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## The Strange Notion of Contract

Grahame Lock\*

**The notion of contract is not as unproblematic as might at first sight appear. Its theoretical basis in particular is very difficult to decipher. It is arguable that whereas the Middle Ages and 16th century produced an exceptionally subtle foundational account, the rise of modernity largely destroyed this doctrine. Nowadays we are far from possessing an adequate theory. This also means that the (ever more) widespread application of social contract doctrine in present-day political life is a questionable enterprise.**

### CONTRACT IN PHILOSOPHICAL HISTORY

Contract is a strange thing. It is doubly strange because it is at the same time so familiar – it is all around us, the whole time.

Gaius the Roman, ‘Our Gaius’, who lived in the second century AD, explained that all of (private) law revolved around just three notions: person (*persona*), thing (*res*) and action (*actio*).<sup>1</sup> Then when, say, one person buys something (*res*) from another person, we have contract or something like it. Gaius distinguished various kinds of contract. Yet, like other Roman lawyers, he did not try to base contract on any general philosophical account – say, of promise or of will.

But the medieval version of Roman law, a theoretically much more sophisticated affair, attempted to produce a general account of *why contracts are binding*. And the answer lay in *consent*. This idea was not in itself new. What was however novel was the claim that consent belonged to the very essence of contract. To make such a claim, you need a philosophical theory of essence. This the medieval legal theorists found in the philosophy of Aristotle. So, for example, Bartolus developed the concept of *causa* as based on either liberality or exchange.<sup>2</sup> Now a *causa* was, according to (later) medieval theorists, an Aristotelian *causa finalis* – that is to say, the reason something (the making of a contract) was done or ought to be done. In fact, the Aristotelian final cause had an essentially *moral* aspect.

The real breakthrough in providing contract with a philosophical foundation came with the Thomistic revival in the 16th century (the revival of the ideas of St Thomas Aquinas, who was himself heavily influenced by Aristotle). Law students of our day are probably not aware what a monumental contribution to legal theory

was made by this Second Scholastic movement (Francisco de Vitoria, Domingo de Soto, Luis de Molina, Francisco Suarez and various others).<sup>3</sup>

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What they argued, as James Gordley summarizes the matter,<sup>4</sup> was that the binding force of contracts was to be analyzed ‘in terms of the Aristotelian and Thomistic virtues of promise-keeping, commutative justice, and liberality’. Note here the use of the term *virtues*. Bartolus’ doctrine of the two varieties of *causa* was now glossed as the claim that every contract was to be classified as either gratuitous or onerous, ‘as made either *causa gratuita* or *causa onerosa*’.<sup>5</sup> There were disagreements between 16th century legal philosophers on many details. The general line of their argument is however clear.

But in the 17th century, the whole edifice of scholasticism – not just in legal theory, but in much more general intellectual terms – came under ever greater pressure. This was the century of the moderns – Descartes in France, Hobbes and Locke in England and many more anti-Aristotelians and anti-scholastics. To put the matter in simple terms, the modern philosophers did not want to base anything on what they regarded as unacceptably dogmatic theological notions. So, in respect of legal theory, they began to drop the moral or virtue account of contract.<sup>6</sup>

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1 See Gaius, *Institutes*, I, 8; cf. A.M. Honoré, *Gaius*, Oxford: Clarendon Press 1962.

2 Bartolus, *Commentaria in corpus iuris civilis*, Venice 1526, repr. Rome 1996.

3 See P. Grossi (ed.), *La seconda scolastica nella formazione del diritto privato moderno*, Milano: Giuffrè 1973.

4 J. Gordley, *Philosophical Origins of Modern Contract Doctrine*, Oxford: Clarendon Press 1991.

5 Gordley, *a.w.*, chapter 4.

6 Gordley, *a.w.*, chapter 5.

## THE WILL THEORY

By the 19th century, systematic attempts were being made to rid law of 'out-dated' and theologically-oriented, that is to say, specifically Christian, references. Thus many leading legal thinkers wanted not just a contract theory purged of religion, but even one purged of all metaphysics. The only or best possibility seemed to be to redefine contract in terms of *will* – the will of the parties entering into the contract. If, say, two or more parties voluntarily, i.e. out of their own free will, enter into a legal agreement, then who is to say that this agreement is not in itself valid and binding? Gordley remarks that the will theory was thus useful to 19th century economic liberals, who – for obvious reasons connected with their private economic interests – held 'that government should leave economic decisions to the market-place' and should not concern itself with problems of justice. The problem was however that the new account 'entangled [its champions] in difficulties they were never able to resolve'. Or, to put it another way: 'We can have a theory of contract, but to do so we need the very concepts that the 19th century jurists threw out.'<sup>7</sup>

In short: the will theory does not work. It does not explain why some choices – that is to say, some meetings of the will of two or more persons – are nevertheless not accepted as establishing a valid or binding contractual agreement. For example, we are not permitted to sell ourselves into slavery.

In the light of this difficulty, one can (if one is a will theorist) do two things – either admit that the will theory is deficient; or attempt to rewrite the law to bring it into line with a consequent will-based approach. The first option was taken by most legal thinkers. They dropped the will theory, at least in serious academic analyses. The second approach was often taken by ideologists. That we cannot sell ourselves into slavery, or properly contract to perform actions which have been regarded over the centuries as immoral, and that some contracts, requiring the performance of such actions, are therefore unenforceable in law, is on this view wrong because inconsequential. The law ought to allow us to sell ourselves into slavery; and, say, prostitution should be regarded as a 'profession like any other', to which a government Job Centre may legitimately direct seekers after work, to be formalized in a regular labour contract; and so on.

Aside from a few incorrigible neo-liberal propagandists – of whom by the way quite a number are now to be found in government –

no one seriously accepts this second view. But if we instead take the first position, namely that the will theory of contract must be dropped, what remains of our understanding of the foundations of contract?

Nothing much. There is at present no adequate philosophical account of the bases of contract. For some lawyers that does not matter: they do not care. This tendential abandonment of serious consideration of such matters may, at least to a certain extent, be tempered – or rather: rendered less obvious – by a pragmatic attachment to an (in fact equally dogmatic) legal positivism: contract is just what the law book says it is. Why the legislator defined it thus in the law book remains a mystery. After all, the legislator has no coherent theory either.

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## THE SOCIAL CONTRACT

Let us now see how this curious and unsatisfactory situation works itself out in the field of political theory. The reader will be well aware that one of the great political dogmas of the modern age is what is generally known as social contract theory (the *pactum societatis*). This holds, roughly, that the existence and authority of any social collectivity – including the state – may be regarded as legitimate only to the extent that its members have severally agreed to transfer to this collectivity their personal rights and freedoms. Well-known proponents of this doctrine, or at least of one or another of its variants, are Thomas Hobbes, John Locke, Samuel von Pufendorf, Jean-Jacques Rousseau and, much more recently, John Rawls.

It is, in our own day, an immensely popular theory. Yet it also suffers from a crucial weakness. The Czech philosopher Jan Sokol writes for example as follows: 'One important strain of juridical and political thought, leading from Hobbes, Grotius and Rousseau up to John Rawls, seeks the source of law and rights in the social contract. This might appear to be a clever solution, until one realizes that a contract itself is a juridical notion and

<sup>7</sup> Gordley, *a.w.*, chapter 7 and Conclusion.

thus presupposes the existence of law' – that is to say, the making of a contract presupposes the very framework of contractual obligation whose binding status it seeks to establish.<sup>8</sup>

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And yet this view of politics and society remains, in the 21st century, overwhelmingly influential. Why? Probably for reasons not of evidence or logic but rather of political ideology. To put the matter (too) bluntly: there are massive political, social and economic interests whose operations are most effectively justified by reference to such a dogma, and more specifically to the version based on an appeal to individual free will. In the terminology of Antonio Gramsci, social contract theory, in this sense, is presently hegemonic.

But we can broaden our critical analysis. What is hegemonic is not just social contract theory, but more generally what may be called *contractualism*. Here is what I wrote about this topic in my Leiden inaugural:<sup>9</sup>

'Contemporary contractualism (...) exploits a modern notion of contract. What defines this notion? James Gordley demonstrated [as we saw] (...) that the evolution of the modern idea of contract was accompanied by a "doctrinal crisis". For jurists had abandoned the Aristotelian and medieval philosophical foundations of contract theory without rebuilding "the edifice they had razed". [For a time] the will became the central explanatory but also legitimating element in the new doctrine.

You may recall that Sir Henry Maine, author of *Ancient Law*, wrote in 1861 about a "movement of the progressive societies (...) from Status to Contract". But his thought is more complex than this slogan suggests. What is often forgotten is that, though Maine was an admirer of Roman law, he insisted (in his chapter on "The Early History of Contract") that the views of the Roman lawyers were "inconsistent with the true history of moral and legal progress". But worse: much later, in modern times, the language of the Roman lawyers became "the language of an age which had lost the key to their [the Romans'] mode of thought" – in other words, law, in the technical sense, had become disjoined from the underlying legal and intellectual culture. Worse still, in Maine's view, was the example offered by the modern Social Contract theorists: "It was", he writes, "for the purpose (...) of gratifying

their speculative tastes by attributing all jurisprudence to a uniform source (...) that they devised the theory that all Law had its origin in contract" – this theory being in fact a mere "legal superstition". Interesting and relevant is also Maine's description in the same chapter of early feudal society, which was, he suggests, bound together precisely by the tie of contract – in contrast, we might say, to the modern, State-based polity. Thus Maine indirectly anticipates the recent critique of the contractualization of society, namely that this latter involves (...) a kind of re-feudalization of social relations.'

The reason we can speak in this connection of a re-feudalization of society is that, for a truly consequent contractualist, there is nothing special about the association called the sovereign state – on the contrary: in principle (if not entirely in practice) human individuals can establish any number of 'clubs', none of which – not even 'Nederland BV' (as this phrase in fact implies) – has any special claim to authority over any other. There are numberless, big and little, 'organizing' and 'rule-making' centres. This doctrine is sometimes referred to by the name 'theory of governance'.

## CONTRACTUALISM AND ANTHROPOLOGY

In his important recent work, Alain Supiot writes of contractualism as 'an ideology according to which no human being may be subjected to any other limits than those which he freely establishes for himself'. This ideology however fails to account for the most elementary truths of anthropology, that is to say, of how human beings are socialized by and operate in an institutional collectivity.<sup>10</sup>

Let me therefore step outside legal theory proper for a moment, and quote once again some of my own words, but now on the relation between the contractualist ideology on the one hand and some crucial anthropological and psychological realities on the other.

For instance, I noted in an earlier piece, 'Freud writes that during the narcissistic stage in human development the little child imagines himself – because that is how the world and especially his parents treat him – to be the centre of the universe, monarch of all he surveys, owing allegiance to no one and to nothing: "He shall (...) be the centre and core of creation – His Majesty the Baby, as we once fancied ourselves", says Freud. In this sense the [phenomenon of narcissism] already has a "political" dimension.' Pierre Legendre, emeritus professor of law at the University of Paris, suggests that it is specifically 'contemporary contractualist

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8 In a lecture recently given in the Netherlands, entitled 'Are Human Rights Natural?'.  
9 G.E. Lock, *Oikoumenes promachoi*, Leiden: Universiteit Leiden

2003.

10 A. Supiot, *Homo juridicus: Essai sur la fonction anthropologique du droit*, Paris: Editions du Seuil 2005, p. 114-115.

ideology' which encourages a generalized social regression to such narcissism. 'For is not each of us repeatedly told, by the mass media and by the commercial advertising industry, by educational institutions and even by government, that he or she is the legitimate source and origin of all his "preferences" or "choices", on the basis of course of his own freely adopted "values"? Thus [on this view] no allegiance is demanded of the individual to anything outside of himself. In present-day contractualist society, each of us is a little monarch'; indeed, he is what might unkindly be termed a little moral megalomaniac.<sup>11</sup>

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#### CONTRACTUALISM TODAY

The Leiden legal philosopher Andreas Kinneging makes a comment relevant to this point (one

on which I remarked in a review of his book). 'Marriage', he writes, 'is nowadays regarded "as a contract like any other"'. Now the logic of this view, which presently enjoys a near monopoly in the Western world, in academic theory but also in practical political life, is (Kinneging adds) that 'the only thing which matters is the agreement of the parties'. So none of the traditional virtues associated with marriage any longer applies. The logic is that people should be able to negotiate any kind of 'marriage', irrespective of gender or numbers (two, three or more) and the like. In fact we already have same-sex marriage, and may soon have group marriage, fixed-term marriage, parttime marriage and so on. 'If all these things have not yet been completely incorporated into the positive law of the western world', the author writes, 'that is only because the traditional view of marriage and the family has not yet been entirely ousted from the law. But we can expect that it will not be long before this happens.'<sup>12</sup> Is it not all just a matter of free contractual agreement between sovereign individuals?

Contract, I suggested, is a strange thing. It is an age-old idea and practice, presumed to be irreplaceable in human interaction. And yet its modern and post-modern variants present immensely problematic aspects, both for law and for social and political life generally.

I don't know whether lawyers and law students of our time are mindful of this. But it is something that we ought to think – and perhaps to worry – about. ❧

11 G.E. Lock, 'Dogma, Heresy and Voluntary Servitude: from the Second Millennium to the Third', *Episteme: Revista Multidisciplinar da Universidade Técnica de Lisboa*, 2001-7, 8, 9, p. 9-28. Cf. Sigmund Freud, 'Zur Einführung des Narzissmus', *Jahrbuch der Psychoanalyse* 1914, p. 1-24; Pierre Legendre, *Le*

*Désir politique de Dieu. Étude sur les montages de l'État et du droit*, Paris: Fayard 1988 and *Sur la question dogmatique en Occident. Aspects théoriques*, Paris: Fayard 1999.

12 A.A.M. Kinneging, *Geografie van goed en kwaad. Filosofische essays*, Utrecht: het Spectrum 2005, p. 196-198.