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THE NEW PUBLIC CONTRACTING

REGULATION, RESPONSIVENESS,
RELATIONALITY

Peter Vincent-Jones

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Preface

This book examines the deployment of contract as a regulatory mechanism in government policies across a broad spectrum of economic and social relationships in contemporary Britain. These range from the financing and provision of public services to the control of behaviour among school pupils and young offenders. My argument is that at the heart of the phenomenon of contractualization lies a distinctive mode of governance – the New Public Contracting – in which powers and responsibilities are devolved to public agencies in various contracting arrangements preserving central government controls and powers of intervention. The book demonstrates the practical problems and deficiencies in legal accountability and control associated with such policies, and suggests some ways of ensuring increased responsiveness in the performance of these public service functions. It draws on empirical and theoretical research I have carried out with colleagues over a fifteen-year period,¹ and more generally, on research on contracting, contracts and competition undertaken by academics from a variety of disciplines.² The analysis is distinguished from recent contributions on this topic by other writers in the traditions of private law, administrative law, and constitutional law by its scope, theoretical position, and socio-legal inter-disciplinary perspective.

Part I introduces the New Public Contracting and establishes its contemporary significance. Chapter 1 begins by distinguishing the core behavioural, legal, and rhetorical dimensions of the concept of contract. Following Macneil, the argument is that contractual relations are defined by the presence of ten essential or common contract norms in varying combinations. The traditional classification of government contracts, based on the distinction between 'external' contracts enforceable at private law and non-enforceable 'internal' contracts, is rejected in favour of a socio-legal typology that reflects the different administrative, economic, and social control functions of contemporary public contracting. Accordingly three main types of the New Public Contracting are distinguished: administrative contracts, economic contracts, and social control contracts. Each entails the deliberate attempt by the state to structure social behaviour – within government, in the economic organisation of public services, and in state–citizen relationships – through

¹ P Vincent-Jones, D Campbell, A Harries, and W Seal, *Conflict and Cooperation in Contracting for Professional Services: A Comparative Study*, (ESRC Final Report, 1998).

² D Campbell, and P Vincent-Jones, (eds), *Contract and Economic Organisation: Socio-Legal Initiatives* (Aldershot: Dartmouth, 1996); S Deakin, and J Michie, (eds), *Contracts, Cooperation and Competition: Studies in Economics, Management and Law* (Oxford: Oxford University Press, 1997); K Walsh, *Public Services and Market Mechanisms: Competition, Contracting and the New Public Management* (Houndmills: Macmillan, 1995).

regulatory arrangements that harness the contract norms for the attainment of determinate public policy purposes. An outline is provided of the distinctive regulatory anatomies of these types of the New Public Contracting. While administrative contracts are a form of *hierarchical regulation*, both economic contracts and social control contracts involve *regulation by contract within hierarchical regulatory frameworks*. The basic theme of the book is that while in business and other private relations contract serves as a mechanism of joint utility maximisation through which the parties may govern and adjust their on-going relationships to mutual benefit,³ such welfare-enhancing conditions are much more problematic and difficult to attain through programmes of policy-driven regulation involving public contracting. A major concern is therefore with how inappropriate central regulation may damage the norms that support trust and cooperation in these contractual relations, and thereby impede the overall attainment of the government's public service policy objectives.

Chapter 2 locates contemporary public contracting developments in their broader policy context, tracing the genealogy of the New Public Contracting from the early 1980s through to the present day. The relationship between the New Public Contracting and the New Public Management is explored in depth. Here I suggest that the UK has been particularly influenced by a market/competition model of public management reform, in comparison with a more restricted 'managerialist contractualist' conception that has been dominant in other countries. The chapter shows how the separate administrative and economic functions of the New Public Contracting have nevertheless been brought within a coherent overall policy framework governing public services, through guidance in the form of *Better Quality Services* (BQS) in central government and the statutory regime of best value in local government. While such regimes may appear to leave senior managers free to choose how to deliver best value or better quality services at optimal cost, in practice discretion is exercised according to central standards and guidelines which favour certain competitive processes, thus limiting options and circumscribing choice. The extension and development of the New Public Contracting under New Labour is set in the context of 'centralized decentralization' and the increasing power of the 'new centre' of government (the Treasury in association with the Cabinet Office) in driving forward policies directed at raising productivity and increasing Britain's international competitiveness.

Part II develops the key theoretical concepts of regulation, responsiveness, and relationality. In Chapter 3 I suggest a synthesis between recent theories of regulation and theories of governmentality. The focus is on the necessarily limited capacities of the state in achieving regulatory goals, and on the vocabularies, technologies, and techniques through which power is exercised in contemporary societies. The New Public Contracting is shown generally to operate by rendering

³ D Campbell, and D Harris, 'Flexibility in Long-Term Contractual Relationships: The Role of Cooperation' (1993) 20 JLS 166.

responsible (or 'responsibilizing') social agents through contractual commitments and obligations undertaken across a whole range of administrative, economic and social relationships. Chapter 4 unpacks the meaning of 'responsiveness' by distinguishing a number of dimensions of this concept in the regulation literature: regulator sensitivity; restorative justice; collaborative regulation; organizational learning; institutional adaptation; public accountability; and responsiveness to consumer/citizen needs. This discussion leads to the formula that will be used in the subsequent evaluation of the New Public Contracting: 'responsiveness = effectiveness + legitimacy'. While effectiveness denotes the efficient deployment of means to the attainment of given ends, legitimacy refers to the need both for public deliberation in the determination of fundamental policy goals, and for the nurturing of qualities of institutional morality and values of good administration within organizations engaged in public service networks. For various reasons, legitimacy is shown to be the more important of these criteria.

Chapter 5 draws together the theoretical threads of the previous two chapters and establishes more precisely the regulatory perspective informing the remainder of the book. Administrative contracts, economic contracts, and social control contracts are shown to be part of wider 'contracting regimes', deployed by the state in efforts to attain determinate policy purposes. A range of problems of unresponsiveness is predicted in the operation of such regimes. In addition to significant legitimacy deficits in the policy process, I suggest that excessive central government interference is likely to have a negative impact on the ability of public agencies to perform the regulatory functions they have been assigned in an efficient and responsive manner. There is a tendency in many cases for the New Public Contracting to undermine norms that are essential to effective contractual relations, as indicated in Chapter 1.

Part III examines in depth the institutional structures and environments of particular instances of each of the three main forms of the New Public Contracting. The focus is on governance problems that have arisen in practice both in the management of contracts and in the wider operation of contracting regimes. Chapter 6 considers two main types of administrative contract used in the restructuring of relations within government: (1) framework documents linking executive agencies and government departments; and (2) Public Service Agreements (PSAs) linking spending departments and the Treasury/new centre of government. The performance indicators and targets embodied in these administrative contracts pervade all levels of the organization and delivery of public services, and are reflected more concretely in the responsibilities devolved to public agencies in other forms of the New Public Contracting. The system of government by contractual targets is subjected to critical scrutiny. The main concern in these administrative contracts is with the operation of contract norms in structuring, confining, or checking the exercise of public power in these relationships.

Chapter 7 explores recent government policies directed at encouraging both competition for public services through outsourcing and market testing,

and the quasi-market organization of entire welfare sectors on the basis of the purchaser-provider split. Rather than examine particular sectors in detail, economic contracting regimes are analysed here in terms of three sets of relationships – purchaser–provider; state–purchaser; and state–provider – illustrated with reference to a range of practical contract governance problems. My principal concern in this chapter is with the effectiveness component of responsiveness. Particular attention is paid to the manner in which the contractual purchaser–provider relationship is conditioned by the hierarchical regulatory relationship between central government and the public purchasing or commissioning agency. Complementing this analysis, Chapter 8 focuses on the role of citizens and consumers in economic contracting regimes. It considers how the development of supply-side competition in quasi-markets is being supplemented by a range of choice, voice, and exit mechanisms involving direct links between consumers and providers in service arrangements that are increasingly difficult to classify as private or public. Here I argue that we are witnessing the transition from quasi-market to regulated market organization in major public service sectors such as health and education, and suggest that in this regard the New Public Contracting may represent a temporary stage in the drift towards increasingly privatized forms of service provision.

Chapter 9 considers how relationships between the state and individual citizens are being structured increasingly through social control contracts in the fields of unemployment and employment services, criminal justice, and education. The responsiveness of these regulatory arrangements is evaluated with reference to the common contract norms of reciprocity, consent, choice, and power. Here there are particular concerns about the fairness of terms of contracts and the adequacy of safeguards against unwarranted interference by the public agency with individual autonomy. A contrast is drawn between social control strategies based on centrally determined regulatory frameworks and the more organic development of contractual techniques by professionals in the spheres of probation and social work. The agendas and rationales are shown to be entirely different, with greater governance problems being anticipated in the case of state-imposed measures.

Part IV examines in depth the role of law in the governance of the New Public Contracting. Chapter 10 reviews the deficiencies in legal accountability that have generally been identified in current debates as accompanying the developments described in the foregoing chapters. Various proposals for legal reform in administrative law, private law, and constitutional law are subjected to critical scrutiny. Rather than attempt to extend or develop private or public law in any particular direction, I suggest that a hybrid reform strategy is most likely to be successful in protecting both the public interest and the particular interests of parties with stakes in public contracting processes.

This leads naturally to the discussion of the role of law in contractual governance in Chapter 11. The first part of this chapter considers how legal procedural reforms might help increase legitimacy and effectiveness by controlling the pace

and extent of contractualization across the whole range of New Public Contracting phenomena. I suggest that a major role for responsive law should be to structure the exercise of discretion by ministers and officials in respect of both the development of general policy and its implementation by public agencies in particular instances. The availability of information at all levels of decision making on public contracting is shown to be an essential component of such 'proceduralization'. One of the purposes of disclosure of information is to maximize responsiveness by improving the quality of public deliberation. Lack of democratic involvement and public deliberation is likely to increase the risk both of inappropriate selection of form of public service organization and of unresponsive regulation. The remainder of the chapter explores how legal frameworks might be reformed in order to help increase effectiveness and fairness through the strengthening of institutions governing administrative contracts, economic contracts, and social control contracts. Given the differences in the functions of these contracts, it cannot be expected that conclusions reached in one sector or setting will be applicable in another. The assumption is that public contracting, in whatever form, requires *appropriate* institutional support for any potential for increased responsiveness inherent in such arrangements to be realized.

Chapter 12 summarizes the main arguments and conclusions concerning the failures of responsiveness in the New Public Contracting, and makes a number of policy recommendations for the reform of particular contracting regimes and legal procedures aimed at improving the quality of decision making on a wide range of public service issues in contemporary Britain. Eight conditions of responsive regulation are expounded as basic elements of a theory of public contractual governance. Four such conditions are concerned mainly with the appropriate support in governance relationships of the contract norms, and four with further institutional and organizational dimensions of responsiveness in the design and implementation of contracting regimes. Finally, in lamenting the general lack of transparency and accountability in New Labour's privatization and contractualization agendas, I conclude with a plea for a new 'social contract' that might serve, at an abstract level, to orient continuing debates on how public service functions should be performed.

A brief note on the organization of material and the structure of the book may be of help to the reader. My deliberate purpose has been to address the general questions of why successive governments in modern Britain have resorted to contractual regulation across such a wide range of social relations, with what degree of success in the attainment of policy goals, and with what implications for legal governance. The analysis of particular administrative, economic, and social control contracts is subordinated to this investigation, and to the development of a general thesis about the limits of public contractual governance. This thematic approach has meant that each of the three main forms of the New Public Contracting is considered at various points throughout the book rather than in self-contained chapters. I hope nevertheless that the chapter headings, sub-headings and index

enable the reader with more specialist interests in one or other of these fields to navigate the text without too much difficulty. Similarly, readers in the disciplines of public administration, public management and policy studies, as well as law and socio-legal studies, should find the relevant material accessible. Due to the range and complexity of the subject matter, the treatment of economic contracts in Chapters 7 and 8 is necessarily more synoptic than the coverage of administrative contracts and social control contracts elsewhere in Part III. These chapters need to be considered in the context of the foundational material contained in Part I. I should stress that my principal concern is with contractualization in England, leaving to one side the significant issue of policy divergence on public service reform accompanying devolution within the UK. Finally, for a legal audience, I emphasize that – consistent with the socio-legal approach and the fundamental distinction between contract behaviour and norms on the one hand, and the law governing such behaviour on the other hand – I have reserved questions of specifically legal analysis and reform for consideration in Part IV.

Acknowledgements

This book extends and completes a project for the socio-legal analysis of public contracting developed in a series of journal articles and other publications over the past fifteen years. During this period I have incurred numerous academic and other debts. I would like to thank Andrew Harries for his research role in two empirical projects based at Sheffield Hallam University in the 1990s, and for his contribution to our jointly published work on local government contracting which has been a reference point for many of the ideas developed in this book. I would like also to thank my colleagues David Campbell, Kevin Dowd, Willie Seal, and Mary Seneviratne, who contributed in various ways to the development of the research at this time. The book is the final product of these influences, and of work undertaken during a research fellowship between 2001 and 2004 for which the support of the ESRC is gratefully acknowledged: 'Regulation and Responsibilisation: The New Public Contracting in Socio-Legal Perspective' (award no R000271186). I am grateful to Richard Taylor and other colleagues in the Law School at the University of Central Lancashire for the support I received in preparing for and carrying out this research. In 2003 I was fortunate to have the opportunity to study as a Visiting Fellow in the Law Program at the Research School of Social Science, Australian National University. I am particularly grateful to Peter Cane for his critical engagement with the theme of the New Public Contracting, and to John Braithwaite, Terry Daintith, Nicola Lacey, Nick Seddon, and Colin Scott for their encouragement and comments on related papers. I thank my present colleagues at the University of Leeds, Ann Blair and Adam Crawford, for commenting on Chapter 8, and Clive Walker who read and commented on the whole draft. I received very helpful and much appreciated comments from three referees at Oxford University Press. I am particularly indebted to David Campbell for his contribution over more than a decade to my thinking on public contracts and regulation, with which I know he will profoundly disagree. Finally, I would like to thank my wife Karen for her detailed comments and efforts to persuade me to write in a more accessible and jargon-free style. While I fear she may not have succeeded in this, I can say with confidence that the sentences are shorter than they would have been without her prompting.

Some parts of the book repeat or develop arguments on public contracting that I have published in journal articles in the course of the last five years. The presentation of Macneil's contract norms in Chapter 1 is a version of the analysis in 'Contractual Governance: Institutional and Organisational Analysis' (2000) 20 *Oxford Journal of Legal Studies* 317. The discussion of the relationship between theories of regulation and governmentality in Chapter 3 is a re-statement of the position outlined in 'Values and Purpose in Government: Central-local Relations

in *Regulatory Perspective*, (2002) 29 *Journal of Law and Society* 27. Most recently, Figs 6 and 7, and parts of Chapter 7 (on contracting regimes), Chapter 8 (on the state role in public services), Chapter 10 (on legal debates and reform strategies), and Chapter 11 (on law and contractual governance) have appeared in 'Citizen Redress in Public Contracting for Human Services' (2005) 68 *Modern Law Review* 887.

Abbreviations

ASBO	Anti-Social Behaviour Order
BPS	Better Public Services
BQS	Better Quality Services
CCT	Compulsory Competitive Tendering
CPA	Comprehensive Performance Assessment
CSR	Comprehensive Spending Review
CTC	City Technology College
DBFO	Design Build Finance and Operate
DBO	Design Build and Operate
DfES	Department for Education and Skills
DSO	Direct Service Organization
DVLA	Driver and Vehicle Licensing Authority
DWP	Department of Work and Pensions
EBPM	Evidence-Based Policy Making
FoI	Freedom of Information
FMI	Financial Management Initiative
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
LEA	Local Education Authority
LGIU	Local Government Information Unit
LIFT	Local Improvement Finance Trust
LMS	Local Management of Schools
LPP	Local Performance Plan
LPSA	Local Public Service Agreement
LSVT	Large Scale Voluntary Transfer
MbO	Management by Objectives
MbR	Management by Results

NAO	National Audit Office
NDPB	Non-Departmental Public Body
NHSFT	NHS Foundation Trust
NICE	National Institute for Clinical Excellence
NPM	New Public Management
OECD	Organization for Economic Cooperation and Development
OPSR	Office of Public Service Reform
PCT	Primary Care Trust
PFI	Private Finance Initiative
PI	Performance Indicator
PMDU	Prime Minister's Delivery Unit
POS	Purchase-of-Service contracting
PPP	Public Private Partnership
PPPP	Public Private Partnerships Programme
PSA	Public Service Agreement
SDA	Service Delivery Agreement
SGI	Services of General Interest
SSAT	Social Security Appeal Tribunal
TEC	Training and Enterprise Council
TUPE	Transfer of Undertakings (Protection of Employment) Regulations 1981
YOT	Youth Offending Team
WHO	World Health Organization
WTO	World Trade Organization

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