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Contract, Status and the Bonds of Welfare

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Contract, Status and the Bonds of Welfare

Cover Page Footnote

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Introduction

[W]e should not be justified in assuming that, although status is a principle that conflicts with contract, the stratified status system which is creeping into citizenship is an alien element of the economic world outside. Social rights in their modern form imply an invasion of contract by status, the subordination of market price to social justice, the replacement of the free bargain by the declaration of rights. But are these principles quite foreign to the practice of the market today, or are they already entrenched within the contract system itself? I think it is clear that they are. (Marshall, 1992: 40)

In this passage from his seminal essay on citizenship and social class, Marshall identifies a link between status and contract. While status, which he equates with social justice and social rights, might be characterised as having infiltrated or invaded contract – suggesting they occupy autonomous spheres – Marshall argues that those principles are already to be found within the market ('the contract system') during the late 1940s and early 1950s. To put it differently, in his view, while status and contract conflict in principle, they are inextricably linked in practice. Marshall was writing at a time – 1950 – when the emerging welfare state, and its focus on social protections and rights, was the object of political consensus. Capital and the functioning of markets (Marshall's 'economic world') were considered to depend on the existence of social justice measures,¹ and social rights derived from one's status as a citizen. But what of the relationship between contract and status *within* the area of social policy today? This is the question addressed in the present article.

For several decades now, contract has been an important feature of contemporary social, and related, policy in the UK. Contracts outsourcing, *inter alia*, the building of National Health Service (NHS) hospitals to private entities as part of the Private Finance Initiative; Acceptable Behaviour Contracts designed to ensure that social housing tenants desist from engagement in so-called anti-social behaviour; Youth Offender Contracts placing obligations on offenders as a means of making them take responsibility for their actions by altering their future behaviour – these are just a few examples of the use of contract by successive UK governments in recent times. While this deployment of contract has been the subject of critical

analysis (e.g. Crawford 2003; Vincent-Jones 2000), there has been little reflection on how, if at all, contract might relate to status in this context. The only argument advanced on this issue seems to be that, in line with Maine's (1986) [1864] characterisation of modernity, contemporary social policy involves a shift in social citizenship from status to contract. Writing about the policy of workfare (in which those seeking to access unemployment benefits must discharge certain conditions), Handler (2004) argues that those benefits should no longer be characterised as rights deriving from one's citizenship status; rather, they are better understood as conditional benefits, the rights to which depend on the discharge of various obligations. While this type of analysis captures some important recent developments in social policy, it is founded on an opposition of contract to status. In characterising a shift from one to the other, the suggestion is that they are distinct entities incapable of belonging, or being understood, together. It is this dissociation of contract from status that this article problematises. It argues, instead, that contract and status in the context of contemporary social policy are inextricably linked and that a fuller understanding of contract in this area depends on an awareness of how it is underpinned by questions of status.

To develop this argument, the article focuses on two examples. The first is what is here called the workfare contract. A feature of what are known as labour activation programmes/policies, in the UK (which this article concentrates on) the workfare contract has taken two forms – initially, the Jobseeker's Agreement and, more recently, the Claimant Commitment. As noted above, to access the relevant state benefit (Jobseekers Allowance in relation to the Jobseeker's Agreement; Universal Credit in the context of the Claimant Commitment), it is necessary to comply with certain conditions set out in those documents. It is clear that governments characterise these as contracts. While this is obvious insofar as the Jobseeker's *Agreement* is concerned, it is also true of the Claimant Commitment, which is described in current government documentation as a record of the responsibilities the claimant has accepted in return for receiving Universal Credit. The second example is what are known as Social Impact Bonds (SIBs). These contracts

are financial instruments created for the purpose of addressing various social issues, including homelessness and recidivism.

Those examples have been chosen as they enable reflection on the nature of the contracts' underlying bonds and obligations – what they are, where they came from, and how they differ from earlier forms. One common way of understanding the source of contractual bonds and obligations is known as the will theory of contract. Thus, it is because the contracting parties have willed or chosen to do certain things that they can be held, or bound, to perform these. To put it another way, the contracting parties have voluntarily assumed or consented to undertake or perform certain things. Contract lawyers sometimes use the Latin phrase *pacta sunt servanda* – agreements made must be kept – to convey this theory of contract. The two examples discussed in this article raise questions about the degree to which the will theory can adequately explain the bonds and obligations underpinning those contracts. It is argued that the explanatory deficit can be addressed via a focus on status. The status of work and those who engage/do not engage in it; the status of capital in the context of social policy; and the status of the state *vis-à-vis* welfare; rather than being distinct from the contracts to be explored here, it is suggested that those statuses are integral to an adequate understanding of them. Implicit in the foregoing is another reason for the choice of examples, namely that they facilitate reflection on different types of contracts. Thus, the workfare contract is one between the state and an individual, whereas the SIB involves the state and non-state entities/organisations, such as financial investors or intermediaries. In turn, this enables consideration of a wider range of factors when it comes to the question of status than would have been the case had the workfare contract been accompanied by a discussion of, say, Acceptable Behaviour Contracts, as these involve similar parties and, arguably, themes.

In developing the argument, the article draws on some of the work of Émile Durkheim and Max Weber on contract and its pre-history. Specifically, it is suggested that their descriptions of the importance of status in pre-modernity – what Durkheim (1957) calls the importance of the 'state of persons or things' and his emphasis on their sacred nature; and what Weber

(1978) calls ‘status contracts’ – can assist in understanding the two examples of contract discussed in this article. As will become clear, while those descriptions do not perfectly reflect the features to be found in the workfare contract and the SIB, they nonetheless shed light on some of their important characteristics, thereby supporting the argument advanced here that issues of status lie at the core of understanding those contracts. Durkheim wrote that ‘[I]n a contract not everything is contractual’ (Durkheim 2013: 165). While what he meant by this – namely, that contracts are subject to a ‘regulatory force’ (the law) that imposes obligations that have not been agreed by the contracting parties – differs from the argument advanced in this article, it is nevertheless this idea of the *non-contractual dimension of contract* that largely animates the discussion and analysis here.

The article is structured as follows. The next section sets out some of the key aspects of Durkheim and Weber’s writings on contract. It concentrates on their analyses of its historical development from the pre-modern to the modern period, identifying especially the nature of the bonds between the parties and their underlying source(s). The remaining substantive sections use Durkheim’s and Weber’s analyses, suitably modified and developed, to make sense of the workfare contract and the SIB, and develop the argument about the inextricable link between status and contract to be found at their core. The final section concludes. It should be noted that the article focuses on social policy in the UK. While the examples discussed are features of the welfare regimes of some other countries, and it is hoped that the analysis of them here may hold some relevance beyond the UK, given the author’s familiarity with the latter jurisdiction, it is the UK that is the focal point.

Durkheim and Weber on Contract and Its Pre-History – Bonds and Status

i) Durkheim – The Origins of the ‘Juridical Moral Bond’

Durkheim’s key reflections on contract are to be found mainly in two of his books. In *The Division of Labour in Society* (Durkheim, 2013), contract appears in the context of Durkheim’s analysis of the forms of social solidarity

and corresponding law. Contract is offered as an example of restitutive law, that form of law associated with the organic solidarity characteristic of industrial society. Durkheim's lengthier reflections on contract formed part of his lectures at Bordeaux University between 1890 and 1900, and appear in *Professional Ethics and Civic Morals* (Durkheim, 1957, Chs. XV-XVIII). It is these latter reflections that will form the focus of this article.

In *Professional Ethics and Civic Morals*, Durkheim provides a history of the emergence of contract, focussing on the changing nature of its underlying bonds. His starting point is the following question: '[w]hat does a juridical moral bond consist in?' His answer is that this type of bond refers to 'a relation conceived by the public consciousness as existing between two subjects, individual or collective, or between these subjects and a thing, and by virtue of which, one of the parties in question has at least a certain right over the other.' (Durkheim, 1957: 176) From where does this type of bond originate? Durkheim argues that it has one of two sources. The first derives from 'a state or condition in being, of things or of persons in relation; and it – the state or condition – may be such that these things or persons are (intermittently or permanently), of a certain nature, in some particular setting, and held by public consciousness to possess certain acquired characteristics.' (Durkheim, 1957: 176)² This, then, concerns status; it is the state or condition of things or of persons in relation that is the source of the bond. Durkheim gives the example of birth into a certain family automatically creating duties towards one's relatives and says that it is a certain state of facts that is the source of rights and obligations in this variant. The bond's second, alternative, source resides in 'a state not yet in being of things or of persons, but simply desired or willed on both sides'. (Durkheim, 1957: 176) A simple agreement to buy and sell something provides an example of this situation, in which it is the desire or intention of each party to proceed with the purchase and sale. As Durkheim says, in this variant 'there are only volitions, or states of will in question, and yet this state of wills may be enough to bring about obligations and therefore rights. It is for the bonds that have this origin that the term 'contractual' has to be reserved.' (Durkheim, 1957: 177) Moreover, Durkheim argues that the function of the contract is to vary an existing status or state of

things or persons, rather than to constitute them: ‘The contract itself cannot constitute the primary foundations on which the right of contract rests.’ (Durkheim, 1957: 177) Thus, for example, a contract may transfer ownership in property, but it cannot create property in the thing transferred itself. And ‘marriage, being of necessity a contract, pre-supposes an existing structure of the family that has nothing contractual about it.’ (Durkheim, 1957: 177)

Two points merit stressing here. First, for Durkheim one can only speak of a true contract (what he calls a ‘contract proper’ or ‘consensual contract’) when the obligations within it arise as a result of the meeting of the parties’ minds or wills, and nothing else (‘the efficacy of the wills in agreement’ (Durkheim, 1957: 181)). Secondly, and consequently, for Durkheim ‘contracts’ that do not spring solely from *consensus ad idem* (a meeting of minds) are not really contracts, despite sometimes being called such; their ultimate binding force emanates from elsewhere – namely, from ‘a state or condition in being, of persons or of things in relation’. As it is this second dimension of Durkheim’s analysis that will be important in this article, it is necessary to follow his thinking on this a bit further by considering how he answers the following question: ‘What indeed is the origin of bonds, that is to say, of rights and obligations that have their source in the state or condition of persons or of things?’ (Durkheim, 1957: 178)

Durkheim says that this ‘origin’ is the sacred character of things or persons or ‘the moral prestige they are endowed with, either direct or indirect’. (Durkheim, 1957: 178) He gives the example of the ‘blood covenant’ and what he calls the ‘real contract’ to represent ‘bonds of the personal status’ and ‘bonds of the *real* status’ respectively. Obligations arising in the context of the blood covenant have their source in consanguinity; it is the fact that the parties are blood relations that creates the bond. Crucially, though, it is not the shared blood alone that matters; it is that ‘to be of the same blood is to share the same god and to have the same sacred quality’. (Durkheim, 1957: 179) Insofar as the ‘real contract’ is concerned, it was the physical delivery of a thing that created the obligation on the party receiving it to hand over something of equivalent value.³ These historical examples therefore point to

the sacred source of obligations. If people felt bound to their communities or kinship groups, it was because all members of the clan bore 'the mark of a sacred symbol' and had within them 'a particle of the divine being from which the clan is supposed to be descended'. (Durkheim, 1957: 178) Thus, the ultimate source of the moral and juridical relations and bonds that flow from a personal or real status is 'some virtue *sui generis*, inherent either in the subjects or the objects and compelling respect.' (Durkheim, 1957: 178)

ii) Weber – 'Status' and 'Purposive' Contracts

Weber (1978) described the society he lived in and wrote about as a 'contractual' one. He saw legal transactions, and specifically contracts, as a source of claims as being the most significant feature of modern substantive law, particularly private law: 'So very characteristic is this feature of private law that one can *a potiori* designate the contemporary type of society, to the extent that private law obtains, a "contractual" one.' (Weber, 1978: 669) Kronman (1983: 96) notes that this contractual characterisation of the modern legal order is one common to Weber, Marx, Durkheim and Maine. Like those authors, Weber also linked the emergence of the importance of contractual freedom to the rise of the market and market exchange. As the latter grew in importance, so the private law of contract developed as a mechanism by which to regulate market exchange. Freedom of contract therefore grew in this sphere – the economy – but not necessarily in other areas of social life. But what was the background to this emergence of the private law of contract in modernity; what preceded this, and what forms of social relation underpinned pre-modern and modern 'contracts'? For present purposes, it is worth explaining Weber's analysis of this historical development, particularly his 'forms of contractual association', which correspond to a distinction between what he calls 'status' (pre-modern) and 'purposive' (modern) contracts.

Weber distinguishes between economic organisation in the form of the household and such organisation in the form of 'the market community'. Thus, while the latter represents 'the most impersonal relationship of practical life

into which humans can enter with one another'...' (Kronman, 1983: 98), the household was synonymous with 'non-contractual fraternal relationships'. (Kronman, 1983: 99) An individual's rights in pre-modernity were determined by his or her belonging to a family, for example; those in the market community derived from the choices that individuals made. Kronman identifies in Weber's analysis what he calls 'a single, fundamental distinction – the distinction between the artificial relationship that is deliberately created by a contract and the natural or quasi-natural relationships that exist between the members of the same household or kinship group.' (Kronman, 1983: 100) This distinction maps on to that between status and purposive contracts.

Weber describes the character of status contracts in the following terms: 'all those primitive contracts by which political or other personal associations, permanent or temporary, or family relations are created involve a change in what may be called the total legal situation (the universal position) and the social status of the persons involved.' (Weber, 1978: 672) And he distinguished status from purposive contracts in the following way:

[status contracts] were oriented toward the total social status of the individual and his integration into an association comprehending his total personality. This form of contract with its all-inclusive rights and duties and the special attitudinal qualities based thereon thus appears in contrast to the money contract, which, as a specific, quantitatively delimited, qualityless, abstract, and usually economically conditioned agreement, represents the archetype of the purposive contract. (Weber, 1978: 674)

Status contracts were mostly 'fraternization contracts', by means of which 'a person was to become somebody's child, father, wife, brother, master, slave, kin, comrade-in-arms, protector, client, follower, vassal, subject, friend, or, quite generally, comrade.' (Weber, 1978: 672) Thus, these contracts meant that the person would become something different in terms of status from what they were before. But the person would, Weber says, 'voluntarily assume[] that new quality'. Status contracts are 'quasi-familial', having their roots in the household community and replicating natural relationships. Thus, they involve fraternal bonds, as opposed to purposive contracts, which involve strangers. In the latter, 'there are no obligations of brotherliness or reverence,

and none of those spontaneous human relations that are sustained by personal unions.’ (Weber, 1978: 636)

Like Durkheim, Weber identified the meeting of individual wills as the essence of modern contracts. In doing so, he stressed that, unlike status contracts, purposive contracts could not have the effect of altering the identities of the contracting parties themselves. Irrespective of how many contracts one entered, one’s basic status as what Kronman calls ‘a person as a locus of aims and intentions endowed with a capacity for purposeful action – a will’ (Kronman, 1983: 105) would not change. A status contract, on the other hand, transforms the contracting parties’ identities and ‘makes them into different kinds of persons’. (Kronman, 1983: 104) This form of contract ‘treats an individual’s possession of some natural or quasi-natural characteristic as the only conceivable basis for ascribing to him an identifiable legal personality.’ (Kronman, 1983: 105)

The following sections explore how Durkheim and Weber’s analyses of contract and its pre-history offer fruitful means for understanding the workfare contract and the Social Impact Bond.

The Workfare Contract

I am not a client, a customer, nor a service user. I am not a shirker, a scrounger, a beggar, nor a thief. I am not a National Insurance number or blip on a screen. I paid my dues, never a penny short, and proud to do so. I don’t tug the forelock, but look my neighbour in the eye and help him if I can. I don’t accept or seek charity. My name is Daniel Blake. I am a man, not a dog. As such, I demand my rights. I demand you treat me with respect. I, Daniel Blake, am a citizen, nothing more and nothing less. Thank you. (*I, Daniel Blake*, 2016)

This section explores the nature of the bonds and obligations underlying the workfare contract. One way of approaching this would be to use the will theory of contract (mentioned earlier) to ask whether the source of the obligations – to pay benefits and engage in work or work-related activity – result from the contracting parties’ wills or choices. As noted in the Introduction, recent governments’ emphasis on agreement and responsibilities flowing from beneficiaries’ acceptance of conditions, suggests this interpretation. Literature critical of workfare has, however, questioned the

existence of agreement in the context of workfare, describing the policy as illiberal (Freedland and King 2003) and the process by which agreement is secured as 'coercive' (Vincent-Jones, 2006: 243-44). This leads to a discussion of the implications of this for the quality of the relationship between the contracting parties, for instance in terms of a lack of choice and consent (Ibid.). Drawing on Durkheim and Weber's work, this article aims to understand the nature of the workfare contract's underlying bonds and obligations differently, broadening the discussion beyond the question of agreement, or its lack, to focus on a number of issues concerning status.

In terms of Durkheim's notion of the bond – that is, 'a relation conceived by the public consciousness as existing between two subjects' – the workfare contract marks a shift in the nature of the bond between the unemployed and the state.⁴ In the post-WWII social democratic welfare state, the nature of this relation could be understood to be premised on solidarity in that the unemployed were basically entitled to benefits from the state when work was unavailable. An acknowledgement that the need flowing from the functioning of capitalism demanded alleviation by the state, defined the bond between unemployed citizens and the state. And the origins of this bond can be traced to a form of Durkheim's notion of status. Those persons were not just the unemployed, but included, for example, the ill and the homeless, or those living in sub-standard accommodation. They, collectively, were citizens in need, and the understanding that citizens not currently in need may be so at some point in the future, founded the obligation of state assistance. Public consciousness was such as to hold citizens generally, not just the unemployed, as having a certain status – namely, they were citizens of welfare states, defined by solidarity in need.⁵ This relationship – one between the state and citizens generally (two collective subjects, to use Durkheim's phraseology) – could therefore be understood through the medium of the universal, rather than being confined to one group within society.

Over time, this notion of the bond defining the welfare state shifted. The unemployed were no longer considered to be citizens in need entitled to state assistance, but as *dependent* on the state, rather than on their own efforts, for their livelihood.⁶ Driven by a shift in political ideology, the dominant

characterisation in public consciousness of the relation between the state and the unemployed became, much like that fostered by the Royal Commission on the Poor Laws in the 19th century,⁷ one defined by immorality, in which those without work possessed unconditional, undeserved rights over the state. The tie or bond linking the state and the unemployed was no longer defined by solidarity in need but by a state of immoral dependency; the unemployed were portrayed as being indefinitely bound to the state – a bond that needed severing. One consequence of this transformation in the nature of the relation between the state and the unemployed was that the right of citizens to welfare (a claim right on the state) and the state's obligation to assist those in need mutated into an emphasis on the obligations of citizens seeking access to welfare and what might be characterised as a right of the state over them – to demand certain actions as the condition of such access.

Where does this form of bond (immoral dependency on the state), and the urge to break it, originate? Again, Durkheim's notion of status is helpful in addressing this question. The starting point here is the ascription, often initiated by politicians and the media, to the unemployed of certain characteristics, which are contrasted with those of more morally upstanding citizens.⁸ Thus, and as the quotation from *I, Daniel Blake* above suggests, the unemployed have been described as 'shirkers' and pitted against those known as 'strivers', as lazy as opposed to those who display effort by going out to work, as welfare 'cheats' engaging in fraud in contrast to those not needing to have recourse to the benefits provided by the welfare state.⁹ The final pages of Édouard Louis's book *Who Killed My Father* (2019) capture the political ascription of such characteristics to those reliant on welfare in France. Thus, during his presidential bid, Nicolas Sarkozy led what Louis describes as 'a campaign against what he calls *les assistés*, those who, according to him, are stealing money from French society because they don't work. He declares: *The worker...sees the assisté doing better than he is, making ends meet by doing nothing*. What he was telling you was that if you didn't work you didn't belong, you were a thief, you were a deadbeat, you were what Simone de Beauvoir would have called a useless mouth.' (Louis, 2019: 70. Emphasis in original) In light of the frequency with which those characteristics are

ascribed to the unemployed, it is tempting to think that they may amount to ‘a state or condition in being of persons’; in reality, though, this state or condition really refers to what the unemployed are not – that is, engaged in work. For what underpins the attack on the bond of state dependency is a notion of the citizen as worker.¹⁰ In the context of social policy, citizenship status is increasingly accorded only to those who work or look for work; the logic being that those who do not work or search for work are not citizens.¹¹ As Louis says, ‘if you didn’t work, you didn’t belong’. Unemployed welfare beneficiaries not engaged in work or work-related activity are deemed to have a sort of non-status as they fall outside of the ‘state or condition in being...of persons in relation’, namely workers and, hence, citizens. The bond between state and citizen that, some argue, must now be severed (the bond of immoral state dependency) originates in a notion of citizenship that revolves around the imperative to work, rather than solidarity in need. Work becomes the measure of citizenship.¹² What is lost in the process is the sense, outlined earlier, of the universal dimension of the welfare state, there to cater for citizens in need (and those who may be in need in the future) generally. What is substituted in its place is division/conflict/opposition – workers v non-workers; citizens v non-citizens; status v non-status – all underpinned by an understanding of human beings as agents of effort, developing their own capacities for hard work and skill sets to compete in the labour market, and as individually responsible for their own livelihoods. Work, and those types of characteristics, are what Alain Supiot (2000: 322) refers to in a different, though related, context as ‘dogmatic foundations’ – that is, ‘prime imperatives which draw their strength from belief and are not induced from what is demonstrated by experience.’ While Supiot discusses the law, including contract, as the market’s dogmatic foundation, insofar as workfare is concerned, it is the bases just identified that function as the dogmatic foundations of the workfare contract. Those bases may even be said to have, in Durkheim’s term, a sacred quality to them or at least ‘the moral prestige they are endowed with’. As noted, by deduction from the critique of the bond of state dependency, work, and those engaged in it, are endowed with a certain moral prestige that is crucial in defining contemporary citizenship in the context of unemployment

policy. The workfare contract therefore builds on such dogmatic foundations, rather than functioning as their foundation (even though, as we shall see presently, this contract seeks to realise those ‘dogmatic foundations’ in practice). As Durkheim says: ‘The contract itself cannot constitute the primary foundations on which the right of contract rests.’ (Durkheim, 1957: 177) It is suggested here that the emergence of the workfare contract should be understood against this background.

What does this mean in terms of the workfare *contract*? It is suggested that this is best understood in terms of the overarching function it performs, which is to manifest in reality the dogmatic foundations upon which it rests. Thus, the workfare contract is designed to bind the unemployed to work, thereby readying them for entry into the contemporary ‘flexible’ labour market.¹³ The work undertaken by the unemployed need not be secure or have good conditions; indeed, it is often unpaid and attracts accusations of exploitation and forced labour. (See, e.g., *R. (on the application of Reilly and Wilson) v. The Secretary of State for Work and Pensions* 2013) Should workfare result in employment, this can often be temporary and insecure, as recent studies have shown. (E.g. Fletcher and Flint 2018; Carpenter et al 2007) No matter; the key objective is to ensure the unemployed work and develop the habits and routines of contemporary working life. Moreover, and despite evidence to the contrary,¹⁴ recent administrations have championed the mantra of work being ‘the surest route out of poverty’. (Department for Work and Pensions 2005: 4) The existence of a tough sanctions regime reinforces the foregoing interpretation of work as sacred,¹⁵ as well as signifying a shift away from the old form of citizenship bond of solidarity in need, given the tapered withdrawal of basic subsistence provided for by this regime. Removing the material necessities of existence suggest an act of profanity on the part of the unemployed, deserving of a deprivation of one’s status as a citizen – an imposed non-belonging flowing from a lack of participation in work or preparing for work, the consequences of which can be tragic.¹⁶

The workfare contract can also be understood as functioning to transform the status of the unemployed.¹⁷ For not only does the contract aim

to bring those not engaged in work within this new norm of citizenship; it also seeks to transform the very notion of a person in the context of welfare. As Dardot and Laval (2013: 65; emphasis in original) say: '[N]eo-liberal policy [of which workfare is one example] must *change man himself*.' Thus, rather than someone in need of protection existing within a solidary community, the workfare contract could be thought to substitute what Kronman, in reference to Weber's purposive contract, and as noted earlier, calls 'a person as a locus of aims and intentions endowed with a capacity for purposeful action – a will'. As many writing of neoliberalism have noted, this is a vision of the human being as the enterprising rational maximiser, developing one's human capital in order better to compete in the marketplace. (See, e.g., Dardot and Laval, 2013, Ch.4) In short, this is the entrepreneur of the self; the financially literate individual able to develop through sheer effort the skills and knowhow necessary to thrive and survive not only in the contemporary labour market, but in markets, and life, generally. Suitably modified, this desired transformative character of the workfare contract can be captured under Weber's category of 'status contracts'. This is because the workfare contract, as indicated, seeks to transform what Weber calls 'the total social status of the individual and his integration into an association comprehending his total personality.' The contract can be understood as aiming to 'transform[] the identities of the parties and make them into different kinds of persons'. This not only captures the transformation in citizenship status from the citizen of the welfare state (one entitled to assistance on the basis of solidarity in need) to the citizen understood as worker, but also the deeper transformation in what it means to be a person in the context of social policy – from the politically and media-induced representations of welfare beneficiaries as lazy and thieving from the state, to *homo economicus*, the self-made individual. As noted, Weber's notion of 'status contracts' does not map directly on to the workfare contract. Thus, it is as difficult to conceive of the latter as involving 'fraternal bonds' or 'obligations of brotherliness', as it is to think that the welfare beneficiary 'voluntarily assume[s] that new quality [i.e. status]'. With those caveats in mind, the 'status contract', rather than Weber's 'purposive contract', nevertheless more accurately captures the essence of the workfare

contract. This is because the latter is not best understood as a ‘voluntary association based on two or more wills’ but as a means of transforming welfare beneficiaries into persons who *come to define themselves* in terms of volition and rational maximisation, thus becoming more suited to engage in purposive contracts. Arguably, this is the kind of transformation in citizenship status in the context of the welfare state that Daniel describes, and vehemently resists, in his statement set out earlier. There, the person of volition takes the form of the client, the customer, the service user (agents of purposive contracts) – actors very different in kind to the one who proudly pays his dues and looks his neighbour in the eye and helps him out if he can, which he equates with ‘a man...a citizen...[a bearer, one could say, of social rights]’. A key function of the workfare contract is thus to alter the makeup of persons, rewiring their very being, and thereby to embed in reality the dogmatic foundations – e.g. human beings as agents of effort capable of competing in markets and responsible for their own livelihoods (‘special attitudinal qualities’, to use one of Weber’s descriptors of status contracts) – upon which this contract rests. It may be tempting to characterise the workfare contract as possessing the types of quality Weber identifies as being found within the purposive contract – including being quantitatively delimited, qualityless, and abstract; contracts, that is, of an ephemeral kind. The workfare contract, however, involves a more permanent, embedded dimension insofar as it seeks to alter the makeup of the unemployed in order to ready them for engagement in precisely those types of (purposive) contract, which both characterise the contemporary labour market and symbolise an insecure social order defined by what Durkheim called ‘transitory links and associations of a fleeting kind’. (Durkheim, 2013: 161)

Social Impact Bonds

Social impact bonds (SIBs) represent a novel funding mechanism designed to address a variety of social issues and welfare needs, such as recidivism, homelessness, youth unemployment or long-term health problems.¹⁸ The UK Government describes SIBs as ‘outcome-based contracts that use private funding from social investors to cover the upfront capital

required for a provider to set up and deliver a service. The service is set out to achieve measurable outcomes...and the investor is repaid only if these outcomes are achieved.¹⁹ An example of the Government's 'payments by results contracts', the idea is to bring the public, private and voluntary sectors together in order to achieve desired outcomes. The public authority (the commissioner) commissions a third sector organisation (a voluntary, community or social enterprise organisation) (the service provider) to provide the service, which is funded by a financial investor (the investor). The investor assumes a large part of the risk that the desired outcomes will materialise. If they do not, the investor receives no payment and loses their initial outlay; if the intervention is successful, the investor receives their initial investment plus a financial return paid by the public authority. A SIB (in the form of a contract) is drawn up between the commissioner and the party having primary responsibility for delivering the desired social outcomes – which may be the service provider, an investor-owned special purpose vehicle (SPV) (which manages the main contract and subcontracts its actual performance to a specialist social provider), or a social finance intermediary (which is funded by the investor and brings together the service provider and investor). Like normal financial bonds, SIBs are financial instruments which, upon maturity, will see the investor receive its principal sum plus interest. Unlike normal financial bonds, however, 'maturity' where the SIB is concerned only occurs on the achievement of certain 'measurable outcomes'. Essentially, SIBs are meant to allow governments to avoid having to fund social services themselves upfront, thereby hopefully reducing costs while maximising social outcomes.

For the purposes of this article, the interest in SIBs, which are contracts, concerns the source of the bond underpinning this financial instrument. On the one hand, this contract can be thought to fit the criteria of Durkheim's 'contract proper' or 'consensual contract'. Here, as we saw earlier, the origin of the bond is the parties' wills. Both parties to the SIB can be understood to desire or will that a particular state of things or of persons materialises – improved health outcomes or a reduction in the number of homeless people, for instance; and a return on the investor's investment,

should the intervention be successful. In other words, the source of the bond, and the obligations and rights created, can be viewed as being *consensus ad idem*. But, while ‘states of will’ are no doubt present in SIBs, it is suggested here that these are insufficient in themselves to explain the origins of the bond between the parties.²⁰ In order to do so, it is necessary to have recourse to the second source of the ‘juridical moral bond’ that Durkheim identified – namely, his notion of status. As noted earlier, in this context Durkheim (1957: 177) stressed ‘the primary foundations on which the right of contract rests.’ The marriage contract, for instance, ‘presupposes an existing structure of the family that has nothing contractual about it.’ (Durkheim, 1957: 177) However, to draw on this second source of the bond in the current context, it is necessary to do two things. The first is to push Durkheim’s notions of things and persons beyond the types of examples – such as members of the same family and the transfer of a real thing to one of the contracting parties – he provided. The second is to downplay the naturalist tendencies in his understanding of status. Thus, while the objective here is to identify the character of the foundations upon which the SIB contract rests, in doing so it is important to recognise that these are not simply given but contingently produced. More specifically, those foundations are shaped by various actors and needs. In this context, then, status must not be understood simply as a natural entity; its givenness cannot be comprehended without an appreciation of the various exigencies and dynamics at play.

What then, in the present context, is the state or condition of things or of persons that constitutes the SIB? Put briefly, the state of things is finance. Just as the sharing or mixing of blood was the source of the blood covenant’s bond, so finance capital, its accompanying discourse and rationalities (such as the focus on measurable outcomes), and the pursuit of profit, constitute the origins of the bond at the heart of the SIB.²¹ Moreover, while the ‘state of things’ here does not, like Durkheim’s ‘real contract’, refer to the physical delivery of a thing, it is nonetheless possible to detect the same underlying principle at work in the SIB. Thus, it is the delivery of finance capital from an investor that creates an obligation on the public authority not only to render in return something of equivalent value, but additionally, an extra payment that is

interest or return or profit on the investment. Of course, where the SIB is concerned, it is the delivery of the specific outcome that triggers the obligation to repay the investor. But insofar as the profit element is concerned, it is the source of the funding itself – finance *capital* – rather than the fact that a particular ‘social outcome’ materialises, that constitutes the obligation to pay the extra amount, as an investment from the private sector demands the recipient reimburse this *with interest*. As Jaeggi and Fraser (2018: 18) note, one of capitalism’s core features is its inherent drive to accumulate capital. Capitalists, they say, are compelled by a systemic demand, which the authors characterise as ‘an overriding imperative inscribed in an impersonal system, capital’s own drive to unending expansion.’ In the context of the SIB, the functional equivalent of Durkheim’s ‘structure of the family that has nothing contractual about it’ can be thought to include the systemic imperative of (finance) capital.

But this ‘state of things’ – capital’s imperative to accumulate – cannot, in the present context, be divorced from Durkheim’s ‘state or condition in being...of persons in relation’. For the centrality of finance also goes to the character of the parties involved in the SIB and the relations between them. That this is true of the investor providing the capital and seeking a return on this investment is obvious. Insofar as the third sector organisation providing the service, the rationality of finance shapes the nature of the social outcomes the service provider is required to aim for – namely, those susceptible to more straightforward measurement and valuation, such as a reduction in the number of reoffences or homeless people. With regards to the commissioner – the public authority – what is really at stake here is the character of the state. For the origins of the bond at the heart of the SIB include the question of the *status, or state, of the state* itself. Substituting the SIB for Durkheim’s marriage contract, it could be said that, as well as capital’s internal dynamic, the SIB ‘presupposes a pre-existing organization of the [*state*] that has nothing contractual about it’. What is this status of the state that underpins the SIB contract? Various characterisations of this type of state exist, from the more generic neoliberal state (e.g. Wacquant 2009: 287-314) to Jessop’s (2002) Schumpeterian Competition State or Schumpeterian Workfare

Postnational Regime, and Streeck's notion of the 'consolidation state' – what he calls 'a supra-state regime that regulates its participating nation-states, without a democratically accountable government but with a set of binding rules.' (Streeck, 2014: 116) However one classifies it, a central component of this type of state is its financialised nature, which, in the current context, results in what Jessop (2002: 152) calls 'the increasing subordination of social policy to economic policy'.²² What is important here, is that this form of state underpins the SIB contract. The state itself, to use Durkheim's words, has 'nothing contractual about it' – especially when considering the citizens, and indeed sovereign nation-states, which are subjected to its workings. For, as Streeck notes, it is not the will of 'the general citizenry' (the *Staatsvolk*) that tends to matter today, but ensuring the satisfaction of 'the people of the market' (the *Marktvolk*). What this latter point suggests, though, is the importance of agency and politics in constructing the financialised state. Thus, just as the constitution of the financialised state has nothing contractual about it, equally it is crucial to note that, despite appearances, and unlike Durkheim's example of the family, its 'pre-existing organisation' is not natural. Rather, it is *politically* produced by the operations of a range of actors, including hegemonic nation states, national politicians, and global financial institutions. (See Streeck, 2014: 162 & 104; Streeck 2019: 6-7)

The importance of politics to the constitution of the financialised state can also be seen in Emma Dowling's analysis of what she calls 'the financialisation of the welfare state'. Dowling critically considers the role of austerity politics in the emergence of new social policy mechanisms such as SIBs. Thus, one narrative of the introduction of such instruments is that, with states constrained to consolidate their finances in order to tackle the high levels of debt consequent upon the bailout of financial institutions, cuts in social spending have been necessary. To continue to provide social services and save costs simultaneously, the state has plugged this gap with finance capital. But it is not simply that the state deploys private finance for social purposes; for Dowling, the financial sector uses the state as a means to create new avenues for the accumulation of profit at a time when, owing to the global financial crisis, other outlets for capital investment may be scarce.

Moreover, in order for such profit to materialise – here, in the form of interest paid on the investor’s initial capital outlay – it needs to derive from what Dowling calls ‘public assets’. Thus, Dowling argues that the trope of ‘cost saving’ associated with austerity fails to capture the essence of mechanisms such as SIBs, which, in reality, represent novel avenues for capital accumulation derived from public goods. This suggests that austerity only constitutes one dimension of the financialised state; or, perhaps more accurately, austerity applies to citizens, but not to capital. For, even after the money transferred to financial institutions during the crisis, states must continue to facilitate profit-making opportunities for finance capital, funded from public resources, which further depletes the funds available for social services and welfare. Consequently, an important dimension of the financialised state underpinning SIBs is the extraction of private profit from public goods. In summary, the non-contractual element of those contracts (SIBs) includes the political project of sustaining capital. And what arises from this is what could be characterised as a new form of the bond of state dependency. Unlike its original characterisation, this is no longer between the unemployed and the state, but between the state and finance capital. This new bond of dependency has two dimensions – a dependency *of the state* on private finance, and a dependency *on the state* of private finance²³ – both of which, however, can be understood to bind the state and finance capital together with the aim of sustaining the latter.

Finally, how might the remaining condition of Durkheim’s description – that public consciousness holds those persons or things to possess certain acquired characteristics – be met insofar as SIBs are concerned? At a general level, the fiscal discipline associated with austerity politics is something wired into public consciousness, as well as manifesting itself in the reality of many people’s daily lives, through, for instance, public sector real terms pay cuts and the closure of publicly funded institutions such as local libraries. In terms of social policy specifically, the focus on financial rationalities such as the need to improve one’s human capital in order to remain competitive and the exhortation to have recourse to the market and the private sphere, rather than the state, as means of welfare provision, are designed not only to shape

public consciousness of the financialised state's characteristics, but to do so to such a degree that they come to define how we think of, and behave, ourselves. Those rationalities can therefore be thought to constitute a form of *doxa* – that is, discourses and ways of acting that become second nature, and appear immune to reflection, far less to contestation. In light of this, it may then be possible to speak of the emergence of a further state of persons produced via the interventions of investor-led SIBs – namely, what Dowling calls 'financialised subjects'.²⁴

Conclusion

Drawing on Durkheim's and Weber's work on contract, especially its pre-history, this article has sought to identify and explain the nature of the types of bonds and obligations, together with their origins, underlying two contracts in the sphere of social policy. The argument has been that, while the will theory of contract holds some explanatory relevance (insofar as SIBs are concerned), issues of status can be thought to lie at the heart of those contracts. This may seem somewhat unusual in an article about contract in the modern era, given that modernity is commonly associated with a movement from status to contract. (Maine 1986 [1864]) This article's conclusion, however, is that this characterisation, which has also been applied to contemporary welfare regimes, (Handler 2004) fails accurately to capture the role that status plays in contemporary social policy. Indeed, the findings presented here indicate that, rather than demonstrating a shift from one to the other, status and contract are, as Marshall argued (though in a different way), inextricably linked.

More generally, this article's argument about the importance of status highlights two features related to the non-contractual dimension of contract that must be kept in mind when engaging critically with the types of social policies discussed. The first concerns the imperative character of the contracts, whether that be the dogmatic foundation of work (of any kind, however poor the conditions or fleeting the duration), the moulding of neoliberal subjects, or the systemic demand of capital that drives the phenomenon of SIBs. Nothing and no-one, including those with political power

and financial investors, seem able to escape. This dovetails with other literature. For instance, Azmanova's notion of 'systemic domination' describes 'the subjection of all actors to the functional imperatives of the system of social relations'. (Azmanova 2018) Like Jaeggi and Fraser, Azmanova notes the imperative nature or 'operational logic' of capitalism – namely, 'the competitive production of profit' – which results in the subordination of all. It is therefore the 'specific operational principle of a historically particular system of social relations' rather than the social relations themselves, that constrains or dominates. As such, systemic domination cannot be understood through the lens of asymmetries of power between actors. It is not agents that dominate, but principles or logics.

This links to the second feature of the non-contractual dimension of contract identified in this article – namely, the importance of contingency when seeking to understand the foundations upon which the contracts discussed are built. Several (brief) points can be made here. First, as noted in the context of the SIB contract, various actors and needs, including (those of) powerful states, politicians, and financial institutions, shape the constitution of the financialised state. Secondly, those constituencies play a crucial role in influencing, amongst other things, the 'operational logic' of social policy. As Azmanova notes, operational principles are principles of historically particular systems of social relations. As such, and as demonstrated in the present article, operational logics can change; here, from an idea of welfare based on the principle of solidarity in need to one revolving, *inter alia*, around a critique of apparent state dependency and the imperative to work. Of course, those logics are attached to particular 'systems' or philosophies – such as neoliberalism – but their emerging dominance in any particular historical period depends on various contingencies and is often the result of struggle between sets of actors. Moreover, the practices that agents engage in within particular institutions – acting, for instance, in a solidary way in the context of a publicly funded healthcare system – can be important in developing and sustaining, or indeed challenging, an operational logic. This leads to a third, and final, point. Recognising the importance of contingency and the politics of operational principles/logics opens up the possibility of resistance to, and

struggle over, these. In his work on the state, Pierre Bourdieu notes that things that are taken for granted and incontestable today – what he calls *doxa* ('the contrary is unthinkable...this is how things are' (Bourdieu 2014: 256)) – were, when considered historically, 'often the product of a struggle'. As he says of the state: 'There is nothing that is constitutive of the state as it is taken for granted today that was not obtained without drama; everything was conquered. The strength of historical evolution, however, is to dismiss the defeated lateral possibilities, not to the realm of the forgotten, but to the unconscious'. (Bourdieu 2014: 174) The analysis of contract undertaken in this article has, via the notion of status, sought to identify some of the imperatives underpinning contemporary social policy. But those imperatives were often the product of struggle and continue to be contested in various forms today. As a consequence of the persistence of neoliberalism, an operational principle/logic like solidarity in need might be considered a 'defeated lateral possibility'. If, however, Bourdieu is right, it has not been forgotten, but remains available as an operational principle capable of being deployed in opposition to the current *doxa*.

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¹ For some, this is only half the story. Offe (1982), for instance, also notes the conservative argument that the welfare state can be destructive of capitalism. The result is his understanding of the welfare state as a contradictory institution in that ‘while capitalism cannot coexist *with* the welfare state, neither can it exist *without* the welfare state.’ (Offe, 1982: 11) Emphasis in original.

² For ease of reference, this first source of the bond will hereinafter be described as ‘Durkheim’s notion of status’.

³ Much like Mauss’s (2002) notion of the gift.

⁴ It is important to note that welfare benefits such as Universal Credit can be claimed by those who are employed but earning low wages. Given recent governments’ emphasis on moving people into work and the serious consequences – both material and symbolic – for those not in work, this article’s focus will be the unemployed.

⁵ Peter Taylor-Gooby (2010: viii) captures the nub of this in his characterisation of the citizenship values – reciprocity, inclusion and trust – associated with what he calls ‘the traditional welfare state’.

⁶ This type of analysis can be found in Lawrence Mead’s (1992 & 1986) work. For a brief history of the discourse of ‘welfare dependency’, see Garrett (2015). Contemporary governments also identify welfare dependency as ‘the underlying problem’ necessitating welfare reform. See Department for Work and Pensions (2010: 1).

⁷ The Poor Law Commissioners’ Report of 1834 (1834) led to The Poor Law Amendment Act 1834 (sometimes known as the ‘New Poor Law’).

⁸ For several examples, see Garrett (2015). An analysis of the relationship between unemployment rates and stigmatising rhetoric around poverty within the media can be found in McArthur and Reeves (2019)

⁹ For an analysis of how such characterisations and representations feed into the formation of an 'anti-welfare commonsense', see Jensen and Tyler (2015).

¹⁰ As Wright notes of labour market policies, they 'constrain and punish recipients by imposing a spoiled identity of 'welfare dependent', prescribing only one viable alternative: worker.' Wright (2012: 322), quoted in Sage (2019: 220).

¹¹ See Mead (1992: 213), where the author poses the question of 'how passive you ['poor people'] can be and remain a citizen in full standing'.

¹² It is important to note that work has always played an important role in the context of the duties of citizenship. Fletcher (2015) has identified how, in inter-war Britain, the unemployed were compelled to work in labour camps before receiving benefits. And Beveridge (1942) also highlighted the importance of work in his famous Report, though the differences with contemporary workfare are significant. For an assessment of the similarities and differences between Beveridge's (and Marshall's) understanding of the duty to work and contemporary workfare, see Veitch 2017.

¹³ As Vincent-Jones notes of the Jobseeker's Agreement, 'the principal policy objective [behind it is] that of labour market discipline'. (Vincent-Jones, 2006: 244).

¹⁴ At the end of 2018, the Joseph Rowntree Foundation (2018) reported that almost 4 million workers live in poverty, an increase of over half a million in the previous 5 years, and that in-work poverty outstripped employment growth.

¹⁵ For details of the sanctions regime, see the Welfare Reform Act 2012, ss.26-27.

¹⁶ See, for example, the case of David Clapson, whose death in 2013 his family attributed to the sanctions imposed on his Jobseekers Allowance. 'Today is the second anniversary of my brother David Clapson's death' (20th July 2015) (part of the 'David Cameron: Hold an inquiry into benefit sanctions that killed my brother' petition), and <https://www.crowdjustice.co.uk/case/david-clapson/>.

¹⁷ Wulfgramm (2014: 261) (quoted in Sage, 2019: 217) has argued that, through their choice of labour market policy, policy-makers make an implicit or explicit statement 'about the status and identity of the unemployed in society'.

¹⁸ The number of SIBs has grown in recent years. By 1st March 2023, 222 SIB projects existed in 39 countries. See: <https://www.brookings.edu/research/social-and-development-impact-bonds-by-the-numbers/> Accessed 3rd April 2023.

¹⁹ <https://www.gov.uk/guidance/social-impact-bonds#history> Accessed 3rd April 2023.

²⁰ Durkheim did not view the source of bonds as an all or nothing affair. Thus, different sources could be present in one specific instance. For example, while he noted that the mixing of blood contained aspects of the will, he argued that the status component of blood (residing in the state of persons) had greater explanatory clout in this instance. He viewed status bonds and willed bonds as two extremes or ends of a spectrum, between which there are 'countless intermediary links'. (Durkheim, 1957: 177)

²¹ For an excellent analysis of how SIBs are driven by the interests, needs and rationalities of finance, and the demands of capital generally, see Dowling (2017).

²² Bryan and Rafferty (2014: 891) argue that, substantively, the term 'financialisation' refers not merely to the growth of the financial sector, but also, and importantly, to the application of 'calculative devices and modes of thinking' to society generally – that is, to fields not commonly understood as relating to finance.

²³ Dowling describes the relation of the state to the financial sector in this context as one of 'co-imbrication', whereby the state uses private finance with the aim of reducing welfare costs and dependency and is used as a vehicle for capital accumulation.

²⁴ For more on the production of 'financialised subjects' arising from SIBs, see Dowling 2017: 303.