

The Limits of Contract

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I. Introduction

The roots of many international legal institutions in private law have been well established. The creative moment in which legal scholars attempted to understand the changing nature of authority after the demise of imperial formations and the intellectual assault on the viability of an ontologically based moral order has been recounted by legal scholars and political theorists alike.¹ But even more importantly, the *generative* force of private law institutions for the development of the international legal order can be seen in their capacity to provide 'standard solutions'² to new problems by means of analogy. One of the most recent examples is perhaps the *sic utere tuo*³ principle which has been put to good use in charting a new course for regulating trans-border pollution problems.

However, no analogy has attained as pivotal an importance as 'contract'. It 'solved' the problem of how 'persons of sovereign authority'⁴ were to relate to each other in international politics, i.e. on the basis of consent and exchange. Thus, treaties as analogues to contracts gave rise to voluntarily created rights and obligations, while at the same time preserving the sovereigns' independence and authority. Of course, some obvious problems exist in using the private law structure

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1 For a comprehensive treatment of the origins of many international legal institutions in private law see Sir H. Lauterpacht, *Private Law Sources and Analogies of International Law* (1927). For a more historical account of the intellectual ancestry of international law see H. Bull, B. Kingsbury and A. Roberts (eds), *Hugo Grotius and International Relations* (1990). See also C.F. Murphy, *The Search for World Order: A Study of Thought and Action* (1984).

2 For the importance of 'standard solutions' for the development of international law see Onuf, 'Legal Theory', in N. Onuf (ed.), *Global Law-making and Law-making in the Global Community* (1982) 1-82.

3 See, e.g., *Lake Lanoux Case* (Arbitration between France and Spain; 1866 – ILR 101, 1957) and *Trail Smelter Case (U.S. v. Canada – 3 U.N.Rep.Int.Arb.Awards 1911; 1941)*.

4 This is Hobbes' term in *Leviathan* (1968) Chapter 13.

as an analogue to an international law construct. Problems like custom and the ability of actors in that arena to determine and modify the public order – which private persons cannot do by their contracts – come readily to mind.

But such ‘first order objections’ did little to challenge the pivotal importance of the contract metaphor for understanding the international game. As a matter of fact, its centrality was further reinforced when it was able to accommodate fundamental changes in the constitution of the actors themselves. By the 19th century, persons of sovereign authority, who originally held their title on the basis of ‘tradition’ or even ‘divine’ rights, could coexist with ‘agents’ empowered by the ‘people’ on the basis of an ‘original contract’.

Finally, even the further differentiation between ‘state’ and ‘society’ in which the members of society reserved their rights as to the proper exercise of authority by the ‘agent’ did not necessitate a major conceptual adjustment. Despite its revolutionary implications, ‘popular sovereignty’ seemed to fit neatly into the existing scheme. All that was necessary was to follow the generative logic of ‘contract’ itself and to reconceptualize the emerging differences between state and society again in contractual terms. Locke’s ‘double contract’ provides here the appropriate template. Domestic as well as international order could be understood as a series of consensual acts in accordance with the contractual paradigm.

Against these tenets I wish to argue that considerably more than consent is required in order to explain the emergence of political authority and obligation. Contrary to the belief that what matters is the exchange, I shall argue that it *does* matter what we exchange and that, therefore, the farther we move from spot exchanges in a market to more complex social arrangements, the less is explained by the institution of contract as opposed to other elements.

These objections, then, cast considerable doubt on the possibility of reducing the choice of political institutions to a contractual paradigm as exemplified by a theory of ‘justice’. I also want to argue that these flaws in the contractual paradigm are not simply the result of the obliviousness to the initial assignment of ‘rights’ without which the notion of consensual exchange is meaningless. It seems rather that the two institutions of the contractual paradigm, consent and property, have contradictory implications, because of the failure of the contract metaphor to specify criteria for membership in the contracting group. While such a neglect is of no importance in the case of bilateral ‘spot contracts’ in which we assume no further social bonds or lasting effects outside the exchange, such an assumption is incoherent in the case of contracts setting up political authority and negotiating distributive schemes.

These difficulties are compounded when we move from bilateral, incomplete contracts to ‘implicit’, incomplete contracts, which is precisely the situation of the hypothetical construct of the ‘original’ contract in the state of nature. Contractual solutions to the problems of authority have either to assume the existence of a well-established community, or they have to rely on a *deus ex machina*, i.e. ‘territoriality’, in order to delineate the ‘members’. To that extent, both legal theory

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and the prevalent theories of international politics assume that the 'people' are always the same whether they appear as 'citizens', as members of a nation, or of an 'ethnos'. International relations theory speaks then simply of 'units' in which the people, the state, the nation and the 'ethnos' are neatly packaged, and the legal theory 'solves' this problem by assuming that the guarantee of 'self-determination' is ensured by endowing individuals with rights of citizenship and participation. Above all, sovereignty and its contemporary manifestation of the territorial state, provide all the necessary conceptual tools.

However, such a theoretical construct is all the more unsatisfactory as international migrations, the revival of ethnic assertiveness, and changing notions of citizenship/nationality make a return to simple territoriality unfeasible. Domestically, the 'democratic deficits' caused by the existence of increasing numbers of refugees and long time resident aliens has not only worried political theorists; the question of their legal status requires answers which cannot be obtained from the traditional conceptual grid or from the mere assertion of 'human rights'. In particular, if group membership is so important, not only for practical but also analytical reasons, and if this problem remains unaddressed by contractarians and 'rights' advocates, it seems that the discourse on rights and contractual thinking can provide less guidance than is usually claimed for the problem of 'justice' either domestically or internationally.

While I obviously do not possess a fully-fledged alternative for the solution of these conceptual puzzles, this article has two more modest goals: one is to show the limits of two currently fashionable contractual paradigms in relation to the liberal reduction of the problem of domestic and international order to a question of 'justice'; and two, to advocate a mode of analysis which utilizes the structure of well-established institutions and attempts to understand the logic of their extension to other areas of social reality. This mode of analysis is at odds with the usual attempts to create 'grand theories' whether in the areas of 'law' or 'politics', or to 'apply' some theory imported from some other discipline to social issues. The former attempts usually fail because of the difficulties in formulating sensible demarcation criteria that establish conceptually distinct spheres and which, therefore, quickly end up 'subsuming' or marginalizing the other spheres or parts of social reality. The latter are in danger of degenerating into mistaken analogical thinking or of providing simple re-descriptions in terms of the new framework rather than generating new insights.

Opting for a conceptual analysis of well-established institutions, I believe that these twin dangers are minimized by a more modest approach, i.e. it is heuristically more fruitful to examine institutions and their conceptual extensions because 'anomalies' are less likely to be ignored or 'normalized' instead of becoming new starting points for theoretical puzzles. Furthermore, such a procedure, because of its 'realism', bears more promise than the grand 'imported' theories which arrive as ready-made models that are then prematurely dispatched in search of their range of application.

In order to make good these claims, my argument will take the following steps. In Section II, I begin with the examination of different types of contracts. In this context I will distinguish the spot contract (simultaneous and sequential exchange), the long-term iterative contract, the incomplete contract and, in particular, the incomplete contract establishing 'authority relationships'. My analysis focuses on 'problems' of enforcement and demonstrates that, contrary to the assumptions made by the 'grand theories' of neoclassical economics and international politics (that view 'self-help' as resulting from 'anarchy'), self-help is pervasive in domestic as well as international affairs. Consequently, both the general equilibrium model as well as the predominant 'theory' of international politics are badly in need of revision. In Section III, I address the difficulties which arise when the incomplete contract model is applied to ongoing relationships that are either nonspecific as to scope and duration, or where these elements are simply 'implied'. For this purpose, I examine the institution of marriage as a contract and, more importantly, the invocation of the contractual paradigm for the determination of political obligation. Section IV draws out some of the conceptual puzzles which arise in this context when a solution is attempted by means of a Rawlsian 'hypothetical contract'. My interest here is not to provide a comprehensive evaluation of the Rawlsian 'original position' and its recent modifications, but rather to assess the importance of the contract and consent metaphor for a 'theory' of the political and legal order, domestically as well as internationally. I argue that consecutive extensions of the contractual paradigm can no longer successfully integrate the different pulls these additions have generated, and that therefore, the contractual paradigm becomes incoherent. To the extent that grand theories of 'politics' and 'law' originate in a contractual paradigm (social contract), I argue that they also quickly reach the limits of their capacity to provide insights for solutions to contemporary problems of domestic and international order.

II. Three Types of Contract

To view the problem of obligation as resulting from the institution of contract, (i.e. the exchange of mutual promises) is to treat consent as foundational for the assignment of responsibility. To that extent, it seems to matter little whether the promises concern tangible resources, more abstract property rights, such as 'good will', or even the commitments or forbearances which we call political obligations. At the heart of the matter, there always lies the notion that nothing more than the voluntary choices of the parties is involved in creating order among them.

But there are peculiar difficulties that arise and that are often not properly reflected upon when we examine the institution of contract in general and when we move from 'spot' exchanges facilitated by the 'meeting of the minds' to the problem of 'implicit' indefinite, multi-person incomplete contracts. Examples of the latter are the 'social contracts' of Hobbes, Locke and Rousseau.

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It might be useful to examine systematically these complications as they emerge in the contractarian enterprise in both the domestic and the international arena. Let us therefore begin with the simplest type of contract, the one in which two actors agree on an on the spot exchange. Obviously such an analysis has to assume that the parties have something to exchange antecedent to their agreement, i.e. property rights must have been assigned. Similarly, the parties must know the rules which constitute the practice of contracting, such as e.g. the use of certain formulas like *do ut des* or signing certain forms. In addition, in order to insure the 'voluntariness' of the exchange, rules must prevent the use of fraud, force and, depending on the case, impose a duty of disclosure of essential but not readily available information.⁵ Finally, in case of non-performance, exogenous 'enforcement' must be provided by the state. With the exception of the last point, ample analogies exist between domestic and international law. Not only do we have explicit rules for the acquisition and alienation of titles, but as Coplin⁶ reminds us, the rules of international law also authoritatively define who is an actor, and they determine the formalities which must be observed if the parties wish to attach validity to their acts (Vienna Convention on Treaties).

Beyond the obvious analogies, the above account of the spot contract provides several lessons. One is that even simple spot contracts are the result of the interaction of highly complex institutional arrangements. Their unproblematic character depends less on the simplicity and 'naturalness' of such arrangements – Adam Smith's allegation of the natural tendency of men to 'truck and barter notwithstanding' – than on the discipline of the actors which makes such exchanges routine. This highlights the second lesson of the example, i.e. the recognition that the 'obligation' resulting from a contractual undertaking cannot simply be reduced to the 'consent' of the parties. They may have committed a mistake of form, might not have foreseen some contingencies which make the contract either wholly or partially voidable, or have provided for grossly disparate benefits for the parties, so that their contract lacked (in common law terms) 'consideration'.

Since I have dealt with these issues at great length elsewhere such cursory remarks might suffice here.⁷ However, what is important here is the realization that the institution of contract combines two related yet distinguishable ideals that suggest different bases for the obligatoriness of contractual obligations. As Michael Sandel points out:

One is the ideal of autonomy, which sees a contract as an act of will, whose morality consists in the voluntary character of the transaction. The other is the ideal of reciprocity which sees the contract as an instrument of mutual benefit ... contracts bind not because

5 For a discussion of these problems see, for example, the works of P. Atiyah, *The Rise and Fall of Freedom of Contract* (1979); G. Gilmore, *The Death of Contract* (1974); C. Fried, *Contract as Promise* (1981); M. Horowitz, *The Transformation of American Law* (1977) especially Chapter 6.

6 Coplin, 'International Law and Assumption about the State System', 17 *World Politics* (1965).

7 See my *Rules, Norms, and Decisions* (1989) Chapter 4.

they are willingly incurred, but because (or in so far as) they tend to produce results that are fair.⁸

The last point becomes of particular importance when courts have to deal with unforeseen circumstances and when, therefore, there is no ascertainable 'will' of the parties, or when losses or risks have to be allocated.

The third lesson is therefore, that 'enforcement' problems cover a much wider field than the popular image of the public authority clubbing recalcitrant actors into submission. As a matter of fact, while exogenous claim enforcement figures prominently in our common sense view, as well as in the economics and law literature, 'self-help measures' i.e. endogenous claim enforcement, are pervasive in private contracts. This is quite contrary to the conventional wisdom among international relations scholars, neoclassical economists and 'pure theorists' of law who all, in one way or another, identify 'self-help' with anarchy and consider the existence of either exogenous enforcement or of self-help as the main distinguishing characteristic of the domestic and the international arenas respectively. But not only is this dichotomy heuristically not very useful, as it makes the existence of order virtually a function of a particular kind of enforcement, it is also essentially misleading. If self-help is a rather pervasive phenomenon in both arenas, i.e. not limited to the exceptional circumstances of 'self-defence', then self-help can neither be used as a defining property of international anarchy, nor can central enforcement institutions be exclusively credited for the existence of order or for the beneficial functioning of 'markets'.

Consider in this context a second type of spot contract, i.e. one which entails sequential performance. This is Hobbes' classical description of Prisoners' Dilemma situations. Aware of the dangers of being played for a sucker, the parties might not want to rely on costly ex post litigation but devise measures which alleviate the dangers of being exploited: they can agree on payment schedules, escrow arrangements, or resort to limited acts of retaliation such as notifying the Better Business Bureau, or ruining the delinquent party's credit.

It is probably no exaggeration to consider the credit reporting system as *the* most important disciplining force in our society in which credit cards and, in general, access to credit (given the low savings rate) have become a virtual necessity. The horror stories which appear periodically in the papers dealing with the consequences of erroneous credit reports make it clear that it is the effects of these private means of enforcement rather than the club of the state that keeps most of us in line. In cases in which neither the loss of reputation nor actual denial of access to future credit serves as a sufficient motivating force to honour one's obligation, resort to more stringent means of private enforcement is sometimes a viable option. Repossession by private agents acting as enforcers of the authoritative decisions of public authorities show an interesting symbiotic relationship of public and private elements in some areas of domestic 'self-help'.

8 M. Sandel, *Liberalism and the Limits of Justice* (1982) 106 and 107.

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Internationally, we possess similar remedies such as e.g. publicity – a measure in which Jeremy Bentham put considerable trust, despite its dubious efficacy in all but a few extreme cases of shunning and branding states as ‘pariahs’ – unilateral countermeasures, such as the suspension of treaties, freezing of assets, the enforcement of arbitral awards through domestic institutions, and various other unfriendly acts falling into the categories of retorsion or reprisals.⁹ Similar to domestic contract law, however, self-help measures have been limited since the inception of the Charter regime and the ICJ *Corfu Channel*¹⁰ decision, to measures not involving the use of force. Self-defence and action authorized by the Security Council are the obvious exceptions.¹¹ The only other exception is perhaps intervention in case of the rescue of one’s own nationals in instances of a credible threat to their safety and the inability of the foreign government to provide for minimum conditions of civil order.¹²

Whether such strict limitation of the role of force in international politics, as outlined above – prohibiting it even in defence of violation of rights – is a sensible solution is, of course another matter. In the absence of a well institutionalized political process presiding over peaceful change, of even the presumption of compulsory judicial settlement, and in the face of the weakness of exogenous claim enforcement, the temptation to resort to forceful reprisals might indeed become overwhelming. Such a course of action might even appear to be morally justifiable, especially after a fruitless exhaustion of other remedies.

Further complications arise when we examine ‘long-term’ iterated transactions. If, as is likely, not all contingencies can be exhaustively listed and dealt with, the contract will have to include catch-all concepts and quite non-specific, higher order ‘principles’. Again the problem of endogenous enforcement arises, precisely because both the attempts to stipulate contingencies and their enforcement through the courts become costly, as Llewellyn has pointed out in his famous ‘What price Contract?’ article.¹³ Instead of a direct *quid pro quo* the parties face two interrelated problems: the commitment to keep the contractual relationship going which, in turn, frames the distributive bargaining problem at each iteration. It is clear that the

9 For a good discussion of unilateral countermeasures in international law see E. Zoller, *Peacetime Unilateral Remedies* (1984).

10 *United Kingdom v. Albania* (1949) ICJ 4. (a.k.a. *Corfu Channel Case*). See also *Nicaragua v. U.S.* (1985) ICJ 169.

11 For a general discussion see O. Schachter, *International Law in Theory and Practice* (1985) especially Chapter 7: ‘The Prohibition of Force’. Additionally, see A. Verdross and B. Simma, *Universelles Völkerrecht: Theorie und Praxis* (3rd ed., 1984) especially Chapter 12: ‘Die Erlaubte Selbsthilfe’. See also Waldock, ‘The Regulation of the Use of Force by Individual States’, 81 *RdC* (1952-II) 451-517.

12 For a discussion of rescue mission vs. a broader right of ‘humanitarian intervention’ see the discussion of Schachter, ‘Self-help in International Law: US Action in the Iranian Hostages Crisis’, 37 *Journal of International Affairs* (1984) 231-46; Donnelly, ‘Human Rights, Humanitarian Intervention and American Foreign Policy: Law, Morality and Politics’, 37 *Journal of International Affairs* (1984) 311-28; and my ‘Sovereignty as Dominion: Is there a Right to Humanitarian Intervention’, in G. Lyons (ed.), *After Westphalia* (1994 forthcoming).

13 Llewellyn, ‘What Price Contract: An Essay in Perspective’, 40 *Yale Law Journal* (1931) 704-751.

parties will be able to maintain such a relationship only if they agree to dispute settlement 'in a businesslike' or 'amicable fashion'. But beyond such an agreement in principle they must share fairly concrete common understandings as to what these principles mean in certain 'typical situations'. Here precedent, customary ways, salience, etc. are all important in particularizing the higher order principles.

If situations cannot be typified, if they are not recurrent enough to develop settled ways of dealing with them, the contract becomes more and more a framework for continuous negotiation rather than a historic document which freezes the 'meeting of the wills' of the parties at a given time. An example for this latter type of 'long-term contract' in the international arena was SALT II. First, 'enforcement' had to be entirely endogenous (national means of verification!) and compliance was based virtually entirely on 'discovery' rather than on measures we traditionally associate with 'enforcement'. Second, since facts seldom speak for themselves but need interpretation particularly if 'intent' is at issue (was it a 'mistake' or a 'deception'?), some method of arriving at a shared understanding becomes necessary. Third, since most of these situations could not readily be typified because they concerned technological innovations or unprecedented events (such as the building of the Krasnoyarsk radar stations), (re)negotiation of the terms of the contract became a characteristic of this particular arms control regime.¹⁴ Commentators have not only correctly pointed to the essential part played by the Standing Group in Geneva¹⁵ dealing with complaints about alleged violations, but have also suggested that a distinction existed between SALT as a treaty and SALT as a process. The last point was vividly brought home by the fact that SALT continued to provide the operative framework even after the 'treaty' had expired.

Another interesting case in point is GATT which serves as the basis for the continued post-war multilateral trading order. Its viability and actual resiliency over the years is hardly conceivable without both the various negotiating 'rounds' creating new specific norms on the basis of the general principles of the initial 'incomplete contract', and the crucial role of its dispute settling mechanisms.¹⁶ While these chambers have certainly not 'enforced' anything, they have created a large body of 'standard solutions' for dealing with trade disputes.¹⁷ Indeed, one can argue that over the years a certain 'evolution' has taken place in which the chambers have moved increasingly from consensual (mediational) procedures to the more principled application of 'norms' and standard solutions to a controversy.

Given the difficulties that arise for endogenous enforcement of incomplete contracts, in particular when the participants face a highly volatile environment, the

14 For a further exploration of the relation between contracting and regimes see my 'Contract and Regimes: Do Issue-specificity and Variations of Formality Matter?', in V. Rittberger (ed.), *Regime Theory and International Relations* (1993) Chapter 4.

15 On the Standing Consultative Commission, see S. Talbot, *Deadly Gambits* (1985) 228-232, 319-321. See also S. Talbot, *Endgame: The Inside Story of Salt II* (1979).

16 For a good discussion of the results of the Tokyo Round of Gatt and its various conventions see J. Grieco, *Cooperation Among Nations: Europe, America, and Non-tariff Barriers to Trade* (1990).

17 See J.H. Jackson, *Restructuring the GATT System* (1990) Part II.

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development of customary practices is difficult; or when asymmetries of information create incentives for actors to act with guile, a radically new 'contractual' solution can be tried. Consider in this context the 'complex incomplete contract'. Instead of iterated rounds of bargains providing for re-negotiation and dispute settlement, this type of contract is based on an exchange of promises of the parties which explicitly changes the *quality* of their relationship.

A good example of this type of contract is the wage contract. On the surface it is an exchange (labour for money), but it is also an incomplete contract that involves a 'long-term' relationship with all the attendant difficulties of endogenous enforcement. After all, hiring people and paying them a salary or wage instead of relying on contracts for procuring the needed goods and services creates a 'firm'. This means that the employer not only acquires the labour power of the employee, but obtains the right of directing it. Labour has not only its price like any other commodity – a point crucial for Marxists – but, more importantly, for our purposes, the wage contract amounts to an exchange of money for the employer's *authority*. The parties cease to enjoy equal status precisely because the contract entails explicit inequality in decision-making power. Employees have to defer to the authoritative directives of their 'boss'; they can no longer object to specific commands, or bargain over them because in the incomplete contract which exchanged 'work' for a wage, broad areas of discretion were left to the employer to determine what 'work' entails.

This authority though is not unlimited; it is circumscribed in a variety of ways. First, there is the limitation of 'time' stipulated by the 'working' hours. Second, there are substantive limits of discretion, such as those that govern the ability of an employer to ask his secretary to type a letter or even perhaps to make coffee, but they prohibit a solicitation of personal favours even if these demands fall within the time period covered by the employment contract. Third, limits are created to regulate hazardous activities, and there are health codes, injunctions against child labour, etc. Finally, there are normative definitions of what constitutes the scope of 'managerial' (owner) directive power, and less formally articulated, but nevertheless important understandings of 'how things are done'. The latter rest on both experiential and/or technical knowledge and on customary conceptions of what can be expected from a worker. Thus, bosses have only limited opportunities to 'pull rank' before their commands engender resistance, and if their directives do not make sense in terms of customary trade practices they will not be followed even if they are innovative or efficient. Indeed, the work force has to be 'brought around' by persuasion and inducements.

In other words, since a principal/agent problem exists in the complex incomplete contract, the de facto terms of the 'exchange' result largely from the sanctions, surveillance and a variety of other self-help measures which cannot be transferred to exogenous enforcement. While the employer can exchange money for work he cannot 'make' the employee work, or 'sue' or fire him for not giving his best. Rather, employers have to rely on surveillance (quotas), incentives (bonuses), threats (probationary period, contract renewal) and/or stipulation of work rules

(particularly important in organizations operating in non-market environments, i.e. bureaucracies).

Against these measures, passive resistance, 'yesing' the boss to death, reporting to 'upstairs' what they want to hear, and – particularly in the case of bureaucracies – 'working by the book' (slow-downs) are quite effective means to counter such enforcement measures. Thus, while the reliance of hierarchy on command rather than exchange certainly creates 'efficiencies' in some respects, it also often generates a perverse incentive system explained by the research on organizational pathologies.¹⁸ These range from misreporting and non-compliance with directives to the extreme case of outright sabotage. Firms and bureaucracies have therefore found it necessary to inculcate feelings of 'loyalty' into the employees, and rely on appeals to a 'corporate culture'.¹⁹

Finally, particular difficulties arise in assessing the efficiency of non-market organizations. They share with firms not only the endogenous enforcement problem of the incomplete wage contract, but have to face, in addition, problems resulting from the absence of a market 'discipline'. Since the output of the organization is not directly related to the satisfaction of the consumers (who create through their 'purchases' the resources (inputs) for the firm), the funding of the bureaucratic organization depends to a large extent on its ability to mobilize resources from groups which are not their clients. Heads of agencies know that ties to congressional leaders are more important than customer satisfaction. In public interest or 'third sector' organizations, resource mobilization depends upon the ability of the leadership to tap into latent sympathies in the environment of the organization. They have to persuade people or groups to contribute to various 'causes' with virtually no control of the donors over the organization's 'product', i.e. its performance. While the 'agency' problem, i.e. endogenous enforcement of the wage contract, is lessened if most employees are highly motivated individuals dedicated to the 'cause', managing according to a 'chain of command' template is virtually impossible in these organizations. In case of conflict over priorities and programs which operationalize and implement the organizational 'goals', disagreements become immediately 'political'. Various leaders and factions will try to rally support, start intrigues, personalize the 'fight', etc.; in short, they will attempt to outflank hierarchical decision control. If there is a solution, it will usually involve 'exit' of one of the factions, a 'sacrifice' of one of its leaders, or the establishment of a new consensus by often laborious negotiations.

These considerations have particular importance for the functioning of international organizations. First, a 'contract' among states establishes, in the 'charter', the organization's 'domain', within which the organization is supposed to exercise its 'powers'. Second, this delineation is not only dependent upon the

18 The locus classicus for this argument is O. Williamson, *Markets and Hierarchies* (1975).

19 For an excellent discussion of this point see Kreps, 'Corporate Culture and Economic Theory', in J. Alt, K. Shepsle (eds), *Rational Perspectives on Positive Political Economy* (1990) 90-143.

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consensus among the sponsors but on the availability of technical knowledge which defines 'functionally' the specific tasks. For example, Peter Cowhey has shown that the operation of the traditional telecommunications regime 'implemented' by the International Telecommunications Union (ITU) was crucially dependent upon the accepted view of natural monopolies (which served as the underpinning in the creation of national Postal- and Telecommunications authorities), and the resulting 'technical problems' of linking national telecommunications networks through compatible switches. The establishment of the ITU in 1932 resulted in an organization in which engineers debated the technical rules and standards for the functioning of the existing networks and their linkage. At most they speculated about the adequacy of the allocation system for radio frequencies and orbital satellite slots. Although, technically speaking, the resulting 'standards' were recommendations only and not 'directives', the three expert bodies charged with these duties could largely proceed with technical and bureaucratic modes of decision-making, until well into the 1970's.

Change came from two sources: one from the increasingly eroding consensus that telecommunications indeed represented natural monopolies, a doubt powerfully reinforced by the emerging notion that 'services' should be treated like 'goods'; and two, from the new technologies of satellite and digital transmission that made it possible to bypass the switches linking national networks.²⁰ Both elements ushered in the end of the old telecommunications regime and upset the merely 'technical' mission of the ITU. It became a forum for debates rather than a functional organization in which authoritative decision-making is legitimized by 'knowledge' of the relevant technology.

The last point brings to the fore the importance of consensual knowledge and the role of epistemic communities in institutionalizing such a consensus in organizational structures and routines. These factors have been investigated by Ernst and Peter Haas.²¹ It also shows that in an arena in which a domain consensus is either non-existent, or is fragmented by constitutional provisions, formal organizations will have to internalize the formation of such a consensus by providing for an appropriate forum. Ann-Marie Burley has shown that the organizational design of some of the functional organizations of the UN not only differs from the old international union model, but that its templates were the regulatory agencies of the New Deal.²² These agencies had been designed to overcome the constitutionally mandated fragmentation of an issue area by

20 See Cowhey, 'The International Communications Regime: The Political Roots of Regimes for High Technology', 44 *International Organization* (1990) 169-99.

21 See, e.g., E. Haas, 'Is there a Hole in the Whole?', 29 *International Organization* (1975) 827-876; and E. Haas, 'Why Collaborate?: Issue Linkage and International Regimes', 32 *World Politics* (1980) 357-405; and P.M. Haas, 'Do Regimes Matter? Epistemic Communities and Mediterranean Pollution Control', 43 *International Organization* (1989) 377-404.

22 Burley, 'Regulating the World: Multilateralism, International Law and the Projection of the New Deal Regulatory State', in J.G. Ruggie (ed.), *Multilateralism Matters: The Theory and Praxis of an Institutional Form* (1993) Chapter 4.

combining legislative and executive functions in the new domain of the regulatory agency. The curious design of traditional IGOs which combines an assembly (for debate and consensus) with a council (giving shape to the 'mission' of the organization) and the 'staff' (secretariat) charged with the support of the council and the administration (implementation) of some policies, is an attempt to satisfy these conflicting demands. But since bolting together different organizational designs is not the same as finding a truly integrative solution for decision-making, we should not be surprised that these different organizational forms often work at cross purposes.

Most obvious are the problems in the case of the multipurpose universal membership organizations such as the League and the United Nations.²³ There is first the General Assembly as an organ to debate and provide for the collective legitimization of issues.²⁴ The Security Council represents, in a way, the directors setting policy to be implemented by personnel assigned to the organization, either through earmarking troops and subjecting them to the machinery of chapter VII, or to the more administrative personnel hired by the Secretary-General. It is not surprising that the former has never been tried and that the increase of direct managerial control by e.g. the Secretary-General of UNESCO has been cited as an instance of the 'politicization' of the organization.²⁵

However, most of the time, politicization charges indicate a disagreement about the priorities of the United Nations. This is amply demonstrated by the challenge for developing nations to make the organization serve their goal of development by redesigning the international economic order²⁶ rather than addressing only, or primarily, 'peace and security' issues. In the case of more specialized agencies, 'politicization' concerned largely the issue of a vanishing domain consensus. For example, the quest for a New Information Order raised the fundamental issue whether information should be treated as a good supplied by private individuals and market mechanisms or as one which is subject to state regulation.²⁷ Similarly, addressing issues outside the original organizational domain was held to exceed the bounds of legitimacy. Under such circumstances, sponsors of the organization have the option to resort to voice (including the withholding of funds) or to loyalty (holding exit at bay and activating voice) as means for establishing domain

23 The history of the underlying ideas for the universal organization is well-elaborated in Kennedy, 'The Move to Institutions', 8 *Cardozo Law Review* (1987) 841-988.

24 On the importance of collective legitimization by the UN see Claude, 'Collective Legitimization as a Function of the UN', 20 *International Organization* (1966) 267-279.

25 See M. Imber, *The USA, ILO, UNESCO and IAEA: Politicization and Withdrawal in the Specialized Agencies* (1989).

26 See Bhagwati, 'Rethinking Global Negotiations', and Ruggie, 'Another Round - Another Requiem? Prospects for the Global Negotiations', both in J. Bhagwati and J.G. Ruggie (eds), *Power, Passion and Purpose: Prospects for North-South Negotiations* (1984).

27 For a comprehensive discussion of these problems see Drake, Nikolaidis, 'Ideas, Interests and Institutionalization: Trade in Services and the Uruguay Round', 44 *International Organization* (1992) 37-100.

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consensus, but both of these options are strengthened by the threat of a credible 'exit'.²⁸

Another set of problems concerns the issue of coordination. Proposals for organizational reform have a long history in the UN system with the Bertrand report serving as only one of the most recent examples. However, given the complex parameters of this organization, opportunities for actual reorganization are here, even more so than in domestic politics, severely limited.²⁹ Furthermore, by arguing for 'reform' of the organizational structures implementing the regime, one makes a subtle but important shift by implying the permanence of the regime which, so to speak, provides the 'constitutional frame' for the organizations within it. This raises the question: can constitutional frames still be understood through the contractual metaphor, or does the rapid increase of theoretical inconsistencies critically undermine the consent argument as the basic template to understand social order? It is the task of the next section to address these issues.

III. Constitutional Contracts: The Problem of Rule and Consent

Enduring commitments based on a promise are often interpreted in contractual terms. In this context the institution of marriage and the 'social contract' founding either 'society' or the public authority of a 'government' are the most prominent examples. In addition, at least one historically powerful tradition existed, which amalgamated the establishment of political rule on 'patriarchal power' supposedly characteristic of the institution of marriage. In the following comments I do not want to follow this line of thought by tracing the role of Filmer's *Patriarcha*³⁰ in Locke's conception of the 'double contract'. Rather, I want to investigate the problem of whether issues of fundamental political rights and obligations can be based on the contractual paradigm. I begin with the marriage 'contract' and then discuss 'constitutional' contracts and the question of 'justice' which arises in this context.

Is marriage really a contract, or are the specific features of this relationship amalgamated to the contractual paradigm only with great difficulty? At first, the voluntariness and the exchange of promises seems to fit it squarely within the contractual template. But a short reflection shows that, at least under modern conditions, neither a specific iterated exchange nor the creation of an authority relationship is implied, though exchanges will be part of the ongoing concern of the parties. True, traditional societies believed in the authority of the *pater familias* and the justified subordination of his wife and children under his authority; legitimized

28 For the fundamental discussion of these strategies see A. Hirschman, *Exit, Voice and Loyalty* (1970).

29 For a survey of the issues dealing with the political rhetoric and reality of reforming the United Nations, see Taylor, 'The United Nations System Under Stress: Financial Pressures and their Consequences', 17 *Review of International Studies* (1991) 365-382.

30 R. Filmer, *Patriarcha*, in J. Locke, *Two Treatises of Government*, ed. by T. Cook (1947).

by the special concern for the well-being of those not able to make their own decisions (women and children). Apologists for patriarchal authority in the state also made recourse to the special bond created by the marriage in order to bolster traditional rule. But as Locke was quick to point out against Filmer, if marriage is based on a contract, then it can be dissolved, when the couple has raised and cared for their children.

The last issue is of particular importance since at least part of our understanding of the institution of marriage implies that the 'contract' is not easily revocable if the parties' preferences change. Rather, what seems to be an important part of this institution is a commitment to the relationship 'for better or for worse'. The contract is not limited in scope to a set of specific activities or an identifiable time period. Rather it is conceived as a commitment to become a certain type of person, a 'life-partner' for the other. Aside from the question of intimacy which thereby becomes possible, and which goes well beyond even unspecified contractual obligations, the other important element here is that the relationship as such presupposes the 'endogenization' of the contracting parties' preferences.

The language of contract becomes thereby strained and its relevance is limited to the disposal of assets brought to or acquired during the marriage in case the couple is unable to sustain the relationship. But here again, it is either a new 'agreement' among the parties (rather than the original contract) or the fiat of the public authority that usually sets the terms, ranging from the property settlement to the custody of children.

The conceptual difficulties multiply when we conceive of constitutional order in terms of the contractual paradigm. Several of the difficulties which already entered the picture of the marriage contract create new difficulties. One is the question of the indefinite duration of the 'contract'. This is further aggravated by the fact that, unlike real persons, 'societies' as ongoing and trans-generational concerns do not die. Second, the problem arises of duties we might have in the absence of actual exchanges, or even of some notions of what our preferences are since we do not know who *we* will be.

Third, unlike marriage, which has a clear inception, many constitutional orders cannot point to a clear instance of 'contracting' among the parties particularly if obedience to 'the law' is predicated upon the consent given by a former generation. Thus, consent is inferred by all types of devices from holding property to even travelling in a country, as these examples taken from Locke suggest.

But such constructions designed to impose obligations on people who through their action supposedly 'consent' to the exercise of authority are unconvincing unless it can be shown that a rule existed which makes such behaviour a sign of consent and thereby 'implies' a contract.

Fourth, our confidence in both the explanatory power and normative pull of such a use of contractual language is not enhanced when, instead of actual or implied contracts, 'hypothetical' contracts are constructed. These analytical devices are

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supposed to clarify what type of rights and obligations we have as 'citizens' of a well ordered society.

The last point leads us to the fifth difficulty which strains the contractual metaphor: its inability to provide for a clear delineation of members who are party to the contract. Who are the relevant others with whom I agree to contract and who might therefore acquire the right to 'outvote' me next time around? Thus, while the contract is supposed to explain the emergence of a group either as a 'society' or as a political organization, it is painfully obvious that without a preliminary delineation of 'membership' the idea of contract becomes incoherent in a multiparty situation. Finally, since the participants of the constitutional contract are not exchanging tangible assets or identifiable services but choosing constitutional principles of justice, the hypothetical contract soon has to be supplemented by the construction of *hypothetical actors*. Since such a construction has some very disturbing implications for individuals, as well as for the domestic and international order, it might be useful to examine these difficulties in greater detail.

Let us begin with the problem of implied consent. It arises, for instance, in a conflict of law situation, when a state seeks to assert personal jurisdiction on the basis of the behaviour of the defendant. But when a state defends its jurisdictional authority on the basis of 'implied consent' by the individual as a condition for the permission to enter the country, then, as Lea Brilmayer correctly points out,

This implicit assumption amounts to a prior assumption of state territorial sovereignty. Only a state that has territorial sovereignty may condition entrance upon consent to obey the law. If the state possesses territorial sovereignty, however, reliance on defendant's consent, whether explicit or implicit is unnecessary. Consent is largely superfluous; indeed, it only serves to mask the fact that territorial sovereignty provides the real basis for the exercise of personal jurisdiction.³¹

Similarly, when the members of the General Council of the New Model Army – historically the *locus classicus* for contract arguments – gathered at Putney in 1647 and debated the questions of the legitimate powers of a government, Ireton used the foreigner's obligation to obey the English laws passed by 'English land holders' as counterfactual against the radical theory of universal consent as the basis of obligation. He thereby not only pointed to the problem that contract presupposes a prior assignment of rights, but, in addition, by focusing on landed property, he also avoided the radical implication that territoriality, seen merely as a container for persons in their natural equality, defined without further qualifications membership in the group contracting for governmental powers. Against the demands of the first article of the *Agreement* which provided for equal representation of 'every man that is an inhabitant', Ireton argued forcefully that only those with a 'permanent fixed interest in the kingdom' should be allowed to vote. In Ireton's case this permanent fixed interest was based on 'property' and not on any universalist notion of an

31 Brilmayer, 'Consent, Contract, and Territory', 74 *Minnesota Law Review*, No. 1 (1989) 1-35; quote at 6.

'absolute natural right' which attaches to them qua persons rather than qua members of a civil society united by 'civil right'.

Such a construction, however, is somewhat question-begging as is Locke's similar construction of a 'civil society' which precedes the governmental contract. Again, the membership of property owners constituting civil society is actually delineated by the 'territory' rather than by 'consent' as such. Nevertheless, Ireton's insistence on a permanent fixed interest in the kingdom dependent upon 'property' attempts to deal with the generation-transcending importance of the political order; this distinguishes it from mere spot or even complex incomplete contracts.

This is not the place to follow the changes that occur when 'property' no longer means 'fixity' of place (that ties people together by necessity), but becomes the collective name for a variety of arrangements (including even intangible assets valued solely for their 'exchange' potential). The implications of the ascendancy of 'wealth' over the original notion of property as 'rootedness' have been well elaborated by Hannah Arendt.³² As a matter of fact, the hold of land on our imagination seems unusually firm. 'Land' not only provides people a 'place in the world' which forces people to address their common problems and to engage in cooperative ventures, but it also becomes a symbol of continuity and an assurance of transgenerational connectedness. Thus, 'the land' becomes one of the most powerful symbols of identification, invoked frequently in national anthems and in countless allusions contained in tales and folklore that contribute to the creation of a collective memory.

A further issue, equally troublesome to contract and consent theory, is the problem of how to bound the new power, i.e. authority, resulting from this complex incomplete *and* indefinite contract. On the surface, the sovereign resulting from the social contract is simply the enforcer of the rights and exchanges among its subjects. But even Hobbes knows that such a conceptualization evades the problem of 'sovereignty' which means that, unlike private incomplete contracting, an authority is created that can decide *what its own competency is*. This obviously entails many new dimensions of authority including that of modifying the framework for 'private' contracting, acting against hold-outs without their consent, or even modifying or overriding certain of their presumed rights, such as their property (by levying taxes), their choice of religion or their freedom of speech. Such a 'plenitudo potestatis' cannot be derived from the concept of the sovereign as an 'enforcer' of private rights.

Thus, while the language of contract is used, it is 'functional necessity' rather than consent in any meaningful sense that informs Hobbes' analysis. He never tires of emphasizing that only in this fashion can the sovereign create peace and the preconditions of commodious living, so eagerly sought by the subjects leaving the state of nature. Only by virtue of this authority, i.e. as the fixer of signs and meaning, can the sovereign avoid internal dissent and conflict. This exercise of

32 H. Arendt, *The Human Condition* (1958) especially Chapter II, sec. 8.

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power can neither be restrained nor can it be rationally opposed. 'Law' is not only what the sovereign says it is, but the obligations arising from his commands are paramount (except in the limiting case in which physical self-preservation is at stake).

Even if we do not agree with Hobbes' 'contract' solution, it is clear that in such types of contracts, functional criteria increasingly replace the ascertainment of historical intentions of the parties to the original contract in the canon of interpretation. And it is precisely this fear of 'functional necessity' that impels some adherents to the contractual approach, such as Buchanan,³³ to insist on a constitutionally guaranteed right of 'secession'.

Some of these problems arise even in the international arena, i.e. in the absence of government but not 'governance'. Even here, law-making treaties adduce interpretative canons such as *ut res magis valeat* and 'purposes' rather than simply relying on the intentions of the parties. Similarly, in the UN Charter, technically a multilateral treaty, the authority to take measures for peace-keeping has received a 'constitutional' interpretation based on notions of functional necessity and 'implied powers'.

The notion of consent seems to quickly approach the vanishing point. Perhaps Rousseau put it most bluntly, that the social contract implies an *aliénation totale* for the person entering it.³⁴ If the public authority 'forces me to be free', i.e. to obey the law, then the only self-imposed law I can be said to be following is my one-time resolution to obey the 'law' whatever it may be. As even Locke suggests, 'he that has once, by actual agreement, and any express declaration, given his consent to be of any commonweal, is perpetually and indispensably obliged to be and remain unalterably a subject to it'.³⁵ If this is an exercise of my autonomy and consent then it is so only metaphorically. As Don Herzog perceptively pointed out:

Consent theorists face an imposing structural dilemma, one built into the logic of their framework. They want to say that individuals consent to the government and that consent generates an obligation to obey the law. So they need a conception of consent that is descriptively plausible: they need to point at citizens and show us their consent. But that conception also needs to be normatively robust: whatever counts as consent has to generate an obligation. These two requirements pull in different directions. I can meet skeptical inquiries about whether people really do consent by watering down my notion of consent. But the skeptic will ask whether *that* bit of consent is enough to generate an obligation. And if I've watered down the notion enough, I will be hard pressed to find a credible affirmative answer. Similarly, if I begin with a conception robust enough to do normative work, I may be hard pressed to say, that in fact people do consent. The consent theorist shares Goldilock's plight trying to find just the right fit. That fit may be unavailable.³⁶

33 See, e.g., Buchanan, 'Rent-seeking, Non-compensated Transfers and Laws of Secession', 26 *Journal of Law and Economics* (1983) 71-89; see also Buchanan, Faith, 'Secession and the Limits of Taxation: Towards a Theory of Internal Exit', 77 *American Economic Review* (1987) 1023-31.

34 J.J. Rousseau, *The Social Contract*, ed. by L. Crocker (1967) Book I, Chapters 8 and 9.

35 J. Locke, *Two Treatises on Government*, ed. by P. Laslett (1970) 365.

36 D. Herzog, *Happy Slaves: A Critique of Consent Theory* (1989) 185.

Although such a fit might indeed be unavailable, two strategies have traditionally been suggested to solve this problem. One, the insistence on 'natural' rights preceding the 'contract' and the establishment of 'political' control in the exercise of public authority created by the contract. Both strategies can be found in Locke. Thus, while he declares on the one hand, 'The supreme power cannot take from any man any part of his property without *his own consent*', on the other hand, when faced with the problems of holdouts and the need to procure 'public goods' by means of taxation, he admits, 'governments cannot be supported without great charge, and 'tis fit everyone who enjoys his share of protection, should pay out of his estate his portions for the maintenance of it. But still it must be with his own consent, i.e. the consent of the majority, giving it either by themselves, or their representatives chosen by them'.³⁷

The interesting point in the latter example is not only that Locke transforms the need of individual consent into one of a parliamentary majority, but that the idea of 'representation' is thereby fundamentally changed. Different from the old conception of 'making' present the majesty of the realm, the representatives now simply become controllers of policy; elections are no longer acclamations but rather increasingly decide controversies about the direction and scope of public authority. However, ultimately the power of members of parliament to oblige their constituents through a majority vote seems to derive more from the notion of their corporate capacity as representatives of the entire body politic than from consent via the delegation of consent by their constituents.

There remains therefore, the intractable difficulty of squaring the obligatory force, resulting from majority decision, with the paradigm of 'consent'. How can we meaningfully say that someone 'consented' when he and his representatives were not only outvoted but had actively opposed the adopted policy? If in following the 'self-imposed' law I am merely abiding by my resolution to follow the commands of a majority, whatever that might entail, then such obedience is hardly an exercise of autonomous choice. On the contrary, it looks much more like the simple submission to be a slave. Again, the tension between the notion that a contract is binding as a *result of a procedure* or on the basis of the result it tends to achieve re-emerges.

The only way to lessen the severity of this dilemma is to re-introduce cognitive factors into the voluntarist account and to move from the *actual consent of real persons* to an argument of hypothetical consent, i.e. that a decision would obtain assent if the actors were actually aware of the relevant considerations. This is, of course, the route taken by natural law, but can also be found in Rousseau's cryptic remark that the 'general will' can never err and that under proper procedures majority rule would lead to the 'discovery' of the general will (as opposed to merely the *volonté de tous*).³⁸

37 J. Locke, *supra* note 35, at 378, 380.

38 J.J. Rousseau, *supra* note 34, Chapters 3 and 4.

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Another, perhaps more sceptical version, is the appeal to the 'ancient constitution', or the limitation of the discretion which inevitably forms part of 'authority' through the explicit exemption of at least certain areas from its domain by enshrining 'rights' which serve as bars to the exercise of public authority. The rights themselves are then either 'self-evident' or natural. A decision of the public authority deserves our respect and justly imposes obligation not because we have either explicitly, or implicitly consented, but because *'reasonable' or rational men or women would consent* to such a decision.

While such a construction alleviates some of the problems, it leaves us in the lurch when 'rights' conflict or when persons claim or allege rights that are non-evident to others. Under such circumstances, the justification has to rely increasingly on the 'fairness' of the procedure by which the decision was made, rather than on the assertion of self-evident underlying factors.

One of the most elaborate and sophisticated versions of this cognitive reconstruction of the voluntarist contract paradigm is of course Rawls' contract in the 'original position'. But in a way there is a striking resemblance between this version of contractarianism and 'legalism', i.e. the notion that obligations result from following rules and norms in a principled fashion. Not only is the question of obligation transformed into the cognitive issue of validity of norms and their 'fair' application, but consent as the basis of obligation is pushed to the margin. It figures only as a validating reason for the 'basic norm' which is 'accepted' as in Kelsen's pure system of law, or as the ground for the duty imposing character of principles chosen behind the 'veil of ignorance'. Having thereby entered 'Law's Empire',³⁹ we must not only take 'rights seriously'⁴⁰ but the problem of the scope and limits of public authority is no longer a matter of bargaining, compromise or the acceptance of solutions actual people can live with. It is rather the task of 'rule-handlers' who are charged with the 'Herculean' task of arriving at a correct solution by being neutral as to the substantive definitions of the 'salus publica' and by insisting on the primacy of 'justice' as procedural fairness over any other value.

At this point it may be useful to take one step back and examine more closely the conceptual transformation that has occurred in conceiving of the 'constitutional' contract in such a fashion. First, it seems clear that much of the persuasive power of this construction results from the linkage between two powerful metaphors; that of a 'game' constituted by rules, and that of contract. Second, the purpose is clearly to provide a transcendental foundation for the primacy of justice as fairness, instead of relying on the problematic link between the logic internal to the system of rules and the 'sociological' fact of acceptance of the *Grundnorm* or on the 'normative force of facticity'. Similarly, the reduction of issues of legitimacy to a question of overall utility is logically faulty because such purely instrumental reasoning is incompatible with the notion of 'rights' as trumps against both public and private claims.

39 R. Dworkin, *The Law's Empire* (1986).

40 See R. Dworkin, *Taking Rights Seriously* (1978).

But if the intention of such a constitutional construct is Kantian it is considerably more ambitious than the Kantian categorical imperative serving as the transcendental criterion in our assessment of duties. While Kant's imperative can be used to evaluate certain practices after they have gained currency in a society – and how successful such an enterprise is, remains highly debatable – it cannot constitute them and, *a fortiori*, it cannot be used for setting up a society, as the social and the constitutional contract pretends to do. Kant seems quite clear that '*pure reason* which legislates a priori' is the transcendental principle – rather than contract as such, or common goals (such as happiness) – which justifies public authority.⁴¹ Similarly, while Kant's postulate to treat others as ends rather than as means has been translated by liberal theorists to mean respect for other persons and their 'rights', a more accurate reading suggests that Kant's respect is centred on the morality of 'law' and thus much more on the 'worthy' parts of persons in so far as they order their actions and lives in conformity with moral ends, rather than on their rights *per se*. To that extent the Kantian respect for persons only partly 'operates as the practice of respect for rights and integrity that is admired by so many'⁴² liberal theorists who have adopted him as one of 'their' canonical writers. But if this is so, then the primacy of justice seems much less defensible than most 'liberal' legalists suggest.

The crucial question then is whether the concept of a constitutional contract overcomes these difficulties and can provide a coherent account of duties and obligations flowing from the adoption of principles of justice. Rawls is clear about the fact that such a 'contract' must be of a special kind in order to deal with the problem of 'the further question' (yes it is a contract, but is it just?), or the problematic argument that it is simply an agreement to keep agreements. For this purpose, Rawls not only chooses a hypothetical contract but places the parties behind a veil of ignorance to mask their knowledge of their own capacities, risk propensities, and likely position in the society for which they are to choose the principles of justice.

Through this device, the contract is doubly hypothetical since it brings together hypothetical actors, i.e. persons who have been stripped of their individuating differences – in Rawlsian terms they are 'theoretically defined'⁴³ in a hypothetical choice situation. The choice in the original position is to 'nullify the effects of specific contingencies which put men at odds and tempt them to exploit social and natural circumstance'.⁴⁴ Thus there is no bargaining, actually not even a discussion. Since each of the participants is 'equally rational, and similarly situated, each is

41 See, e.g., his essay, 'On the Common Saying: This May be True in Theory but it Does Not Apply in Practice', in H. Reiss (ed.) *Kant's Political Writings* (1970) 61-92, particularly 73 s.

42 B. Honig, *Political Theory and the Displacement of Politics* (1993) 18.

43 J. Rawls, *A Theory of Justice* (1971) 147.

44 *Ibid.*, at 136.

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convinced by the same arguments'.⁴⁵ The result is that under such circumstances the principles of justice as 'fairness' are adopted 'unanimously'.

At this point one justifiably gets nervous. After all, why should anyone feel obliged by the results of a 'contract' in which hypothetical actors chose in ignorance? What does it mean to talk in that case of 'agreement'? Gone is not only Rawls' original commitment to 'reasonable empiricism' on which he insisted against Kant's metaphysical presuppositions (transcendental deduction), gone also is the assumption of diversity among persons, which was the main reason for preferring a deontological scheme of rules, in particular of rights, rather than a utilitarian criterion.⁴⁶ After utilitarianism was (correctly) dismissed for 'extending to society the principle of choice for one man'⁴⁷ we can only be surprised by Rawls' admission that the adoption of principles of justice is 'unanimous', or even stranger still, that it is tantamount to the 'choice' of *one* person, *any person*, taken at random. He writes: 'Therefore we can view the choice in the original position from the standpoint of one person taken at random. If anyone after due reflection prefers a conception of justice, then they all do, and a unanimous agreement can be reached'.⁴⁸

The attractiveness of this type of hypothetical contract for legalists dealing with difficult constitutional issues is obvious. The popularity of such 'contractual' thinking is not merely superficial, but has obvious implications for a 'legalistic' theory of how 'law' ought to work, producing clarity and finality of choices. The conjunction of 'contract' with the notion of a game suggest that the 'finality' of decisions in moral, legal and political affairs results from a simple appeal to some institutional rules, very much as 'moves' function in a well-structured game. But, as we all know, judgments in the public and legal spheres can be opposed with good reasons and are therefore considerably more complex than even the 'judgment calls' of a 'neutral' referee.

This problem becomes painfully obvious when one considers Rawls' categorical denial of 'desert' as a valid basis for claims to distributive justice. Since people do not even 'possess' their natural assets, no 'just' claims can be made on the basis of desert prior to the establishment of particular institutions. Rawls' argument is that natural endowments as well as cultural privileges are accidental and should not be considered as valid, inchoate claims antecedent to the constitutional choice of the principles of justice. In order to ensconce the radical equality of the choosers in the original position and in order to ensure the adoption of the difference principle, Rawls has to argue that a person's natural assets are not his or hers but are actually *owned* by the community.⁴⁹ This not only makes for a strange theory of 'rights', it

45 Ibid.

46 Ibid., at 3-4.

47 Ibid., at 28.

48 Ibid., at 139.

49 For a further discussion of some of the implications of this type of 'egalitarianism', i.e. *asset egalitarianism*, see Arrow, 'Some Ordinalist-Utilitarian Notes on Rawl's Theory of Justice', 70

also makes 'the community' a mystical entity far beyond the 'organic' conceptions he so ardently opposes. In fact, the perhaps unintended but furtive introduction of substantive criteria, with neither a (logically weak) 'communal' (i.e. in terms of, for example, an actual distribution of moral sentiments in a population), nor a (logically strong) 'transcendental' justification makes this project based on a contract in the original position incoherent. As John Gray suggests,

The significance of Rawls' neglect of entitlement and, in general, of historical principles of justice is that, since nowhere does he justify their absence from the list of alternative conceptions of justice he has no independent chain of reasoning which might warrant end state rather than historical principles. The point, then, is not that Rawls' construction of the original position is designed only to yield end state principles, nor yet that his list of alternative principles of justice is far from exhaustive (which Rawls readily admits), but that Rawls' reasoning becomes viciously circular, in so far as he can give no good reasons for accepting stipulations regarding the original position other than that they allow him to derive the outcome he wants.⁵⁰

Finally, the primacy of justice advanced in contractual terms as a voluntary undertaking, is quickly transformed into a simple problem of cognition which, however, far from being 'neutral' imposes a particular discipline hidden in the original position. Since the actors in the original position cannot even adopt provisional rules to be revised in the light of subsequent experience, because no matter who enters or when one enters into the original position, the same principles 'are always chosen',⁵¹ parties never need to learn. They are always assured of a 'right perspective' on the issues that might arise. A nearly Hobbesian quiet settles over the entire enterprise. The institutions based on the principles of justice become the fixers of meanings. Now that everything has been rendered predictable and reduced to the 'administration of justice' what is required is some proper instruction by Herculean teachers of law, and an occasional adjustment of one's vision provided by the 'perspective' of the original position in the face of actual disruptions and rejections of such solutions in real life.

IV. The Problems of 'Grand Theorizing'

This examination of the various forms of contract and the limitations of the contractual paradigm when extended to 'constitutional contracts' has hopefully, even if only indirectly, strengthened my argument against 'grand theories' in general, and against an overarching 'legal' theory in particular. I have attempted to engage in a type of theorizing that is thematically open but sharply focused. It is

Journal of Philosophy (1973) 245-262. For a trenchant critique of the type of 'end state theories of justice' to which such asset egalitarianism gives rise, see R. Nozick, *Anarchy, State, and Utopia* (1974) 155ff.

50 Gray, 'Social Contract, Community and Ideology', in J. Gray, *Liberalism: Essays in Political Philosophy* (1991) Chapter 3, quote at 32.

51 Rawls, *supra* note 43, at 139.

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open in that it does not take for granted the traditional disciplinary limitations, such as those existing between law, politics or philosophy. But I have resisted advancing a new grand or integrated 'theory' by keeping the investigation focused on a fairly well developed institution and examining systematically the problems that arise from the conceptual extensions of the notions of contract and consent.

This procedure allowed me to address a variety of issues whose connectedness usually eludes us because of the blinders thrown up by 'disciplines'. One such issue was 'self-help' in the domestic arena which is usually neglected by both neo-classical economics – as many of the beneficial effects of the general equilibrium model only hold if 'exogenous' claim enforcement can be 'assumed' – and by political science, precisely because the discipline of international politics is characterized by anarchy and self-help in stark contrast to the domestic arena.

But the disciplining force of the established 'fields' goes still further. Even the traditional definition of international law as 'a body of rules binding upon states' becomes an accomplice in this distortion of understanding social reality. It attempts to separate a 'set of rules', in terms of a 'system', outside the context of shaping interactions. By this very distinction, such an attempt enters into a symbiotic relationship with similar efforts to cleanse international politics of most of its normative elements and founding its autonomy on 'power', the distribution of capabilities, or whatever. The connection of 'great debates', – such as the one between 'utopians' and 'realists'⁵² in the interwar and post WWII era – and the establishment of disciplinary boundaries becomes visible. Although proponents of such disciplinary boundaries differed, of course, on many significant points, both shared a peculiar understanding of 'politics' and 'law' that valorized the disciplinary boundaries.

Utopians, as long as they were good legalists – and were not exclusively comprised of social activists, fundamentalists, or Marxists – argued that unless all politics is transformed into the paradigm of 'just' action no stabilization of expectations crucial for the establishment and maintenance of social order is possible. For international politics the agenda seemed clear: if not world government, at least 'war' had to be outlawed. Furthermore, the uncompromising character of justice made it impossible to subject the role of unprincipled adjustments that are part of social life but depend on bargaining or even coercion, to critical appraisal. There was either justice or chaos.

The flip side of this argument was of course, that 'an entirely extravagant image of politics, as essentially a species of war, has to be maintained. Only thus can the sanctity of rule-following as a social policy be kept from compromising associations'.⁵³ This was then grist to the mill of 'realists' who defined politics in terms of the limiting situation of 'emergency' and of the fundamental distinction

52 See the reflection on this great debate in E.H. Carr, *The Twenty Years Crisis, 1919-1939* (1964).

53 J. Shklar, *Legalism: Laws, Morals and Political Trials* (1986) 122.

between friend and foe (Carl Schmitt),⁵⁴ as the *libido dominandi* (Reinhold Niebuhr),⁵⁵ or the idea that force is the first and foremost 'ratio' in the international arena (Waltz).⁵⁶ Thus the autonomy of the political sphere is based on the foundationalist assumption of politics as potential physical violence.

This is after all why today's realists claim that the brutal killings we see in Bosnia/Herzegovina dampen not only our optimism concerning the advent of a new world order, but 'prove' the correctness of neo-realist theory.⁵⁷ Thus 'anarchy', with its concomitant security dilemma, remains the master key that unlocks the 'Sesame' of international politics.⁵⁸ But contrary to (neo)realism's assertions, there is no singular logic of 'anarchy' nor does self-help mean the resort to force. Even internationally, the 'structural' conflicts between Germany and France, and between France and England have been transformed. What we witness today is rather a security community in which resort to force becomes unimaginable.⁵⁹ Furthermore, groups that are suddenly faced with the issue of securing their own way of life after secession or central government collapse, have not *inevitably* interpreted their situation as a security dilemma. Why are some of the more benign outcomes so facetiously ignored? Sweden and Norway parted amicably in 1905, and their relations probably have been better since. The Czech and Slovak republics were able to work out a 'velvet divorce', even Quebec and Canada, as well as Catalonia, the Basque region and Spain could compromise. Although their relations are certainly full of tension, it is equally certain that they are not appropriately characterized by the 'anarchical' logic of a security dilemma.

Underlying such misinterpretations is, of course, the nearly metaphysical assumption that such anomalies are only temporary respites from the inexorable logic that forces 'units' to become alike. But contrary to formulations which consider the 'nation-state' to be the rule, this organizational form has always been the exception. Historical experience shows that the theoretical equivalence of nation and state has always been contestable, that it has been *actively* contested, and that, at present, the logics of sovereignty and 'nationalism' are heading in different directions. This is a phenomenon that ought to be investigated by an adequate 'theory' of international politics, but the 'evolutionary' logic of the international

54 C. Schmitt, *Der Begriff des Politischen* (1979) Chapter 2.

55 See, e.g., R. Niebuhr, *The Children of Light and the Children of Darkness* (1944) Chapter 1.

56 K. Waltz, *Theory of International Politics* (1979) especially 113.

For an argument that it is this substantive understanding of politics rather than the 'logic' of a generative structure, see my 'Errors Have Their Advantages', 38 *International Organization* (1984) 305-320. For recent arguments that 'anarchy' is not determinative of outcomes, see Wendt, 'Anarchy is What States Make of it', 46 *International Organization* (1987) 391-425; and B. Buzan, C. Jones, and R. Little, *The Logic of Anarchy* (1993).

57 Such claims are made by J. Mearsheimer and B. Posen in their recent essays on 'hyper-nationalism'. See Mearsheimer, 'Back to the Future: Instability in Europe after the Cold War', 15 *International Security* (1990) 5-56, and Posen, 'Nationalism, the Mass Army and Military Power', 18 *International Security*, No. 2 (1993).

58 See, e.g., the articles by Mearsheimer and Posen, *ibid.*

59 See K. Deutsch *et al.*, *Political Community and the North Atlantic Area* (1957), reprinted in *International Political Communities: An Anthology* (1966) 1-92.

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system entitles our present scholars in the 'discipline' to pay only the scantiest attention to 'real' politics. As in the world of true love, reality increasingly proves nothing.

Meanwhile legalists are busy at work promoting human rights by drafting new documents and advocating the establishment of new judicial institutions for their 'enforcement'. As is fitting for 'liberals', here, as anywhere else, 'more' is better than 'less' and, therefore all that is required is to transform anything desirable either by a conceptual extension or by a new draft convention into a 'right'. From there it is then easy to construe not only a license but a duty whose determination is entrusted to legal experts, without much attention to the social realities or even the intervening conceptual problems.

Thus, extravagant claims are made for 'the people's' right to 'democratic' participation,⁶⁰ and third parties' interventions for violations of human rights are justified by a simple 'liberation of Paris principle': if the 'people' throw flowers intervention by outsiders is O.K., if they throw bottles or anything else, it is illegal.⁶¹ Unfortunately, such parodies of analysis are not uncommon, resulting directly from a particular mode of approaching issues. The legalist's work is done as soon as he has, in true Kelsenian fashion, established something as a 'right' or a 'delict', or asserted that 'human dignity' is impaired by the violation of guaranteed human rights. But since, even domestically, the status of justice as the supreme virtue is contested, 'law's empire' is often felt to be little more than legal imperialism, often ensconcing policies of dubious value. It is therefore not surprising that different cultures, in which the concepts of law, courts, the insistence on rights and adversarial procedures, resonate much less than in the Western tradition, are hard to convince that behind the universalist claims of human rights is only the imperialism of law, and not imperialism pure and simple.

In contra-distinction to the ideal that there are 'solutions' in accordance with legal justice, the dilemmas of politics fail to be silenced. Examples come readily to mind: the (Haitian) refugee problem, Somalia and the Bosnian crisis. In the latter case our tolerance for cognitive dissonance is severely tested when we see that under the auspices of the same organization, one set of lawyers is busy preparing the documents for prosecuting as war criminals the very same persons with whom another set of jurisconsults attempts to mediate the dispute. Apparently the problem of establishing the conditions of social coexistence among groups, caught in the throes of a violent struggle, is somewhat more complicated than serving 'justice' by enlarging 'law's empire', or even of enforcing some of its basic injunctions.

Against these 'grand' theories which belie their initially modest claims to provide only theories of 'sectors' by their colonization efforts, by either marginalizing recalcitrant fact through silence, or by appropriating them through

60 Fox, 'The Right to Political Participation in International Law', Paper presented at the Annual Meeting of the American Political Science Association, Washington, D.C. Sept. 1993.

61 Leviin, 'The Law of Force and the Force of Law: Grenada, the Falklands, and Humanitarian Intervention', 27 *Harv. Int'l LJ.* (1988) 621-657, at 654.

misrepresenting it as an instance of the grand theory, I have advanced more modest claims based on the careful analysis of the logic of institutions. Grand theories, whether legal or political, are usually not very helpful precisely because as 'grand' theories they tend to 'normalize' discordant facts instead of making them occasions for further analytical development.

Nowhere does this become clearer than in the case of the thorny issue of a right to 'self-determination'. The normalization of international relations theory consists in leaving the connection between nation and state unexplored and by representing problems of ethnicity and nationalism as appendices to the well known 'anarchy' problematic. Legalism on the other hand, even if it takes 'rights seriously' misrepresents these problems as 'human rights' issues.

Consider in this context the assertion of the Universal Declaration of Human Rights which provides: 'everyone has the right to take part in the government of his country directly through freely chosen representatives'.⁶² Here the question of self-determination is clearly viewed not only in individualistic terms but as part and parcel of a consent theory to governmental authority. But even if we agree that the right to self-determination might indeed be an individual right, it does not follow that it has much to do with participation in government. Only if we assume a complete identity between two sets of distinctive memberships, i.e. the nation and the citizen, does this inference follow. Here, the lack of an articulated theory of community and the criteria of membership, (despite their logical necessity for any contract theory), becomes visible.

One need not be an adherent of the communitarian critique of contractarianism in order to appreciate the conceptual befuddlement in this area. As Tamir aptly put it,

... self-rule and national self-determination are two distinct concepts. They differ in their individualistic and communal aspects, represent two distinct human goods and derive their value from two separate human interests. The individualistic aspect of both of these rights celebrates personal autonomy and the right of individuals. Whereas in the right to self-rule this aspect points to the right of individuals to govern their lives without being subject to external dictates, in the case of self-determination, it concerns the way in which individuals define their personal and national identity.⁶³

Thus, many 'minorities' striving for self-determination are understandably hard to convince that their struggle is 'really' only about voting and civil rights in a community they want to leave without forgoing the claim to some territory (as do refugees). Are then problems of self-determination best understood as hidden territorial claims as Brilmeyer⁶⁴ suggests? Some of her examples, such as India's take-over of Goa, or France's claim to Alsace seem indeed to indicate a territorial

62 *Universal Declaration of Human Rights*, G.A.Res. 217, 1948.

63 Y. Tamir, *Liberal Nationalism* (1993) 70.

64 Brilmeyer, 'Secession and Self-determination: The Colonial Interpretation', 16 *Yale J. Int'l L.*, No. 1 (1991) 177-202.

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agenda. But are these examples representative or do they only prove that self-determination claims are sometimes advanced as self-determination claims because of ideological reasons due to the greater legitimacy of the self-determination?

Certainly such an analysis corrects the rather naive liberal statist view underlying much of the human rights debate. Using the terminology of civil rights in order to protect minorities, the Charter suggests not only that 'in a world where individual rights are fully protected, minority groups will not only disappear with time' but also that the nationality problem will 'cease to pose a threat to world stability'.⁶⁵ But is the quest for self-determination really only about territorial claims that can be amalgamated by the traditional logic of 'sovereignty'? In short, is the generative logic really one in which 'the state' again masters the 'nation', or is the present preoccupation with 'ethnicity' pointing to the importance of identity which has quite different, but probably equally deep, implications for politics and law as contract and consent? One can reasonably suspect that this is the case, but it is less clear what this would entail for our institutions and concepts of political order and citizenship. This is obviously a problem going far beyond the scope of the present paper and will have to be taken up at another time.

65 As quoted in Tamir, *supra* note 63, at 76.