

The Social Contract Revisited

The Social Contract in Hard Times

REPORT AND ANALYSIS OF THE SIXTH WORKSHOP OF
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Introduction

This report provides both a record and a critical assessment of the sixth workshop of the Foundation for Law, Justice and Society's programme, *The Social Contract Revisited*. The workshop was held in Oxford on 7–9 October 2009 and asked, perhaps for the first time, what effects hard times have on the political, economic, and institutional facets 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 related. Against the background of increasing stability and prosperity, and improvements in personal security, social order, general health, and so on, the wealthy are 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.

Nevertheless, it is a commonly held view that crises bring people together. The indiscriminate nature of some crises (such as terrorism and war) may lead to a reassessment of the social contract and of the institutions that underlie it. And yet, some 'general' disasters are more discriminate than others and have

different effects. Witness, for example, the response to Hurricane Katrina, which victimized predominantly poor minorities. The current economic crisis, it has been argued, affects the wealthy and the (upper) middle class much more than it affects the working class.

For these reasons, it is clear why many commentators have suggested that reformers should not let a crisis go to waste. As Theda Skocpol has shown, for example, the American Civil War provided the platform for a categorical scheme of payments to soldiers injured in action and to widows of soldiers killed in action, that could not have been implemented previously.

Yet, the extensive literature on the modern welfare state notably lacks a thorough and methodical discussion of the way sudden events, referred to by some participants as 'black swans', impact social policy and the social contract in general. This workshop sought to make some progress towards bridging this gap. The twenty-first century provides new (and some old) challenges for the social contract, and the recent and ongoing hard times may provide the opportunity to confront them in an efficient way.

Black Swans and Elephants on the Move

Keynote lecture by **Professor Francis G. Castles**,
Professor of Political Science, Edinburgh University
(Emeritus) and Australian National University

Chair: **Professor Denis Galligan**, *Professor of Socio-Legal Studies, University of Oxford*

Professor Frank Castles set the stage for the workshop with a methodical and stimulating analysis of the effects of 'black swans'¹ on the structure of the welfare state and constitution of the social contract. Castles compares the effects of past crises, such as hyperinflation in Germany, the Great Depression, and the Second World War, with contemporary crises, such as economic depression, epidemics, and environmental catastrophes. While the events of the first half of the twentieth century played a central role in the establishment of welfare states, recent events have not, nor are future events expected to change the path of the now established 'elephant on the move' of the welfare state. What could be the reason for such disparity of outcomes?

Castles initially investigates if and why past events had a significant impact on the development of the nascent welfare state. Surveying the familiar examples of the American Civil War, inflationary catastrophes in Germany, the Great Depression, and the Second World War, he comes to more cautious conclusions than those generally reached by welfare state scholars.

First, the American Civil War was undoubtedly of great impact, leading to the establishment of a scheme of categorical payments to soldiers injured in battle and to widows of soldiers killed in action that

'covered over a third of all the elderly men living in the North'² and eventually took about 40 per cent of American government spending by the end of the century. And yet, Castles notes that this event was not sufficient to lead to an institutional change. The scheme was, to an extent, ad hoc, catering as it did only for Civil War veterans and their dependants, and thus self-terminating by the 1920s.

Second, hyperinflation in Germany did lead to an ideological shift in important sectors of German society. As middle and lower classes were hit by destitution, trade union rank-and-file members realized that price stability is a vital goal of economic policy. This new political alignment enabled institutional change, though not one normally classified as part of the welfare state: the creation of an autonomous central bank, the Deutsche Bundesbank, 'as an institutionalization of the political will to maintain price stability'.³

Third, the Great Depression is commonly viewed as enabling Roosevelt's New Deal, as well as the election of Social Democrats and Labour governments in Sweden and in New Zealand, respectively. While this is probably true, Castles argues, it was not a necessary course of development. In other countries, such as the United Kingdom and Australia, the fiscal crisis led to contractionary policies and a sacrifice of existing levels of welfare state protection. More dramatically, Austria, Germany, and Italy attempted to divert attention from the economic unrest by pursuing military and totalitarian agendas. In sum, Castles finds that the effects of the Great Depression were 'indeterminate in direction and depended for their content on a range of other factors'.

1. The term is borrowed from a recent book by N. N. Taleb *The Black Swan* (Allen Lane, 2007), and is defined as 'outlier events with potentially extreme consequences'.

2. Skocpol, T. (1995) *Protecting Soldiers and Mothers*. Cambridge, MA: Harvard University Press, p. 1.

3. Schmidt, M. (1989) 'Learning from Catastrophes'. In: F. Castles (ed.) *The Comparative History of Public Policy*. Oxford: Oxford University Press, p. 70.

Fourth, and finally, a variety of authors try to explain *why* the Second World War was the watershed event that precipitated the golden age of the welfare state. Among the prominent explanations are the growth in tolerance towards higher taxation and social spending because of the war; the positive effect that the war had on national solidarity, which is 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, and it is possible that they all encapsulate an important phenomenon. Significantly, they all assume that the war had a momentous impact on the development of the welfare state, and Castles notes 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.

In sum, the notable 'black swan' events leading up to the mid-twentieth century did have an effect on social policy. Some of the changes were more structural and far-reaching than others; some led to expansive policies while others paved different social and economic routes. Can the same be said of events that occurred, and will occur, in later periods?

Castles suggests that 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. Their size reduces the capacity of welfare states to change their structure, their ideological predispositions, or the way they operate. They are, to use Hinrichs' metaphor, 'elephants on

the move',⁴ 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. Whilst Castles does not investigate the detail of the metaphor, it is interesting to note that Hinrichs qualifies it to only include welfare institutions that 'enjoy high esteem and support among citizens'.⁵ This explanation does not exclude others, it does beg 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 Castles's thesis. His distinction between pre-welfare state era and post-welfare state era assumes what needs to be proven. If an event is identified as having 'an effect' on welfare state institutions only in cases where institutions are created following the event, it goes without saying that once such institutions are established, external effects may have only limited impact. But this narrow definition of the 'effect' that an event has allows more nuanced, albeit important, changes to evade analysis.

Take, for example, the commitment to full employment, a fundamental element of welfare state policy. Karl Klare notes that although commitment to full employment was always more symbolic than real, 'Cold War militarism created political room for government spending that would have been politically impossible were the goal 'merely' to achieve employment security'.⁶ Or the expansion of unemployment programmes which, at least in Piven and Cloward's classic formulation, may be connected to riots and social unrest. They explain that 'when mass unemployment leads to outbreaks of turmoil, relief programs are ordinarily initiated or expanded to absorb and control enough of the unemployed to

4. Hinrichs, K. (2001) 'Elephants on the Move: Patterns of Public Pension Reform in OECD Countries', *European Review*, 8: 353.

5. Hinrichs, at 79.

6. Klare, K. (2000) 'Countervailing Workers' Power as a Regulatory Strategy'. In: Collins, Davies and Rideout (eds.) *Legal Regulation of the Employment Relation*. The Netherlands: Kluwer Law International, p. 73.

restore order'.⁷ In Germany, reunification motivated the government to initiate significant institutional and financial reform.⁸ The general point, then, is that changes *within* social institutions, even significant in form, substance, and funding, are not captured by Castles' analysis. Indeed, even the Obama administration's \$787 billion stimulus package which, on some accounts, saved or created between 1.1 and 3.5 million jobs,⁹ is not seen as a 'restructuring' of the welfare state.

That being said, Castles' analysis, according to which the 'black swans of yesteryear barked louder than the black swans of today', is stimulating and challenging. His general analysis was accompanied by a final observation which was referred to throughout the workshop. Castles suggests, somewhat speculatively, that past and current crises differ in their impact not only because of the nature of the welfare state they encounter, but also because of the different way that crises are perceived. Contemporary strategists advise politicians to placate the public and reduce the possibility of being accused of a lack of preparedness in the face of an emergency situation.

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The consequence of this approach, however, is that politicians are not able to garner the momentous capital necessary for institutional change. While this observation may or may not be well founded, at the very least it reminds us that crises are not an objective matter of fact. They are perceived and constructed by political actors, who may employ them in a manner that will fit their agenda. Moreover, crises are mediated events. Just as politicians may try to avoid the public perception of a crisis as such, the public may understand an event as a crisis only following a concerted effort by the political echelons to characterize it as such, as did the Roosevelt administration.

7. Piven, F. and Cloward, R. (1971) *Regulating the Poor*. New York: Pantheon Books, p. 3.

8. Czada, R. (2009) 'From Muddling Through to Struggling Through'. In: R. Czada and K. Herashima (eds.) *Germany and Japan After 1989* (ISS Research Series, no. 33, University of Tokyo), p. 75.

9. Calmes, J. and Cooper, M. 'New Consensus Sees Stimulus Package as Worthy Step' *New York Times* (21 November 2009).

<<http://www.nytimes.com/2009/11/21/business/economy/21stimulus.html?th&emc=th>>

SESSION ONE

Theory

Professor Michael B. Katz, *Department of History, University of Pennsylvania*: 'The American Welfare State and Social Contract in Hard Times'

Professor Lorie Charlesworth, *Law Faculty, Liverpool University*: 'Welfare in Crisis: On the Significance of Socio-Legal Reconstruction'

Chair: **Professor Fred D'Agostino**, *Faculty of Arts, University of Queensland, Australia*

The first session provided the historical and theoretical structure for the analysis of the way welfare states respond to hard times. Michael Katz and Lorie Charlesworth traced the development of, respectively, American and British welfare policies in a manner that offers valuable insights into the workings of the social contract in hard times. Michael Katz identifies four factors that determine the operation of the social contract in hard times, each of which are quite distinct, and serve to supplement Castles' analysis. His first point is that the social structure of poverty and risks creates the foundation for the policy, since it establishes who the poor are, what distinguishes deserving and undeserving poor, and the importance of moral hazard. This is of central importance, because an observation that carries throughout Katz's thesis is one that relates directly to the boundaries of the social contract, namely, that hard times do not always affect people in equal manner. Dickens, in his own characterization of *Hard Times*, had something similar to say about good times:

'You don't know', said Sissy, half crying, 'what a stupid girl I am. All through school hours I make mistakes. ... to-day, for instance, Mr. M'Choakumchild was explaining to us about Natural Prosperity'.

'National, I think it must have been', observed Louisa ...

'National Prosperity. And he said, Now, this schoolroom is a Nation. And in this nation, there are fifty millions of money. Isn't this a prosperous nation? Girl number twenty, isn't this a prosperous nation, and a'n't you in a thriving state?'

'What did you say?' asked Louisa.

'Miss Louisa, I said I didn't know. I thought I couldn't know whether it was a prosperous nation or not, and whether I was in a thriving state or not, unless I knew who had got the money, and whether any of it was mine. But that had nothing to do with it. It was not in the figures at all', said Sissy, wiping her eyes.

'That was a great mistake of yours', observed Louisa.¹⁰

But good times and hard times that affect peoples in different fashion will sway public policy in different fashions. According to Katz, 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. This claim is ambitious, not only because it stands in tension with the structural analysis offered by Castles. More directly, the analysis complements the one offered by Piven and Cloward, who suggest that welfare is served as a social opiate, calming and soothing the masses. It may be that the distinction between them derives from the different crises they address. Piven and Cloward focus on social crises that have a strong racial character and that rise from the streets. Katz, on the other hand, focuses on market-based economic crises that may or may not affect certain segments of the population. Different forms of crises may lead to different analyses.

10. Charles Dickens, *Hard Times* (Everyman's Library, 1992) at 53-54.

Katz's second point relates to the structure of benefits and payments or, to be more precise, the categorization of welfare benefits as insurance based, means-tested, or tax breaks. The latter, which includes deductibility of home mortgage and medical benefit exemptions, has become a major source of American middle-class welfare.¹¹ For example, a fiscal crisis of a local state generally leads to the reduction in means-tested public assistance. The reduction in benefits reflects, in other words, a contraction of the social contract and a redrawing of lines between different sections of society. When the crisis affects middle-class interests, however, a different strategy is adopted. Katz finds, for example, that the current economic crisis has created a unique opportunity to push 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.

The third element of Katz's argument relates to the political alignments that constrain or enable governments at a particular time. Narrowly construed, this factor could refer to the reliance of particular parties on certain segments of the population, such as the Democratic reliance on working-class voters, or the Republicans on conservative, religious voters. The problem is that the significance of this basic observation is not straightforward. In certain times of crisis, the identification of particular groups with political parties has caused the party to prioritize policies that advance the interests of those groups. In other times, that exact allegiance has motivated the party to take the voting patterns of those groups for granted, and to advance policies that will sway voters that belong, traditionally, to the other voting bloc. The analysis of political alignments may take into account the association of other relevant actors, such as big business and trade unions. Their interests are not always straightforward. Katz offers the example

The current economic crisis has created a unique opportunity to push forward health insurance that has failed every Democratic president in America since Harry Truman.

of Wal-Mart and the national service workers union (SEIU), a pair normally at odds, who joined forces to mount a national campaign for health insurance.

Fourth, and finally, reform, ex hypothesis, does not originate in a vacuum. Katz refers to Theda Skocpol's use of the terms 'path dependence' and 'policy feedback' to highlight the fact that 'policies, once enacted, restructure subsequent political processes'. He notes that policy feedback may transform or expand the capacities of the state. In addition, policies may 'affect the social identities, goals, and capabilities of groups that subsequently struggle or ally in politics'.¹² An important example that Katz offers is the shadow that the American Supreme Court cast over the New Deal's legislative initiatives. Such constraints undoubtedly shaped the results of the reform. The point is not only institutional. In Katz's words, 'economic crises become intellectual crises. Events overwhelm existing paradigms'. More concretely, an economic crisis may reflect a crisis of the ruling economic ideology at the time. But whether or not this is the case depends to a large extent on whether there is an alternative. This was the case with Keynesianism in the 1930s, but it is not clear whether, for example, such a counter-theory is in place at the moment. This would explain, perhaps, why no significant changes in social policy are observed even after New Orleans was almost demolished by a hurricane and the collapse of the automobile industry has left major cities with a 30 per cent unemployment rate. The latter, for example, would seem to demand that we revisit the

11. See Hacker, J. (2002) *The Divided Welfare State*. Cambridge: Cambridge University Press, pp. 29–40.

12. Skocpol, T. (1992) *Protecting Soldiers and Mothers: The Political Origins of Social Policy in the United States*. Cambridge: Harvard University Press, pp. 56–58, 59.

assumption that the American, if not Western, state is founded upon – that there is no shortage of jobs, and that social policy may be designed accordingly.

Lorie Charlesworth invites us to consider welfare's legal path, both in nature and the way it has been misrepresented. At the centre of her vivid brief account of 350 years of legal history is the claim that paupers under the Poor Law did, in fact, enjoy a right to relief. Charlesworth draws a comparison with the concept of the settlement, which establishes the conditions for relief on residence within a designated municipality. She argues, here and in other writings, that 'poor law was largely settlement law, and settlement law provided the rights and obligations which underpinned both the right to poor relief and the duty to provide it'.¹³

But this conclusion is far from evident. Under the Act of Settlement, local justices had the power to remove 'any Person or Persons that are likely to be chargeable to the parish [that they] shall come to inhabit'.¹⁴ Moreover, as Charlesworth herself notes, each parish operated separately with considerable legal discretion, exercising a degree of freedom that 'led to increasingly idiosyncratic methods of distributing poor relief'.¹⁵

The use of such discretion was perceived, even by those who were unsympathetic to any form of relief, as 'contradictory to all ideas of freedom' and 'as a most disgraceful and disgusting tyranny'.¹⁶ The situation of paupers was made all the more difficult by the fact that the administration accentuated the

harsh provisions of the Act of Settlement with even harsher practices, ignoring even the few safeguards that the law supplied.¹⁷

Moving back to the issue of state reaction to hard times, Charlesworth's paper reminds us that, once again, the boundaries of the social contract are of central importance. In addition to the evident effect on the situation of claimants, such an extreme degree of local control and discretion has also been considered to be an ill-founded mechanism in dealing with the task at hand:

It can only be concluded that 'the elementary lesson that effective treatment of the Unemployment problem is utterly beyond the power of Local Government has not been learned'. Even with regard to the provision of maintenance, the government refused to realise 'the difficulties inherent in the use of a local system of relief to cure a depression national in its scope, and due to causes that are national and even international rather than local in their character'.¹⁸

This insight is especially important when considering the social contract in hard times. The boundaries of the contract, as indicated above, mark the line between the collective and the 'other'. In other words, it identifies the groups that are entitled to redress during the crisis. In addition, since hard times often require a significant organizational and financial effort, it should be noted that the state is far better equipped with the necessary resources to address the crisis.

13. Charlesworth, L. (1999) 'The Poor Law', *Journal of Social Security Law*, 6: 79,80.

14. Settlement Act s. 1.

15. Charlesworth (n. 15), 85.

16. Malthus, T. R. (1976) cited in M. Rose 'Settlement, Removal and the New Poor Law'. In: D. Fraser (ed.) *The New Poor Law in the Nineteenth Century*. Basingstoke: Macmillan, p. 25.

17. Such as the requirement to obtain judicial order before removal. See Cranston, R. (1985) *Legal Foundations of the Welfare State*. London: Weidenfeld and Nicholson, p. 24.

18. Webb, S. and Webb, B. (1963) *English Poor Law History - Part II: The Last Hundred Years*. London: Cass, p. 708 (footnotes omitted).

SESSION TWO:

Institutional Aspects

Dr Bea Cantillon, *Antwerp University*: 'Crises and Welfare States: the Need for New Distributional Agendas'

Dr Chris Pierson, *Nottingham University*: 'Black Swans Meet Grey Elephants: Crisis of the Welfare States'

Chair: **Professor Neil Gilbert**, *University of California at Berkeley*

The second session investigated the institutional background that facilitates and legitimates the potential and actual state responses that are available when hard times hit. Bea Cantillon and Chris Pierson discussed the pragmatic and normative issues and constraints to be considered in this respect. In different respects, both papers relate to some of the themes developed in the opening address and in the previous session.

Bea Cantillon opened her paper by raising an important question: why did OECD countries not succeed in making any further progress in the fight against (relative) income poverty, particularly within the population at working age during a period that showed an increase in employment rates and high levels of social spending? As Cantillon notes, this is not as surprising as appears at first glance. Esping-Andersen and Myles have noted that 'because it taxes and spends, the welfare state is by definition redistributive, but this does not automatically entail that it creates more equality'.¹⁹

Cantillon's answer begins with the changing nature of the welfare state: since the 1990s, all OECD welfare

states are moving in the same direction – a 'recasting' or recalibrating of the welfare state.²⁰ Such recalibration emphasizes unemployment, which includes activation programmes, targeting and means-testing. In addition, attention is also given 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.

This has meant that the welfare state has moved beyond the traditional redistributive social welfare agenda into what is now commonly referred to as the 'social investment state'.²¹ Here, education and equality of opportunity are favoured over equality of outcomes and poverty. For example, during the course of the 1990s, European countries reduced social assistance benefits for the working age population by 10 per cent to 20 per cent.

But this transition is problematic on more than one count. Whilst activation policies provide economic incentives for the unemployed to find their way into the labour market, these policies also impose greater exclusion on those who cannot be 'activated'. The second concern these activation policies raises pertains to the role of women in the labour market. In order to increase female labour force participation, policies must be put in place to enable the successful reconciliation of work and family life. Such a policy, however, benefits those women who are already in the labour force, namely high-skilled women, in the hope that others will follow. The evidence suggests, however, that participation rates of low-skilled women remain low, and redistribution seems to be flowing in the wrong direction.

19. Esping-Andersen, G. and Myles, J. (2009) 'Economic Inequality and the Welfare State'. In: W. Savlerda, B. Nolan, and T. M. Smeeding (eds.) *The Oxford Handbook of Economic Inequality*. Oxford: Oxford University Press, p. 639.

20. Rhodes, M., Hemerijck, A., and Ferrera, M. (2003) 'Recasting European Welfare States'. In: J. Hayward and A. Menon (eds.), *Governing Europe*. Oxford: Oxford University Press.

21. Giddens, A. (1998) *The Third Way*. Cambridge: Polity Press.

Despite an increase in the expenditure on non-compulsory education, intergenerational class mobility is declining.

The third difficulty concerns the effects of the new social investment policy on social mobility and equal opportunity. Current data suggests that, despite an increase in the expenditure on non-compulsory education, intergenerational class mobility is declining.

These challenges should provoke us to reconsider the core aims of the new social contract, and specifically whether the focus should be to reduce inequality, respond to risk, or alleviate poverty. Cantillon's most important observation is that the response to new social risks, such as balancing work and family, has worked to the advantage of relatively privileged groups. If, indeed, the aim of the social contract is increasingly turning to 'social investment' and responding to social risks, then hard times that affect the relatively privileged become a welfare state matter of concern. Conversely, as explained by Michael Katz, if poverty and inequality become less of a concern, then a 'crisis' that may expand inequalities, such as unification in Germany, is not perceived as such. Amartya Sen's comment, which Cantillon invoked as an epigraph to her paper, is indeed apt: 'the present economic crises do not, I would argue, call for a 'new capitalism', but they do demand a new understanding of older ideas ... many of which have been sadly neglected'.²²

Chris Pierson's paper begins from a theoretical standpoint, querying whether the notion of the social contract is a useful one to employ, as well as what makes a 'crisis' worthy of its name. As for the former, his skeptical approach follows Ronald Dworkin, who argued (against the Rawlsian methodology) that the social contract 'is not merely a pale form of an actual contract; it is no contract at all'.²³

But Pierson suggests that the social contract is, perhaps, shorthand for social solidarity, the idea that as members of a community (the borders of which are contestable) we owe certain obligations to each other. This, in other words, is a normative ideal for certain social standards, rather than a basis for an argument that particular, operational claims from the government may be grounded on that ideal.

As for the concept of a 'crisis', Pierson usefully outlines a few characteristics that identify a crisis as an event that is more than a 'bad experience'. First, a crisis is limited in time. A timeless problem, such as shortage of funds to cure every sick person on the planet, cannot helpfully be seen as a crisis that demands our immediate attention. The second characteristic of a crisis is that it is an event severe enough to require some form of action, since the consequences of allowing the conditions of the crisis to continue would be unendurable. And, third, crises have to be socially constructed. As noted earlier, crises may have certain more or less objective features, but equally significant are the subjective elements. A state can treat a relatively minor event as a crisis, and it can (try to) minimize the importance of major events. Pierson develops this insight to enquire which individuals, because of their privileged position, get to 'name' a crisis.

From here, Pierson moves to suggest that not only is the welfare state primarily concerned with addressing risks, it is, in effect, a 'crisis reduction or crisis management machine'. If a new crisis develops, the welfare state responds by creating the necessary institutions so as to address the current and, moreover, the subsequent crisis similarly and effectively. If welfare states have become 'elephants on the move' or, perhaps, similar to ship tankers, a large, slow moving object, very small and slow change could have a very significant effect in the future. If we choose to characterize crises as dramatic, sudden events, we may miss the more subtle, long-term changes that major events can bring about.

22. Sen, A. (2009) 'Capitalism Beyond the Crisis', *New York Review of Books*, 56 (March 2009).

23. Dworkin, R. (1973) 'The Original Position', *University of Chicago Law Review*, 40: 500, 501.

SESSION THREE

From Welfare to Warfare? On the Boundaries of the Social Contract

Professor Stephan Leibfried, *University of Bremen*: 'And they Shall Beat Their Swords into Plowshares: The Dutch Genesis of a European Icon and the German Fate of the Treaty of Lisbon'

Professor Michael Shalev, *Political Science, Hebrew University, Israel*: 'States Make Wars and Wars Make Welfare States? Israel as a Case Study'

Chair: **Dr Amir Paz-Fuchs**, *Director of the Social Contract Revisited programme, FLJS*

The third panel included two papers that offered different, yet equally refreshing, perspectives on the boundaries of the social contract and the effect this has on the response to hard times.

Stephan Leibfried's paper focused on current developments at the European level. These developments are intriguing for those interested in social contract discourse because of the way they relate to early seventeenth and eighteenth century contractual theory. Hobbes, Locke, and Rousseau developed their theories with a clear question in mind: how do we justify the transfer of power of citizens to the state? Since the existence and powers of the nation state are matters that are currently beyond contention, these writings seemed of little practical relevance to contemporary analysis. But the Irish endorsement of the Lisbon treaty, and the European Union selection of its first full-time president, suggest that Europe is at the 'nation building' stage that raises the questions that vexed early and modern social contract theorists: how do we realize democracy to its fullest? What should fair institutions look like? What is the proper balance of power between levels of government? What should be the role of the courts?

Seeking to address these issues, Leibfried begins with a poster entitled, 'All Our Colours to the Mast', by Dutch artist Reyn Dirksen. The poster serves as an icon of European integration since 1950, when it won first prize in a competition administered by the US Marshall Plan Agency. The press at the time saw it as 'a symbol of economic cooperation', of world trade and prosperity. It was also a practical and symbolic transition from the war era and war industries, reflecting the biblical idea of beating 'their swords into ploughshares', and moving to a common market for goods and labour (in 1957) and, later, to capital and services. The Marshall plan, as we may recall, invested some \$13 billion over a four-year period and had a profound effect on the post-war reconstruction of Europe. A form of nation building, if you will.

It is interesting to note that the source of inspiration for Dirksen's ship was the symbol of Dutch unity – the Seven Provinces flagship, a celebrated Dutch flagship that was instrumental in a resounding victory over the English in a battle known as the Raid/Battle on the Medway in June 1667. If the source of inspiration is to be taken at face value, the symbol of Dutch unity has been transformed into a symbol of European unity. Moreover, both pictures were designed at a time when the respective entities have just emerged from the brink of grave danger to their very existence. The press at the time made much of the differences between the two ships: while the Seven Provinces was shown from the stern, heading to war, Dirksen's ship had its bow towards the viewer, 'emerging... out of the darkness of the past and into the light of the future, navigating the high seas and overcoming all hindrances' – a visual narrative of the opportunity for transition that a crisis offers. But what is the prospect, or route, of this transition?

One possible avenue of analysis is through the age-old distinction of federalist vs. confederal types of states. As Leibfried suggests, the symbol of a ship hoisting fifteen flags serves as 'an icon for peaceful cooperation between sovereign states that went beyond the old system of international politics ... [and] would eventually lead to a European federalism'.

At the other end of the spectrum, we would find a model of confederalism, with more power concentrated at the provincial and metropolitan level than in a federation. Here there is no hierarchal centre, and the sovereignty of the states is protected from outside interference.

This issue is not solely an institutional one. It goes to the heart of the issues that divided social contract theorists in the seventeenth and eighteenth centuries. Approaching the matter in this fashion, we would be advised to recall that social contract theorists (but not policymakers) generally ignored the intermediary institutions – charities, churches, municipalities – between the citizens and the state. Tellingly, this position stands in sharp contrast to the debate taking place with respect to the form of the European Union. In the latter case, the European citizens, though not completely out of the picture, definitely hold a secondary role. Their interests are assumed, perhaps problematically, to be held and upheld by their national governments, and a government protecting the national sovereignty is supposedly protecting the interests of its citizens as well.

A second perspective focuses on the actual agendas involved. Two questions arise: first, is the new structure intended to be simply an instrument in the service of European individuals and corporations? An alternative would be a European Union that aspires to address issues of 'peace, prosperity, and social and institutional cohesion'.

One testament to complexity of the matter lies in the fact that opposition to European federalism comes not only from the neoliberal flanks, but also from those holding nationalist agendas. Rousseau's Republicanism, perhaps, goes both ways: the task of

advancing a 'European' identity, if it exists, requires overcoming particularistic nationalist sentiments. But opposition to European federalism may derive from an adherence to social democratic values and a perception that the four European 'freedoms' constitute a retreat from those values, with a deregulated market as a governing social and economic paradigm. Arguably, this view lies at the heart of the *Solange* decisions, where the court ruled that as long as there is no comprehensive European bill of rights, national constitutional law will take precedence over European law.

Michael Shalev's focus on loyalty benefits cuts across this social democratic–neoliberal divide. His argument is related to Robert Goodin's view that 'the state, as presently conceived, is too inclusive' since it 'claims a monopoly on the power to legitimate any other sources of social succor'.²⁴ Indeed, the issue of loyalty benefits is uniquely important because it combines two worlds that, arguably, have been segregated for too long: the moral and ideological perspective of state action, and the empirical and economic analysis of the welfare state.

And Michael Shalev is right to note that if any country might be expected to serve as a laboratory for such an inquiry, Israel should be it. He opens with a reference to a new trend in the analysis of Israel's occupation of the West Bank which characterizes it as an economic entanglement and not solely as part of a political, ethnic, or religious conflict. The paper seeks to identify, map, and investigate the existence of what Shalev terms 'loyalty benefits' and analyze the trends that they are subject to. He identifies loyalty benefits as a particular category of transfer payments used to advance a clear state interest in privileging one status group over another. As such, this is part of a larger project that questions the ethos of Israel as founded on social-democratic principles. This perception, exhibited in the first decades in a robust, centralist economic structure as well as in more

24. Goodin, R. (1996) 'Inclusion and Exclusion', *Archives Européennes de Sociologie*, 37: 343, 363.

romantic manifestations like the Kibbutz, has been revisited by critical scholars who suggest that the solidaristic aspects of the Zionist project were never as universal as one may assume, but rather heavily biased towards discrete segments in society, namely, and in receding order, Jews, European (Jews), and men. In other words, rather than being an inclusive endeavour, it had significant exclusionary consequences, especially for Arab citizens of Israel (not to mention Palestinians in the occupied territories), and Mizrahi (Oriental) Jews.

This message is of central importance to the social contract project in general, and to this workshop in particular, because it stands in opposition to common intuitions that lead many to believe that times of crisis increase solidarity and inclusion, forcing people to come together, to set aside differences and to view the common goal as paramount. While a military crisis is indeed an opportunity for institutional change, such a change does not necessarily benefit all segments of society equally, let alone lessen disparities. In heterogenic societies characterized by ethnic, racial, or religious tensions, it may be employed by powerful majorities, or hegemonic groups, to solidify their hold and expand their rights, at the expense of minority groups.

The paper goes on to suggest the existence of not one, but rather a multiplicity of 'social contracts'. Some are Republican in nature, identifying 'deserving' groups of citizens and granting them categorical benefits, that is, benefits that are, per Shalev, 'paid to members of socially or politically defined "categories" considered worthy of public support, irrespective of either demonstrated need or an individual record of prior social insurance contributions'. Other social contracts are based on liberal, if not neoliberal, ideology of exchange – a 'narrow' conception of the social contract. Here, citizens have to work for their rights, and demonstrate desert.

But there are several ambiguities here. If loyalty benefits are grounded in a Republican ethos (in Shalev's words: 'contribution to the common good'

A military crisis is indeed an opportunity for institutional change, such a change does not necessarily benefit all segments of society equally, let alone lessen disparities.

and 'motivating and rewarding citizens for advancing state interests'), other benefits could fit the bill (literally). Welfare-to-work programmes, currently in force in many countries, are based on a very strong state interest that unemployed individuals 'work first' and make demands later. Child benefit policies, in China or in Germany, are a direct result of demographic concerns as defined by the state. And Piven and Cloward have shown how social policy serves to regulate the poor and keep them in line with prevailing moral norms.

But perhaps Shalev means to suggest that loyalty benefits are not part of a Republican, or even nationalist, category, but rather only ostensibly employ such rhetoric for purposes of legitimacy and to garner public support. Instead, their main purpose is to reward particular groups at the expense of other groups. In this case, the definition should be modified somewhat, so as to indicate when loyalty benefits reward people for who they are (e.g. Jews), and when they are granted for what they do (military service). Shalev is right to draw inspiration from Esping-Andersen's colourful description of the conservative (in his typology) welfare state regime, which has as part of its purpose 'to chain the workers directly to the monarchy'. But that does not cover the whole story. Holocaust survivors and Jews who immigrate to Israel are awarded benefits because of who they *are*; military reservists are granted benefits because of what they *do*; disabled veterans and demobilized soldiers receive benefits because of what they *did*. The fact that some of these groups include non-Jews, usually as a minority, raises the question of whether this is accepted as insignificant to the broader goal, or whether the Jewish/non-Jewish divide is less relevant.

Another fascinating ambiguity in Shalev's subject matter, also connected to social contract theory, is that, from time to time, people move from one contractual mould to another. The best example of this is the ultra-orthodox community which, at different times, are predominantly viewed as 'deserving' because they preserve Jewish learning or just because they are Jewish, and at other times are viewed as parasitic because they don't serve in the

army and have a very low labour participation rate. Lastly, Shalev's project suggests an uneasy relationship between the layers of the social contract. The neoliberal, narrowly contractual exchange relationship is in tension with the Republican form of solidarity as a governing principle. The retrenchment in loyalty benefits, even more significant than other programmes, suggests that perhaps the American republican ideology is winning the day over the French Republicanism.

SESSION FOUR

The Disparate Effects of Hard Times on the Social Contract

Professor Michele Landis Dauber, *Stanford Law School*: 'The Real Third Rail of American Politics'

Professor Lucie White, *Law Faculty, Harvard University*: 'Including the 'Other' in the Social Contract: the Hardest Challenge of Our Time'

Chair: **Professor Matthew Diller**, *Dean of Cardozo Law School, Yeshiva University*

The fourth and final panel brought to centre stage a matter that accompanied discussions throughout, the fact that some 'disasters' are not accorded the significance they merit because they affect the 'other', a fact that is reflected both in public perception and in the scale of the government response. Michele Dauber and Lucie White deal, at first glance, with very different subject matters: Dauber recounts the historical circumstances leading up to the New Deal and the way that history had an effect on the public and legal debates that were held; White paints a troubling picture of Western countries' failure to assist African nations in good times, let alone in hard times. And yet, the papers have much in common. They both focus on the willingness (or lack thereof) to respond to calamities, and both find that that willingness is still connected to race and to moral worthiness.

The legal aspect of Dauber's paper offers an abundance of material to those (such as the legal realists) interested in the role of legal precedent in general, and prior to the New Deal, in particular. The New Deal had long antecedents in the dawn of US disaster relief, and its promoters urged that it be implemented as a form of adhering to, and not breaking with, tradition. For lawyers, the reasoning underlying this argument is clear: it was necessary to

show that Congress's power to spend was already well established, legally and politically. Moreover, the argument was made that not only was relief not prohibited by traditional American policy, but that such relief is in 'the spirit of generosity which has always actuated the Government of the United States under similar conditions'.²⁵

But, apart from the legal argument necessary to establish that appropriations were constitutionally permissible, the historical perspective is important in setting the frame of the social and political debate. Through a keen understanding of the historical precedents, Roosevelt recognized that, if significant aid is to be delivered, its justification must make use of the types of narrative employed in the relief of victims of the 1791 slave insurrection in St. Domingo, the Whiskey Rebellion in 1794, or the Alexandria fire of 1827. In such cases, the claimants managed to present the disaster as unforeseeable and themselves as morally blameless victims. Along with Republican senator Robert La Follette Jr., Roosevelt embarked on a concerted effort to portray the economic misfortunes that resulted from the Great Depression in terms of a largescale environmental disaster. This was reflected not only in the political rhetoric used, but in the appropriation of the work of cultural luminaries such as photographer Dorothea Lange, filmmaker Pare Lorentz, and novelist John Steinbeck.

The perception of a crisis in the public eye will determine, to a large extent, the range of possibilities open to the government when it plans to mobilize public reform.

25. *Congressional Record* (1931), 74, pt. 4: 4437.

The aim underlying this approach to the crisis is clear. A 'disaster' is not (solely) an objective reality, and hence, the perception of a crisis in the public eye will determine, to a large extent, the range of possibilities open to the government when it plans to mobilize public reform. As noted by Pierson above, a crisis must be limited in time. Dauber echoes this sentiment when she explains that for Congress and the Supreme Court to act with public backing, the Depression had to be 'solidified in the popular imagination as a single event'. However, it must be asked whether there is some tension between long-standing reform of public institutions and the characterization of a crisis as a localized (in time or place) event. In this regard, an earlier observation of Castles is pertinent: that even the generous American 'welfare state' that was established in the aftermath of the Civil War evaporated once the survivors passed away and the discrete cause it was meant to deal with disappeared.

Dauber's paper concludes with the implications of her analysis to the modern-day example of hurricane Katrina. In her view, Katrina was a defining moment in President's Bush's legacy precisely because the administration did not respond to people in need. The President did not grasp that, while the people did not change, they were now able to portray themselves as victims of circumstances beyond their control. Failure to provide for blameless victims is as politically risky as being overly generous to the able-bodied poor, who are 'undeserving'.

But when observing the ground-level 'reform' that took place, we find that Katrina is a complicated story. Even the perception of the hurricane's victims as deserving does not automatically mean that institutional, social, and economic reform would correspond with a more redistributive agenda. As Naomi Klein explains, it was actually wealthy developers and Chicago school economists who saw the disaster as an opportunity to establish a 'clean slate' to start over with fewer regulations, lower taxes, and cheaper workers.²⁶ The dominant ideas of

the time, it seems, are more powerful in determining the route of change.

Lucie White's paper raises the all-important question of the borders of the social contract. She asks what kind of roles and responsibilities people in the global North have towards people in the South. Acknowledging that the current economic calamity has dire effects in the North, she reminds us that these are compounded in the South. In her view, including radically impoverished peoples in the social contract is 'the great moral challenge of our time'.

Instead, the response has commonly been one that is driven by fear and self-interest: hunger may open avenues for militant fundamentalists; bad hygiene may lead to epidemics which may be carried to our neighbourhoods; sweatshop workers may produce hazardous products; and poverty may provide incentives to migration. Indeed, many have argued that aiding our neighbour is in our interest because his misery will soon become our misery. Self-interest, in other words, may be a force for good, motivating as it does aid and relief. In White's analysis, however, because such assistance does not derive from empathy and connectedness, it often leads to aggression and denial.

White acknowledges that if Western aid has been paltry even in the best of times, hard times make it even more difficult to convince those in the West of the need to provide aid to developing countries. Against this background, White suggests that greater empathy between people in the North and those in the South may make a difference; a sense of connectedness would provide the structure for the social contract. White acknowledges that including 'others' in the social contract would make public debate more fractious, and would require many hard choices. And yet, such contention is well worth the cost for, according to White, the ability to react to disaster in a beneficial fashion is possible only when there is a feeling of connectedness.

This position raises a very important question: can empathy be created? White points out that young

26. Klein, N. (2007) *Shock Doctrine*. London: Penguin, p. 4.

people appear motivated, joining human rights and African poverty programmes in universities in large numbers. Another example is the Fourth World movement in Europe, which consists of affluent adults building a close alliance with poor and

homeless individuals. Such positive, bottom-up trends can and should be accompanied with top-down institutional responses, such as fellowships, sister-city alliances, and cross-border redistribution debates in the Puerto Alegre model.

Conclusion

The intuition that was voiced by many of the participants in previous workshops was that crises bring people together, broadening and strengthening the social contract and creating the conditions for institutional reform. Sadly, this workshop revealed that the matter is not so straightforward. The scholars who participated, all of them well versed in welfare state development and institutional analysis, acknowledged that this was their first attempt at thinking of the effects of hard times on the social contract, and their analysis is, to an extent, speculative and tentative. And yet, considered as a whole, the variety of disciplines and perspectives represented offer several promising avenues to follow in developing a comprehensive theory.

The first points to emerge was that the 'hard times' at question are highly contestable, and subject to misrepresentation by parties such as political forces and the media, who have their own agendas. Whereas some crises, such as military engagements that have a profound effect on civil society, or a debilitating, prolonged economic calamity, may be indisputably viewed as such, many others, as Frank Castles asserted, and Chris Pierson and Michele Dauber corroborated, are manipulated by these actors to either mobilize response or to placate the public into the belief that the status quo can be allowed to prevail.

A second key lesson that we can take from the workshop is that a crisis never takes place in a vacuum. The parties in power, the judicial precedents that are in place, legal rights that are recognized, the local or federal government structure, and the reigning and any alternative ideologies, all influence the character and range of the response. Whether or not paupers enjoyed a right to relief under the Poor Laws, as Lorie Charlesworth argues, may have had an impact on the reforms at the time. Stephan Leibfried's analysis of the formation of the European

Union, from the aftermath of the Second World War to the Lisbon Treaty demonstrates that the allocation of powers amongst various levels of government at the European level may be decisive in determining the policies available. The *laissez faire* constitutionalism that Roosevelt faced in the Supreme Court was a force that he had to reckon with, and determined, to a great degree, the options available to him. And, as astutely observed by Michael Katz, the fact that Keynesianism was lurking off-stage was important when the Great Depression undermined the prevailing economic theory of the 1930s. The fact that no such counter-theory commands a wide consensus today may limit the depth of responses to the present economic crisis.

Thirdly, not all hard times are equal. Because of the complex structure of benefits, some crises affect lower income groups, while others hit middle-class investments and interests. The response to the crisis, as Michael Katz suggests, often bears a strong correlation with the affected group. Hence, if the state is experiencing extraordinary yet general fiscal pressures, means-tested benefits are often cut because it is necessary to reduce public spending. And yet, when hard times affect pensions and house prices, government increases public spending, because the interests of the tax-contributing population are at stake. Bea Cantillon took this insight one step further, suggesting that the recalibration of the welfare state and its emphasis on 'new' social risks has led to many policies that are indeed redistributive, but not necessarily egalitarian. Redistribution, in other words, may be moving from the 'have-nots' to the 'haves'. Michael Shalev's focus on loyalty benefits offers an additional slant to this insight, since it suggests that the redistribution may exist between certain identity groups within the state. In other words, the borders of the social contract do not necessarily correspond with state

borders. Rather, benefits may assist some segments of the population and not others.

Fourth, we may close the circle by conceding the breadth of the project at hand, including the difficulty of defining and identifying a 'crisis' and, correspondingly, the challenge that exists when

seeking to determine when a 'change' or 'reform' has been undertaken, following a crisis. And yet, the insightful papers presented in the workshop, from a multiplicity of perspectives, have done much to tackle the issues, providing valuable insights and platforms for further research and policymaking.

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