

# **The New Public Contracting: A Relational Development**

**For ‘The Future of Relational Contract: A Symposium in Honour of Ian Macneil’,  
University of Leeds, 29<sup>th</sup>-30<sup>th</sup> March 2012.**

Peter Vincent-Jones  
School of Law  
University of Leeds

## **Abstract**

The question of the proper role of the state in the coordination of economic activity poses continuing problems for the capitalist systems of developed, developing and transitional societies. In hybrid organisation, the state does not provide ‘public’ services directly, but rather contracts with private and non-profit providers in a variety of partnership arrangements in sectors such as environmental management, health and social care, welfare and social security, employment and training, and policing and incarceration. Drawing on Macneil’s relational contract theory, we consider how this mode of governance should be understood, and with what implications for government policy and practice. The paper highlights problems associated with this form of contractualisation, and discusses some obvious examples of public contracting failure. In spite of such deficiencies, we defend the responsive potential of hybrids against recent criticisms, focusing on the example of personalised budgets in social care. We then consider how Macneilian analysis might be further developed in light of contemporary theories of reflexive governance. To this end we identify basic conditions of social learning in relational economic exchanges within hybrid partnership networks. We conclude by outlining a research programme for operationalizing Macneil’s contract norms, in the empirical study of social learning in organisational architectures involving collaboration between state and civil society actors engaged in the performance of public functions.

## Introduction

1. Public sector studies drawing on Macneil's relational theory
  - (a) A selective overview
  - (b) Public contracting failures
2. The value of hybrid governance
  - (a) Campbell's critique of hybrids
  - (b) In defence of hybridity
  - (c) The responsive potential of hybrids
3. Relational contract and social learning in partnership networks
  - (a) Organisational architecture
  - (b) Social learning and reflexive governance
  - (c) Conditions of social learning in economic exchange
  - (d) An empirical research programme

## Conclusion

## Introduction

In *The New Public Contracting*, I argued that Margaret Thatcher's Britain was marked by the development of a novel form of contractual governance distinguishable from traditional public procurement by its purposive regulatory character.<sup>1</sup> The novelty lay in the manner in which the state sought to achieve policy goals through the delegation of powers and responsibilities to public agencies in contractual arrangements preserving central government controls and powers of intervention. The relationships comprising the 'new public contracting' (NPC) were analysed with reference to Macneil's common contract norms. While the results were different in each policy context, a pattern emerged. Regulatory ineffectiveness in sectors such as health and social care was attributed to the weakness of relational norms in exchanges between the contracting parties, and to often dysfunctional relations with central government. Similar defects were observed in the institutional structures governing relationships between state agencies and citizens in the attempted use of contract as a mechanism of social control in fields such as education, welfare and criminal justice. The NPC was further argued to be unresponsive in failing to provide adequate opportunities for public participation in the development of policy and in decision making on public service issues. While there might be good arguments in favour of contractualisation,<sup>2</sup>

---

<sup>1</sup> P. Vincent-Jones, *The New Public Contracting: Regulation, Responsiveness, Relationality* (Oxford: Oxford University Press, 2006).

<sup>2</sup> The term 'contractualisation' refers to the process of transition from the direct performance of public functions by the state towards more decentralised forms of governance entailing economic contracts,

these were opaque and difficult to evaluate given the general lack of procedures under the UK constitution promoting accountability and transparency. Despite such problems, I suggested that the deficiencies in this mode of governance were not in principle incurable, and that public contracting might in any case be the ‘least worst’ choice among a number of imperfect alternatives. This left open the possibility that an economic function might be more optimally performed either by the state directly or by the regulated market, and that social control aims might better be pursued through overt state authority rather than through the medium of contract.

The present Symposium provides an opportunity to take stock of academic and policy developments in the seven-year period since this thesis was propounded. The offloading of ‘public’ functions hitherto performed directly by the state to the private and non-profit sectors is gathering pace under the Coalition government.<sup>3</sup> In most cases, an element of state control is maintained through contracts between public agencies and independent sector entities in governance arrangements which may be described as hybrid.<sup>4</sup> Recent policy initiatives include the sharpening of economic incentives in the quasi-market for healthcare through increasing competition and the transfer of commissioning to GP consortia;<sup>5</sup> the outsourcing of prison and policing services including the investigation of crime and detention of suspects;<sup>6</sup> the contracting out of employment services to private companies remunerated according to their success in finding work for jobseekers;<sup>7</sup> the transfer of ownership of roads and transport infrastructure from the Highways Agency to the private sector;<sup>8</sup> and the sale of Royal Mail assets to finance the otherwise unaffordable pensions scheme for post office

---

administrative contracts, and social control contracts – see *ibid*, p. 311. The focus of the present paper is on economic contracts.

<sup>3</sup> Most of these initiatives have been announced with little or no public debate. Where such debate has occurred (as in the case of NHS reforms which have been the subject of protracted Parliamentary scrutiny and media attention) their legitimacy is still in doubt. For example, the NHS Reform Act 2012 was passed following the Government’s refusal to publish the Department of Health’s ‘register of risks’ associated with the policy, in the face of rulings by both the information commissioner and the information tribunal that the information be made available. Having won an emergency debate to discuss the issue, the opposition lost a motion calling for publication of the report before MPs cast their final vote.

<sup>4</sup> For a different meaning of ‘hybrid’, referring to co-ordination of economic activity ‘between market and organisation’, see H. Collins, ‘Introduction to Networks as Connected Contracts’, in G. Teubner, *Networks as Connected Contracts* (Oxford: Hart Publishing, 2011).

<sup>5</sup> NHS Reform Act 2012.

<sup>6</sup> ‘Revealed: hidden government plans to privatise the police’, *Guardian*, 3<sup>rd</sup> March 2012.

<sup>7</sup> ‘Payment by results scheme to help long-term unemployed launched’, *Guardian*, 10<sup>th</sup> June 2011.

<sup>8</sup> ‘Cameron unveils plans to sell off the roads’, *Guardian*, 19<sup>th</sup> March 2012. The announcement is of a feasibility study to investigate how private companies might enter contracts to run motorways and major trunk roads on long-term leases, on the model of privatisation of water and sewage systems.

workers.<sup>9</sup> While such reforms are being imposed by central government in regulatory frameworks resembling the economic form of the NPC, in many cases there is a new emphasis on partnership and collaboration between state and civil society actors in the attainment of a common purpose. Other collaborations appear more bottom-up and to have resulted from local joint initiatives among interested parties. For example, public goods such as green-space management and urban regeneration also are secured increasingly through contractual arrangements based on cooperation between local government agencies and non-governmental organisations.<sup>10</sup>

This paper considers how contractual relationships in such hybrid governance structures should be analysed and understood, and with what implications for government policy and practice. Section 1 begins by surveying the recent literature drawing on Macneil's relational theory in studies of public contracting. It moves on to examine one particular instance of public contracting failure – the Private Finance Initiative (PFI). Section 2 defends the principle of hybrid governance against a number of recent criticisms, most notably by David Campbell. It goes on to show how hybrids may serve in the attainment of public policy goals, focusing on the example of personalised budgets in social care. Section 3 considers how Macneil's relational theory might be further developed in light of contemporary theories of reflexive governance, exploring the potential for social learning in relational economic exchanges within hybrid organisational architectures. The final section suggests a possible research programme for operationalizing Macneil's contract norms in the empirical study of social learning in partnership networks involving collaboration between state and civil society actors engaged in the performance of public functions.

## **1. Public sector studies drawing on Macneil's relational theory**

Macneil's relational theory provides a powerful conceptual apparatus for analysing the ways in which social exchange behaviour both gives rise to and is supported by the 'common contract norms' of role integrity, reciprocity, implementation of planning, effectuation of consent, flexibility, contractual solidarity, the protection of reliance and expectation interests,

---

<sup>9</sup> The Postal Services Act 2011 paves the way for privatisation by removing restrictions on ownership of Royal Mail Holdings plc, enabling the sale of up to 90% of assets and providing for a mutual ownership structure for the assets retained.

<sup>10</sup> In public space governance, for example, the picture that emerges is 'not so much one of privatisation, but instead one of complex redistribution of roles, rights and responsibilities ... to a range of social actors beyond the state.' In place of traditional policy delivery and accountability, 'publicness' is constructed through a variety of contracts, legal agreements and performance management mechanisms involving private and voluntary entities – C. De Magalhaes, 'Public Space and the Contracting-out of Publicness: A Framework for Analysis' (2010).

the creation and restraint of power, the propriety of means, and harmonization within the social matrix.<sup>11</sup> These norms are derived from the ‘primal roots’ of contract (the social conditions that need historically to have become established in order for contractual exchange to be possible): the development of society and the specialisation of labour, and the capacity of human beings to exercise choice and be consciously aware of the future.<sup>12</sup> Macneil’s anthropological point of departure in this behavioural (rather than legal) definition of contract explains his influence across such a wide range of disciplines.<sup>13</sup> Wherever social interaction occurs, the *quality* of relationships may be assessed with reference to the configuration of relatively ‘discrete’ and ‘relational’ norms in the contractual environment. There is a continuing tendency in public sector studies for interpretations of Macneil to neglect or downplay the contract norms,<sup>14</sup> and to focus instead on classifying relationships according to their location on a spectrum of discrete and relational contracts.<sup>15</sup> Regardless of the methodological emphasis,<sup>16</sup> the now-extensive literature bears out the value of relational theory in analysing problems of contractualisation under different economic and social conditions in a range of countries including South Africa, Canada, Australia, New Zealand, Ireland, China, Holland and the USA, as well as Britain. The following section outlines the influence of Macneil’s relational theory in public sector studies, leaving to one side applications in the management sciences literature focusing on ‘business-to-business’

---

<sup>11</sup> I. Macneil, ‘Relational Contract Theory: Challenges and Queries’, (2000) 94 *Northwestern University Law Review* 877, 879-80. While in this article Macneil uses the term ‘essential contract theory’ to differentiate his particular conception of relational contract from others, for present purposes the conventional terminology is retained.

<sup>12</sup> I. Macneil, *The New Social Contract: An Inquiry into Modern Contractual Relations* (New Haven and London: Yale University Press, 1980), pp. 1-4.

<sup>13</sup> Macneil laments the bias given our thinking by the ‘law-oriented definition of contracts’. ‘If we wish to understand contract, and indeed if we wish to understand contract law, we must think about exchange and such things first, and law second’, *ibid.*, p. 5.

<sup>14</sup> Most interpretations of Macneil have drawn on the articles appearing in the 1970s and early 1980s, in which there is comparatively little reference to or development of the common contract norms. The articles most commonly cited are: ‘The Many Futures of Contracts’ (1974) 47 *Southern California Law Review* 691; ‘Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical and Relational Contract Law’ (1978) 72 *Northwestern University Law Review* 854; and ‘Economic Analysis of Contractual Relations: Its Shortfalls and the Need For a Rich Classificatory Apparatus’ (1981) 75 *Northwestern University Law Review* 1018.

<sup>15</sup> A variant of this approach counter-poses classical and relational contracts – see N. Palmer and A. Mills, ‘Classical Versus Relational Approaches to Understanding Control on a Contract with Independent GPs in South Africa’ (2003) 12 *Health Economics* 1005-1020.

<sup>16</sup> See P. Vincent-Jones, ‘The Reception of Ian Macneil’s Work on Contract in the UK’, in D. Campbell (ed.), *Selected Papers of Ian Macneil* (London: Sweet and Maxwell, 2001).

exchanges.<sup>17</sup> Given the relative lack of attention to Macneil's work in analyses of contractualisation in the social control arena, the emphasis will be on economic contracts.<sup>18</sup>

(a) *A selective overview*

Studies in local government in England have shown how the introduction of compulsory competitive tendering in the 1980s disrupted existing bureaucratic governance and created an institutional vacuum which could not be filled by detailed contract planning. An adversarial climate frequently resulted, with conflicts over contract monitoring and adjustment resulting in disputes that unsurprisingly proved incapable of resolution by reference to contract documentation.<sup>19</sup> Similarly in the NHS following the introduction of the purchaser-provider split, there was a tendency for contractual relationships to deteriorate, leading to an over-emphasis on sanctions for poor performance.<sup>20</sup> While in both sectors contract behaviour became more relational over time,<sup>21</sup> in the English NHS this has been hampered by continuous cycles of reform and the imposition of new management structures. The attempt to introduce 'harder-edged' contracting in the form of the national standard contract in 2007

---

<sup>17</sup> A considerable literature in marketing and management studies, beyond the scope of the present review, seeks to operationalize Macneil's contract norms in the empirical study of a range of mainly private sector 'business-to-business' exchanges – see: K. Blois, 'Business to Business Exchanges: A Rich Descriptive Apparatus Derived from Macneil's and Menger's Analyses' (2002) 39 *Journal of Management Studies* 523-552; G. Gundlach and R. Achrol, 'Governance in Exchange: Contract Law and its Alternatives' (1993) 12 *Journal of Public Policy and Marketing* 141-155; J. Heide and G. John, 'Do Norms Matter in Marketing Relationships?' (1992) 56 *Journal of Marketing* 32-44; P. Kaufman and L. Stern, 'Relational Exchange Norms, Perceptions of Unfairness, and Retained Hostility in Commercial Litigation' (1988) 32 *Journal of Conflict Resolution* 534-552; R. Lusch and J. Brown, 'Interdependency, Contracting, and Relational Behaviour in Marketing Channels' (1996) 60 *Journal of Marketing* 19-38; B. Pilling, L. Crosby and D. Jackson, 'Relational Bonds in Industrial Exchange: An Experimental Test of the Transaction Cost Framework' (1994) 30 *Journal of Business Research* 237-251. For a critique of the use of scales derived from the contract norms to evaluate the degree of relationality in such studies, see K. Blois and B. Ivens, 'Measuring Relational Norms: Some Methodological Issues' (2006) 40 *European Journal of Marketing* 352-365.

<sup>18</sup> P. Vincent-Jones, 'Contractual Governance: Institutional and Organisational Analysis' (2000) 20 *Oxford Journal of Legal Studies* 317-351; Vincent-Jones, op. cit., Ch. 9; A. Crawford, 'Contractual Governance of Deviant Behaviour' (2003) 30 *Journal of Law and Society* 479-505.

<sup>19</sup> P. Vincent-Jones and A. Harries, 'Conflict and Cooperation in Local Authority Quasi-Markets: The Hybrid Organisation of Internal Contracting Under CCT' (1996) 22 *Local Government Studies* 187; P. Vincent-Jones, 'Hybrid Organization, Contractual Governance, and Compulsory Competitive Tendering in the Provision of Local Authority Services', in S. Deakin and J. Michie (eds), *Contracts, Cooperation and Competition: Studies in Economics, Management and Law* (Oxford: Oxford University Press, 1997).

<sup>20</sup> N. Deakin and K. Walsh, 'The Enabling State: The Role of Markets and Contracts' (1996) 74 *Public Administration* 33.

<sup>21</sup> R. Flynn and G. Williams (eds.), *Contracting for Health: Quasi-Markets and the National Health Service* (Oxford: Oxford University Press, 1997)

proved particularly problematic.<sup>22</sup> The failure of ‘complete’ planning was followed by a reversion to more relational styles, including greater reliance on the NHS hierarchy, the avoidance of formal dispute resolution, and the adoption of risk re-allocation compromises which sometimes ignored contractual provisions.<sup>23</sup> It is likely that further relational problems will accompany the transfer under the Health and Social Care Act 2012 of healthcare commissioning from Primary Care Trusts to GP consortia, which will lack experience and expertise in large scale secondary care contracting.<sup>24</sup>

Various contractual problems have resulted from quasi-market reforms directed at increasing the diversity of health and social care providers in the public and independent state sectors. Obstacles to relational contracting under such conditions include the novelty of many of the relationships, the undeveloped and unstable nature of markets, the occurrence of loss-leading bidding by contractors, an over-emphasis on price with insufficient regard to quality at the award stage, and generally high transaction costs associated with incomplete information, bounded rationality and uncertainty.<sup>25</sup> In some respects contracting for public services is little different to complex private contracting in sectors such as construction ‘where people work together in the face of uncertainty and complexity with diverse interests and conflicting agendas.’<sup>26</sup> The success of such projects cannot be guaranteed by an appropriate contracting method and degree of planning, but is dependent also on the minimisation of transaction costs in the performance of the contract through relational techniques such as joint risk management. However, relationality should not necessarily be seen as positively related to the anticipated duration of the contractual relationship. Davis’s study of the factors shaping the effectiveness of three strategic contracts pursued by an English local authority shows how trust and cooperation are not only emergent qualities of long-term inter-organisational and inter-personal relationships, but may also exist in temporary projects involving relatively short-term engagements between the parties.<sup>27</sup> The restricted duration of the projects was no

---

<sup>22</sup> D. Hughes et. al., ‘Contracts in the English NHS: Market Levers and Social Embeddedness’ (2011) 20 *Health Sociology Review* 321-333. The development of relational patterns over time, in spite of disruption caused by top-down interventions, is here analysed in terms of ‘disembedding’ market reforms provoking a self-protective counter-reaction that attempts to re-embed economic in social relations.

<sup>23</sup> See D. Hughes et. al. ‘NHS Contracting in England and Wales: Changing Contexts and Relationships’, National Institute for Health Research Service Delivery and Organisation Programme, March 2011. <http://www.sdo.nihr.ac.uk/projdetails.php?ref=08-1618-127>

<sup>24</sup> C. Petsoulas et. al., ‘The Use of Standard Contracts in the English National Health Service: A Case Study Analysis’ (2011) 73 *Social Science and Medicine* 185-192

<sup>25</sup> E. Reeves, ‘The Practice of Contracting in Public Private Partnerships: Transaction Costs and Relational Contracting in the Irish Schools (2008) 86 *Public Administration* 969-986.

<sup>26</sup> M. Rahman and M. Kumaraswamy, ‘Joint Risk Management through Transactionally Efficient Relational Contracting’ (2002) 20 *Construction Management & Economics* 45-54.

<sup>27</sup> P. Davis, ‘The Effectiveness of Relational Contracting in a Temporary Public Organization: Intensive Collaboration Between an English Local Authority and Private Contractors’ (2007) 85 *Public Administration* 383-404.

barrier to the development of flexible strategies for dealing with contractual problems, in spite of ‘an environment of considerable organizational and communal stress, in which a premium was placed on rapid and innovative responses’.<sup>28</sup>

The importance of a *balance* of discrete and relational norms to the success of client-contractor relationships is evident in Walker and Davis’s empirical study of English local authority contracting.<sup>29</sup> In this research, interviewees were asked to indicate scores on a discrete-relational continuum for various dimensions of the client-contractor relationships in which they were involved (such as the type of communication, degree of initial planning, expectations as to bindingness, the distribution of benefits and burdens, and the anticipation of problems), in order to determine whether the relationships were primarily ‘transactional’ or ‘relational’ in character.<sup>30</sup> The overall findings revealed the necessarily complementary nature of transactional and relational elements in the contractual environment. A high degree of contract planning (indicating an *ex ante* ‘transactional’ style) was not an impediment to relational contracting.<sup>31</sup> Van der Veen’s comparative study of large-scale urban development agreements in England, Holland and the USA also shows how the effectiveness of real-life projects is dependent on an appropriate combination of the contract norms. The detailed analysis of how particular norms were involved in the different projects is followed by a classification of each agreement on a ‘discrete-relational’ scale, with all the arrangements being found to have discrete elements.<sup>32</sup> Similarly, in their comparative study of contracting for health care in Canada, Australia and New Zealand, Lavoie and colleagues acknowledge that the classical-relational dichotomy is an over-simplification.<sup>33</sup> What is important to achieving the governments’ goals of improving the participation of marginalized populations and indigenous communities in primary health care is the embedding of the different types of exchange in relational contractual environments.<sup>34</sup>

---

<sup>28</sup> Ibid, p.387.

<sup>29</sup> B. Walker and H. Davis, ‘Perspectives on Contractual Relationships and the Move to Best Value in Local Authorities’ (1999) 25 *Local Government Studies* 16; on this point see also Reeves, op cit.

<sup>30</sup> Ibid, p. 25.

<sup>31</sup> See also Reeves, op cit. The notion of a ‘balance’ of discrete and relational norms implies mutual tension and potential conflict. This aspect Macneil’s relational theory is often misunderstood (see for example Teubner’s misinterpretation of ‘relational’ as indicating ‘a nice and warm cooperative relation between human beings’ – G. Teubner, ‘Contracting Worlds: The Many Autonomies of Private Law’ (2000) 9 *Social and Legal Studies* 399-417; for a rebuttal, see I. Macneil, ‘Contracting Worlds and Essential Contract Theory’ (2000) 9 *Social and Legal Studies* 431-438.

<sup>32</sup> M. Van der Veen, *Contracting for Better Places: A Relational Analysis of Development Agreements in Urban Development Projects* (IOS Press: Amsterdam, 2009), p. 326.

<sup>33</sup> J. Lavoie, A Boulton and J. Dwyer, ‘Analysing Contractual Environments: Lessons from Indigenous Health in Canada, Australia and New Zealand’ (2010) 88 *Public Administration* 665-679, p. 668.

<sup>34</sup> Ibid, p. 677.

The negative effects of government interference on contractual relationships involved in the delivery of public services, and ultimately on the quality of the services themselves, may be seen in the context of Public-Private Partnerships (PPPs). Reeves' study of a contract to design, build, operate and finance five secondary schools in Ireland showed how contractual difficulties were associated with political pressures to get the schools up and running.<sup>35</sup> In addition to sub-optimal decisions at the pre-contractual stage, the *ex post* conduct of the relationship was 'impeded by fundamental problems of communication between the DoES and the ultimate users of the contracted service, that is, the schools'. The result was a higher level of transaction costs than might have been expected given more relational conditions. While it is acknowledged that the quality of relationships might improve over the 25-year lifespan of the contract, the overall conclusion is that PPPs in the education sector will not lead to enhanced economic efficiency 'unless considerable care is taken to quantify the costs and benefits of PPP at the *ex ante* stage. In addition, it is necessary to improve the flow of information to all key stakeholders thereby securing a level of "buy in" which can underpin the development of long term cooperation and mutual benefit.'<sup>36</sup>

(b) *Public contracting failures*

All these studies highlight the difficulties associated with the introduction of new forms of contractual governance. While in some cases contractual problems are considered temporary and resolvable through the gradual development of relational norms, in other instances they appear more fundamental and stem from an inappropriate choice of governance structure. In such circumstances it is unlikely that the conditions of relational contracting will become established, and that the potential benefits of this form of organisation will be realized.

In Britain the PFI is an obvious example of policy-driven regulation leading to non-optimal governance arrangements. A recent Treasury Select Committee Report concluded that the PFI represented poor value for money in the procurement of public infrastructure projects such as schools and hospitals compared with traditional procurement based on government borrowing.<sup>37</sup> While there is no evidence that PFI projects are delivered more quickly than under conventional procurement methods, there is mounting evidence that design innovation has been worse and the quality of buildings poorer. In addition, these projects are complex and costly to procure, and are inherently inflexible and difficult to manage.<sup>38</sup> Incentives on

---

<sup>35</sup> Reeves, op cit.

<sup>36</sup> Ibid, p. 985.

<sup>37</sup> Typical costs are 8% and 4% respectively – Treasury Select Committee, 19<sup>th</sup> August 2011, Seventeenth Report, 18<sup>th</sup> July 2011

<sup>38</sup> In evidence to the Select Committee, Transport for London were clear that 'experience is that PFIs are the least flexible form of contract', ibid para 52. The norm of flexibility is vital to the success of complex contractual relationships.

the part of government departments to choose PFI in preference to alternatives include the non-appearance of the majority of PFI spending in government debt figures, and the ability to leverage up spending without recourse to capital budgets.<sup>39</sup> The much-vaunted theoretical advantage of PFI concerns the transfer of risks associated with the future demand for and usage of an asset to the private sector. In practice, however, there have been too many cases in which such transfer either has not taken place, or has proved ineffective.<sup>40</sup> Given that the government is ultimately accountable for the delivery of public services, some of the claimed risk transfer may be illusory.<sup>41</sup>

Like any private sector exchange, optimal transactions between public purchasers and private providers must ‘create incentives for efficiency by normally imposing financial parameters that are binding.’<sup>42</sup> The mutual commitment of the parties is an essential part of the planning process. Where perverse incentives inform the parties’ calculations, for example regarding the allocation of risk, it cannot be expected that the contract will be welfare-enhancing. The most extreme case of contract failure involves the bankruptcy or liquidation of the PFI provider, with the state picking up the bill.<sup>43</sup> Where the contractor for whatever reason is unable to bear the risk, the costs fall on the taxpayer.<sup>44</sup> Another type of ‘failure’ may be said to occur in an on-going contractual relationship where the state in effect ‘bails out’ a provider in financial difficulties under threat of default.<sup>45</sup> Because the basic rationale for PFI projects is the transfer of risk to the private provider, this situation is very different to the routine relational practice of adjusting contract terms in light of changing circumstances (reflecting the norm of flexibility), particularly if the contractor has ‘deliberately underestimated the cost in the belief that further funds will be made available’.<sup>46</sup> The well-documented problems with the PFI in practice bear out the predictions made at the time of writing of the *New Public Contracting*. Relational deficiencies here are due ultimately to the policy-driven regulatory environment which distorts the economic incentives necessary for the contractual relationship to be welfare-enhancing. This type of economic contracting regime routinely denies the

---

<sup>39</sup> Ibid, see Summary.

<sup>40</sup> Ibid, paras. 33-39.

<sup>41</sup> Ibid, para. 39.

<sup>42</sup> D. Campbell, ‘Relational Contract and the Nature of Private Ordering: A Comment on Vincent-Jones’ (2007) 14 *Indiana Journal of Global Legal Studies* 279-300, p. 287.

<sup>43</sup> There have been similar problems with the increasing involvement of private companies in the health and residential care sectors, where there are further dangers associated with the disruption of services to vulnerable citizens. The bankruptcy of the private equity firm Southern Cross is just one example – ‘Southern Cross fiasco sheds new light on secretive world of private equity’, *Guardian*, 2<sup>nd</sup> June 2011.

<sup>44</sup> Treasury Select Committee, op. cit., para. 36.

<sup>45</sup> In February 2012 the Department of Health announced that it was making available £1.5bn in emergency funding to help seven hospital trusts with crippling PFI debts to make repayments, and so avoid having to cut patient services. Grants from the ‘stability fund’ can be accessed specifically for this purpose over the full 25 year period of the contracts – *Guardian*, 4<sup>th</sup> Feb 2012.

<sup>46</sup> Campbell, op. cit., p. 287

degree of autonomy and flexibility in the choice of mode of public service organization that is required for responsive public services.

For some commentators, such examples of contractual failure are indicative of deep-rooted problems with the state's use of contract as a policy instrument. In Campbell's view, contractual governance can never be an appropriate choice for the performance of the economic functions just described, and it is a serious mistake even to 'hold out the possibility of devising welfare-enhancing governance structures that transcend the public-private divide.'<sup>47</sup> Far from being retrievable, contractualisation is argued to be both 'fundamentally irrational' and 'illegitimate.'<sup>48</sup> The policies are misconceived in their attempt to pursue pre-determined goals and public purposes,<sup>49</sup> representing 'an authoritarian growth of the central state.'<sup>50</sup> The only way effectively to increase economic welfare is by reversing the process of contractualisation, thereby shrinking the public sector and allowing the private sector to grow.<sup>51</sup>

However, the obvious failure of the PFI need not be taken to imply that contractualisation is in principle flawed or misconceived. An alternative view is that the relational and other conditions of responsiveness might, in the right circumstances, be achievable. The relational deficiencies of the PFI need not be generalised to other forms of contractual collaboration between state and civil society actors. The remainder of this essay sets out a defence of economic contracts in terms of what I will argue to be the necessarily hybrid character of modern public services organisation, before going on to suggest how recent developments in social learning theory might be used to enrich current Macneilian analysis of relational contracts.

## **2. The value of hybrid governance**

The question of the proper role of the state in the coordination of economic activity poses continuing problems for the capitalist systems of developed, developing and transitional societies.<sup>52</sup> Whereas private services can be left to the market, the designation of a service as

---

<sup>47</sup> Campbell, op cit, p. 289

<sup>48</sup> Ibid, p. 291 and p. 300 respectively.

<sup>49</sup> 'in essence, a pattern' (p. 292)

<sup>50</sup> Ibid, p. 291.

<sup>51</sup> Ibid, p. 290; 300

<sup>52</sup> See P. Jackson, 'Public Sector Added Value: Can Bureaucracy Deliver?' (2001) 79 *Public Administration* 5-28: 'Where should the boundaries of the state be drawn? How should bureaucracy be shaped?', p. 25. The nature of the relationship between the state and the market is just as much an issue for low

‘public’ is the result of a collective decision that state intervention is necessary in order to achieve social objectives or to protect common interests: ‘The origin of every public service lies in an essential or collective need which is recognized in the community at large as being impossible for private initiative to fulfil adequately.’<sup>53</sup> While by definition the state plays a fundamental role,<sup>54</sup> it need not perform the activity directly. Governance structures may range from full public ownership and direct provision on the one hand, to the statutory regulation of markets on the other. In between these extremes lie a variety of hybrid arrangements combining state and independent sector involvement, including contractualisation in the economic form of the NPC. The development of hybrids in the public sector has been mirrored in recent years by the shifting of horizontal and vertical boundaries of private sector organisations as firms reconfigure their value chains.<sup>55</sup>

The case for a ‘mixed economy’ combining features of market and bureaucratic designs in the coordination of economic activity is summarised by Jackson:

The age old question of markets versus hierarchy is too simplistic. Instead, the search is for optimal complex network relationships that are based upon cooperation and participation rather than competition and control. Within these networks the public sector, it is argued, has a new role of acting as a broker in the creation of value ... Whilst there is no complete agreement, nevertheless, a significantly large group of economists are now firmly of the view that the extreme positions that government should be responsible for all economic activity or that government should do nothing cannot be sustained ... Government bureaucracies simply do not have the information processing capacity of markets so they are unable to solve the coordination problem nor can they successfully mimic the incentives established in markets. Markets, however, are also deficient in important and significant respects. They are not efficient except under very restrictive and special conditions. Moreover, they produce welfare distributions that are not socially just.<sup>56</sup>

(a) *Campbell’s critique of hybrids*

---

and middle income countries (LMICs) as for advanced societies - for a relational analysis of the use of contract in the governance of healthcare in South Africa, see Palmer and Mills, op. cit.

<sup>53</sup> E. M. Garcia, ‘Public Service, Public Services, Public Functions, and Guarantees of the Rights of Citizens: Unchanging Needs in a Changed Context’, in M. Freedland and S. Sciarra, (eds), *Public Services and Citizenship in European Law – Public and Labour Law Perspectives* (Oxford: Oxford University Press, 1998), p. 81

<sup>54</sup> Ibid, p. 80.

<sup>55</sup> Jackson, op. cit. The private sector has seen the emergence of new forms of partnership involving networks, strategic alliances, joint ventures and franchising as means of achieving competitive advantage through collaboration and cooperation, p. 25; for a definition and discussion of networks in this sense, from a legal perspective, see Collins, op. cit., pp. 10-14.

<sup>56</sup> Ibid, p. 5.

As has been seen, Campbell denies that hybrids can be part of the solution to problems of organisation of public services.<sup>57</sup> The role of the state in liberal democratic society should instead be limited to creating and maintaining the institutions that support market exchange. Rather than conceiving of the market as comprising bilateral relations between utility-maximising individuals, as depicted in *laissez-faire* economics and in the classical law, Campbell envisages a tripartite relationship between the contracting parties and a third party (the state) which mediates their relationship and ‘gives effect only to socially understood and politically endorsed intentions’.<sup>58</sup> There are two main dimensions to Campbell’s argument that hybrids between public and private (or between hierarchy and market) are unsustainable, and that economic contracts of the kind found in the NPC can never be legitimate.

First, hybrids are seen as part of a response by the state to the successful neo-liberal attack on the excesses and inefficiencies of the welfare state. Given the failures of bureaucratic organisation, and the impossibility of continuing to rely on direct command and control, the state instead has had to reinvent itself in another form. It has done this through an extension of the New Public Management which, under the ‘guise’ of contract, has enabled the public sector to be maintained and even to expand. Far from retreating or being ‘hollowed out’,<sup>59</sup> the state has advanced, and in a quite misleading manner: ‘Obfuscation about the size, extent, and nature of public intervention is at the heart of the “third way” followed by contemporary government.’<sup>60</sup> Campbell contends that the only legitimate response to the failure of ‘visible regulation’ was for the state to withdraw from the activity, rather than attempt to disguise the intervention by contractualising it: ‘The public sector as such would have had to shrink and the market sector to grow.’<sup>61</sup>

A second and related strand in Campbell’s rejection of hybrid organisation concerns the illegitimacy of the state’s pursuit of public purposes through contract, and its attempt to produce pre-determined results through ‘patterning’.<sup>62</sup>

The point about private allocation via the market is, precisely, that it is private. It is directed at the satisfaction of goals set by private parties because the moral foundation of liberal

---

<sup>57</sup> In this view, it is a mistake even to hold out the possibility of ‘devising welfare enhancing governance structures that transcend the public-private divide by being quasi-contractual hybrids between hierarchy and market’ – Campbell, *op. cit.*, p.289.

<sup>58</sup> Campbell, *op. cit.*, p. 281.

<sup>59</sup> C. Harlow, ‘The “Hidden Paw” of the State and the Publicisation of Private Law’, in D. Dyzenhaus, M. Hunt and G. Huscroft (eds.), *A Simple Common Lawyer: Essays in Honour of Michael Taggart* (Oxford: Hart Publishing, 2009).

<sup>60</sup> Campbell, *op. cit.*, p. 287. The central feature of the hybrid contract is that it ‘obfuscates the hierarchical coercion that is the identifying feature of state intervention, and it is wrong that the state should intervene in this way’ (p. 294).

<sup>61</sup> *Ibid*, p. 290.

<sup>62</sup> *Ibid*, p. 292.

democratic society is respect for autonomy of citizens, which, in respect of economic goods, may be prosaically expressed as the belief that they know their own interests best. Liberal democratic society's best claim to legitimacy rests not on the moral value of particular social goals set by society, but on the extent of the freedom of its citizens to set their own goals. One may say that the goal of liberal democratic society should be to eschew the pursuit of social goals.<sup>63</sup>

Good governance must be based on the voluntary choices of economic actors. This requires the creation of the market as a sphere, 'in which the public authority which frames that sphere does not attempt to produce results within it, but leaves the results to the outcome of the voluntary contractual commitments of the parties.'<sup>64</sup> Given that economic and social contracts of the NPC kind are by definition highly purposive, it follows that they can never be legitimate.

This critique questions not only the thesis set out in *The New Public Contracting*, but also the current orthodoxy on the potential of private/public partnerships and other forms of collaboration between state and civil society actors in addressing contemporary governance problems. While Campbell does not make the point explicitly, and indeed is generous to a fault in his acknowledgment of the value of the Macneilian analysis of contractualisation, his argument implies that the only type of economic exchange worthy of the description 'relational' is that which occurs between private entities in appropriately constituted markets. The attempt to establish relational and other conditions of responsiveness of hybrid governance is not only doomed to failure, but fundamentally misconceived. Campbell does concede that in addition to creating and sustaining the 'market as sphere', the state has a further role in the direct provision of some goods.<sup>65</sup> In such cases it is legitimate for the state to intervene ('though it should not do nearly as much as it tries to do now'<sup>66</sup>) on the basis of an agreed public purpose. However, the basic tenor of the argument is that the greater burden of provision be borne by the private sector, and that that the public sector be shrunk: 'It is incumbent on us to really bring about the retreat of the state.'<sup>67</sup>

(b) *In defence of hybridity*

A number of points may be made in response to Campbell's dismissal of hybrids. To begin with, it may be suggested that proponents of new forms of partnership between government and civil society never claimed these would entail any less state involvement than under bureaucratic governance. 'Third way' advocates acknowledged that the development of a

---

<sup>63</sup> Ibid, pp. 293-4.

<sup>64</sup> Ibid, p. 294.

<sup>65</sup> Ibid, p. 300.

<sup>66</sup> Ibid, p. 294.

<sup>67</sup> Ibid, p. 291.

mixed economy might require a similar degree of intervention but in a different form. For centre-left commentators at least, the task of ‘reinventing government’ did not have to be according to the neo-liberal prescription: ‘The issue isn’t more government or less, but recognizing that governance must adjust to the new circumstances.’<sup>68</sup> The *sharing* of responsibilities for the performance of public functions among networks of public and non-state actors is reflected in established notions of the third sector,<sup>69</sup> mixed administration,<sup>70</sup> and third-party government.<sup>71</sup> Again, it was never claimed that increasing independent sector involvement in the provision of public services would be accompanied by a ‘retreat’ of the state, or any simple shift in the mode of governance from ‘public’ to ‘private’.<sup>72</sup> It was also accepted that there might occur an expansion rather than contraction of the public sphere, in the sense of increasing the role of democratic processes and procedures in decision making on matters of public interest.<sup>73</sup>

More obviously, Campbell’s condemnation of contractualisation as fundamentally irrational and inefficient appears exaggerated.<sup>74</sup> There must be *some* public-private sector transactions which are not based on hierarchical coercion, which succeed in creating incentives for efficiency, and which are genuinely marked by the relational characteristics found in private sector contracts. Such potential is implicit in the studies of Public Private Partnerships (PPPs) and other forms of cooperative multi-sector working drawing on Macneil’s relational contract

---

<sup>68</sup> A. Giddens, *The Third Way: The Renewal of Social Democracy* (Cambridge: Polity Press, 1998), p.72. While the size of the state was a central issue for neo-liberals, this was not necessarily so for centre-left critics of traditional welfarism.

<sup>69</sup> M. Freedland, ‘Law, Public Services, and Citizenship – New Domains, New Regimes?’, in M. Freedland and S. Sciarra (eds.), *Public Services and Citizenship in European Law: Public and Labour Law Perspectives* (Oxford: Oxford University Press, 1998). The continued regulatory role of the State in respect to privatized functions is explained in terms of the partial or incomplete nature of transfers to the private sector, ‘leaving the activity in question perched between the public and private sectors in a genuinely distinctive situation, which should be regarded as constituting a third sector’, id, p. 4.

<sup>70</sup> M. Aronson, ‘A Public Lawyer’s Responses to Privatisation and Outsourcing’, in M. Taggart (ed.), *The Province of Administrative Law* (Oxford: Hart Publishing, 1997).

<sup>71</sup> L. M. Salamon, ‘The Tools Approach and the New Governance: Conclusion and Implications’, in L. M. Salamon (ed.), *The Tools of Government: A Guide to the New Governance* (Oxford: Oxford University Press, 2002)

<sup>72</sup> P. Zumbansen, ‘The Governance of Contracting: The Province of Administrative Law in an Era of Contractualized Government’, in W. Rainer Walz, H. Kötz and K. Schmidt et al. (eds), *Non-Profit Yearbook* (2003). The notion of retreat is better suited to the analysis of changing patterns of governance in specific sectors, and the shift in the governance of the world economy away from nation states towards a range of non-state authorities, big firms, and international bureaucracies – see S. Strange, *The Retreat of the State: The Diffusion of Power in the World Economy* (Cambridge: Cambridge University Press, 1996).

<sup>73</sup> Giddens, op. cit., p. 73. ‘Re-inventing government certainly sometimes means adopting market-based solutions. But it also should mean reasserting the effectiveness of government in the face of markets’ (Giddens 75).

<sup>74</sup> Campbell, op cit, p. 291

theory, referred to in section 1 above. The state may play a role in ‘adding value’ in the design of governance arrangements by brokering different forms of collaboration that may operate more effectively and efficiently as coordination mechanisms than the alternatives suggested by the ‘markets vs. hierarchy’ literature.<sup>75</sup> An optimal hybrid governance structure may contribute to dynamic efficiency by improving information flows, increasing cooperation, and enhancing the capacity of the network to respond to external challenges and to innovate over time.<sup>76</sup> It appears perverse to deny the possibility of such advantages of hybrid organisation, and to focus exclusively instead on what has been conceded to be the ‘worst case’ of the NPC – the PFI.

The charge that contractualisation implies an ‘authoritarian growth of the central state’ is also misplaced. Public-private contracts based on government policy initiatives are arguably inherently no more authoritarian than any other contractual relationship where there exists a power imbalance that must be managed in order for the transaction to operate relationally. There is in any case an important sense in which many complex private sector contractual relationships may be described as ‘hierarchical’ in character. The contract may be designed to serve as an authoritative instrument, for example where the client is enabled automatically to levy penalties for defective performance, or where inspection and monitoring provisions confer on the client powers to supervise the work being undertaken by a service provider. The effect of building such hierarchical features into contracts is ‘to incorporate elements of the client organization and the contractor organization into a new unity.’<sup>77</sup> The result is a hybrid form of organisation, which gives the client a form of control *within the market* over the process of production and the contractor’s role in it. The presence of *hierarchical* elements in complex contracts overcomes problems associated with difficulties of uncertainty and asset specificity. Here the contract may function as a ‘constitution’ which, in hierarchical organizations, is found in more direct authority relations.<sup>78</sup> The only material difference between contractual relationships located wholly in the private sector (for example in a complex construction project) and economic contracts of the sort found in the NPC is that in

---

<sup>75</sup> Jackson, *op cit*, p. 16.

<sup>76</sup> Dynamic efficiency may thus be distinguished from operational or x-efficiency, which is concerned with waste elimination and cost containment, *ibid*.

<sup>77</sup> A. Stinchcombe, ‘Contracts as Hierarchical Documents’ in A. Stinchcombe and C. Heimer (eds.), *Organisation Theory and Project Management: Administrative Uncertainty in Norwegian Offshore Oil* (Norwegian University Press, 1985) p.169. This is Stinchcombe’s answer to the question of why complex contractual forms can be found governing inter-firm relations in circumstances where economic theory would have predicted vertical integration.

<sup>78</sup> This organisational dimension of contract has as much to do with economic coordination as with legal norms and obligations. The focus is on contract behaviour, ‘in which contract law is but one of many environmental factors’ – see I. Macneil, ‘Values in Contract: Internal and External’ (1983) 78 *Northwestern University Law Review* 340, p. 383. (Macneil makes this point here in criticising ‘discrete theorists’ who tend to think of contract as meaning contract law rather than contract behaviour).

the latter case the client is a public rather than a private body, using the contract as an instrument for the attainment of specifically public goals.

This leads on to Campbell's claim as to the illegitimacy of the state's pursuit of public purposes through contracts. Such pursuit has long been a feature of government in liberal-democratic societies. The term 'new contracting' was used in the early post-war period in Britain and the United States to describe novel delegations of authority to institutions outside the direct framework of government, involving something quite different from 'traditional' public procurement – the routine buying of goods and services in well-established markets. Hence in the UK, public contracting was argued to be moving from the logistic periphery of government action into the arena of policy-making.<sup>79</sup> Economic objectives were increasingly pursued through the positive deployment of procurement powers to assist industrial restructuring and regional development. Social policies aimed to change behaviour through contract compliance requirements in respect of employment practices, race and sex discrimination, and environmental protection.<sup>80</sup> The use by central government of contractual powers to promote economic or social policy objectives without recourse to Parliament was analysed famously by Daintith in terms of the 'new prerogative' of regulation by contract, involving a shift in the mode of state control from 'imperium' to 'dominium'.<sup>81</sup> Similarly in the United States, contract was regarded from the 1970s as an instrument of regulation and a means of social control.<sup>82</sup> The emergence of regulation by contract and contracting out was seen as entailing a new concept in government and a novel development in American law. The associated breakdown of the private/public distinction was marked by a trend towards discharging governmental responsibilities at least in part by private endeavour, and by the sharing of governmental power between state officials and 'personnel who draw their pay checks from profit or non-profit private enterprise'.<sup>83</sup> Rather than deny the validity of the state's pursuit policy goals through contract *tout court*, the legitimacy of such endeavours

---

<sup>79</sup> B. Smith, 'Accountability and Independence in the Contract State', in B. Smith and D. Hague, (eds), *The Dilemma of Accountability in Modern Government: Independence Versus Control* (London: Macmillan, 1971), p. 13.

<sup>80</sup> S. Arrowsmith, 'Public Procurement as an Instrument of Policy and the Impact of Market Liberalisation' (1995) 111 *Law Quarterly Review* 234, p. 238; P. Morris, 'Legal Regulation of Contract Compliance: An Anglo-American Comparison' (1990) 19 *Anglo-American Law Review* 87. The scope for implementation of secondary policies has been cut down by Britain's treaty commitments at European and international levels.

<sup>81</sup> T. Daintith, 'Regulation by Contract: The New Prerogative' (1979) *CLP* 41.

<sup>82</sup> A. S. Miller, 'Government Contracts and Social Control: A Preliminary Inquiry' (1955) 41 *Virginia Law Review* 27.

<sup>83</sup> A. S. Miller, 'Administration by Contract: A New Concern for the Administrative Lawyer' (1961) 36 *New York University Law Review* 957, p. 967; G. Langrod, 'Administrative Contracts: A Comparative Study' (1955) 4 *American Journal of Comparative Law* 325. On the rise of contract as an administrative and regulatory instrument in the US in the context of more recent global privatization trends, see: J. Freeman, 'The Contracting State' (2000) 28 *Florida State University Law Review* 155.

should instead be regarded as turning on the nature and quality of public participation in decision making on issues of public interest.<sup>84</sup>

Whether state intervention is necessary in order to protect common interests or to promote social objectives should be the subject of democratic debate and deliberation. Where the decision is that a need cannot be satisfied by the private market, citizens and service users have a crucial role to play in determining whether the ‘public’ service is provided directly or through quasi-market organisation, and (in the case of quasi-market organisation where services are commissioned on their behalf by state agencies) by whom.<sup>85</sup> Against this position, Campbell denies that citizens and consumers can legitimately participate in such decision making. Quasi-market organisation cannot be justified on such a democratic basis, because it entails coercive and obfuscatory recourse to the hybrid contract, and ‘it is wrong that the state should intervene in this way.’<sup>86</sup>

(c) *The responsive potential of hybrids*

For a socialist who believes that true socialism can only be achieved through market mechanisms, there is an irony in Campbell’s blanket rejection of hybrids. This appears to rule out the selection of governance structures towards the market end of the public-private spectrum,<sup>87</sup> such as personalised budgets for social care services, which may increase the scope for ‘private’ expression of individual preferences and thereby deliver many of the proclaimed benefits of market organisation, and may be a step on the way to full privatisation. The present section considers the responsive potential of this type of hybrid.<sup>88</sup>

Direct payments are subsidies paid by the state to enable citizen-consumers to spend cash to obtain services directly from service providers.<sup>89</sup> Direct payments may be distinguished from

---

<sup>84</sup> Campbell’s critique of welfarism focuses mainly on developments in legal doctrine. However, the argument concerning the nature of doctrinal change (assuming it is accepted) does not translate very well into the domain of welfarist policy more generally, if by that is meant the attempt by the state to address social and economic coordination problems through deliberate and purposive interventions.

<sup>85</sup> Public participation is vital to producing services ‘that individual users value and in the quantity and quality that they prefer’ – Jackson, *op cit*, p. 18.

<sup>86</sup> Campbell, *op cit*, p. 294.

<sup>87</sup> See Vincent-Jones, *New Public Contracting*, *op. cit.*, p. 205.

<sup>88</sup> While the state does not exercise control through the medium of contract, so not strictly within the definition of the NPC, this type of arrangement may be considered hybrid in the sense that the process of contracting is at least set up and supervised by a public agency, which may also purchase services on the part of the consumer.

<sup>89</sup> Direct payments, like other forms of vouchering, are the most market-like form of provision short of complete privatisation – E. Savas, *Privatizing the Public Sector: How To Shrink Government* (Chatham House, 1982) 68–69. While regarded with suspicion by those on the traditional left, vouchering has received some support across the political spectrum. It may be considered either as a distinctive mode of service provision with

more recently introduced individual or personalised budgets, which may include this option, but which also enable users either to nominate a care manager to purchase services on their behalf, or to give the budget to a provider organisation and call off services against the budget as they deem necessary.<sup>90</sup>

A major policy aim of this type of arrangement is to empower service users (for example, disabled or older citizens) by giving them more control over the resources available to them, so that services can be better tailored to their particular needs and circumstances.<sup>91</sup> Provided that the consumer is able to exercise choice and has the ability to exit the relationship, this governance structure has the potential to lead to superior allocative efficiency than may be achieved by concentrating purchasing power in the hands of a representative public agency (the most common form of quasi-market).<sup>92</sup> Where competition exists or can be stimulated, the devolution of purchasing power to service users to choose among alternative providers may also serve as a stimulus to service improvement. By contrast with real market organization, an element of public and professional control remains through the allocation of budgets and supervision of spending, and equity and redistributive goals may be pursued through subsidies to disadvantaged individuals and groups. This subsidy may be argued to be preferable to the unintended subsidization that occurs where there is no effective pricing of any kind, as is currently the case with most public services. Personalised budgets may therefore be regarded as compatible with the commitment that public services should remain free at the point of delivery and funded from general taxation. The recipient exercises choice in deciding how to allocate the resource, and whether the legally enforceable contractual relationship will be created directly with the service provider or indirectly through a public agency acting as broker. Despite the vulnerability of many recipients, there is no evidence of particular problems with these contracts, and no reason to believe that they cannot operate relationally and effectively in service delivery. The role for the local state here is to stimulate the development of competition and to encourage other market conditions that will enable citizen-consumers to make informed choices according to their needs and preference. If this type of intervention amounts to ‘patterning’, it is surely patterning of a very delicate nature,

---

a more client-centred emphasis than traditional mechanisms, or as part of a strategy of gradual progression towards real market organisation – A. G. Watts, ‘Applying Market Principles to the Delivery of Careers Guidance Services: A Critical Review’, in W. Bartlett, J. Roberts, and J. Le Grand (eds), *A Revolution in Social Policy: Quasi-Market Reforms in the 1990s* (Bristol: The Policy Press, 1998) p. 249.

<sup>90</sup> K. Baxter, C. Glendinning and I. Greener, ‘The Implications of Personal Budgets for the Home Care Market’ (2011) 31 *Public Money and Management* 91-98, p. 93. Service users who want to avoid the risks and formalities of employing their own carers therefore have a number of options, with varying degrees of increased control compared with direct state or purchase-of-service contracting.

<sup>91</sup> Ibid, p. 91.

<sup>92</sup> E. Steuerle and E. Twombly, ‘Vouchers’, in L. Salamon, (ed), *The Tools of Government: A Guide to the New Governance* (Oxford: Oxford University Press, 2002).

and not so different to what Campbell claims is the ‘proper’ role of the state in securing the institutional supports that are necessary to ensure the efficient operation of real markets.

The potential of personalised budgets may fail to be realised for a number of reasons. For example, it is not clear how social care providers, in particular non-profit and third sector organisations that have been used to contracting with local authorities, will respond to the different environment of personalised funding.<sup>93</sup> If the market for services does not diversify and develop, the predicted efficiency benefits will not be achieved. This form of vouchering may create structural inefficiencies (for example, several care agencies working in the same building with different clients) and reduce provider accountability where there is no-one other than the client to hold the provider to account.<sup>94</sup> The complexity of some human services and the need for on-going professional involvement, together with the increasing vulnerability of some client populations, may render this type of arrangement non-viable for many individuals in the longer term. And the poorest and most vulnerable citizens may in any case not be best placed to take advantage of this facility, which may benefit the privileged and well-educated ultimately at their expense.

However, all that need be established for the present argument is that this hybrid arrangement might, in the right circumstances, be part of the solution to the problem of how best to deliver certain public services for some citizens. For other service users with different needs or capacities, the better option might be a more conventional quasi-market in which greater public control is exercised by a representative commissioning agency, or even direct provision by a public bureaucracy. The fundamental governance issue concerns how the selection is made – by what decision making process and with what degree of user involvement – between alternative service delivery mechanisms. This is precisely the matter that Campbell insists cannot legitimately be the subject of democratic deliberation.

### **3. Relational contract and social learning in partnership networks**

This section extends the Macneilian perspective by considering *why* relationality is such an important feature of hybrid governance, and *how* this quality may add value in arrangements for the provision of public services and the performance of public functions.

#### *a) Organisational architecture*

---

<sup>93</sup> Baxter et al, p. 93.

<sup>94</sup> K. Walsh, et al, *Contracting for Change: Contracts in Health, Social Care, and Other Local Government Services* (Oxford: Oxford University Press, 1997), p. 198.

The concept of ‘organisational architecture’ provides a useful starting point in this further inquiry.<sup>95</sup> Originally coined by academics in the fields of economics and management sciences, this term has recently been adopted in the social science disciplines and in public administration. In the present context, the concept refers to the arrangement of decision making units in a system combining state and civil society actors in partnership networks.<sup>96</sup> An organisational architecture, whether hybrid or located wholly within the market sphere, may be understood as comprising a particular set of relational contracts between employers, employees, suppliers, customers, and other organisations:

Architecture is a structure of relationships ... To understand the effectiveness of alternative architectures, one needs to concentrate on the precise nature of the relational contracts and the way in which they relate to one another within a network. Organizational architecture shapes organizational space and defines organizational context and can, therefore, empower or constrain. It is much more than simply organization structure and transcends the transactions cost view of organizations as a ‘nexus of contracts’ ...<sup>97</sup>

In an optimal organisational architecture, relationality should contribute to improved performance by enhancing the reflexive capacity of actors engaged in various forms of exchange within the network.<sup>98</sup> This reflexive capacity is associated with processes of collective learning and experimentation. The framework within which these processes occur and are shaped is not fixed but rather in constant evolution:

Architecture tends to emerge in the sense that there is a constant search for that particular constellation of relationships that results in ‘excellence’. The precise set of relationships that produce high performance is ‘discovered’ through the testing out of hypotheses in the process of managing. In the case of private sector organizations the search is for a unique non-imitable architecture that will give a sustainable competitive advantage. This approach invites us to think in similar terms when considering the performance of public sector organizations. The search is for an efficient and effective architecture, i.e. that which adds maximum value. It is not a one-off strategic design problem. Rather it is an act of discovery, which will involve experimentation.<sup>99</sup>

In all organisational architectures, bilateral relations and associated contract norms are nested within wider ‘circuits of power’.<sup>100</sup> These ‘extra-contractual’, hierarchical dimensions also are vital in enhancing ‘performativity’ and ultimately the effectiveness of the governance

---

<sup>95</sup> For a description of past use of this term, see Jackson op. cit., p. 14.

<sup>96</sup> Ibid, p. 14. While the nation state occupies the pinnacle of the governance structure, the ‘civil society’ partners may be trans-national – as is increasingly the case with providers of IT and management services in fields such as health and education.

<sup>97</sup> Jackson, op. cit., Ibid, p. 15.

<sup>98</sup> Davis, op. cit. The suggestion here is of a causal relationship between relationality and effectiveness.

<sup>99</sup> Ibid, p. 16.

<sup>100</sup> Ibid.

structure as a whole. In the case of public services there is a need not only for dynamic efficiency, but also for allocative efficiency in maximising responsiveness to citizen and consumer needs:

Participation acts like a control mechanism. It promotes external accountability rather than the more traditional internal, vertical, bureaucratic accountability. However, enabling mechanisms to foster participation must be created. Participation is not spontaneous or automatic.

Decentralization and participation need to be designed into the architecture. They imply a sharing of power and this is a challenge which has not been met in the past.<sup>101</sup>

In a similar formulation, the concept of ‘performativity’ is used to describe ‘the capacity of a contractual system to generate added value for the stakeholders.’<sup>102</sup> This implies a shift in focus away from the role of relationality in improving performance in economic exchange, taking account of the purpose of the network in serving the interests of citizens and service users.

An organisational architecture for delivering public services therefore has to satisfy multiple conditions of efficiency and effectiveness, which may be particularly difficult to achieve in the current economic climate of austerity, financial crisis and public expenditure cuts. Other factors may inhibit the development of an optimal architectural design. For example, constant structural reforms (as in the NHS) may interfere with adaptive processes that, in the private sector or under other conditions, enable the evolution of optimal governance structures. Again, the drift towards privatisation in public services may undermine democratic structures that are necessary to ensure allocative efficiency.

#### *b) Social learning and reflexive governance*

While implicit in the literature just considered, the central role of social learning in organisational design is explicitly recognised in the contemporary legal-philosophical theory of reflexive governance. This distinctive perspective draws elements from various strands of existing social learning theory, most notably in the literature on deliberative democracy,<sup>103</sup> experimentalism,<sup>104</sup> organisational learning,<sup>105</sup> and (to a lesser degree) transformative

---

<sup>101</sup> Jackson, op. cit., p. 18.

<sup>102</sup> Davis at p.387.

<sup>103</sup> See <http://refgov.cpd.ucl.ac.be/> (accessed 18 August 2010); O. De Schutter and J. Lenoble (eds.), *Reflexive Governance: Re-defining the Public Interest in a Pluralistic World* (Oxford: Hart Publishing 2010); J. Lenoble and M. Maesschalck, *Democracy, Law and Governance* (London: Ashgate, 2010).

<sup>104</sup> C. Sabel, ‘Learning by Monitoring: The Institutions of Economic Development’, in N. Smelser and R. Swedberg (eds.), *The Handbook of Economic Sociology* (New York, Russell Sage Foundation, 1994).

<sup>105</sup> C. Argyris and D. Schön, *Organizational Learning: A Theory of Action Perspective* (Reading, Mass: Addison Wesley, 1978); D. Schön, *The Reflective Practitioner: How Professionals Think in Action* (London:

learning and policy learning.<sup>106</sup> According to Lenoble and Maesschalck,<sup>107</sup> the most intractable and contentious governance problems can ultimately be resolved only through social learning strategies aimed at maximising the fulfilment of normative expectations of participants in a collective action.<sup>108</sup> Social learning in this sense involves specific kinds of communication, deliberation and reflection by all parties with interests or stakes in the issue in question. Transcending the dualism of markets/neo-institutionalism and bureaucracies/state welfarism, the emphasis is on the need to create institutional conditions that support social learning on the part of key actors engaged in decision making on matters of public interest.

Seen in this light, organisational architectures may ideally be considered as frameworks for the facilitation of social learning. Social learning in hybrid partnership networks occurs through multiple, communicative relationships between professionals, employers, employees, purchasers, providers, service users and other stakeholders. The exchange of information between social actors contributes a vital resource for decision-making at each 'node' in the network.<sup>109</sup> What is learned, and the nature of learning, is dependent on the particular kind of relationship. For example, while some relationships involve contractual planning, others may lack this quality. Some relationships may be economic in nature and involve the transfer of money, as in purchase-of-service contracting, while others are 'non-monetised' and based on hierarchical direction, or some other form of communicative interaction such as regulation.

In economic exchange, the social learning capacities of clients and contractors (whether state or independent sector) are structured by the 'rules of engagement' set by policy makers overseeing the development of the hybrid governance arrangement. For example, in quasi-

---

Temple Smith, 1983); M. Easterby-Smith, 'Disciplines of Organizational Learning: Contributions and Critiques' (1997) 50 *Human Relations* 1085.

<sup>106</sup> J. Mezirow, 'Transformative Learning as Discourse' (2003) 1 *Journal of Transformative Education* 58; A. Peterson, 'The Limits of Social Learning: Translating Analysis into Action' (1997) 22 *Journal of Health Politics, Policy and Law* 1077; J. White, 'Learning from Outliers' (2000) 25 *Journal of Health Politics Policy and Law* 743.

<sup>107</sup> Lenoble and Maesschalck, 'Beyond Neo-institutionalist and Pragmatist Approaches to Governance, Working Paper Series: REFGOV-SGI/TNU-1, Centre de Philosophie du Droit, UCLouvain (2006).

<sup>108</sup> Ibid, p. 5. According to this account, the 'normative expectations' of participants in a collective action may be understood in terms of either what members believe should be done or gained, or how the interests with which they are concerned should be met. The collective action might involve problem solving in relation to issues such as environmental protection or preservation of scarce resources, or (as here) the question of how public services should be provided.

<sup>109</sup> See S. Burris, P. Drahos and C. Shearing, 'Nodal Governance' (2005) 30 *Australian Journal of Legal Philosophy* (working paper version, p. 11): 'A node as we conceive of it is a site within an OGS (Outcome Generating System) where knowledge, capacity and resources are mobilized to manage a course of events'. The node as a site governance comprises four essential characteristics: a way of thinking (mentalities); a set of methods (technologies); resources to support the node's operation; and institutions that structure the mobilization of mentalities, resources and technologies over time' (p. 12). 'Superstructural nodes are the command centres of networked governance' (p. 13).

market contracting for social services there is a need for external ordering or coordination through institutions designed to improve efficiency by altering incentives among economic actors. Such support should help enable decision makers in social care networks to develop solutions to governance problems that maximise efficiency and minimise transaction costs, thereby satisfying at least to some extent the economic dimension of the public interest.

However, well-documented problems with quasi-market organisation (monopoly power, bounded rationality, asymmetric information, externalities and agency<sup>110</sup>) limit what may be achieved through learning based solely on economic rationality. In order for the welfare-maximising potential of contractual relationships to be realised, decision makers must avoid rational-technocratic assumptions and adopt instead a pragmatic approach that acknowledges the need for continuous revision of basic assumptions underpinning the provisional goals and problem solving strategies of their part of the organisation.<sup>111</sup> Purchasers and providers in partnership networks may thus be seen as collectively engaged in continuous discussion of joint goals in situations of uncertainty and limited understanding.<sup>112</sup> The nature of governance problems and the interests of actors cannot be assumed to be fixed, but are rather negotiated, defined and redefined through collective engagement in various communicative, deliberative and experimental practices in the process of exchange. In this conception, public contracting may be seen as part of a ‘collective strategy to raise the level of collective intelligence in both private and public fields of action.’<sup>113</sup> This mode of governance has an important role to play in contributing to knowledge generation by coordinating, and drawing on, the resources available in networks of relationships in a range of experimental projects involving collaboration between state and civil society actors.<sup>114</sup>

An experimentalist strand of socio-legal contract scholarship suggests that vertical disintegration of the supply chain in many industries is being accompanied by new forms of ‘contracting for innovation’ that are distinct from the more familiar cooperative mechanisms of relational contracting (involving norms of reciprocity, expectations of future dealing, etc).<sup>115</sup> Gilson et al use the term ‘braiding’ to conceptualise the way in which parties respond

---

<sup>110</sup> DH, *The Future Regulation of Health and Adult Social Care in England*, Consultation Paper (November 2006) para 1.14.

<sup>111</sup> Argyris and Schön, *op cit*.

<sup>112</sup> ‘Just as in a conversation they must accept the possibility that their views of themselves, or the world, and the interests arising from both – their identities, in short – will be changed unexpectedly by those explorations’ – Sabel, *op. cit.*, p. 145.

<sup>113</sup> Karl-Heinz Ladeur, ‘The Role of Contracts and Networks in Public Governance: The Importance of the “Social Epistemology” of Decision Making’ (2007) 14 *Indiana Journal of Legal Studies* 329-351, p. 351.

<sup>114</sup> *Ibid*, p. 346. ‘The new embedding rationale of contracting should ... be seen in the experimental mode of knowledge generation that is institutionalized in the new post-modern private and public-private networks of innovation’, p. 349.

<sup>115</sup> R. Gilson, C. Sabel and R. Scott, ‘Contracting for Innovation: Vertical Disintegration and Interfirm Collaboration’ (2009) 109 *Columbia Law Review* 431.

to rising uncertainty by writing contracts that ‘intertwine’ formal and informal mechanisms – ‘in a way that allows each to assess the disposition and capacity of the other to respond cooperatively and effectively to unforeseen circumstances.’<sup>116</sup> Production in capitalist economies is arguably increasingly governed through complex contractual relationships involving innovative collaborations that cannot be analysed according to traditional definitions of contract and cooperation.<sup>117</sup> The contractual relationships between commissioners and providers of services in partnership networks may similarly be analysed in terms of the scope for such innovation. These various forms of cooperation and iterative collaboration may be understood as enhancing the relational quality of exchange by increasing the capacity of networks of actors to experiment with the widest possible range of solutions to governance problems.

In quasi-market organization, ‘bilateral’ exchanges between commissioners and service providers cannot be understood in isolation from relationships with citizens and service users.<sup>118</sup> The active participation of citizens and consumers serves as a vital learning resource. In human service sectors such as health and social care, patients and consumers are also co-producers. They contribute to the collective learning process by raising issues and posing questions that professionals have not considered.<sup>119</sup> In each public service context there is a need to facilitate communication between decision makers and citizens, and to develop appropriate venues and fora for deliberation.<sup>120</sup> Effective public engagement entails constructive dialogue aimed at reshaping the relationship between professionals, managers,

---

<sup>116</sup> R. Gilson, C. Sabel and R. Scott, ‘Braiding: the Interaction of Formal and Informal Contracting in Theory, Practice, and Doctrine’ (2010) 110 *Columbia Law Review* 1377, at 1377.

<sup>117</sup> M. Jennehohn, ‘Governing Innovative Collaboration: A New Theory of Contract’, Columbia University School of Law, Working Paper Series, SSRN, author #484873, 22 October 2006.

<sup>118</sup> The main focus here will be on partnership networks involved in the provision of public services. Public goods such as green-space management and urban regeneration also are provided increasingly through contractual arrangements involving new forms of collaboration between state and civil society actors – see: C. De Magalhaes, ‘Public Space and the Contracting-out of Publicness: A Framework for Analysis’ (2010) 15 *Journal of Urban Design* 559-574; D. Peel, G. Lloyd and A. Lord, ‘Business Improvement Districts and the Discourse of Contractualism’ (2009) 17 *European Planning Studies* 401-422 (on the ‘contractual turn’ in urban governance, involving the displacement of traditional town centre management by projects for business improvement districts, and entailing ‘new forms of formalised and contractualised partnership working’); A. Lindholst and P. Bogetoft, ‘Managerial Challenges in Public Service Contracting: Lessons in Green Space Management (2011) 89 *Public Administration* 1036-1062.

<sup>119</sup> J. Tritter and A. McCallum, ‘The Snakes and Ladders of User Involvement: Moving Beyond Arnstein’ (2006) 76 *Health Policy* 156, p. 164.

<sup>120</sup> C. Mullen, ‘Representation or Reason: Consulting the Public on the Ethics of Health Policy’ (2008) 16 (4) *Health Care Analysis* 397. For a discussion of alternative democratic rationales for PPI, see C. Mullen, D. Hughes, and P. Vincent-Jones, ‘The Democratic Potential of Public Participation: Healthcare Governance in England’ (2011) 20 *Social and Legal Studies* 1.

and other stakeholders in the network.<sup>121</sup> Clearly new technologies of communication have a vital role to play here.

A truly relational exchange, therefore, is one in which decision makers at the commissioning and service providing nodes of the network have the greatest possible knowledge and experience through which to address and resolve governance problems in the public interest. Social learning theory does not stop here however. In his analysis of the part played by relational exchange in enhancing performance, Davis suggests that ‘performativity’ depends ultimately on reflexive changes in the capacity of the actors involved.<sup>122</sup> According to Argyris and Schön, social actors must avoid repetitive and defensive patterns of thinking associated with ‘single-loop’ learning, and engage in ‘frame reflection’ involving ‘double-loop’ learning: ‘Double-loop learning occurs where error is detected and corrected in ways that involve the modification of an organisation’s underlying norms, policies and objectives.’<sup>123</sup> There is an ongoing need for decision makers to engage in forms of inquiry which ‘resolve incompatible organisational norms by setting new priorities and weightings of norms, or by restructuring the norms themselves together with associated strategies and assumptions.’<sup>124</sup> Relationships are predicted to fail where their fundamental assumptions and routines become self-reinforcing, and single-loop learning inhibits the detection and correction of error.<sup>125</sup> This cognitive dimension of decision making and problem solving is developed in greater depth in Lenoble and Maesschalck’s theory of reflexive governance as social learning.<sup>126</sup>

c) *Conditions of social learning in economic exchange*

---

<sup>121</sup> Tritter and McCallum, op cit, p. 164.

<sup>122</sup> Davis, op. cit., p. 384; reference is also made to ‘contractual learning’, p. 391.

<sup>123</sup> Argyris and Schön, op. cit., p. 3.

<sup>124</sup> Ibid, p. 18.

<sup>125</sup> C. Argyris, *Reasoning, Learning and Action: Individual and Organisational* (San Francisco: Jossey-Bass, 1982).

<sup>126</sup> According to Lenoble and Maesschalck, the theoretical advance offered by the ‘genetic’ approach over Schönian pragmatism is the further specification of an institutional mechanism capable of facilitating the actors’ engagement in the frame-reflective processes associated with double-loop learning. Rather than being taken for granted, in the genetic approach the capacity for cognitive reframing and self-representation is conceived: ‘as the product of an operation of “terceisation”, that is, as the product of an operation that requires, as part of the process of self-construction, the invocation of a third element whose externality makes possible the actor’s construction of her or his image – the image that will enable her or him to identify herself or himself (and her or his interests) in a given context for action’ – J. Lenoble and M. Maesschalck, op. cit., 2010 (Part II Chapter 4 section 2).

The state has a positive role to play in creating and maintaining conditions of social learning at all levels and in multiple relationships within partnership networks.<sup>127</sup> Contractual relationships between commissioners and service providers in quasi-markets for human services such as health and social care open up particularly promising spaces for social learning. Government interventions may help build capacities for citizens and service users to contribute to social learning in the contracting process in various ways, for example by providing education and training opportunities and developing communicative skills necessary for effective public engagement. The state can play a part also in establishing appropriate democratic fora of participation and deliberation, and in creating an institutional framework for incentivising key decision makers such as commissioners and service providers to listen and be receptive to stakeholder input.<sup>128</sup>

However, the experience of recent public service reforms has been disappointing measured in such terms.<sup>129</sup> In the English healthcare sector, for example, successive waves of PPI (Patient and Public Involvement) initiatives have had little success in improving the quality of democratic engagement. The creation of Patient and Public Involvement Forums (one for each NHS Trust and Primary Care Trust in England) in 2002 was accompanied by the introduction of a new legal duty on NHS bodies to ‘involve and consult’ patients and the public in the planning of services, in decision making affecting their operation, and in the development of proposals for changes in their provision. These combined reforms failed to open up channels of communication between stakeholders and decision makers, and so could not begin to fulfil the communicative preconditions of social learning set out above. NHS bodies deliberately avoided statutory duties, or engaged in consultations which were insincere or tokenistic.<sup>130</sup> Forums failed to represent the diversity of participants, and to draw on the pool of available knowledge and experience of patients and the public.

The replacement in 2008 of Forums by Local Involvement Networks (LINKs) was a positive development in this regard. LINKs are responsible for both health and social care across an entire local authority area, and are charged specifically with supporting the involvement of

---

<sup>127</sup> The following account is a development of the argument in P. Vincent-Jones, ‘The New Public Contracting: Public Versus Private Ordering?’ (2007) 14 *Indiana Journal of Global Legal Studies* 259-278.

<sup>128</sup> Other conditions may be more difficult for government to facilitate, for example, decision makers must have capacities to avoid self-reinforcing routines and to engage in frame reflection, and stakeholders must be sufficiently motivated to want to contribute.

<sup>129</sup> This is hardly surprising given the failure of government clearly to articulate a coherent strategy for public service reform. One problem here has been the simultaneous pursuit of ‘choice’ and ‘voice’ initiatives, with little evidence that the relationships between the policy reforms have been properly thought through – see P. Vincent-Jones, D. Hughes and C. Mullen, ‘New Labour’s PPI Reforms: Patient and Public Involvement in Healthcare Governance?’ (2009) 72 *Modern Law Review* 247-271.

<sup>130</sup> HCHC, Patient and Public Involvement in the NHS, Third Report of Session 2006-07, HC 278-1, para 271.

people in the commissioning, provision, and scrutiny of local care services,<sup>131</sup> obtaining the views of people about their needs and their experiences of local care services,<sup>132</sup> and making reports and recommendations about how local care services could or ought to be improved.<sup>133</sup> This function is complemented by the legal duty on service commissioners to show what they have done in response to consultations required to be undertaken with users of services.<sup>134</sup> There is a similar duty on ‘services providers’ to reflect upon and explain what they have done differently in response to reports and recommendations made by LINKs.<sup>135</sup>

The state may play a further positive role in overseeing and monitoring the extent and quality participation in the processes of service commissioning and subsequent contract management. The importance of regulation for this purpose is explicitly recognised in recent government policy.<sup>136</sup> The Health and Social Care Act 2008 Act provided that the Secretary of State may direct the CQC to devise indicators which will be used to assess PCTs, NHS providers and local authorities across all aspects of their performance, including in relation to PPI. Included in the ‘fifth domain’ of CQC’s current Core Standards (‘Accessible and Responsive Care’) is core standard C17, which requires that: ‘The views of patients, their carers and others are sought and taken into account in designing, planning, delivering and improving healthcare services.’<sup>137</sup> By comparison with the first phase of PPI reforms in 2001, therefore, the post-2008 initiatives may be welcomed as more likely to connect service users with both commissioners and providers of services, and thereby to satisfy at least some of the basic pre-requisites of reflexive governance in exchange relationships.

However, just as government may help facilitate conditions of social learning, so its policies may inhibit their development. The effect of many government initiatives has been to disrupt

---

<sup>131</sup> Local Government and Public Involvement in Health Act 2007 (hereafter ‘2007 Act’), s 221(2)(a).

<sup>132</sup> s 221 (2)(c)

<sup>133</sup> s 221 (2)(d)

<sup>134</sup> s 234, inserting a new s17A (SHAs) and s24A (PCTs) into Part 2 of the NHS Act 2006.

<sup>135</sup> 2007 Act s 224 (1). ‘Services-provider’ is defined in s 224 (2) as meaning (a) a NHS trust; (b) an NHS foundation trust; (c) a PCT; (d) a local authority; or (e) a person prescribed in regulations. s 224 (1). Regulations specify that the response must ‘provide an explanation to the referrer of any action it intends to take in respect of the report or recommendation or an explanation of why it does not intend to take any action in respect of that report or recommendation.’

<sup>136</sup> The report of the Expert Panel set up to review PPI in 2006 recommended that ‘assessment criteria are established to enable regulators to assess the performance of commissioners ... including an assessment of how local arrangements for involving service users and the public, in particular the LINKs, are supported and utilised, and how well commissioners have sought and responded to the views and needs of communities and needs within their populations’ – Department of Health, Concluding the Review of Patient and Public Involvement: Recommendations to Ministers from the Expert Panel (May 2006), para 11.6.

<sup>137</sup> <http://www.cqc.org.uk/guidanceforprofessionals/nhstrusts/specialreviews/2008/09/patientandpublicengagement.cfm>, accessed 11 February 2011. The CQC is currently completing a national study of how NHS and independent sector organisations are engaging with patients and the public, with a view to developing a detailed assessment framework that can be used for future regulation.

the relational and other conditions that are necessary for social learning. A major problem with NHS modernisation in England has been the simultaneous pursuit of ‘voice’ and ‘choice’ initiatives that are in mutual tension, and lacking in coherent overall rationale.<sup>138</sup> Policy confusion and the privileging of economic over democratic elements in the reform agenda are preventing the ‘embedding’ of economic relations in social relations in healthcare networks by impeding economic, deliberative and experimentalist practices that may serve to promote reflexive governance in the public interest.<sup>139</sup> Inappropriate or contradictory state interventions pose obstacles to the capacity of networks to resolve governance problems to the satisfaction of those engaged in the collective action to the greatest extent possible. This conclusion is consistent with the studies highlighting problems of relational contracting in other contexts, such as the procurement of public service infrastructure under the PFI, which are attributable to defective policies and government interference in particular projects. This suggests a key difference between the NPC in Britain, and contractualisation in at least some other parts of the world where hybrid initiatives have tended to be bottom-up rather than top-down.

d) *An empirical research programme*

Social learning theory, and the action frame of reference, with which it is associated provide a novel lens through which the familiar theme of the relationship between law and social organisation may be further explored. This takes us back to the fundamental distinction between ‘law’ and ‘exchange’ as dimensions to contractual relationships – between formal and informal, use and non-use of law, and legal norms and non-legal norms. The social learning approach might be adopted in any contractual setting, but for present purposes the focus is on the linkages between different types of network relationship and learning processes within hybrid forms of organisation.

---

<sup>138</sup> The government’s pursuit of contradictory policy initiatives in this context clearly has nothing in common with experimentalist social learning. We are in complete agreement with Campbell on this point: ‘A process of experimentation is indeed a process of trial and error, but the scientist who stumbles from one failure to another and, at the end of, say, a quarter century, says frankly that the basic issues still have to be addressed, is not a good scientist, but rather one who has called into question the wisdom of persistence with his research program’ – Campbell, *op. cit.*, p. 291. Experiments at the policy-making level can only be legitimate if they satisfy procedural and other requirements, for example the clear statement of policy purposes, and provisions for monitoring and evaluating success, and for learning from failure – see Lateur, *op. cit.*, p. 350.

<sup>139</sup> P. Vincent-Jones, ‘Embedding Economic Relationships through Social Learning? The Limits of Patient and Public Involvement in Healthcare Governance in England’ (2011) 38 *Journal of Law and Society* 215-244. G. Krippner and A. Alvarez, ‘Embeddedness and the Intellectual Projects of Economic Sociology’ (2007) 31 *Annual Review of Sociology* 219.

Having identified some basic conditions of social learning, the next step is to explore further the linkages between types of network relationship and the learning processes involved in reflexive decision making and problem solving in hybrid organisation.<sup>140</sup> A number of questions arise at this stage of the analysis. What different sorts of social learning are made possible by, and may occur within, the various horizontal and vertical relationships within partnership networks? How do contractual and hierarchical relationships differ in this respect? To what extent is the capacity for social learning positively related to the specifically *reciprocal* and *consensual* nature of a contractual exchange? How exactly does contractual exchange open up spaces for social learning that may not be present in other forms of coordination based on hierarchical direction? How do contracts that are legally binding differ from those that do not have this quality, but which may still be considered contracts on Macneil's behavioural definition? To what extent might the techniques of 'contracting for innovation' that are observable in private sector transactions be applicable in the very different context of quasi-market contracting for human services such as health and social care?

These questions might be addressed by operationalizing Macneil's contract norms in empirical research, drawing on the approach adopted in areas such as marketing and management studies.<sup>141</sup> The proposed research might investigate how different contract norms, or constellations of norms, operate in ways that are either conducive or inimical to social learning in different hybrid forms of organisation. While the relational norms are expected to play a positive role, a balance with discrete norms is likely to be necessary in order to provide the right incentives for social learning. The research might investigate the effect of norms, and of particular contract designs, on cognitive processes involving double-loop learning and frame-reflection. It might further consider the implications for social learning of different types of norm enforcement (formal and informal procedures for sanctioning non-conformity or departure from patterns of expected behaviour), and explore the impact of litigation and the judicial process in comparison with less formal mechanisms such as arbitration and ADR.

This proposed research agenda is in line with mainstream post-Macaulay socio-legal scholarship which focuses on the use and non-use of law in business practice, highlighting

---

<sup>140</sup> 'Public decision making has always been closely linked to a cognitive mode of generation of facts, referring to plausibility standards, proof rules, and so forth' – Karl-Heinz Ladeur, 'The Role of Contracts and Networks in Public Governance: The Importance of the "Social Epistemology" of Decision Making' (2007) 14 *Indiana Journal of Legal Studies* 329-351, p. 329.

<sup>141</sup> Existing research is useful only for the broad outline of its empirical methodology. For a critique of shortcomings in the selection of common contract norms for empirical study in this research, and of other problems with the research design, see Blois and Ivens, *op. cit.*

the complexity of the relationship between law and exchange processes.<sup>142</sup> Collaborative relationships are routinely the product of a combination of formal and informal, legal and non-legal influences, and even threats of litigation need not be antithetical to relational contracting.<sup>143</sup> Hadfield and Bozovic have shown how formal contract law can serve as a ‘scaffolding’, which ‘allows transactional partners to bridge the incompleteness of inescapably informal structure of complex relationships in situations of high uncertainty.’<sup>144</sup> While partners in a joint enterprise frequently structure their relationships with reference to contract law, ‘they do so not in order to secure the threat of formal contract remedies – as the conventional view in the literature holds – but ... in order to coordinate the inferences each makes, and expects the other to make, about their commitment to the joint enterprise.’<sup>145</sup>

Complementing such scholarship, it has been suggested that a particularly fruitful way of approaching the study of the influence of law in economic exchange is through social learning theory. We concur with Rubin that ‘empirical studies that follow a traditional social science model, although valuable, cannot penetrate these relationships ... because they do not tell us about the internal thought processes of the actor.’<sup>146</sup> The principal focus is on social action rather than on legal structures, doctrines, and regulatory frameworks. Reflexivity as a quality of governance refers ultimately to a particular kind of orientation on the part of actors in decision making and problem solving, both individually and in relation to other actors.<sup>147</sup> Social learning theory and the action frame of reference with which it is associated provide a novel lens through which the familiar theme of the relationship between law and social organisation may be further explored.<sup>148</sup>

---

<sup>142</sup> Clearly it is not the case that law has little or no influence on empirical economic exchanges and disputes, or that law is largely irrelevant or peripheral to social life – see D. Campbell, ‘What Do We Mean by the Non-Use of Contract’; R. Gordon, ‘Macaulay on Law, Private Governments and Spontaneous Order’, papers for ‘Empirical and Lyrical: Revisiting the Contracts Scholarship of Stewart Macaulay’, University of Wisconsin Law School, 21st – 22nd October 2011.

<sup>143</sup> J. Whitford, ‘Relational Work, Contract and Conflict in Business Organization’, paper for ‘Empirical and Lyrical: Revisiting the Contracts Scholarship of Stewart Macaulay’, University of Wisconsin Law School, 21st – 22nd October 2011.

<sup>144</sup> G. Hadfield and I. Bozovic, ‘Scaffolding: Using Formal Contracts to Build Informal Relations in Support of Innovation’ (2012) University of Southern California Law School, Law and Economics Working Paper Series, Paper 144, p. 55.

<sup>145</sup> Ibid.

<sup>146</sup> E. Rubin, ‘Law and Reality: The Evolution of Empirical Legal Scholarship’, paper for ‘Empirical and Lyrical: Revisiting the Contracts Scholarship of Stewart Macaulay’, University of Wisconsin Law School, 21st – 22nd October 2011.

<sup>147</sup> For a compatible analysis of collective action as constituting ‘outcome generating systems’, see Burris, Drahos and Shearing, *op. cit.*

<sup>148</sup> This pragmatist problem solving approach is applicable in other governance contexts where market and bureaucratic failures have occurred and where the problem of how to protect the public interest has become acute, for example in fields such as energy, biodiversity, and corporate governance. See for example T. Prosser

## Conclusion

Whether welcome or not, hybrid forms of organisation are playing an increasing role in contemporary governance on a global scale. Collaboration between state and civil society actors in partnership networks is a feature of developing and transitional societies as well as western liberal democracies.<sup>149</sup> Throughout the world, state agencies are entering contracts with private and non-profit providers for the provision of a growing range of local authority, health and social care, welfare and social security, employment and training, and policing and criminal justice services. This paper has analysed such phenomena by developing of Macneil's relational contract theory in conjunction with insights drawn from the theoretical literature on reflexive governance as social learning.

David Campbell began his comment on *The New Public Contracting* by referring to W.W. Jacob's story *The Monkey's Paw*.<sup>150</sup> The moral of the story is captured in the epigram: 'Be careful what you wish for, you may receive it.' Campbell welcomes the granting of his wish for the loosening of the grip of the classical law, and for a more adequate understanding of the social dimension of economic exchange based on recognition that the 'free market' expression of choices of individuals is a social institution. He regrets however the unattractive development of the 'welfarist' law of contract, which 'has not stopped at the eradication of the atomistic individual but has moved on to the erosion of the positive individual dimension of contract expressed in choice under freedom of contract.'<sup>151</sup> Campbell's critique of the contractualisation of the public sector is an extension of his views on the negative effects of the welfarist private law of contract. On this account, the well documented failures of state's attempt to use contract as a mechanism to achieve public goals are a reflection of fundamental problems of this mode of governance that can only be addressed by abandoning any kind of patterning, and by the retreat of the state. The implication is that commentators who acknowledge the failures of hybrids, but who continue to insist on their retrievability, are (like him but for different reasons) not being sufficiently careful in making their wishes. Apologists for contractualisation are endorsing and justifying

---

et al, 'Neo-Institutionalist and Collaborative-Relational Approaches to Governance in Services of General Interest: The Case of Energy in the UK and Germany', in O. De Schutter and J. Lenoble (eds.), op cit, n 16; S. Deakin and A Koukiadaki, 'Reflexive Approaches to Corporate Governance', id; T. Dedeurwaerdere, 'The Contribution of Network Governance in Overcoming Frame Conflicts: Enabling Social Learning and Building Reflexive Abilities in Biodiversity Governance', id.

<sup>149</sup> K. Slack and W. Savedoff, *Public-Private Provider Contracting for Health Services: Examples from Latin America and the Caribbean* (New York: Inter-American Development Bank, 2001).

<sup>150</sup> Campbell, op. cit., p. 281.

<sup>151</sup> p.281.

the continued existence of a monstrous form of social organisation which is not only incapable of improvement, but also inherently authoritarian and repressive in its increasing encroachment on individual liberty.<sup>152</sup>

Against this interpretation, we have argued that the state has a key role to play in economic coordination in areas of public interest, and have defended public contracts as potentially providing part of the solution to a range of contemporary governance problems, based on the theory of reflexive governance as social learning.<sup>153</sup> We hold to the view that it is indeed possible for citizens legitimately to agree a collective purpose to be pursued by public authority, and reject Hayekian notion that markets are the only means of coordinating diffused knowledge and capacity and of bringing order to complex systems.<sup>154</sup> Depending on the pace of economic development and on progress in combating prevailing economic and social inequalities, many ‘public’ goods and services are likely to lose that status and eventually to become subject to ‘private’ governance regimes. Other services, particularly in sectors such as health and social care, are likely to retain their public character. Such services should continue to be provided through collaboration between state and civil society actors as the best means of satisfying collective expectations of citizens that cannot be spontaneously realized through the market.

---

<sup>152</sup> While the danger of excessive complexity and bureaucracy in the design of organisational architectures should be acknowledged, it should not be exaggerated. Partnership networks may be small and local, rather than large and national in scale. This solution is therefore compatible in principle with Macneil’s plea for relational contract to combat bureaucracies, whether public or private, which are putting various contract norms in jeopardy – see I. Macneil, *op. cit.* (1983), pp. 416-418.

<sup>153</sup> This pragmatist problem solving approach is applicable in other governance contexts where market and bureaucratic failures have occurred and where the problem of how to protect the public interest has become acute, for example in fields such as energy, biodiversity, and corporate governance. See for example T. Prosser et al, ‘Neo-Institutionalist and Collaborative-Relational Approaches to Governance in Services of General Interest: The Case of Energy in the UK and Germany’, in O. De Schutter and J. Lenoble (eds.), *op. cit.*, n 16; S. Deakin and A Koukiadaki, ‘Reflexive Approaches to Corporate Governance’, *id.*; T. Dedeurwaerdere, ‘The Contribution of Network Governance in Overcoming Frame Conflicts: Enabling Social Learning and Building Reflexive Abilities in Biodiversity Governance’, *id.*

<sup>154</sup> S. Burris, P. Drahos and C. Shearing, ‘Nodal Governance’ (2005) 30 *Australian Journal of Legal Philosophy* (working paper version, p. 4).