

The Social Contract Revisited

Individual Responsibility and Welfare Contractualism

A Relational Evaluation

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Executive Summary

- Behaviour management contracts between state agencies and citizens are neither essentially illiberal, nor necessarily incompatible with individual autonomy. Whether citizens engage meaningfully in 'really contractual' relationships from which they benefit, and how far they may be regarded as contractually responsible, are questions for empirical investigation informed by relational contract theory.
 - Jobseekers Agreements are just one type of behaviour management contract. Other contemporary examples include home-school agreements, youth offender contracts, and parenting contracts. Each of these forms of contractual governance is deserving of relational evaluation on its own merits.
 - The idea that individuals are capable of undertaking responsibility for their own welfare on a contractual basis is consistent with the proposition that the state also should be responsible for the welfare of citizens.
- The contractual assumption of responsibility is dependent on institutional and social preconditions of fairness, reciprocity, and equality that can only be secured collectively.
- The prevailing economic recession is leading to widening social inequalities and increasing the potential for unfairness in the formation and implementation of welfare contracts. Structural unemployment and constraints on public finance are limiting the capacity of the state effectively to assist citizens in acquiring skills and finding work, and undermining the relational foundations of this governance mechanism.
 - If the state cannot guarantee fairness and reciprocity in Jobseeker's Agreements, together with minimum levels of social inclusion and equality, the pretence of 'contract' in current welfare policy should be abandoned. This leaves open the wider question of whether citizens should be provided benefits as of right or subject to conditions imposed by the state.

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A Relational Evaluation

While individual contracts had been used to structure relationships between professionals and clients in the field of social work from the early 1980s, the contract mechanism was first deployed as an instrument of behaviour modification in the welfare context by the UK government under the Jobseekers Act 1995. This legislation made the payment of the jobseeker's allowance conditional upon specific contractual undertakings entered into by welfare recipients in a signed Jobseeker's Agreement (JA). The change in terminology from 'unemployment benefit' to 'jobseeker's allowance' in the new scheme clearly indicated the shift from a system of entitlement based on a record of contributions, to one of conditional payments dependent on claimants being 'available for employment' and 'actively seeking employment'.

The Labour government elected in 1997 built on this foundation with the 'New Deal', a package of programmes directed at giving unemployed people help and support in acquiring work skills and finding jobs. In its current incarnation (separate schemes apply to young people, those over twenty-five and fifty, lone parents, disabled people, partners, and musicians) a 'personal adviser' is required to draw up an action plan tailored to the experiences, interests, and goals of the client, helping overcome any difficulties that might be interfering with jobseeking (such as transport or literacy problems), and identifying any extra support needed. If a job has not been secured by the end of a four-month period, the adviser is responsible for arranging a package of full-time help to meet the customer's specific needs. This may involve work experience with an employer or voluntary organization, training for a specific job, enrolling on courses to develop the skills that employers want, practical help with applying for jobs, and interview practice.

While the JA is not enforceable in the courts, the symbolism of contract pervades the new relationship between Jobcentre Plus and the claimant. The agreement is required to be in writing and signed by both parties, and a copy provided to the claimant. Regulations specify the matters to be contained in the document, including the claimant's name, the type of work sought, the steps to be taken in looking for work and improving chances of finding work, and the help to be provided by Jobcentre Plus. The process for variation of the terms of the agreement closely follows that for its creation, involving similar formalities. The purpose of the variation provisions is to ensure that the agreement can be adapted flexibly to changes in the labour market or the claimant's circumstances.

Behaviour modification contracts and the social contract

JAs are just one example of the burgeoning use of contract as an instrument of social control. Following the election of New Labour in 1997, this function was extended beyond the field of welfare under the School Standards and Framework Act 1998 (home-school agreements), the Youth Justice and Criminal Evidence Act 1999 (youth offender contracts), and the Anti-Social Behaviour Act 2003 (parenting contracts). In Britain as in other social democracies, programmes directed at behaviour modification have been accompanied by the representation of the state-citizen relationship in 'New Contractualist' discourse. Both Conservative and Labour governments have made extensive use of social contract rhetoric in promoting a particular vision of social order and of the proper role of individuals in society.

Social contract rhetoric has provided the general ideological backdrop and justification for major changes to the organization of public services since

1979. The traditional welfare state grounded in universal social rights has been radically challenged, with the notion of entitlements being replaced by one of negotiated claims and reciprocal duties. New Labour's plans for reform of the 'unaffordable' welfare system by the 'Third Way' ('promoting opportunity instead of dependence') were deliberately couched in terms of 'A New Contract for Welfare' in policy proposals in 1998. In the 'something for something' society, the duty of the state to ensure that citizens have a stake in society's future is balanced by the acceptance of responsibility of individuals for their own improvement.

Skeptics of such discourse argue that welfare contractualism is inherently conducive to a moralistic, populist, and censorious political discourse which can quite readily overwhelm any potential advantages that may rationally be argued to accompany it.¹ In this view the attempt to make welfare payments dependent on claimants' contractual commitments is fundamentally misguided and lacking in legitimacy. Agnostics counter that welfare contracts are not essentially illiberal and repressive, but may in principle be compatible with increased individual freedom and autonomy. In arbitrating between these competing claims the key question is whether, and if so in what circumstances, claimants may legitimately be regarded as undertaking responsibilities for their own welfare on a contractual basis. The extent to which claimants are able to engage meaningfully in genuinely contractual relationships from which they benefit is a matter for empirical investigation, informed by relational contract theory.

Relational contract theory

Like other behaviour modification contracts, the JA is not legally enforceable. The lawyer's definition of contract is therefore of little assistance in analyzing this mode of governance of the state-citizen

relationship. A better starting point for understanding what government is trying to achieve by making welfare payments conditional on agreement is the alternative definition of 'contract' as a form of institutionally guided behaviour that serves to reduce complexity in social exchange. In this conception, a relationship is 'contractual' to the extent that it is structured according to a mutually agreed plan consisting of reciprocal and specific commitments concerning future action. Contract is distinguished from other means of promoting certainty in social interaction based on authority relations or hierarchical direction by this key feature, which requires the support of core norms of consent and choice in the planning process.

However, the effectiveness of contract as a governance mechanism is crucially dependent on a further set of 'relational' norms.² For example, it is necessary that the relationship between the parties be guided by the norm of *flexibility* in order to avoid excessive rigidity in the implementation of planning, and to deal with contingencies that could not have been foreseen at the time of agreement. The norm of *reciprocity*, which implies that the exchange is of mutual benefit, is of vital importance at the beginning of the exchange and throughout its duration. Further relational norms of *power* and *proportionality* are necessary to control relations of domination and subordination, and to ensure that the parties deal with unexpected eventualities in a manner that preserves cooperation in the relationship.

Compared with an externally imposed regulatory framework, the advantage of the contract mechanism (where appropriately supported by relational norms) lies in its capacity for self-regulation. Contract provides a basis for the maximization of joint welfare by enabling the parties to produce for themselves a constitution which may be used in the adjustment of their

1. Freedland, M., and King, D. (2003) 'Contractual Governance and Illiberal Contracts: Some Problems of Contractualism as an Instrument of Behaviour Management by Agencies of Government', *Cambridge Journal of Economics*, 27: 465.

2. Macneil, I. R. (1983) 'Values in Contract: Internal and External', *Northwestern University Law Review*, 78: 340.

ongoing relations.³ While the parties' interests diverge, the exchange is capable of benefiting both. Of course, such welfare-enhancing or joint-maximizing conditions are much more problematic and difficult to attain through contractual regimes of behaviour modification imposed by the state than in private relations. To the extent that contract norms are absent or only weakly represented in JAs, it cannot be expected that obligations will be discharged or the contract performed to mutual benefit, or that the programme will succeed in achieving the government's wider goals of changing jobseeking behaviour.

Jobseekers Agreement: relational deficiencies

A first problem with JAs concerns the process whereby 'agreement' is secured, and the implications for the quality of the relationship in terms of the norms of consent, choice, and power. In reality there is unlikely to be much scope at the planning stage for bargaining over what the jobseeker must do in order to demonstrate 'actively seeking employment.' Beneath the rhetoric of contract, the 'agreement' may involve the obtaining of the claimant's signature under duress.⁴

Second is the problem of reciprocity, at both the planning stage and in the implementation of the contract. JAs might be viewed as potentially advantageous to claimants in this respect. The Jobcentre's side of the bargain might include responsibilities for skills development, the provision of training opportunities, and other help in overcoming obstacles to employability. While individualization in theory implies the tailoring of services to the particular needs of clients by a designated single-point case coordinator or service broker, in practice it is doubtful how far the New

Deal has delivered on this promise. Even in times of full employment, empirical evidence suggests that genuine options are not always offered, and the quality of training is often poor or nonexistent. Choice is both limited and restricted. The agreement with the jobseeker tends not to reflect client preferences, and is seldom aimed at improving substantive skills or addressing major barriers to employability.⁵

The most popular option of full-time education and training is not available in many areas, and claimants may be compelled, or feel impelled, to accept unpopular alternatives such as placements in the voluntary sector or with the environmental task force. Claimants enrolled on New Deal programmes are frequently scornful of their individual action plans. JAs tend to be mechanically drawn up, forcing the unemployed into meaningless activities involving 'make-work' or broom-pushing. Employment service workers are similarly frustrated in many cases by the absence of suitable job opportunities, the significant personal barriers to employability faced by claimants, and by lack of time and resources to perform their tasks properly. Welfare departments are typically understaffed and under-resourced, making it difficult for workers to take any genuine interest in clients' own long-term goals and perceptions.

A third set of problems concerns the potential for unfairness. Even if it is conceded that JAs are consensual and reciprocal, and that they are capable of benefiting clients, there is a lack of adequate safeguards preventing abuse in particular cases – for example through the illegitimate or disproportionate use of sanctions. An adjudication officer may terminate the JA where the claimant is judged to have failed to comply with a condition or a subsequent direction, resulting in loss of benefit. While there exists a procedure for informal review and more formal appeals, claimants may simply be

3. Campbell, D. and Harris, D. (1993) 'Flexibility in Long-Term Contractual Relationships: The Role of Cooperation' *Journal of Law and Society*, 20: 166.

4. Fulbrook, J. (1995) 'The Job Seekers' Act 1995: Consolidation with a Sting of Contractual Compliance' *Industrial Law Journal*, 24: 395.

5. Carney, T. and Ramia, G. (2002) *From Rights to Management: Contract, New Public Management and Employment Services*. The Hague: Kluwer Law International.

unaware of their contractual 'entitlements', or be fatalistic or otherwise unwilling to pursue their 'rights' as to quasi-judicial redress. The excessive use of sanctions may serve to reinforce social exclusion. UK government statistics reveal particularly high rates of use of New Deal sanctions in areas of chronic job shortage such as the North-East, indicating that those suffering most from the vagaries of the market economy are also those who are the most penalized.

Regardless of how the JA is agreed, and with what degree of respect for the contract norms, it may be argued that the institutional environment is one of compulsion and the principal policy objective that of labour market discipline. As to unfairness in a wider sense, there is evidence that the implementation of the JA regime in Britain has had a disproportionate impact on disadvantaged groups, particularly ethnic minorities. Despite claims of improvements in the system of matching jobseekers with job opportunities made by supporters of workfare programmes, it appears that the most vulnerable are often excluded from such benefits.

Conditions of legitimacy of welfare contractualism

In order for welfare contractualism to serve as a legitimate mode of governance of relationships between the state and citizens, various conditions would have to be satisfied. Agreements should be (and must be seen to be) the result of genuine negotiation and a process of bargaining. The making, monitoring, and enforcement of contracts should be governed by procedures designed to ensure fairness and mutual respect. There should be a real possibility of sanctions proportionate to breaches on both sides, but also safeguards against their inappropriate or excessive use. Public agencies should undertake reciprocal contractual commitments, and be given sufficient resources to perform their side of the bargain. An appropriate dispute resolution machinery should be available and particularly attuned to protecting the contractual interests of the weaker party.

A more fundamental set of preconditions of legitimacy of welfare contractualism concerns the need for a minimum level of economic and social equality, in particular as regards employment opportunities and the provision by the state of education and training programmes appropriate to prevailing economic circumstances. A genuine commitment to 'fair reciprocity' in this sense implies a duty on the part of the state actively to reduce barriers to inequality and social exclusion.

That such conditions are both possible and achievable in practice may be illustrated by the experience of other countries. For example, Denmark has a relatively liberal welfare and employment policy, embracing contractual techniques that appear to involve greater respect for the relational contract norms. The Danish workfare model is based on 'needs-orientated' action plans agreed and signed by the employment exchange and the individual claimant. Despite similarities with the JA in Britain, there are significant differences. The Danish provisions are articulated within more traditional welfare state values, with less emphasis on the responsibilities of the individual. Negotiated work plans are more likely to be the product of genuine consensus, and to be less punitive and disciplinary in their operation. In contrast with the UK (and also the US), in Denmark the attainment of economic goals of low unemployment and low inflation in the 1990s was not at the expense of a reduction of real wages and social benefits, and not founded on a new underclass of working poor.⁶ On this account, despite obligations on the unemployed to engage actively in the labour market, and some reduction in unemployment benefits, the maintenance of relatively generous social assistance is associated with low levels of social marginalization and polarization. The commitment to upgrading skills and qualifications is a key component of the government's strategy for enhancing the

6. Torfing, J. (1999) 'Workfare With Welfare: Recent Reforms of the Danish Welfare State', *Journal of European Social Policy*, 9: 5.

competitiveness of a small open economy, and the evidence appears to indicate a relatively high level of motivation of the unemployed through programmes of training and education.

However, leaving aside the issue of whether the Danish model could ever be applied in the very different political and economic circumstances obtaining in Britain, the current financial crisis and economic recession pose major questions regarding the ability of the state to guarantee the necessary conditions of legitimacy and effectiveness of contractual governance in the welfare context. Constraints on public spending and the return of mass unemployment are increasing the potential for unfairness in the formation and implementation of particular welfare contracts, and undermining reciprocity by limiting the capacity of the state effectively to assist citizens in acquiring skills and finding work.

Inequalities are likely to become more acute as the economic recession deepens towards the end of the decade. A growing problem with workfare programmes in the current climate is cream-skimming, whereby the 'best' clients (those already closest to the labour market) are selected for the 'best' opportunities, leaving the less socially desirable options for those most in need. Meanwhile socially disadvantaged or marginalized citizens are likely to be signatories to a number of behaviour management contracts in the fields of education and criminal justice as well as welfare, for example as young people subject to referral orders, tenants on poor housing estates subject to acceptable behaviour contracts, or parents of children suspected of anti-social behaviour either at school or in the community. The combined effect of these arrangements in many cases will be to discipline and sanction those who are already vulnerable and socially excluded for noncompliance.

Conclusion

While all behavioural contracts perform social control functions, they vary considerably in their nature and policy objectives. Youth offender contracts and

rehabilitation contracts are triggered by breach of the criminal law or conviction involving a custodial sentence. Parenting contracts may be used in the attempt to control young persons *suspected* of involvement in criminal or anti-social behaviour. JAs and home-school agreements are not predicated on breach of the law or suspicion of legal wrongdoing, but rather apply to whole classes of citizens (respectively welfare claimants and parents of school children). These differences have significant implications for the way in which the notion of 'personal responsibility' is conceived. While the similarities are compelling, each form of behaviour management contract is deserving of consideration and relational evaluation on its own merits.

The proposition that responsibility for the welfare of citizens should rest with the state is not incompatible with the argument that individuals might, in certain circumstances, be regarded as capable of undertaking some degree of responsibility for their own welfare on a contractual basis. The question of whether conditions in welfare contracts are (or can be) genuinely contractual is separate from that of whether welfare rights should be absolute or conditional. This distinction tends to be blurred in contemporary dominant critiques, which elide normative consideration of the proper scope and content of the social contract on the one hand with the analysis of particular forms of welfare contract on the other hand. If the adaptation of contract as a means of behavioural regulation is not ruled in principle unacceptable, relational contract theory may help to specify the preconditions of legitimacy and effectiveness of this instance of the new public contracting.⁷

In theory, the self-regulatory mechanism of contract provides an inherently reflexive mode of governance. There is a significant difference between an obligation voluntarily undertaken and one imposed by command

7. Vincent-Jones, P. (2006) *The New Public Contracting: Regulation, Responsiveness, Relationality*. Oxford: Oxford University Press.

of the state, the former being more likely to be of mutual benefit and to be effective in changing behaviour. There is also a difference in the way in which the consequences of norm violation can be presented, with the sanction following breach of an agreed undertaking being easier to justify both to the party who has broken the obligation and to society as a whole. Furthermore, welfare contractualism may be used to focus attention on the state's own reciprocal obligations, and on whether it is delivering its side of the bargain. This opens up new possibilities for increased public accountability. On the government's own analysis, the current 'third age of welfare' is supposed to entail responsibility on the part of governments for providing help to individuals in discharging their individual and social responsibilities.⁷

In practice, however, the empirical evidence has revealed significant relational deficiencies in the implementation of welfare contractualist policy in

Britain, even during a period of full employment. Problems include the unequal power relationship between the state and individual citizens; the probable lack of negotiation and consensus in the determination of agreements; the lack of reciprocity in the state's undertakings and ability to deliver on them; and the general absence of substantive individual rights and procedural safeguards in respect of contractual processes. Structural unemployment coupled with widening economic and social inequalities is exacerbating such problems.

If the state cannot guarantee fairness and reciprocity in welfare contracts, founded on minimum levels of social inclusion and equality, conditionality cannot have a genuinely contractual basis. In that case the pretence of contract in government policy should be abandoned, leaving open the more fundamental question of whether citizens should be provided welfare benefits as of right, or subject to conditions imposed by the state.

8. Department of Social Security (1998) *A New Contract for Welfare: New Ambitions for Our Country*, Green Paper, Cm 3805.

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The Social Contract Revisited

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.

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