important to note that the social contract should be understood as sharing only strictly defined elements with the commercial contract. Both, indeed, are committed to values such as choice, liberty, and individualism. However, the social contract also incorporates other ideological facets, more associated with the contemporary term, *social inclusion*.

Like 'social contract', 'social inclusion' is based on a metaphor. It views society as a geographical entity, casting individuals on its 'margins' as experiencing difficulties in overcoming 'borders' between them and social or labour market mobility. Or, as D'Agostino suggests, the same may be said about the 'capabilities' approach, promoted by, among others, Amartya Sen and Martha Nussbaum. This approach enables the evaluation of social states in terms of human well-being (welfare). It emphasizes capabilities, such as the ability to live to old age, to engage in economic transactions, or to participate in political activities. These are construed in terms of the substantive freedoms people have reason to value. All three approaches, and possibly others, view society as being obligated to increase the individual's capacity to participate on equal terms, not only in current institutions, but also in both the idea and the construction of future institutions.

*Criticism and Discussion:*

This idea connects the social contract to welfarism and to the responsibility of the state to ensure that people have, or are helped to acquire, the capacities necessary for civil participation and for public reasoning. If the welfare of those who are worst off is not increased, then individuals born into poverty 'will interpret the social contract as no more than a



giant swindle perpetrated by the well-to-do'.<sup>1</sup> The ideal contractual moment assumes that the idealized surrogates are free of coercion and enjoy full social contract capacity. This would mean that they are able to negotiate with their peers on equal terms. Of course, this is an ideal portrayal. And yet, if it is not to be rendered meaningless, the state has an obligation to cater for the needs of those stakeholders who are worst-off. It has the obligation, in other words, to move them closer to the position of the ideal surrogates. Devising a social contract is possible only in circumstances in which the welfare of stakeholders is enhanced to support the progressive realization of their capacity to participate in the contracting process. The aim of the welfare state, then, is to bridge the gap between the naturalized (i.e., real-life) social contract and the 'normative' (i.e., ideal) social contract.

Yet bridging this gap has its 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, with the wrong kind of contract resulting. 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' (Benjamin Constant). To take a practical 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?

The next issue to consider, and one that recurred in the presentations and discussion, concerns the boundaries of social contract theory. This raises several questions, including: what are the elements intrinsic to such a theory? Does a political philosophy that has no use for 'true' or 'real' consent lose its identity as a contractual theory? Should mundane, service-provider/beneficiary contracts be discussed as part of the social contract discourse? What role can critical perspectives, such as those that focus on gender or race, play within social contract theories?

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In dealing with some of these issues, consider, first, the role of consent in social contract thinking. It may be the case that hypothetical social contracts, such as Rawls', have no real use for the consensual element at all. Contemporary social contract theory is, in effect, about moral reasoning and a choice of moral principles to guide political action. The hypothetical contract is the work of one single person, who chooses rationally and reasonably. The purpose of the thought experiment designated by the contract is to show that society is not structured according to a natural order, hierarchal or religious, but is more than simple social coordination. Society is, or should be, a *fair system of social cooperation* guided by reasons that people behind the veil of ignorance would choose.

1. Holmes, S. and Sunstein, C. (1999) *The Cost of Rights*. London: WW Norton, p. 193.

A second somewhat mundane issue is to what extent should government contracts between service providers and beneficiaries be seen to derive from a social contract? Western countries, several of which have begun to adopt such contracts as a form of social policy, claim legitimacy for them by reference to the social contract. The practice has been justifiably criticized as an unwarranted use of the fiction of a social contract.

A third issue is that, as some critics contend, social contract theories are written by white males who are insensitive to the history, interests, and needs of other distinctive groups, not least women. An even stronger criticism is that theories formulated by classic social contract writers advance gender, ethnic, and racial domination. An illustration of this criticism is provided by the standard contractarian reliance on heads of families as necessary elements of the original position. Some suggest that these assumptions have been the basis of the theory and policies of the welfare state, which has a strong patriarchal nature, especially in Anglo-American countries.

While the relevance of social contract *theory* to marginalized groups is not central to our present concerns, it reminds us of the need to be cautious when generalizing from particular histories, intuitions, and incentives into contemporary policies. Criticisms of social contract approaches become most pertinent when contractual justifications interact with welfare state policies.

## SESSION TWO:

## From Social Contract Theory to Welfare State Practice

**Professor Michael Freeden**, University of Oxford: 'The Organic Moment: The Waxing and Waning of a Vision of Welfare'

**Professor David Schmidtz**, University of Arizona and **Dr Jason Brennan**, Brown University, New England: 'Social Contract and Rule of Law'

**Dr Stuart White**, University of Oxford and **Graeme Cooke**, Institute for Public Policy Research (IPPR): 'Social Justice and the Welfare Contract'

Chair: **Dr Amir Paz-Fuchs**

It is often suggested that the point of intersection of social welfare perspectives and social contract theory is liberal ideology. Though the three do not overlap in any intuitive understanding, welfare theorists entered the domain of the social contract through the employment of human rights. The New Liberals, such as Hobson and Hobhouse, worryingly observed how the term 'natural rights' became the bastion of ideological protection for the well-to-do. They sought, then, to reformulate the term 'natural' to entail what was essentially necessary to human well-being. In doing so, they laid down an essential building-block for twentieth century welfare thinking. Arguing that 'any genuine right is one of the conditions of social welfare',<sup>2</sup> the New Liberals suggested by 'genuine' that the decontractualization of rights and their unconditionality paved the way for welfare thinking.

This idea that vulnerable individuals should enjoy the protection of uncontractual rights is related to the rise in late nineteenth century and early twentieth

century discourse of claims concerning commercial contracts, or 'freedom of contract'. Some liberals, such as T. H. Green, argued that freedom of contract should be limited in accordance with liberal principles in order to achieve social progress. Deploying arguments similar to those of D'Agostino, Green asserted it to be the duty of the state to enable individuals to develop their social potential and 'to exercise the faculties and improve the talents which God has given them'.<sup>3</sup>

**Response: Professor Michael Freeden, University of Oxford**

Michael Freeden notes that the 'two new conceptual moves [of safeguarding decontractualized rights while respecting freedom of contract] meant that human capacities were seen to be in part the result of social co-operation, and crucial goods had to be supplied to individuals no longer capable of sustaining or healing themselves'.

With individuals being seen as inherently vulnerable, perspectives on society also began to change. Society took on a new meaning as an organic entity with an extensive capacity for social engineering, in a manner transcending the traditional borders between the public and the private. Indeed, society was perceived as an extension of human nature which is rational and yet holistic, inclusive, and egalitarian. But if individuals were to be granted welfare as of right, society must be seen as more than a bundle of social ties. The very idea of society entails kinship, common pride, a common language, and patriotism. Given such a character and structure, society, through the state as its instrument, has the

2. Hobhouse, L.T. (1911) *Social Evolution and Political Theory*. New York: Columbia University Press, p. 198.

3. Green, T. H. (1881) *Liberal Legislation and Freedom of Contract*. Oxford: Slatter and Rose, p. 22.

capacity to assume responsibility for equal opportunities and social progress. At the same time, the construction of society as organic has its price, and while contractual formalism was rejected, the quasi-contractual notion of reciprocity has been embraced by the new liberals. Nevertheless, according to exponents of these ideas, the brunt of reciprocity should be felt by the wealthy rather than the poor, who are entitled to support.

*Response:* **Professor David Schmitz, University of Arizona and Dr Jason Brennan, Brown University, New England**

So while welfare state ideology emphasizes the move towards equality and the recognition of rights, we might ask whether and to what extent they are an inherent feature of social contract theory? While Jason Brennan and David Schmitz acknowledge that, when entering the social contract, all people are treated equally, they are cautious about the legitimate demands of equality as society develops. Instead, their reference to historical claims (when dividing up the hypothetical apples, we must remember that 'someone grew the apples, someone brought them to the table, and for that matter someone made the table') has a distinctly Nozickian feel to it.

Robert Nozick, it will be recalled, maintains that justice of distribution is determined by historical circumstances, unlike theories that assume a patterned distribution. Nozick views distribution as just if it was brought about by the free exchanges by

consenting adults. He thus assumes a just starting position for these exchanges. In terms of the terminology proposed earlier of the naturalized and the normative social contract, Nozick's position (and that of others) is to take the naturalized contract as given, and then to draw normative inferences from it. Apples are easily divided up if it does not matter where they came from. It is more complicated to do so if some apples were stolen and others grown by slaves. If the present holdings, property rights, entitlements, etc., are arbitrary products of history, the way they perpetuate distribution patterns requires justification.

*Response:* **Dr Stuart White, University of Oxford and Graeme Cooke, Institute for Public Policy Research (IPPR)**

Stuart White and Graeme Cooke advance a different approach. On their view, the existing state of affairs cannot be used as a normative basis for future arrangements. Justice requires an examination of that very state of affairs. Instead of using the existing state of affairs as the basis for a normative account, they argue, it is important to draw on a commitment to equal opportunities when moving the naturalized contract, that is, the real position of people, towards a normative social contract based on justice.

A similar approach is needed if social contract theory is to 'take rights seriously'.<sup>4</sup> It is often claimed, not least in contemporary debate, that social contract ideology demands reciprocal obligations from all individuals, rich and poor, in return for their rights. If this claim is to be fair and just, reciprocity is justifiably demanded only when suitable background principles are in place. Among such principles, White and Cooke note the following: (i) a fair level of economic *opportunity*; (ii) fair *reward* structures in employment; (iii) that contributions be expected and

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4. Dworkin, R. (1977) *Taking Rights Seriously*. London: Duckworth.

enforced on a *universal* basis, from rich as well as from poor; (iv) that society have a diverse and extended sense of what counts as *economic* contributions, so that such matters as unpaid care would qualify.

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 four background conditions just noted are far from satisfied. Should the principle of proportionality, which the authors mention, 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?

#### *Criticism and Discussion:*

The impact of social contract theory on rights and obligations in the modern welfare state was a central theme in the presentations and discussions of this panel. A perhaps surprising consensus appeared to emerge that social contract ideology is opposed to the idea of unconditional, inalienable rights. Instead, a social contract implies the idea of *contractual* or *negotiable* rights.

One problem with this perspective is that it allows governments to make rights conditional on the fulfillment of 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 of 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,

*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?*

*unconditional* welfare was said to free women from arbitrary decisions made by welfare authorities.

This 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 to welfare should be unconditional, as illustrated by the example of a right to a minimum income. It is in relation to the conditionality of welfare benefits, they argue, that the social contract shows its lasting influence.

Another matter that arises in moving from social contract theory to welfare state practice is the tendency to ignore the role of civil society. 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. Firstly, 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) will be permitted to discriminate in the provision of services that were originally the responsibility of the state.

Consideration of the role of civil society raises a number of issues of relevance to the *Social Contract Revisited* programme. One concerns multiculturalism and minority rights. The dominant culture of a society often dictates the terms and conditions of the welfare state, as is evident in realms such as health and education. A related matter concerns the connection between social solidarity and welfare, it being suggested that the more homogeneous societies are, the stronger their commitment to welfare.

A second issue concerns the role of civil society associations within the welfare state structure, the notion being that the privatization of welfare provision, on the one hand, and the grass-roots development of such associations, on the other hand, require a more refined analysis than that provoked by the Hobbesian image of citizens versus state.

The third matter relates to the feminist critique of the social contract and the liberal distinction between the private and the public spheres. Both perspectives have concrete policy manifestations, especially regarding the weight given to care-giving. If reciprocity is a foundational element in current social policy, then the contribution of care-givers, who are mainly women, should be properly recognized.

## SESSION THREE:

## Alternative Visions of the Welfare State and the Social Contract

**Professor Neil Gilbert**, University of California, Berkeley: 'The Modern Welfare State: The Changing Context of Social Protection'

**Professor Bill Jordan**, Exeter University: 'The Social Contract in a Second-Best World: Sustainability, Interdependence and Well-being'

**Mike Tanner**, Cato Institute: 'The Conservative Welfare State: New Vision or Oxymoron'

**Professor Peter Vallentyne**, University of Minnesota: 'Left-Libertarianism and the Welfare State'

Chair: **Paul Dodyk**

The papers presented in this panel expanded on the changes that Western welfare states have undergone in recent years, and suggested the main reasons for these changes. Some authors argued for a new understanding of the welfare state, others for a new vision of the social contract.

The modern welfare state is undergoing significant changes, which include the following:

- (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 gross domestic product (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.

As a result of these changes, access to the welfare state is more restricted, benefits are means-tested, the market has an expanded role, and welfare is made conditional on contractual obligations.

*Response:* **Professor Neil Gilbert, University of California, Berkeley**

Though the United States is leading these trends, they are universal. As Neil Gilbert expresses it: from a 'universal approach to publicly delivered benefits designed to protect labour against the vicissitudes of the market ... to private delivery of provisions designed to promote labour force participation and individual responsibility', he claims we are witnessing a change from the welfare state to the 'enabling state'.

Is there cause for concern? If, in its restructuring, the new enabling/welfare state replaces the public ethos, the need for social protection, and the striving for family and community well-being, all in order to allow domination of the market, then there is plainly cause for concern. If the 'enabling state' reverses its commitment to increase the capacity of individuals to enter into the social contract process, in favour of an individualism that benefits the advantaged and punishes the disadvantaged, all in the name of personal responsibility, then the cause for concern is exacerbated.

Another set of trends may require a changing perspective for what, in Plant's terminology, should figure in the 'contractual grinder'. Thus, the historical notion of robust societies in fierce competition with each other is becoming obsolete due to globalization. The old Lockean assumption that there

are enough resources on earth to sustain economic survival is now questionable, the conclusion being that sustainable development must feature in contractual reckoning.

A revised understanding of human nature, incentives, and behaviour should also lead to a reconfiguration of the social contract. The image of individual persons as rational maximizers participating in a social contract must now be revised, since research now shows that personal relationships, health, work satisfaction, and community participation are all better indicators of subjective well-being than income.

But how can these factors be inserted into social contract foundations? Two approaches are suggested: according to one the contractarian approach can accommodate the new factors, while under the second a major revision is warranted.

The first of these is effected by revisiting the social contract and incorporating the new information into its structure. Governments may need to coordinate amongst themselves and new international institutions established to oversee the global social contract. Subjective well-being, for instance, can be accounted for by modern contractarians. Interpersonal interactions and subjective welfare may be given quantitative value and analyzed in terms of

cost, energy, and utility. And so, under this formulation, social contract theory would not require major revision or reformulation.

It should be noted that the point concerning global membership may reveal an ironic historical twist. While Locke, as we saw earlier, was ridiculed by Hume for suggesting that those who are dissatisfied with the contract can simply opt out by leaving, increased mobilization in contemporary societies, even for the poorer of the world's population, make the suggestion less ridiculous.

The question is, however, whether the idea of membership, which is foundational in social contract theory, loses its significance in modern societies. Alternatively, the new social contract tradition may accommodate a new conception of membership. The ability to vote over the Internet, thousands of miles away from the sovereign's domain, may require us to develop a more complex conceptualization of membership insofar as political authority is concerned. Recurring demands of immigrants to receive benefits upon their arrival from their host country or to export benefits from the country of origin, reveal that the question of national borders is still a very live one, insofar as distributive questions are concerned. Thus, global interdependence may be the greatest challenge for the social contract.

According to the transformation approach, social contract theory has to be radically reformulated, severing it from the economic model that supposedly underlies contractarian methodology. It is thus 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, a democratic structure, and the struggle for participation, all of which are not given due weight in social contract thinking.

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In addition to technological and demographic changes, over which humans have control, the normative and political factors also need to be addressed. To what extent, then, are social contract ideals or welfare state positions 'political' in the strictest sense? Two papers in the panel approach the welfare state bureaucracy and social contract theory from very different positions.

*Response:* **Mike Tanner, Cato Institute**

Michael Tanner suggests that while traditional conservative agendas have been skeptical of the use of government power in general and with regard to the welfare state in particular, a new brand of conservatism has arisen in recent years. It is most apparent in the United States, but not absent from other Western countries, where conservative governments have preferred to retain big government but redirect its objectives, rather than reduce the scope of government. This is the 'conservative welfare state'. Here governments use social welfare issues such as poverty, pensions, and health care to achieve conservative ends. This agenda is common to both George Bush and David Cameron. The difference between their agenda and the progressive, liberal welfare state lies in the objectives and the underlying values that government wishes to advance through its policies. A policy that expands government action through the social welfare institutions so as to advance thrift, hard work 'and especially sexual and family mores' is considered, problematically in Tanner's view, a conservative policy.

Proponents of the conservative welfare state are, like libertarian conservatives, highly critical of progressive welfare state policies. Both strands of conservatism agree that mediating institutions, such as family, community, and churches, are better equipped to address social issues than governments. The two strands of conservatism differ, however, in the way they perceive the relationship between individual persons and governments. While libertarians wish that government would 'get out of the way' to allow

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mediating institutions to fulfill their role in society, welfare conservatives promote the funding of such organizations, as exemplified in George Bush's Faith-Based Initiatives.

The crux of this argument has an interesting connection to White and Cooke's call to focus on mediating or civil society associations. Libertarians, when supporting the reduction of government control, assume that in the vacuum that results, civil society associations will flourish. However, White and Cooke do not view civil associations as being *prima facie* preferable to government. They take the existence of civil associations for granted and see their potential for helping in the tackling of social problems.

Although there is some common ground between their view and that of libertarians, there is a fundamental difference as to the dangers that may arise when mediating institutions are granted governmental roles or have to assume responsibilities vacated by government. Such associations may advance their own agenda, use their power to coerce poor individuals into what they view as accepted forms of behaviour, and discriminate against certain groups in society. This was precisely the form of welfare provision that emerged 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.

Libertarians oppose the government paternalism advanced by welfare conservatives such as Lawrence Mead, noting that suddenly paternalist policies are acceptable 'as long as they get to be the parents'. It is worth observing, however, that libertarians accept the promotion of a similar agenda by private charities. It might be thought that the substantive issue should be at the centre of attention, rather than the form by which it is administered. What is at stake, after all, is the exploitation of people's conditions for the purpose of influencing their behaviour in ways that violate liberal tenets of autonomy and respect for individual choice. Whether this is done by a government, by Microsoft, or by the Presbyterian Church should be accorded little significance.

*Response:* **Professor Peter Vallentyne, University of Minnesota**

Two final comments relate to Peter Vallentyne's account of Left Libertarianism. Firstly, though somewhat 'out in left-field', it is interesting to note how left libertarianism connects nicely with the main themes of the workshop as discussed in this report. The idea of reciprocity appears in left libertarianism as an important undercurrent. Enforcement costs could, for example, be levied on criminals, thus advancing a clear quid pro quo logic.

Secondly, a major aim of left libertarianism is to promote the importance of equality. This is of significance since equality and inequality are not included among the current trends of the welfare state as sketched by Gilbert. It may be that such an important element of the traditional welfare state structure has been neglected as an aspiration for future welfare state policies.

## SESSION FOUR:

## From Social Contract Theory: Who is Under Contract?

**Professor John Linarelli**, University of La Verne, Ontario: 'An Argument for the Contractualist Moral Evaluation of International Institutions'

**Professor Bernd Schulte**, Max Planck Institute, Munich: 'A New 'Social Contract' for Europe'

**Professor Michael Dougan**, University of Liverpool: 'One Man's Ceiling is Another Man's Floor: Legislative and Judicial Developments in the Exportation of Welfare Benefits Across the EU'

**Professor Derek Hum**, University of Manitoba: 'The Social Contract of the Welfare State: A Real World Addendum for Immigrants'

Chair: **Professor Carole Pateman**, University of California, Los Angeles

The purpose of the workshop's final panel was to examine the breadth of the social contract in the sense of who participates in it. Although Groucho Marx said he would refuse to join a club that accepts people like him as members, the marginalized, the poor, and the sick cannot afford this witticism. The boundaries of the social contract and the welfare state are, for them, all-important. A common aspect of some social contract theories is their individualistic bias (using the term here non-judgementally). Individuals are at the centre of the contract, and the contract is constructed for their benefit. But who counts for the purpose of the contract? Does it include the migrant worker, the immigrant, the tourist, the seeker of better health care or education? Who are the insiders and who are the outsiders of the contract?

The effects of globalization have a significant role in the matter. The first years of globalization were concerned with economic issues, such as the actions of corporations and the effects on labour markets. Now they go beyond that to have an impact on social and cultural structures, and in turn on the character of welfare structure. Papers in the panel rightly distinguished between global patterns and the unique, contemporary European experience.

*Response:* **Professor Derek Hum, University of Manitoba**

Outside Europe, social contract terminology may be employed in dealing with the difficulties experienced by immigrants moving to Western countries. The main danger they face is being wholly 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 economic integration policies concerning newcomers. Derek Hum charges that such policies constitute 'economic eugenics', which is to say that, 'many if not most of the selection criteria for immigrants are associated with

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individual characteristics that are thought to improve the economic fortunes of the destination country'.

The empirical account of the situation of immigrants in wealthy, Western countries is both significant and disturbing, especially when compared to the optimistic European approach which views free movement as a basic constitutional and economic principle. Even within Europe, the system deals very differently with immigrants from *outside*. Here, as in other Western countries, such as the United States, Canada, and Australia, the idea of citizenship as the basis for participation in the social contract is creating exclusion, which results in an unattractive selection process, between the welcomed rich, multilingual and well-educated immigrant, and the unwanted immigrant, immediately tagged as the 'other'.

**Response: Professor Bernd Schulte, Max Planck Institute, Munich and Professor Michael Dougan, University of Liverpool**

Two papers in the panel addressed specific issues faced by European welfare states and the possibility of identifying an emerging European social contract and its implications for the European welfare state. Threats to the formation of a European social contract and welfare state include demographic changes, economic stagnancy, globalization, and social and cultural disintegration. And yet, the

European Union (EU) has made considerable progress in providing uniform regulations, standards for social protection, and shared values of liberty, democracy, and the rule of law.

It has been suggested that the development of a European identity puts at risk the social contract of European nations by reducing the autonomy of governments to pursue market-correcting policies and preserve their own 'social contract'. This is leading to the processes discussed above: increased targeting of benefits to the most needy, stringent qualifying arrangements, and introduction of market schemes to supply welfare provision.

At the same time, however, those same European states are undergoing a *process of convergence* that enables welfare regimes to remain intact. Even if, for the sake of argument, state authority, territory, and people are becoming of less importance, Europeanization is proving to be, in Bernd Schulte's words, an 'opportunity for creating a social counterweight to deregulation and liberalization as well as to globally functioning markets and transnational enterprises'. Through European Treaties, legislative and administrative action, and decisions of the European Court of Justice (ECJ), the EU has managed to improve gender equality, reduce discrimination based on nationality, and increase access to health care and education across Europe.

*Criticism and Discussion:*

These trends towards developing a European Social Model, with its emphasis on 'solidarity', are given significant support in the European Charter of Fundamental Rights, which may eventually receive constitutional status within the EU. 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

*There is likely to be tension between these advances towards social solidarity on the one hand, and on the other hand the foundational values of the European Community, such as the free movement of capital, goods, services, and persons.*

interest. It also makes reference to solidarity between generations, sustainable development, and market competitiveness.

It should be noted, however, that there is likely to be tension between these advances towards social solidarity on the one hand, and on the other hand the foundational values of the European Community, such as the free movement of capital, goods, services, and persons. The dynamics of social solidarity are simply different from those of economic liberties, with the latter's orientation towards market forces. One way of dealing with the tension lies in the European Open Method of Coordination (OMC), a mechanism which is not legally binding, but rather based on soft law mechanisms such as guidelines, indicators, benchmarking, and sharing common policy objectives and best practices.

The portability of benefits from one member state to another illustrates the tensions just referred to. Access to social benefits traditionally depended on the satisfaction of the twin criteria of territoriality and nationality. In Europe, however, these two conditions have been greatly reduced and greater weight is attributed to free movement, equal treatment and Union citizenship. The ECJ has widened the categories of people who may travel from one member state to another without losing their rights to social benefits from their home state. What is the rationale underlying this jurisprudence?

The reference to a citizen's right to free movement may be part of the justification, but surely fails to

take into account of, in Michael Dougan's words, 'the degree to which the territoriality of the welfare state is central to its very identity'. An alternative explanation could be sought in an emerging notion of a distinctively European social contract and welfare system. If such an account is plausible, the prospects for the future are of great interest. In doing so, however, one cannot underestimate the task of forging a viable welfare state from twenty-seven member states, dozens of nationalities, and a vast population.

Nevertheless, whatever the challenges for the future, we see the beginnings of an innovative and dynamic social contract, driven at least to some degree from the lived-experience of the population. We see citizens moving across Europe, starting new lives, building families and businesses, acquiring education, and so on. The expectation of a mobile population is increasingly that the benefits of welfare will be available on the basis of residence and work, rather than origins or domicile. The ECJ, in its decisions, is inclined to agree with these expectations and lend its support. The European social contract is thus being woven together by the realities of modern European life and its legal and constitutional recognition, while the European, supranational 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'.

## Conclusion

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While some participants may have come to the workshop skeptical as to the contribution social contract theory could make to welfare policy, the discussion has shown just how fruitful such an approach can be. The ideological, technological, and demographic challenges of the modern welfare state

were identified and discussed, leaving ample room for exploration in future workshops. In future events, the focus will be on the various aspects of the social contract and their implications for welfare policies, including matters such as education, income support, health, and so on.



# Participants

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**John W. Adams**, attorney and businessman, chairman of the Foundation for Law, Justice and Society

**Dr Jason Brennan**, Brown University, New England

**Dr Dario Castiglione**, University of Exeter

**Graeme Cooke**, Institute for Public Policy Research (IPPR)

**Professor Fred D'Agostino**, Queensland University

**Paul Dodyk**, chairman of the 'Social Contract Revisited' Advisory Group

**Professor Michael Dougan**, University of Liverpool

**Professor Michael Freeden**, University of Oxford

**Dr Celeste Friend**, Hamilton College, New York

**Professor Neil Gilbert**, University of California, Berkeley

**Professor Denis Galligan**, University of Oxford and member of the board of directors of the Foundation for Law, Justice and Society

**Professor Derek Hum**, University of Manitoba, Canada

**Professor Bill Jordan**, Exeter University

**Professor John Linarelli**, University of La Verne, Ontario

**Professor Carole Pateman**, University of California, Los Angeles

**Dr Amir Paz-Fuchs**, programme director for 'The Social Contract Revisited'

**Professor Lord Raymond Plant**, professor of Jurisprudence and Political Philosophy, King's College London

**Professor David Schmitz**, University of Arizona

**Professor Bernd Schulte**, Max Planck Institute, Munich

**Mike Tanner**, Cato Institute

**Professor Peter Vallentyne**, University of Minnesota

**Dr Stuart White**, University of Oxford

## The Foundation

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The mission of the Foundation is to study, reflect on, and promote an understanding of the role 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.

## The Social Contract Revisited

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The aim of the Foundation's programme, *The Social Contract Revisited*, is to establish the theoretical and institutional underpinnings that characterize the reciprocal rights and obligations amongst citizens and between the citizens and the state in modern liberal society. Through publication of the findings of such study, the Foundation will enrich both the theoretical and the policy debate concerning some of the most fundamental issues facing modern Western societies.

**Dr Amir Paz-Fuchs** completed his first degree (magna cum laude) in law and philosophy at the Hebrew University in Jerusalem. As a lawyer, he worked as the head of the Centre for the Rights of the Unemployed, giving pro bono legal counselling in matters of social security and labour rights. In 2006, he completed his DPhil at Oxford. Currently he teaches labour law and jurisprudence at the Ono College of Law, Israel, and continues his pro bono work with several human rights organizations.

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