§ Law in Context

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Contractual revolution

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Forty years ago, contract was a low-lying feature in the administrative law landscape. This mirrored state forms, at the time the classic welfarist model of direct service provision by integrated, hierarchical, public bodies. It also reflected the non-development of a distinctive 'public law' body of legislation

and jurisprudence.[1] On the one hand, Dicey dominant, the basic premise was that government contracts should be subject to the ordinary private law;[2] on the other, a history of Crown immunities and privileges reinforced the sense of an internal, executive-owned activity devoid of formal legal regulation.[3] Public procurement in its traditional format of buying in goods and services was both big business and largely hidden from view. Behind the scenes, a well-established 'law of the contract' was in operation, a reservoir of standard terms and conditions on which officials could draw when specifying performance and to anticipate disputes.[4]

Today in contrast, contract and regulation are twin pillars of the new architecture of governance.[5] Underpinning the development is the capacity of this great instrument of economic exchange for multi-tasking. In the guise of 'pseudo-contract' (see p. 198 above) it is *a way of modelling institutional relations* (all those MoUs). Under the broad rubric of 'contracting out' it is *the vehicle for the delivery of many public services*. And as a repository for rules, principles and standards it functions as *an alternative source of regulation*.

Illustrating the sheer scale of the development, as also the particular elements of continuity and change (government using contracts since time immemorial but doing so in recent times in a variety of novel ways), Davies has identified:

> at least six (albeit somewhat fluid) categories of contracting activity in which the government engages: procurement; providing services by contracting with private bodies ('contracting out'); the private finance initiative (PFI) and other public/private partnerships (PPPs); 'agreements' between the government and self-regulatory organisations; various types of agreement internal to government such as NHS contracts or Next Steps agency framework documents; and contracts of employment with staff.[6]

Reflecting 'a contract culture' (see p. 57 above), some effects are immediately apparent. Policies of outsourcing stretch across, and so blur, the public/private 'divide'. Private-sector notions of contract infuse public administration: the discipline of markets or market mimicking, the individualist ethos of freedom

[1] H. Street, *Governmental Liability* (Cambridge University Press, 1953) Ch. 3; J. Mitchell, *The Contracts of Public Authorities* (Bell, 1954).

[2] For accounts from elsewhere in the common law world, see P. Hogg and P. Monahan, *The Liability of the Crown*, 3rd edn (Carswell, 2000) and N. Seddon, *Government Contracts*, 3rd edn (Federation Press, 2005).

[3] T. Daintith, 'Regulation by contract: The new prerogative' (1979) 32 *CLP* 41.

[4] C. Turpin, *Government Procurement and Contracts* (Longman, 1989).

[5] R. De Hoog and L. Salamon, 'Purchase-of-service contracting' in Salamon (ed.) *The Tools of Government: A guide to the new governance* (Oxford University Press, 2002); P. Vincent-Jones, *The New Public Contracting* (Oxford University Press, 2006).

[6] A. Davies, *Accountability: A public law analysis of government by contract* (Oxford University Press, 2001), p. 1. 'Contracts' with individuals directed e.g. to behaviour management are a major omission (see below).

of choice. Contractual ideas of mutual obligation permeate government policies concerning the rights and responsibilities of the citizen. Contract as an organisational tool shows destructive, as well as constructive, properties. Through the contractual model the bureaucratic hierarchies and organisational forms previously associated with 'government' have been challenged or subverted.

The many parallels to UK regulatory reform will not be lost on the reader. Instigated by the Conservatives as part of 'the blue rinse', this general process of 'contractualisation' has been taken to new heights by New Labour. Precepts of VFM, or of a role for contract in delivering 'the three Es'; injections of business acumen and creativity; creative mixes of public with private power – once again, it all fits. The literature shows the UK development as part of a broader convergence associated with approaches to public management[7] and growing internationalisation of public procurement practice and procedure.[8] This country can, however, plausibly claim to be *the* world leader in contractual forms of governance, encompassing at one extreme massively complicated financial deals for public services (see Chapter 9) yet extending in a different direction into the realms of individual behaviour management and social control of an underclass (see p. 351 below).

The tension between ministers' wishes for authoritative action and promotion of a system of 'distributed public governance' (see p. 246 above) pervades the administrative framework. There is further 'thickening at the centre', this time in the service of the so-called 'contracting state'.[9] To enhance its steering capacity over multiple public purchasers, the Treasury typically deploys a mixed bag of sticks and carrots. We find more soft law (pre-contractual administrative 'guidance'); more standard terms (contract colonising new areas); and – yes – more bureaucratic regulation (audit technique). Matters are compounded by the fact that much in contractual governance is impregnated with controversy, not only in the broad ideological sense (the role of the state), but also in particular projects (as when the authority would prefer to use alternative methods). As contract has emerged centre stage in administrative law, so political tensions have heightened and contract's hidden political dimension has surfaced.

Sparking further questions about the suitability of the framework, statutory regulation has also spread. In the drive to open up publicly funded activities to the market, local government typically bore the brunt; this was successively the realm of the Conservatives' compulsory competitive tendering (CCT) and New Labour's best-value regime (see Chapter 2). An important product

[7] J-B Auby, 'Comparative approaches to the rise of contract in the public sphere' (2007) *PL* 40; and see J. Freeman and M. Minow (eds.), *Outsourcing the US* (Harvard University Press, 2006).

[8] S. Arrowsmith, *The Law of Public and Utilities Procurement*, 2nd edn (Sweet and Maxwell, 2005).

[9] I. Harden, *The Contracting State* (Open University Press, 1992).

of the Single Market has been the deep penetration of national rules on the making of particular government contracts by EU law, such that the former is commonly the expression of the latter. The regime of public procurement has itself required major reform, once more illustrating the limits and limitations of rules and the irrepressible character of discretion (see Chapter 5). We see too the regulatory pendulum swinging on 'contract compliance' or the controversial use by government of the private legal form to promote broader policy objectives.[10] The expansive uses of contract have exposed tension and uncertainty in the case law over both executive freedom of action and the public/private 'border'. This has been marked by a series of flashpoints culminating, as we shall see, in fierce controversy over the amenability of contracted-out public services to the HRA.

Contractual governance is no panacea. There are some sharp lessons to be learned about the functional limitations of the private legal form. The contractual allocation of risk to the private sector has obvious attractions, but with vital public services it is easier said than done. Alternatively, the role for regulation by contract points up classic 'red light' concerns about possible abuse of state power; the more so, when the individuals concerned have little with which to bargain. Executive use of the private legal form strengthens rather than weakens the case for protective arrangements.[11] Contract has the potential to enhance managerial and administrative forms of accountability through specification, but equally discretions can go unchecked in a jungle of terms and conditions and technical detail.[12] And the propensity of contract to squeeze out political accountability should never be forgotten. All the more reason for administrative lawyers to proclaim good governance values![13]

1. Old and new

(a) Shadow of the Crown

Any discussion of government contract is complicated by the legal fiction of 'the Crown' (see p. 9 above). Since 'the Crown' is said to have all the powers of a natural person, including the power to enter into contracts, the activity is afforded a broad and flexible framework. However this operates to limit democratic accountability. The focus naturally being on the general estimates of expenditure, the idea of Parliament refusing funds to fulfil a contract has gone

[10] C. McCrudden, *Buying Social Justice: Equality, government procurement, and legal change* (Oxford University Press, 2007).

[11] M. Aronson, 'A public lawyer's responses to privatisation and outsourcing' in Taggart (ed.), *The Province of Administrative Law* (Hart, 1997).

[12] A. Davies, *Accountability: A public law analysis of government by contract* (Oxford University Press, 2001).

[13] M. Taggart, 'The impact of corporatisation and privatisation on administrative law' (1992) 51 *Australian J. of Public Administration* 368; A. Aman, *Politics, Policy and Outsourcing in the United States: The role of administrative law in a changing state* (Hart Publishing, 2008).

untested.[14] Conversely, HM Treasury as the lead player has the maximum possibility to drive forward new and perhaps controversial policies of contractual governance using internal, soft-law techniques.

In addition, the Crown enjoys certain immunities. Section 21 of the Crown Proceedings Act 1947[15] provides that no injunction or order for specific performance lies against the Crown in 'civil proceedings',[16] although in lieu a declaration can be made. Again, the payment of money by way of damages or otherwise cannot be enforced against the Crown by the normal processes of execution or attachment (s. 25). A special defence of 'executive necessity' to an action for breach of contract against the Crown has been derived from the old case of *The Amphitrite*.[17] An undertaking not to requisition a foreign ship in wartime was held unenforceable. In so denying compensation, the judge carefully distinguished the situation of commercial contracts and spoke generally of the need to preserve executive freedom of action in matters concerning 'the welfare of the state'.

All this raises questions about the meaning of the term 'Crown'[18] and the legal position of ministers and agencies.[19] As Crown agents, ministers have general authority to make contracts on behalf of the Crown. But do they in addition have an independent capacity to make contracts in their own name? *Town Investments* is one well-known authority denying this.[20] Similar questions arise in the context of devolution. In Wales as in Scotland[21] ministers are now 'Ministers of the Crown'.[22] Agencification further complicates matters. Where statute is used, the realm of Crown proceedings is apt to be diminished. In *British Medical Association v Greater Glasgow Health Board*[23] the board was set up to perform functions on behalf of the Crown but nonetheless was denied the protection of s. 21. Then again, 'the Crown' represents fertile territory for pseudo-contract in its internal administrative form. As NSAs (see p. 63 above) vividly illustrate, it takes two to contract. In Freedland's words, there is 'a sort

[14] The best-known common law authority is *New South Wales v Bardolph* [1934] 52 CLR 455.

[15] Prior to the CPA there was no legal right to sue the Crown. In contract, as distinct from tort, petition of right procedure could be used to mount a claim for damages (as in *The Amphitrite*, below).

[16] The restriction that Lord Woolf circumnavigated for the purpose of judicial review in *M v Home Office* (see p. 10 above).

[17] [1921] 3 KB 500.

[18] See especially here, J. McLean, 'The Crown in contract and administrative law' (2004) 24 *OJLS* 129.

[19] As also, historically, of civil servants. Moving on from arcane understandings of the prerogative, it was eventually accepted in *R v Lord Chancellor's Department, ex p. Nangle* [1992] 1 All ER 897 that civil service employment was based on formal contract.

[20] *Town Investments v Department of the Environment* [1978] AC 359. See C. Harlow, 'The Crown: Wrong once again?' (1977) 40 *MLR* 728.

[21] See A. Tomkins, 'The Crown in Scots law' in A. McHarg and T. Mullen (eds), *Public Law in Scotland* (Avizandum, 2006).

[22] Government of Wales Act 2006, ss. 48, 89.

[23] [1989] AC 1211.

of double legal fiction, whereby a non-corporation is deemed to enter into non-contracts'.[24]

Contracting out prompts the question: 'what is sacrosanct?' An answer was given in s. 71 of the Deregulation and Contracting Out Act 1994, in light of the general provision of order-making power to authorise the exercise of ministerial functions by private bodies.[25] Judicial activity; functions interfering with individual liberty; power of entry, search or seizure into or of any property; power or duty to make subordinate legislation: we here find an important set of excepted or non-delegable core public functions. A sharp reminder of the innate flexibility of the domestic administrative law system in the absence of a written constitution, the list is also notably minimalist.

(b) Ordinary law: Contract technology

Governing, as it does, such matters as capacity and formation, implied terms and performance, and termination and remedies, the general common law of contract still provides much of the formal legal framework of government contracting. Indeed, many of the technical challenges associated with contractual governance will be familiar to the private commercial lawyer. Similarly many tools and techniques are read across from the business to the public sphere, where certain key issues are accentuated in the light of collective interest. From time to time, there clearly is a need for adjustment. If, for example, the government contractor defaults, the continuity of essential public services may be jeopardised. Statutory step-in powers may be required. Or take the twin doctrines of 'consideration' and 'privity of contract', central to the English private legal concept. Questions about the 'rights' of 'third parties' are brought sharply into focus with contracting-out of public services. English law has moved cautiously in freeing-up the classical bipolar model of contract by the Contracts (Rights of Third Parties) Act 1999.[26] Provided that the public purchaser can bargain successfully with the contractor to include terms that protect the consumer interest, as also that 'on a proper construction' the contract does not exclude enforcement by the beneficiary, it may be possible for the citizen/service-user to obtain redress for poor performance.

Some fifty years ago Mitchell was pleading for a distinctive body of law that would be more sensitive to the distinctive characteristics of government contract.[27] A principle of governmental effectiveness should be established, such that no contract would be enforced in any case where some essential governmental activity would be thereby rendered impossible or seriously impeded. On the other hand, a principle of compensation should be developed

[24] M. Freedland, 'Government by contract and public law' [1994] *PL* 86.
[25] By analogy with the famous *Carltona* principle: p. 196 above.
[26] See R. Stevens, 'The Contracts (Rights of Third Parties) Act 1999' (2004) 120 *LQR* 292.
[27] Mitchell, *The Contracts of Public Authorities*.

in situations where the administration reneged on its own contractual obligations. Remember the criticism that Dicey, by refusing to accept the reality of state power and so disguising the inequality between the state and its citizens, had disabled effective legal control of the state machine (see Chapter 1). For Mitchell, the collective interest and the private-sector interest needed re-balancing with compensation as 'a check', the existence of which would provide a safeguard for individual rights.

Extrapolated from the French system of administrative law, the project failed of course, run aground in the shoals of Diceyan 'background theory'. However we hear continuing echoes of the argument. For Davies, reflecting on the contractual revolution in public services:

> Government contracts pose some problems, not encountered in contracts between private actors, which can only be addressed through a more developed *public law* regime. Government contracting is thus an area in which the public/private divide ought to be drawn more sharply. This would not necessarily entail a 'public law of contract' entirely separate from the private law of contract. Instead it would involve the development of a 'law of public contracts': a set of public law doctrines which would supplement or modify the ordinary law of contract where the government was one of the contracting parties.[28]

The fact is that 'English law does not cope well with the wider public interests which might be at stake in government contracting.' As well as the difficulty of ensuring democratic accountability, which then places a special premium on audit technique (see Chapter 9), the representation of service recipients in the contractual decision-making is in no way guaranteed. But as Davies also concludes, a separate law of public contracts is impractical: it would have to meet the 'significant objection' of 'the difficulty of determining its scope of application'.[29]

The way forward lies in a continuing set of pragmatic adjustments, framed on the one hand by Dicey's equality principle, whereby 'the take off point' (see p. 22 above) is that government liability closely parallels private liability, and, on the other, by the Single Market and EU public procurement regime. While there still is no 'Government Contracts Act', there are, to reiterate, special rules for many government contracts. Nor is judicial review the courts' only way of improving legal accountability. We would expect attempts to transcend the artificiality of the public/private distinction to intensify, as by a stress on underlying common-law values.[30]

[28] A. Davies, 'English law's treatment of government contracts: The problem of wider public interests' in Freedland and Auby (eds), *The Public-Private Divide – Une Entente Assez Cordiale?* (Hart Publishing, 2006), p. 113.

[29] *Ibid*., pp. 128–9.

[30] See further, with reference to revivifying old common law obligations for essential public services, M. Taggart, 'The province of administrative law determined?' in Taggart (ed.), *The Province of Administrative Law* (Hart Publishing, 1997) and 'Common law price control, state-owned enterprises and the level playing field' in Harlow, Pearson and Taggart (eds.), *Administrative Law in a Changing State* (Hart Publishing, 2008).

With the Treasury naturally preferring to keep the courts at arm's length, formal legal principles have in any case played a limited role. Long-standing techniques of internal or bureaucratic law (administrative directions, codes of practice, established procedures) occupy the space. The secretive lore of central government procurement is one classic example; the torrent of Treasury communications promoting PFI is another (see p. 417 below). Again, the 'law of the contract' offers much by way of a flexible 'contract technology' able, in Mitchell's terms, to be more sensitive to the special demands of government contract. As Turpin explained in a famous study, model or standard terms and conditions also constitute a vehicle of internal hierarchical control:

> The 'law' created by the agreement of the parties is 'subordinate' law, in that the conditions for its creation are regulated by the general law of the land; and it is 'particular' law, applicable only to the parties who have by their contract brought it into existence. It is in operation as law only during the continuance of the contract. In government contracting, however, there are many basic terms that are not freshly devised for each contract, but are supplied from sets of standard conditions adopted by government departments for regular use. In this case, the 'rules' applicable to each contract have a continuing existence in the Government's standard conditions. It is only by their incorporation in each individual contract that they take effect as law for the parties, but the standard conditions have a quasi-obligatory character with respect to all relevant contracts in so far as government contracts staff are directed to incorporate them.[31]

A seemingly draconian authority, the survival[32] of *The Amphitrite* points up how this contract technology helps to suppress the role of the general law in relation to liability and dispute resolution. Government contracts commonly contain variation clauses which make provision for compensation, as also so-called break clauses, permitting the authority to terminate the contract at any time. Exactly the kind of public interest considerations and remedies associated with the French *contrat administratif*[33] are thereby factored in.

(c) 'New prerogative': 'New contractual governance'

Herbert Hart once referred to making a contract 'as the exercise of limited legislative powers by individuals'.[34] For 'individuals' read 'executive' or 'agency' and the huge potential of government contracting as a vehicle for rules becomes apparent. In a classic paper published in 1979, Daintith identified 'regulation by contract' as 'the new prerogative':

[31] Turpin, *Government Procurement and Contracts*, pp. 105–6.
[32] There is limited case law. See in particular *Robertson v Minister of Pensions* [1948] 1 KB 227 and *Crown Lands Comrs v Page* [1960] 2 QB 274.
[33] See for a modern account, L. Richer, *Droit des contrats administratifs*, 4th edn (LGDJ, 2004).
[34] H. L. A. Hart, *The Concept of Law*, 2nd edn (Clarendon, 1994), p. 96.

> Government contracting . . . incorporates, into standard terms and allocation procedures, clauses and public requirements which by their breadth and importance pass far beyond the mutual objectives of the contracting parties and which, therefore, might normally be promoted by statutory regulation . . . Government has discovered a means of using its increasing economic strength vis-à-vis private industry so as to promote certain policies in a style, and with results, which for a long time we have assumed must be the hallmark of Parliamentary legislation: [i.e.], officially promulgated rules backed by effective general compulsion. This means the power to rule without parliamentary consent, which is the hallmark of prerogative.[35]

It has to be remembered that this was the era of the corporate state, the immediate context being the then Labour Government's non-statutory tactic of blacklisting government contractors who refused to abide by its general incomes policy. Legally speaking too, such swingeing economic policies of 'contract compliance' appear a thing of the past, given EC public procurement policy and indeed *GCHQ* (see p. 107 above). But more subtle exercises of 'regulation by contract' are of the very essence of today's 'contracting state': another variation on the theme of 'steering not rowing'. Public service franchising, whereby, via the machinery of auction, market rules are laid out as contractual conditions and then made the subject of monitoring and supervision, is one technique providing many examples (see Chapter 9).[36] Raising concerns about control and accountability, Daintith had also unknowingly signalled the future.

As a technique of government, regulation by contract is commonly grounded in the *dominium* power of the state – the deployment of wealth in aid of policy objectives.[37] This being fuelled by the great public power of taxation, we see immediately the strength of the Treasury's position at the heart of a network of public purchasers. We note too the attractions for policy-makers in terms of contemporary regulatory theory. As against *imperium* or the command of law (see Chapter 4), regulation by contract suggests greater flexibility and shared ownership, as well as less formal accountability.

A recent survey by Vincent-Jones[38] suggests a three-fold, functional classification:

- Administrative contracts: these are contractual arrangements intended (or having the potential) to increase the transparency and effectiveness of the operation of the machinery of government. They are associated with the attempt to separate the political and managerial aspects of government,

[35] T. Daintith, 'Regulation by contract: The new prerogative' (1979) 32 *CLP* 41, 41–2.

[36] For alternative, sector-specific, potentials, see e.g. E. Orts and K. Deketelaere, *Environmental Contracts: Comparative approaches to regulatory innovation in the United States and Europe* (Kluwer, 2002).

[37] T. Daintith, 'The techniques of government' in Jowell and Oliver (eds.), *The Changing Constitution* (Clarendon, 1994).

[38] P. Vincent-Jones, *The New Public Contracting* (Oxford University Press, 2006).

and to clarify bureaucratic roles through performance-based management systems (see Chapter 2).
- Economic contracts: these are contractual arrangements directed at improving public services through competition and/or the devolution of management powers to public purchasing or commissioning agencies in a variety of hybrid forms beyond simple market or bureaucratic organisation. Policy initiatives are about the better use and co-ordination of resources (see Chapter 9).
- Social control contracts: these are adaptations of the contractual mechanism used in the regulation of relationships between individual citizens and state authority. They entail entitlements contingent upon reciprocal responsibilities and their arrangements perform a more or less overt disciplinary function (see below).

The contractual revolution is seen here spreading rapidly beyond the sphere of economics into public administration and social policy as a distinctive mode of governance, characterised by the delegation of contractual powers and responsibilities to public bodies in regulatory frameworks preserving central controls and powers of intervention. The development is highly instrumental in character, with contract norms being harnessed in each situation – within government, in the economic organisation of public services, and in state–citizen relationships – for the attainment of determinate public policy purposes. For yesterday's 'new prerogative', read today's 'new public contracting'.

Reflecting a paradigm shift in law and administration (see Chapter 2), the close interplay of contractual with regulatory forms of governance takes many forms.[39] Just as consensual elements are evident in the practices of traditional regulation so the success of regulation by contract will typically depend on the culture of regulation and compliance in which it is set.[40] The term 'regulation by contract' is also used today to denote the burgeoning use of contract-type arrangements as the instrument of intra- and inter-governmental co-ordination. Earlier we mentioned 'framework documents' defining the goals and functions of NSAs and 'concordats' dealing with relationships between Whitehall and the devolved administrations. To these may be added devices such as the 'public service agreement' and the seemingly ubiquitous memorandum of understanding.

We note the different conceptual understandings in play: contract in the strict, formal, sense of 'thing'; and contract(ualism), as contemporary developments in governance lead us to insist, more generously defined in terms

[39] C. Donnelly, *Delegation of Governmental Power to Private Parties: A comparative perspective* (Oxford University Press, 2007).

[40] See M. Considine, 'Contract regimes and reflexive governance: Comparing employment service reforms in the United Kingdom, the Netherlands, New Zealand and Australia' (2000) 78 *Pub. Admin.* 613.

of 'core notions of reciprocity, mutuality of obligations, and rights balanced by responsibilities'.[41] In Chapter 2 we saw for example that the language of contract can be used in an expansive way, encompassing (and so modelling) a variety of arrangements which are not themselves directly legally enforceable in the courts ('pseudo-contract'). Sanction, after all, can take many forms. Woe betide the Government unit that consistently fails to deliver on PSA commitments!

Contractualism begets contractualism, so increasingly ordering the state and its modes of delivery. Freedland and King speak of a 'pyramid' of contract.[42] Premised on a high degree of central co-ordination through detailed output specification and the setting of standards, contractual governance at UK level is thus seen as determinedly systemic in character, comprising both macro- and micro-levels of operation. An alternative description is 'cascades of contracts',[43] as when there are agreements of various kinds between the Treasury and the Department, the Department and the NSA, the NSA and local units, the local units and private suppliers of services, and the private suppliers of services and subcontractors.

(d) Functional limitations

Paradoxical it may seem, but contract theorists have done much in recent times to enrich our understanding of the limitations of the private legal form.[44] At the root of this is insistence on the need to understand the social matrix of norms, understandings and expectations in which a contract is embedded.[45] As Wightman notes pithily, 'the behaviour of the parties cannot be read off from the terms of any agreement'.[46] The long-term interests of both parties may bind them together regardless of any potential legal sanction, a feature highlighted by public bodies commonly being repeat players in the field of contract. It would be strange indeed if, in the case of essential public services, the relationship was never given priority over the

[41] Vincent-Jones, *The New Public Contracting*, p. 13; drawing on I. Macneil, *The New Social Contract* (Yale University Press, 1980); and see R. Brownsword, *Contract Law: Themes for the 21st century*, 2nd edn (Oxford University Press, 2006).

[42] M. Freedland and D. King, 'Contractual governance and illiberal contracts: Some problems of contractualism as an instrument of behaviour management by agencies of government' (2003) 27 *Cambridge Journal of Economics* 465.

[43] J. Boston, 'The use of contracting in the public sector: Recent New Zealand experience' (1996) 55 *Australian Journal of Public Administration* 105.

[44] See generally R. Hillman, *The Richness of Contract Law: An analysis and critique of contemporary theories of contract law* (Kluwer, 1997); S. Smith, *Contract Theory* (Clarendon, 2004).

[45] P. S. Atiyah, *The Rise and Fall of Freedom of Contract* (Clarendon, 1990); and see D. Campbell, H. Collins and J Wightman (eds.), *Implicit Dimensions of Contract: Discrete, relational and network contracts* (Hart Publishing, 2003).

[46] J. Wightman, 'Book review' (2003) 15 *Journal of Environmental Law* 99, 101; and *Contract: A critical commentary* (Pluto Press, 1996).

deal.[47] Of course the argument should not be pressed too far. As Collins reminds us:

> The contractual framework does not disappear when the injured party prefers to ignore the breach of contract and to emphasise instead the norms derived from the business relation or economic interest. The contractual framework may be invoked at any time. It will be resuscitated if the parties perceive that the long-term relationship is about to terminate or the considerations of economic self-interest now point in the direction of strict contractual enforcement. In the absence of these conditions, however, which will normally represent the situation in successful trading relations, we should expect the contractual framework to be temporarily occluded.[48]

In analysing contract as a social institution, contract theorists stress the concept of 'presentiation'.[49] Nowhere is the self-conscious attempt, through planning, 'to bring the future into the present' better illustrated than in the case of the private finance initiative. Some of these arrangements for the supply of public services and infrastructures are very long-term – a shaping of the future landscape that distinguishes the UK experiment in contractual governance. Public law values of flexibility and (democratic) responsiveness are threatened; there is even a sense of the classic 'no-fettering' rule (see Chapter 5) being flattened. Amid all the (Treasury) talk of risk allocation, there is however a pervasive sense of contractual 'incompleteness'.[50] 'Presentiating' some thirty years of modernisation of the London Tube (see p. 425 below) is not so easy.

Macneil's famous analysis of 'discrete' and 'relational' contracts[51] is very relevant to public procurement and its legal regulation. Signalled by the demand for repeated bouts of competitive bidding, we will see how EU policies have pressed national practice firmly in the direction of the discrete or individuated model. How else could entrenched local preferences associated with relational factors of stability and co-operation be overpowered? But this fuels complaints of high transaction costs; today, there is an element of re-balancing, with more space for contractual dialogue and mutual learning. 'Public purchasing is a skill which requires the judicious exercise of knowledge, expertise and, yes, discretion.'[52]

[47] As in business contracts: see S. Macaulay, 'Non-contractual relations in business: A preliminary study (1963) 28 *American Sociological Review* 55 and H. Beale and T. Dugdale, 'Contracts between businessmen: Planning and the use of contractual remedies' (1975) *BJLS* 45.

[48] H. Collins, *Regulating Contracts* (Oxford University Press, 1999), pp. 137–8. The implications for judicial reasoning are disputed: G. Gava and J. Greene, 'Do we need a hybrid law of contract?' (2004) 63 *CLJ* 605.

[49] I. Macneil, *The New Social Contract* (Yale University Press, 1980), p. 60

[50] O. Hart, *Firms, Contracts and Financial Structure* (Oxford University Press, 1995).

[51] I. Macneil, 'The many futures of contracts', (1974) 47 *Southern California Law Review* 691 and 'Relational contract theory: Challenges and queries' ((2000) 94 *Northwestern Univ. L. Rev.* 877. But see D. Campbell, 'Ian Macneil and the relational theory of contract' in Campbell (ed.), *Selected Papers of Ian Macneil* (Sweet and Maxwell, 2001).

[52] P. Trepte, 'Book review' [2007] *PL* 608.

The modern focus in contract theory on 'relationality' as a quality of social exchange highlights the importance to smooth and effective workings of core elements of voluntarism and reciprocity, fairness and trust. This suggests a difficulty with the use by government of contract in a highly instrumental – one is tempted to say, 'green light' – fashion. Instancing the regulation of individuals by pseudo-contract, Vincent-Jones lays stress on 'the negative effects of policy-driven regulation on the relational elements of trust and cooperation that are essential to realising the capacity of contract to benefit both the parties and society more generally.'[53]

2. Pseudo-contract: Regulation and responsibilisation

Pseudo-contract has increasingly been used to model relations between the state and the individual. In Chapter 2, we saw how in neo-liberal fashion Thatcherism presented the citizen as both the dominant partner and consumer, with John Major's Citizen's Charter then making the core idea of services in return for taxes explicit (while avoiding justiciable service-delivery rights). The alternative dimension of contractual governance *of* the individual was already emerging however in the shape of regulation by pseudo-contract; ultimately, 'contract' as a technique of social control, contrary to its classic liberal meaning (the virtues of consent and freedom of choice). This type of approach has taken off under New Labour in a further reconceptualising of state/citizen relationships. We see a systematic and highly instrumental use of pseudo-contract across key strands of public policy: from attempts at 'diversion' from criminal law process, to tackling deviance, and on through the integrative potential of education to 'work not dole'. Reflecting particular policy aims, the degree – and balance – of promise and threat in such arrangements varies. Rooted however in ideas of 'responsibilisation',[54] of 'growing' individuals as self-determining and self-willing agents, a common theme is contractualisation as an explicit means of 'regulated self-regulation'.[55]

Administrative lawyers generally have been slow to engage with this phenomenon, in part, no doubt, because of a lack of judicial review cases associated with use of the contractual form. Yet there are many relevant aspects. Executive power may be dressed in private garb, but we see the creeping

[53] Vincent-Jones, *The New Public Contracting*, p. 30; drawing on D. Campbell and D. Harris, 'Flexibility in long-term contracts: The role of co-operation' (1993) 20 *JLS* 166.

[54] A. Deacon and K. Mann, 'Agency, modernity and social policy' (1999) *Journal of Social Policy* 413; N. Rose, 'Government and control' in Garland and Sparks (eds.), *Criminology and Social Theory* (Clarendon, 2000).

[55] See on this element, A.Yeatman, 'Interpreting contemporary contractualism' in Dean and Hindess (eds.), *Governing Australia: Studies in contemporary rationalities of government* (Cambridge University Press, 1998) and H. Collins, 'Regulating contract law' in Parker, Scott, Lacey and Braithwaite (eds.), *Regulating Law* (Oxford University Press, 2004).

tentacles of state regulation. As a vehicle for pre-emptive intervention in citizen's lives, pseudo-contract colonises more areas: less liberty. We are back with K. C. Davis and the 'dark and windowless' areas of administrative law. Administrative lawyers are – or rather should be – concerned to ensure proper procedural protection. What are the guarantees of 'fair dealing' for the disadvantaged citizen in these highly personalised forms of 'negotiated' regulation? The technique also falls to be evaluated as one of a range and mix of state interventions. How and in what conditions is it effective? Questions arise about the use and proportionality of sanctions. While these agreements are not enforceable in the conventional contractual manner, 'breach' by the regulated individual may trigger other, sharper, enforcement methods such as preventative civil orders and even penal sanctions, or denial of benefits and privileges.

(a) Control contracts

Pseudo-contract as a tool of social work became widespread in the 1980s. There were checklists of tasks for 'clients' such as alcoholics or drug addicts, behaviour modification schemes incorporating rewards and sanctions tailored to 'progress', and conditions or requirements for the use of care facilities. For policy-makers concerned to inculcate a greater sense of individual responsibility among particular target groups 'contract' offered an enticing mix of specification, tailored process, and symbolic value (fitting with NPM, it also provided a measure of 'productivity' of social work, serving both to define and limit, and to deflect from central government, public-service responsibilities):[56]

> A Social Work contract was taken to have particular advantages for the *relationship* between the social worker and client. The first of these was that it treated clients with *respect* and helped them become more *responsible* for their choices . . . A further benefit was that contracts were thought to supply a definite spur to *motivation* and *achievement.* Because contracts provided a clear specification of the goals of social work intervention they made it possible (sometimes all too possible) to see what progress had been achieved. Clients would be motivated by their involvement in drawing up the contract, by their consent to what it contained, by the incentive of the reciprocal promises of the Social Work Department and, where applicable, by fear of sanctions if it broke down . . . A final set of functions related to control by the social worker and her *accountability.* Contracts were capable of helping both social workers and clients gain more control of their interaction so as to better achieve their aims. [57]

[56] See Freedland and King, 'Contractual governance and illiberal contracts'.

[57] D. Nelken, 'The use of "contracts" as a social work technique' (1987) 40 *CLP* 207, 215–16. In a policy context of 'care in the community', the technique could also facilitate multi-agency engagement.

Mixing 'carrot and stick', the resort to 'contract' as part of an expanding pattern of state interventions under New Labour has been fuelled by concerns about antisocial behaviour. 'Where families and parents are failing to meet their responsibilities to their communities, we will work with them until they do.'[58] Within a few years, the regulation had taken on the character of a complex set of written rules including 'parental contracts', 'acceptable behaviour contracts' (below), 'youth offender contracts',[59] and generalised 'home-school agreements'.[60] The centre provides copious administrative guidance and standard forms.

In a situation of unequal power how real is agreement? A contractual rhetoric of 'voluntariness' cannot disguise the fact of many of these 'state-based control contracts' being 'imposed upon the individual to a greater degree than similar-looking private contractual arrangements'.[61] Criminologists point up the particular normative force of this kind of individualised contractual governance:

> Given the language of choice, autonomy and voluntariness, in which contracting is couched, the failure of a given party to adhere to their self-imposed and agreed part of the bargain means that they have failed themselves – by breaking their own promise – as well as their obligations to others. This failure appears as more serious than the failure to fulfil a command ordered of them. Hence, failure to honour an agreement serves to legitimate more fundamental interventions into people's lives. In certain circumstances, this may justify a more punitive response.[62]

Parenting contracts show the widening sphere. The Anti-Social Behaviour Act 2003 empowered youth-offending teams to 'contract' with the parents where there is reason to believe that the child or young person 'has engaged, or is likely to engage', in criminal conduct or antisocial behaviour.[63] Such powers have subsequently been given to a range of bodies, including local authorities and housing associations.[64] The 2003 Act likewise made parenting contracts another instrument in the 'tool-box' of interventions in cases of truancy or

[58] White Paper, *Respect and Responsibility: Taking a stand against anti-social behaviour*, Cm. 5778 (2003), p. 12; and see A. Von Hirsch and A. Simester (eds.), *Incivilities: Regulating offensive behaviour* (Oxford University Press, 2006).

[59] Inaugurated by the Youth Justice and Criminal Evidence Act 1999 (as consolidated in the Powers of Criminal Courts (Sentencing) Act 2000). The relevant White Paper is *No More Excuses: A new approach to tackling youth crime in England and Wales*, Cm. 3809 (1997).

[60] Rolled out across the state-sector under the auspices of the School Standards and Framework Act 1998, HSAs demonstrate a much greater sense of reciprocity: A. Blair, 'Home-School Agreements: A legislative framework for soft control of parents' (2001) *Education Law Journal* 79.

[61] S. Mackenzie, 'Second-chance punitivism and the contractual governance of crime and incivility: New Labour, old Hobbes' (2008) 35 *JLS* 214, 222.

[62] A. Crawford, 'Contractual governance of deviant behaviour' (2003) 30 *JLS* 479, 503–4.

[63] Anti-Social Behaviour Act 2003, s. 25.

[64] Police and Justice Act 2006, ss. 23–5.

exclusion from school.[65] This now extends to situations where the school or LEA has reason to believe that the child's conduct 'has caused, or is likely to cause' significant disruption.[66]

Mixing discipline with support, the 'contract' typically consists of two main elements. The first is a parenting programme: the vehicle for various therapies, founded in turn on agency assessments or risk-evaluations. The second is 'restrictive covenants': ways in which the parent is tasked with controlling their child, for example by ensuring regular school attendance. Modelled in terms of a regulatory 'enforcement pyramid' (see p. 242 above), relevant sanctions underwrite the place of such 'contracts' in the hinterland of formal law. Up from this level of intervention lies the 'parenting order',[67] whereby, on pain of penal sanction, parents can be required to take steps to address their child's misbehaviour.[68] Administrative guidance explains:

> As contracts are voluntary there is no penalty for refusing to enter into or failing to comply with one. However, previous failure to co-operate with support offered through a contract is a relevant consideration for a court when deciding whether to make a parenting order. Therefore contracts provide YOTs with additional authority when attempting to secure voluntary co-operation from parents.[69]

Commonly paired with parenting contracts, 'acceptable behaviour contracts' for children and young persons have been much in vogue. Pioneered in London at the beginning of the decade, by 2006 some 18,000 'ABCs' had been made by local enforcement agencies in England and Wales[70] despite the fact that there was no explicit statutory framework[71] – a new 'new prerogative' indeed! The ABC is officially considered a 'second-tier approach' to anti-social behaviour, on from the cheap, if not so cheerful, warning letter, and ahead of the more costly and judicially determined Anti-Social Behaviour Order (ASBO). The innate flexibility of pseudo-contract means however that ABCs themselves can be used incrementally:

> The contract specifies a list of anti-social acts in which the person can be shown to have been involved, and which they agree not to continue. The contract can also include positives, i.e. activities that will help prevent recurrence, such as attending school. The main

[65] Anti-Social Behaviour Act 2003, s. 19: see DCSF, *Guidance on Education-Related Parenting Contracts, Parenting Orders and Penalty Notices* (2007).
[66] Education and Inspections Act 2006, s. 97.
[67] Originally introduced in the Crime and Disorder Act 1998, ss. 8–10. See for an unsuccessful HRA challenge, *R (M) v Inner London Crown Court* [2003] EWHC 301.
[68] Anti-Social Behaviour Act 2003, ss. 20–2, 26–8, as amended.
[69] Home Office, *Parenting Contracts and Orders Guidance* (2004) [2.13].
[70] House of Commons Debates, vol. 456, col. 358W (31 January 2007). And see K. Bullock and B. Jones, *Acceptable Behaviour Contracts: Addressing anti-social behaviour in the London Borough of Islington* (Home Office, 2004).
[71] See Home Office, *Acceptable Behaviour Contracts and Agreements* (2007).

> aim is to lead perpetrators towards recognition both of the impact of their behaviour and of the need to take responsibility for their actions. For this reason it is important that the individual should be involved in drawing up the contract.
>
> Where behaviour is more problematic – either because it is persistent or because it is serious – then support to address the underlying causes of the behaviour should be offered in parallel to the contract. This may include diversionary activities (such as attendance at a youth project), counselling or support for the family . . . Legal action (such as an application for an ASBO or a possession order, if the perpetrator is in social housing) should be stated on the contract where this is the potential consequence of breaking the agreement.[72]

The use made of ABCs at local level has been variable.[73] The guidance itself exhibits concerns: for children still at primary school a parental intervention 'may be preferable'; perhaps hopefully, 'practitioners will be aware of the need to guard against racial stereotyping'.[74] The guidance speaks of multiple 'triggers' for ABCs: complaints to housing officers; police intelligence; discussions with residents, etc.[75] The obvious administrative benefit of ABCs – no need to establish a formal evidence chain – is another piece in the jigsaw of risk-oriented state interventions eroding civil liberties. What, one might ask, of the rule of law?

We are back too with the functional limitations of contract, the chief relational elements of trust and co-operation being under threat in this highly disciplinary context. The methodology may also be criticised for glossing over underlying causes of social problems; is it just a matter of responsibilisation? The NAO gives a suitably cautious assessment:

> 65 per cent of the people in our sample who received an Acceptable Behaviour Contract did not re-engage in anti-social behaviour. However Contracts were less effective with people aged under 18 where just over 60 per cent of our cases displayed further anti-social behaviour. This outcome could be due to a failure to engage the young person sufficiently in forming a contract and to support them, for example in disengaging from the society of certain of their peers . . . In practice, it is possible that other factors unrelated to the intervention, such as changes in family circumstances, may have contributed partly or wholly to changes in behaviour.[76]

(b) Contractualising welfare, etc.

One of the more controversial Conservative reforms to the Welfare State was the Job Seeker's Allowance, which replaced unemployment benefit and income

[72] *Ibid.*, pp. 1–2, 9.
[73] See NAO, *Tackling Anti-Social Behaviour*, HC 99 (2006/7).
[74] Home Office, *Acceptable Behaviour Contracts*, pp. 3, 11.
[75] *Ibid.*, pp. 4–5.
[76] NAO, *Tackling Anti-Social Behaviour*, pp. 6, 19.

support for the unemployed. The scheme was designed to focus the efforts of claimants on looking for work, as well as securing better VFM.[77] To this end the 'Job Seeker's Agreement' was created as a condition precedent of receiving benefit, its requirements typically including targets for job applications.[78] Highlighting the element of compulsion, as also of one-sidedness, the employment officer would only 'contract' if satisfied that compliance would secure the general statutory requirements of availability for work and actively seeking employment. The claimant could hardly shop elsewhere.[79]

New Labour ministers built enthusiastically on the JSA, reinforcing the view of unemployment largely in terms of an individual's capacities and capabilities. A 1998 Green Paper set the tone. 'At the heart of the modern welfare state will be a new contract between the citizen and the Government based on responsibilities and rights.' The talk was of 'opportunity instead of dependence':[80] splendidly envisioned in terms of 'the Third Way', active engagement of the citizen with the state (see p. 71 above). Promoted as a 'New Deal', this meant determinedly conditional income-maintenance programmes of 'workfare' with requirements to undertake training or join work schemes to enhance employability.[81] Over time, different sets of 'contractual' conditions have evolved for lone parents, people with disabilities, etc. The reconfiguration of the state–citizen relationship is made abundantly clear:

> In a contributory system, establishing the right to protection is the end result of a process during which the claimant via his/her contributions 'demonstrates' his/her responsible behaviour. Conditions are mainly attached before the claim is made . . . Conversely, in the new arrangements, the claim for support marks the beginning of a different process whereby conditions are attached after the claim is made. What is strengthened here is the 'right' of the state to 'steer' and monitor the claimant's behaviour after the claim is made.[82]

In the face of stubbornly high rates of detachment from the labour market[83] the contract culture is underpinned by the Welfare Reform Act 2007.[84] A

[77] White Paper, *Job Seeker's Allowance*, Cm. 2687 (1994).

[78] Jobseekers' Act 1995, ss. 1, 9.

[79] See J. Fulbrook, 'The Job Seekers' Act 1995: Consolidation with a sting of contractual compliance' (1995) 24 *Industrial Law J.* 395.

[80] Green Paper, *A New Contract for Welfare: New ambitions for our country*, Cm. 3805 (1998), pp. 1–2; and see S. White, 'Social rights and the social contract: Political theory and the new welfare politics' (2000) 30 *B. J. Pol. Sci.* 507.

[81] See especially, DWP, *Building on New Deal: Local solutions meeting individual needs* (2004). There is a strong comparative element: see J. Handler, 'Social citizenship and workfare in the US and Western Europe: From status to contract' (2003) 13 *Journal of European Social Policy* 229.

[82] E. Carmel and T. Papadopoulos, 'The new governance of social security in Britain' in Millar (ed.), *Understanding Social Security: Issues for social policy and practice* (Policy Press, 2003), p. 5.

[83] See for criticism of the regulatory 'effectiveness', F. Field and P. White, *Welfare Isn't Working* (Reform, 2007).

[84] See Green Paper, *A New Deal for Welfare: Empowering people to work*, Cm. 6730 (2006).

major revamp extending conditionality, the legislation replaces incapacity benefit with the tellingly titled 'employment and support allowance'. A subsequent Green Paper speaks of strengthening the 'benefit contract' between the state and the individual: government will provide personalised support in exchange for an obligation to work for all those capable. Framed by 'powers to require those who need it to undertake training', and by 'tougher sanctions' for those failing to take relevant steps, this is the world of tailored 'back-to-work action plans'.[85] Showing how the different strands of contractual governance intertwine, the Green Paper also speaks of 'modernising and strengthening the welfare to work market', a new 'right to bid' for public, private and voluntary providers. 'Individual responsibility is at the heart of these reforms. For people to exercise responsibility, we need to increase choice'.[86]

The general dynamic shows no sign of slackening – quite the reverse. 'Contractual relations' between state and citizen feature prominently in a Cabinet Office strategy review. 'Could we move from an implicit one-way contract based on outputs to one based on explicit mutually agreed outcomes? . . . How might this work in key areas like healthcare, schooling, policing and family support?':[87]

> Our actions are an important determinant of whether we will live productive and healthy lives, in clean and sustainable environments, in communities free from fear or isolation. Unfortunately all too often we fail – collectively and individually – to behave in the way required to achieve these outcomes. There is an increasing recognition that cultural factors are important determinants of our behaviour . . . Where there are gaps in both underlying attitudes, values, aspirations and self-efficacy as well as in actual behaviour . . . this suggests an approach based on combining addressing the cultural factors along with smoothing this into behaviour through enabling, incentivising, and encouraging measures . . . 'Encouraging' measures include contracts and codifications to build a consistent behavioural path of achievement . . . explicit or implicit contracts whereby the citizen is incentivised to engage in co-productive behaviour . . . clear agreements between whole groups . . . reinforced by . . . rewards or greater responsibility.[88]

The Orwellian overtones are all too apparent: contract from cradle to grave?

[85] DWP, *No One Written Off: Reforming the welfare state to reward responsibilities* (2008), pp. 12–13. And see in turn DWP, *Raising Expectations and Increasing Support: Reforming welfare for the future,* Cm. 7506 (2008). The relevant legislation – the Welfare Reform Bill – is currently before Parliament.

[86] *Ibid*., pp. 118, 120.

[87] PM's Strategy Unit, *Strategic Priorities for the UK* (2006), p. 26.

[88] PM's Strategy Unit, *Achieving Culture Change: A policy framework* (2007), pp. 10–11, 115.

3. Outsourcing: Policy and structures

(a) Central . . .

The public sector currently spends £160 billion a year on purchasing goods and services. The amounts have mushroomed in recent years, with the popularity of outsourcing and historically high levels of government investment. The Treasury recognises that 'all of us, as taxpayers who use and fund public services, have the right to expect government to meet the highest professional standards when it procures on their behalf'.[89]

Twenty-five years ago the Conservatives were trying to achieve this. The Central Unit on Procurement was established to advise departments on their increasingly important – and varied – procurement strategies.[90] Coming on top of the substantial body of principles and procedures that had evolved over many years, its administrative guidance, with titles like 'model forms of contract', 'specification writing', 'quality assurance' and 'disputes resolution', quickly multiplied. Greater emphasis than hitherto was placed on VFM; and elaborate processes of market testing, whereby in-house teams had to compete against external bidders, were developed.[91] Underlining the close linkage with NPM, a 1995 White Paper spoke of integrated processes 'covering the whole cycle of acquisition and use from start to finish, to ensure quality and economy'.[92] Continuous information flows, shared understandings, and migration of personnel between purchasing departments and their major suppliers, were typical of a 'procurement community',[93] strongly corporatist in ethos. But fitting with the drive to the Single Market, the official orthodoxy was now liberalisation and genuine competition.

'Pragmatic not dogmatic' was the predictable catchphrase of the incoming Blair government's administrative guidance on market testing and contracting out. In delivering on ministers' commitment to a modern, responsive and customer-focused range of services, senior Whitehall managers should bear in mind that competition was only one option, and that, as against lowest price, VFM meant 'better quality services at optimal cost'.[94] Market-type disciplines would however remain a central element in the programme of public-sector reform at UK level.[95]

The aim, of course, was 'better' procurement. The Gershon review[96] in 1999 highlighted a lack of consistency and common process among Whitehall

[89] HM Treasury, *Transforming Government Procurement* (2007), p. 1.
[90] Cabinet Office, *Government Purchasing* (HMSO, 1984).
[91] Office of Public Service and Science, *The Government's Guide to Market Testing* (HMSO, 1993).
[92] *Setting New Standards: A Strategy for government procurement*, Cm. 2840 (1995), p. 6.
[93] Turpin, *Government Procurement and Contracts*.
[94] Cabinet Office, *Better Quality Services Handbook* (HMSO, 1998), p. 1.
[95] See NAO, *Benchmarking and Market Testing the Ongoing Services Component of PFI Projects*, HC 453 (2006/7).
[96] HM Treasury, *Review of Civil Procurement in Central Government* (1999).

departments, as well as 'a very wide spectrum' between best and worst practice. Agencification itself was a reason for greater centralisation of procurement practice and procedure:

> The fragmentation and lack of co-ordination of these activities results in the Centre lacking the 'clout' necessary to lead Government procurement into the 21st Century . . . There is a widespread recognition of the need for, and benefit of, a central body which ensures consistency of policy, avoids re-invention of wheels, catalyses appropriate aggregation and promotes best practice.[97]

So was born the Office of Government Commerce, a separate entity inside the Treasury with its own chief executive, responsible for improving VFM by driving up standards and capability in procurement. OGC quickly elaborated a whole range of strategies, from promoting effective competition for government business to securing improvements in the management of large, complex and novel projects, and on through to support for the wider public sector in procurement matters.[98] So-called 'conventional procurement' – departments buying in the goods and services they need using in-house units – should be treated as only one option, alongside PPPs and PFI (which themselves take many forms, see Chapter 9).[99] Soft law was laid on soft law as OGC took over, reworked, and extended, the administrative guidance.

OGC has had ownership of 'the Gateway Process', treated as mandatory in central government for complex procurement, IT-enabled and construction programmes, whereby projects are independently reviewed at critical stages in their life cycle to determine whether they should proceed further and if so whether changes are necessary. While somewhat cumbersome in nature, the reviews are rightly prized for providing 'an external challenge to the robustness of plans and processes'.[100] A trading arm, OGC buying.solutions, able to assess and access a vast array of products and services on behalf of public sector bodies, was an obvious next step. How better to promote 'best practice' than through a set of pre-tendered contracts?[101] OGC also leads for the UK on EU and, as regards the WTO, OECD and UNCITRAL,[102] international procurement policy issues. Reflecting the highly porous nature of the national and transnational regulatory frameworks, this is important work. Echoing developments among the super-agencies (see Chapter 6), the aim is to ensure a two-way traffic, whereby international legal development 'both

[97] *Ibid*., p. 4.
[98] OGC, *Procurement Policy Guidelines* (2001). Procurement being an aspect of devolved government, OGC's remit is correspondingly limited however.
[99] OGC, *Procurement Strategies* (2007).
[100] OGC, *Gateway Review for Programmes and Projects* (2007), 1. But see NAO, *Delays in Administering the 2005 Single Payments Scheme in England*, HC 1631 (2005/6).
[101] There is also a well-established, UK-wide, professional network centred on the Chartered Institute of Purchasing and Supply.
[102] United Nations Commission on International Trade Law.

influences and is influenced by the developing UK domestic procurement policy agenda'.[103]

Evidently, however, things have not gone well. The search is on for major efficiency gains as this huge collective purchasing power is harnessed to equip the UK with world-class public services in the face of growing challenges of global competition, changing demographics and increasing pressures on natural resources. A Treasury-led revamp of policies and processes inaugurated in 2007 promises to transform government procurement:

> Government needs to harness the benefits that businesses can offer . . . through a procurement function . . . that is increasingly adaptable, flexible and knowledgeable about the commercial world . . . The positive influence of procurement can go far beyond simply securing the goods and services it requires – it can also transform the market to the benefit of others . . . Effective procurement . . . has the capacity to drive the efficiency of suppliers and their supply chains, demonstrating the added importance of conducting procurement to the highest professional standards.[104]

Policy-makers have also come to elaborate not one but two overarching principles of procurement policy and practice:

> The challenge is to meet the public's demands for increasingly high quality public services at good value for money and in a sustainable way . . . The Government is determined to be at the forefront of sustainable procurement, making the government estate carbon neutral by 2012. The OGC will help delivery, encouraging departments to develop the expertise to value whole life costs and benefits.[105]

The 'greening' of administrative law thus augments demands for more centralisation and hierarchy, greater professionalism, and heightened modalities of internal regulation:[106]

- Recognising its importance to public service delivery, departments will strengthen their procurement capability with greater direction and support from the top.
- Departments will collaborate more in the purchase of goods and services common across more than one department, to get better value for money.
- A new Major Projects Review Group will ensure that the most important and complex projects are subject to effective scrutiny at the key stages.
- OGC will have strong powers to set out the procurement standards

[103] OGC, *Policy and Standards* (2007), p. 1.

[104] HM Treasury, *Transforming government procurement*, p. 3; and see CBI, *Innovation and Public Procurement* (2007).

[105] HM Treasury, *Transforming government procurement*; and see Sustainable Development Task Force, *Procuring the Future* (2006).

[106] HM Treasury, *Transforming government procurement.*

departments need to meet, monitor departments' performance against them, and ensure remedial action is taken where necessary.
- Overseeing the changes needed across government, the OGC will be a smaller, higher-calibre organisation and work closely with departments and suppliers to improve capacity and effectiveness.

Some basic nostrums of 'good' procurement have been recycled (in the next chapter, we see some of them honoured in the breach). A procuring authority should:

- be clear on the objectives of the procurement from the outset
- be aware of external factors that will impact on the procurement such as the policy environment or planning issues
- communicate those objectives to potential suppliers at an early stage, to gauge the market's ability to deliver and explore a range of possible solutions
- consider using an output or outcome based specification, to give suppliers – who naturally know more about business than potential buyers – more scope to provide innovative solutions
- follow a competitive, efficient, fair and transparent procurement process, and communicate to potential suppliers at the outset what that process will be
- be clear about affordability – the resources available to spend on the particular good or service. . .The procurer has to select on the basis of whole-life value for money, but in setting budgets for individual projects departments also needs to make decisions about relative policy priorities and needs
- establish effective contractual management processes and resources in good time to drive excellent supplier performance throughout the contract. [107]

(b) . . . and local

Local government procurement presents its own challenges. Margaret Thatcher aimed primarily at forcing the market on councils: 'subjecting in-house provision of services to competition would expose the true cost of carrying out the work and lead to greater efficiency in the use of resources and, hence, to better value for money for local authorities and for the tax-payers.'[108] Consistent with the Conservatives' general programme, compulsory competitive tendering was also a way of reducing the size of the public sector and the power of trade unions. Since local government had traditionally been very reliant on in-house provision, the policy had huge potential.

In central government, policies of outsourcing and market testing could be implemented through soft law; in local government,[109] where councils

[107] *Ibid.*, pp. 4–5: drawing on NAO, *Improving Procurement*, HC 361 (2003/4).
[108] Department of the Environment, *Competing for Quality: Competition in the provision of local services* (1991) [1.4].
[109] Local Government Planning and Land Act 1980, Part III; Local Government Act 1988; Local Government Act 1992.

were independent legal entities, statutory intervention was necessary. As well as complying with EU procurement rules on the tender process (below), an authority would have to solicit bids both from its own service unit and from private-sector providers and act in making the award so as not to restrict, distort or prevent competition. The regulatory design became ever more elaborate as CCT was progressively applied across local government services. Whitehall became increasingly 'involved in policing the "rules of the game" and plugging loopholes'.[110] Legal paper proliferated in a rising spiral of command and recalcitrance.[111] Despite the fierce element of compulsion, CCT had not delivered a thriving market in local services by the time the Conservatives left office;[112] in-house teams continued to win the great majority of 'contracts'.[113] The greater long-term impact stemmed from the requirement to operate on a trading basis and the resultant spread of commercialism – that is to say, a cultural shift in local government, from a public service base to a business organisation base.[114]

The replacement of CCT with the regime of 'best value' in local services was a flagship policy of the incoming Blair government. Competitive tendering would now be a strictly voluntary activity, so drawing the sting of complaints of excessive legalism or domination by Whitehall and neglect of service quality.[115] Typically however, the Conservative blueprint for public-service delivery was being modified, not jettisoned (see Chapter 2); there would be no rolling back of local contractual governance. Amid the plethora of performance standards and indicators, market testing and contracting out were ways of showing compliance with a best value authority's duty of making arrangements 'to secure continuous improvement' in service functions.[116] Then again:

> The introduction of Best Value, and with it the very active promotion of strategic service delivery partnerships by Central Government, marked a subtle, though significant, change

[110] A. Cochrane, 'Local Government' in Maidment and Thompson (eds.), *Managing the United Kingdom* (Sage, 1993), 224. And see *R v Environment Secretary, ex p. Haringey LBC* (1994) 92 LGR 538.

[111] We dealt with this more fully in C. Harlow and R. Rawlings, *Law and Administration* (Butterworths, 2nd edn 1997), Ch. 9.

[112] Competitive pressures were partly blunted by employee protection under the Acquired Rights Directive [1977] OJ C61/26. See M. Radford and A. Kerr, 'Acquiring Rights – Losing Power' (1997) 60 *MLR* 23.

[113] Although competition levels and in-house success rates varied considerably between services: see K. Walsh and H. Davis, *Competition and Service: The Impact of the Local Government Act 1988* (HMSO, 1993). Since the authority could not contract with itself, the in-house transaction would be pseudo-contract.

[114] J. Greenwood and D. Wilson, 'Towards the contract state: CCT in local government' (1994) 47 *Parl. Affairs* 405.

[115] DETR, *Modernising Local Government: Improving local services through best value* (1998) [1–2]; and see M. Geddes and S. Martin, 'The policy and politics of best value' (2000) 28 *Policy and Politics* 379.

[116] Local Government Act 1999, s. 3. But see ODPM, *Best Value and Performance Improvement* (2003).

> in public sector procurement strategy. Best Value brought public sector procurement into step with private sector thinking which had long maintained that key supplier relationships should be organised on an enduring partnership rather than short-term contract basis.[117]

More recently, a national procurement strategy for England has been pursued, replete with rolling targets. The talk is of 'smart' procurement, emphasis on specifying outcomes not functions and on payment by results. Institutional developments – local buying consortia and regional centres of excellence – reflect the demands for greater co-operation and co-ordination in the sector. This builds on the important missionary work of the '4ps', a general source of procurement advice and assistance to local government first established under the Conservatives (see p. 418 below). The forces of change are unrelenting:

> The Strategy . . . has laid the foundations for the next phase: the transformation of local public services. [The Department] and our partners will work with local authorities to underpin a radical value for money programme to deliver the ambition set out in the 2007 Budget of at least 3% annual cashable efficiencies . . . whether delivered through smarter procurement, re-engineering services or any other innovative approaches . . . While priority has been accorded to the delivery of efficiency gains, the role of procurement in the promotion of the economic, social and environmental well being of communities [is] a central feature.[118]

(c) Buying social justice

Use of the great commercial power of government contracting to achieve political and social objectives has a long and chequered history.[119] Such strategies of contract compliance touch on basic ideological questions: social engineering, however beneficial, versus a purist conception of VFM and business autonomy. From a 'green light' standpoint, the technique may be a viable alternative to criminal sanctions or individual complaint and adjudication as a way of regulating operator behaviour, or else a useful supplement. The proactive, or fire-watching, qualities are valuable, as is also the scope for flexibility or negotiated compliance. Familiar in the US as a distinctive technique of administrative action, especially in relation to race and sex discrimination,[120]

[117] DCLG, *The Long-term Evaluation of the Best Value Regime* (2006), p. 93.

[118] Department for Communities and Local Government, *The National Procurement Strategy for Local Government: Final report* (2008), p. 45; and see Audit Commission, *Healthy Competition* (2007).

[119] Reaching back to 'the Fair Wages Resolution', first promulgated by the House of Commons in 1891. See O. Kahn-Freund, 'Legislation through adjudication: The legal aspects of fair wages clauses and recognised conditions' (1948) 11 *MLR* 274. (This is now the realm of the statutory minimum wage.)

[120] For a valuable comparative study see R. Dhami, J. Squires and T. Modood, *Developing Positive Action Policies: Learning from the experiences of Europe and North America* (DWP, 2006).

contract compliance eventually came to be sanctioned by statute for Northern Ireland.[121]

In the 1980s many councils, led by the Greater London Council, resorted to contract compliance to enforce equal opportunities. Special units developed to monitor and advise contractors, with the ultimate sanction of termination of contract or disbarment from tendering.[122] Some authorities went further, refusing to contract with firms that had business dealings in (apartheid) South Africa or connections with the nuclear industry. Matters came to a head in *R v Lewisham LBC, ex p. Shell UK Ltd*,[123] when this practice was challenged by the UK subsidiary of a powerful multinational with other subsidiaries operating in South Africa. There are close similarities with the *Wheeler* case (see p. 114 above). Whereas the council sought to justify the boycott on the basis of its statutory duty to promote good race relations within the borough, the court focused on the pressure put on the company to end trading links and found improper purpose: 'It is to be remembered that Shell UK was not acting in any way unlawfully.'

Prime Minister Thatcher had seen enough. A striking example of 'imperium' to curb 'dominium', s. 7 of the Local Government Act 1988 required local authorities to disregard 'matters which are non-commercial matters for the purposes of this section'. The list included contractors' terms and conditions of employment; conduct in industrial disputes; involvement with defence or foreign policy or location in any country; and any political, industrial or sectarian affiliation.[124] The Act effectively corralled the use of contract compliance by local authorities,[125] which was in any case already being stunted by developments in Community law (see p. 383 below).

With New Labour in power, the core idea of *buying social justice* began again to creep up the agenda. After all, the further the 'contractual revolution' progressed, the greater the potential scope for this type of policy lever (today some 30 per cent of British companies are contracted by the public sector). McCrudden, the leading commentator, has produced a basic template for determining 'how best to introduce social policies, and *which* such policies should be integrated into the process of public procurement' (as with the modelling of regulatory legitimacy (see Chapter 7), major value judgements cannot be avoided however):

[121] Fair Employment (Northern Ireland) Act 1989: see C. McCrudden, R. Ford and A. Heath, 'Legal regulation of affirmative action in Northern Ireland: An empirical assessment', (2004) 24 *OJLS* 363.

[122] Institute of Personnel Management, *Contract Compliance: The United Kingdom experience* (1987).

[123] [1988] 1 All ER 938.

[124] The prohibition covered all types of procurement contract regardless of their financial value (with a tightly drawn exception for race relations (s. 18)).

[125] The message was driven home via judicial review: *R v Islington LBC, ex p. Building Employers' Confederation* [1989] IRLR 382.

> First, linkages should be chosen that are effective in achieving the aim of the procurement and delivering the social policy. This is likely to mean concentrating procurement resources on delivering only the most important policy goals so as not to overload the system. This is a crucial point. Not every public policy can, or should, be taken into account in procurement. Second, potential suppliers should understand clearly from the outset what categories of information and service standards may be expected . . . Third, choosing which government policies should be integrated into procurement will need to be carefully considered and justified, with the criteria clearly specified . . . Integration does not mean that all such polices should be integrated, or in the same way, or to the same depth. Fourth, linkages should be chosen that are as consistent as possible with the other aspects and values of the procurement process. Fifth, linkages should be chosen that are justifiable. Departments are accountable for their expenditure and, therefore, will need to determine whether any extra costs that may result . . . are justified.[126]

The curb on councils was loosened through the Local Government Act 1999 as part of the move to 'best value'.[127] Contracting authorities could now factor workplace issues and in particular take account of the equal-opportunities practices of potential providers where this was relevant to service delivery. While pragmatic concerns about the burden on business typically hold sway, more recent developments show the policy-makers becoming more ambitious in promoting such linkages within the broad framework of VFM.[128] Showing the potential of blending social with economic considerations, central government has moved, for example, to specify skill levels and training for those providing contracted services. 'It is important for Government to lead by example . . . There will be benefits for those who use public services, the individual employee, and the employer.'[129] Contract compliance can be an especially useful tool for crossing the public/private 'divide' in the context of positive duties. We note how the new generation of legislative duties on public bodies to promote equality[130] encompasses the dominium power and hence government contracting: for example, questioning bidders about the make-up of their work force. As part of a proposed package of reforms centred on the idea of a single equality duty, ministers recently signalled further changes to procurement policy so as to require suppliers, as well as public bodies, to detail

[126] McCrudden, *Buying Social Justice*, p. 578.

[127] Local Government Best Value (Exclusion of Non-commercial Considerations) 2001, SI No. 909; DETR, *Best Value and Procurement: Handling of workplace matters in contracting* (2001).

[128] As also of course EC law: see generally, OGC, *Buy and Make a Difference: How to address social issues in public procurement* (2008).

[129] Cabinet Office, *Access to Skills, Trade Unions and Advice in Government Contracting* (2008), p. 1. Government contractors are further 'encouraged' actively to publicise trade union representation and rights at work.

[130] Race Relations (Amendment) Act 2000; Disability Discrimination Act 2005; Equality Act 2006; and see above Ch. 5.

pay gaps.[131] Contract compliance is here seen as a way to 'drive transparency' into a large wedge of the private sector, so contributing to delivery of the Government's targets.[132]

Contract compliance can also help in promoting human rights protection for service users. The lack of direct 'horizontal' effect of the HRA (see p. 20 above), and more especially a restrictive case law denying the statutory Convention rights in contexts of 'contracting out', has given this a very contemporary edge. Indeed, majority speeches in the leading case of *YL*[133] (see p. 380 below) make the link expressly: 'The contractual terms which a local authority is often able to impose on a proprietor of a care home with whom it makes arrangements may well ensure that a person's rights against the proprietor are pretty similar in practice to those which would be enjoyed against the local authority.'[134]

Ministers have issued multi-sectoral guidance:

> The most fruitful way for public authorities to proceed when attempting to contract to secure the protection of human rights for service users is via the specification of services . . . The public authority should detail . . . the activities which it considers will be required to be performed by the supplier, including output specifications relating to processes where these help to define the performance characteristics of the service . . .
>
> There are several advantages . . . It provides all potential suppliers with a very high degree of certainty as to what will be required from them . . . It enables the public authority to ensure that there is a mutual understanding as between itself and the supplier that the services will be delivered in a particular, HRA compliant way . . . It enables the public authority to fully reflect the needs of relevant stakeholders in the service delivered. Where appropriate, users of the service could be invited to feed into the process of drawing up the specification, thus [meeting] end user expectation that human rights issues have been satisfactorily addressed . . . It provides transparency as to the way in which the public authority has sought to secure the discharge of the HRA obligations it has. Flowing from this, it assists the public authority in monitoring and enforcement of those obligations (and auditing bodies similarly) . . . It may be possible to adopt greater commonality . . . A public authority consensus view as to the way in which certain issues should be dealt with could be fed into all relevant contracts. In this way, the culture of respect for human rights can be fostered.[135]

How realistic is this? From a human rights perspective, the risks of inconsistency, associated on the one hand with a diverse range of public contracting

[131] Government Equalities Office, *Framework for a Fairer Future: The Equality Bill*, Cm. 7431 (2008).

[132] *The Equality Bill: Government response to consultation*, Cm. 7454 (2008). Imposing pay audits across the private sector was evidently considered a step too far.

[133] *YL (by her litigation friend the Official Solicitor) v Birmingham City Council and Others* [2007] UKHL 27.

[134] Lord Neuberger [149]; echoing Lord Woolf in the *Leonard Cheshire* case (see p. 379 below).

[135] ODPM, *Guidance on Contracting for Services in the Light of the Human Rights Act* (2005).

bodies and, on the other, with highly variegated local markets, loom large. While there clearly are potentials for public deliberation – a more 'responsive' form of contractual governance – the practical difficulties of promoting genuinely participative modes of rule-making with the private legal form cannot be gainsaid. There is also the problem of enforceability by service-users with the Contract (Rights of Third Parties) Act 1999 providing only a partial solution. As shown in *YL*, sophisticated contractual 'webs' applying human rights standards can be developed to smooth the way through, for example, tripartite contracts between the public purchaser, operator and end-user. But will they be?

The limitations of contractual technique are shown. Take the commercial difficulties of negotiating contractual terms with uncertain implications; the guidance did not recommend generic compliance clauses (see p. 380 below) on grounds of higher bid costs and likely market resistance. 'Suppliers might feel unable to price risk.'[136] Yet as the British Institute of Human Rights observes, a specification-based approach to 'presentiation' sits uncomfortably with the idea of an all-embracing 'living law':

> The successful implementation of contract specifications requires the public authority to identify whether the delivery of the particular service engages human rights issues and the steps that need to be taken to ensure the relevant rights are respected. Whether this is even possible is debatable, since human rights questions arise in a multitude of different potential situations some of which cannot be predicted. It is not possible in our view to take such a prescriptive approach to human rights protection. In any event, to have the chance of protecting human rights in this way, even partially successfully, the public authority would need to have a very good understanding of human rights issues . . . In the vast majority of public bodies, human rights have remained in the domain of legal services or human resources. In light of this, it seems difficult to understand how an approach based on contract specification could be effective in protecting the human rights of service users.[137]

But while it lacks the glamour of human rights adjudication, public lawyers should not lose sight of the valuable spaces for dialogue inherent in the contractual process, as also the sense of shared 'ownership' familiarly associated with the private legal form. Contract compliance remains a useful part of the equipment for the hard slog of mainstreaming human rights values where it really matters – beyond the courtroom. Irrespective of the statutory coverage, we could expect to see the gradual elaboration of model clauses, no doubt with inputs from the Commission for Equality and Human Rights.

[136] *Ibid*., p. 2.

[137] JCHR, *The Meaning of Public Authority under the Human Rights Act*, HC 410 (2006-07), p. 21(BIHR evidence); and see BIHR, *The Human Rights Act: Changing lives* (2007).

4. Flashpoints

The interaction of the conceptual framework of ordinary private law with, on the one side, the needs of public policy and administration and, on the other, demands for individual protection, infuses the case law. Perhaps confusingly, the courts are found in certain situations holding fast to, or dismantling, old exceptions or privileges in favour of a private law model, and in others edging towards a public law one. Fuelled by the ever-increasing economic and social significance of the 'contractual revolution' – public procurement as big business (disappointed tenderers), outsourced public-service delivery (afflicted users) – alternative ways of developing legal accountability are naturally the subject of exploration. Judicial review has been weak however in the very area where administrative development has been strong. The prevailing common law ethos of government contracts as subject to general private law doctrines facilitates the use of informal administrative or negotiated rules. A public law system would supervise and monitor such arrangements; here the result has been judicial reluctance to apply to the contract function common law doctrines of judicial review that apply to other government activities; as also, in the context of contracted out public services, Convention rights. At one with a strong dose of neo-liberalism, the inhibition is connected with the consensual basis of contract and freedom of contract.[138] Let us look more closely.

(a) From incapacity to restitution

Unlike the Crown, statutory bodies such as local authorities have no general capacity to contract. The ultra vires principle applies to contract as to other activities and the scope of the power will be dependent upon the construction of the relevant legislation. Historically, cases have been few and far between, a reflection both of broad and flexible legal frameworks,[139] and of light-touch judicial scrutiny (a power to contract easily implied[140]). Providing that 'a local authority shall have power to do anything . . . which is calculated to facilitate, or is conducive or incidental to, the discharge of any of its functions', s. 111 of the Local Government Act 1972 embodied this approach.[141]

Contrariwise, the undermining of traditional relationships by the assertion of a strong central will became a familiar theme during the long years of

[138] See P. Cane, *An Introduction to Administrative Law*, 4th edn (Clarendon, 2004), pp. 294–301. But see E. McKendrick, 'Judicial control of contractual discretion' in Auby and Freedland (eds.), *The Public-Private Divide*.

[139] J. Griffith, *Central Departments and Local Authorities* (Allen and Unwin, 1966); M. Loughlin, *Local Government in the Modern State* (Sweet and Maxwell, 1986).

[140] *Attorney-General v Great Eastern Railway* (1880) 5 App Cas 473 is the standard authority.

[141] See likewise s. 2 of the Local Government Act 2000 and s. 60 of the Government of Wales Act 2006 (general power to promote or improve the economic, social or environmental 'well-being' of the area/country).

Conservative government.[142] Operationalised by audit in terms of 'regularity' (see p. 60 above), more structured and restrictive legislation brought the ultra vires principle to the fore. Local authorities meanwhile sought to protect expenditure programmes through creative accounting and innovative financing techniques. The scene was set for a flood of litigation on the power to contract, involving some very special kinds of arrangement: multi-million pound 'interest swaps'.

Led by Hammersmith, various councils had resorted to the futures market, exchanging debt with different banks with a view to benefiting from movements in interest rates. For several years a matter of doubt, the question whether these swap transactions were within the powers of the authorities became pressing as the market turned against them. In *Hazell v Hammersmith and Fulham LBC*[143] the local auditor sought a declaration of ultra vires, such that the contracts would be void and unenforceable against the public body. The main issue was whether, in the absence of express powers, the transactions could be brought within the general wording of s. 111. This in turn involved the question of the relationship with a very detailed set of provisions on borrowing set out in Schedule 13 to the same Act. The House of Lords roundly rejected the characterisation of the contracts as an appropriate means of debt management on the part of local government:

> *Lord Templeman:* A power is not incidental merely because it is convenient or desirable or profitable. A swap transaction undertaken by a local authority involves speculation in future interest trends with the object of making a profit in order to increase the available resources of the local authorities . . . Individual trading corporations and others may speculate as much as they please or consider prudent. But a local authority is not a trading or currency or commercial operator with no limit on the method or extent of its borrowing or with powers to speculate. A local authority is a public authority dealing with public monies . . . Schedule 13 establishes a comprehensive code which defines and limits the powers of a local authority with regard to its borrowing. This schedule is . . . inconsistent with any incidental powers to enter into swap transactions.[144]

Faced with huge loss of profits, the banks naturally called foul. There was much talk of the adverse impact of the case on the financial markets, both in terms of the cost of future credit to local government and damage to the City of London's international reputation. The Bank of England was sufficiently concerned to press the case, unsuccessfully, for what the Governor was pleased to call 'retro-corrective' legislation to restore 'the principle of the sanctity of

[142] M. Loughlin, *Legality and Locality: The role of law in central-local government relations* (Clarendon, 1996); I. Leigh, *Law, Politics and Local Democracy* (Oxford University Press, 2000).

[143] [1992] 2 AC 1.

[144] For criticism see M. Loughlin, 'Innovative financing in local government: The limits of legal instrumentalism' [1990] *PL* 372; [1991] *PL* 568.

conduct'. *Hazell* however is one of those public law cases involving many diverse and competing interests. Take the local taxpayers. Why should they bear the risk? For Lord Templeman, protection of the public is uppermost. Again, the risk of ultra vires was no more hidden from the banks than from the local authorities; indeed, dispensing with specialist legal advice, some banks had turned a blind eye to the issue.[145] And what, it may be asked, of 'government under law', or of the role of ultra vires in buttressing the system of representative democracy? Note that, presented with the auditor's claim and hence the task of statutory interpretation, the court in *Hazell* had only a binary choice.

Might a distinction be drawn between cases of 'simple' ultra vires, as in *Hazell*, and of abuse of power? Even due diligence and search on behalf of the private contractor may not reveal the transaction that is capable of being lawful but is unlawful by reason of the purpose for which it was made. The issue came to the fore in *Crédit Suisse v Allerdale BC*,[146] where the bank tried to enforce a contract of guarantee relating to a failed development scheme. The case further illustrates the 'defensive use' of ultra vires, with the council pleading both the insufficiency of s. 111 and – the arrangement being made in order to avoid the strict borrowing limits set by central government – improper purpose. For the bank, much was made of the potential prejudice in government contracts to the private party, especially in terms of expectation losses (the classic contract calculus). It was argued that ultra vires contracts made by public bodies should not be treated as void automatically; the court should be able to uphold a contract where the other party acted in good faith. An analogy was drawn with the discretionary character of remedies in judicial review procedure, the argument being that since the enforceability of the guarantee turned on issues of public law, the same principles should apply in considering the consequences of a breach of public law in civil proceedings. The bank lost on all the main issues however. The Court of Appeal conceded little by way of flexibility in the interpretation and application of local authority powers.[147] And the doctrine of ultra vires was applied to maximum effect – no distinct categories, no public law discretion:

> *Neill LJ:* I know of no authority for the proposition that the ultra vires decisions of local authorities can be classified into categories of invalidity . . . Where a public authority acts outside its jurisdiction in any of the ways indicated by Lord Reid in *Anisminic* [p. 27 above] the decision is void. In the case of a decision to enter into a contract of guarantee, the consequences in private law are those which flow where one of the parties to a contract lacks capacity.

[145] See E. McKendrick, 'Local authorities and swaps: Undermining the market?' in Goode and Cranston (eds.), *Making Commercial Law* (Oxford University Press, 1997).

[146] [1996] 4 All ER 129.

[147] See further the conjoined appeal, *Crédit Suisse v Waltham Forest London Borough Council* [1996] 4 All ER 176.

This is hardly satisfactory. Observe how the counterparty suffers the worst of the public/private law dichotomy: deprived of private law rights by public law yet unable in a commercial forum to take advantage of public law discretions. *Crédit Suisse* also cut against government policy, raising doubts over the guarantees and indemnities offered by statutory authorities in PPPs and under PFI. The predictable outcome was a dose of legislative pragmatism to mitigate the rigour of the common law. The Local Government (Contracts) Act 1997 is designed to provide contracting parties with a safe harbour while preserving the public protection of ultra vires. In consequence:

- Every statutory provision conferring or imposing a local government function confers power to contract for the provision of assets or services for the purposes of discharging that function.
- Local authorities can certify that they have power to enter into particular medium- or long-term contracts (as associated with PFI), so blocking arguments in private law proceedings of unenforceability.
- Conversely, rights of challenge of the auditor and – via judicial review – of local taxpayers are preserved.
- The court is further empowered however to permit the (otherwise 'void') contract to continue, so avoiding a possible disruption to services, and (if the parties have not otherwise stipulated) to award the private contractor compensation.

This is a neat little code which, by drawing the sting of *Crédit Suisse*, calms nerves. Administrative procedure is prioritised, elements of party autonomy factored, and the judges assigned a reserve power or back-up function. While some fine-tuning is in order, for example allowing for a contract to continue only on a transitional basis,[148] the model could usefully be applied to other agency-oriented fields of contractual governance.

It is one thing to declare the contract of a public body ultra vires, another to sort out the consequences. Take the situation following *Hazell*. Unable to claim damages for breach, the banks looked to the principle of unjust enrichment. Restitution had emerged in the early 1990s as a major growth area in domestic law.[149] Key doctrinal issues remained to be resolved however, a feature duly highlighted by the fluid and interactive character of the interest swap market.[150] To blow the whistle and seek to restore the players to their original position would prove a somewhat arbitrary exercise given the mixing of public and

[148] See A. Davies, 'Ultra vires problems in government contracts' (2006) 122 *LQR* 98. The radical alternative would be to afford statutory bodies like local authorities a general power of competence (for the problems, see R. Carnwath, 'The reasonable limits of local authority powers' [1996] *PL* 244).

[149] The essential 'breakthrough' case was *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548.

[150] See further, P. Birks and F. Rose (eds.), *Lessons of the Swaps Litigation* (Mansfield Press, 2000).

private bodies, and redistribution of the risk through separate parallel deals, in the market.[151] Bear in mind polycentricity and the limitations of adjudication (which tends to isolate and focus on particular transactions).

Matters came to a head again in *Kleinwort Benson Ltd v Lincoln City Council*.[152] Could the bank recover payments made in the mistaken belief that they were pursuant to a binding contract or did an old (but much criticised) common law rule of no recovery for mistake of law prevent this? Recognition of the claim would allow for greater legal flexibility through the principle of unjust enrichment in cases of contractual incapacity. Showing scant sympathy for the financially hard-pressed local authority, the House of Lords did so,[153] subject to general defences such as change of position. The ruling is one of a number that establishes restitution in the judicial 'tool-kit' of remedies against public bodies, including in non-contractual contexts, a dimension to which we return in Chapter 17.

(b) To fetter or not to fetter

The common law principle that a public authority must retain the freedom to exercise its discretionary power in the public interest is well established (see Chapter 5). But how far – *The Amphitrite* aside – should this 'no fettering' principle be pressed in the case of contract? With competing values in play of security of contract and party autonomy, and of government effectiveness and political responsiveness, the question admits of no simple answer. Two different approaches are found in the early authorities. One involves a very strict test whereby the contract is void if it overlaps the subject matter of a statutory power.[154] The other, ultimately favoured by the House of Lords,[155] entails the more benign test of incompatibility between the purpose of the statutory power and the contractual purpose. That this allows the use of contract as a tool of statutory purpose is of great contemporary significance; as when, so facilitated, long-term PFI-type arrangements cut at the public law values expressed by 'no fettering' (see Chapter 9).

The test of incompatibility operates to defeat blatant attempts to rewrite statutory obligations. A classic example is *Stringer v Minister of Housing and Local Government*,[156] where the local authority made a formal agreement with Manchester University to discourage development in the vicinity of the Jodrell

[151] As with back-to-back contracts where the local authority's transaction would be ultra vires and the counter-party's 'balancing' transaction with another bank perfectly valid.

[152] [1999] 2 AC 349. See further, for the sea of uncertainty, *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669.

[153] Building on *Woolwich Equitable Building Society v Commissioners of Inland Revenue* [1993] AC 70.

[154] *Ayr Harbour Trustees v Oswald* (1883) 8 App Cas 623.

[155] *British Transport Commission v Westmoreland County Council* [1958] AC 126, drawing on *Birkdale District Electric Supply Co Ltd v Southport Corpn* [1926] AC 355.

[156] [1970] 1 WLR 1281.

Bank telescope. The contract was held ultra vires since it bound the council to contravene the planning laws by a failure to consider all specified matters. Again in *R (Kilby) v Basildon DC*,[157] the Housing Act 1985 stipulated several ways to vary a council tenancy 'and not otherwise'. A clause in K's agreement purporting to give the tenants' committee a power of veto thus amounted to unlawful contractual fettering of the authority's management powers. Void *ab initio*, it could not found a legitimate expectation that the procedure would be followed.

Difficulties arise when – typical of a multi-functional body like a local authority – two potentially discordant statutory powers are involved. Take *R v Hammersmith and Fulham London Borough Council, ex p. Beddowes*.[158] Acting under a statutory power to dispose of land held for housing purposes, the ruling Conservative group resolved to sell off part of an estate to property developers and to enter into covenants over the remainder precluding the council from exercising a statutory power to provide housing via new tenancies. The contract, bitterly opposed by the Labour opposition, was signed a few hours before control of the council changed hands following local elections. A resident sought judicial review on the basis that the covenants were an unlawful fetter on the council's powers as a housing authority. By a majority, the Court of Appeal dismissed the challenge:

> *Fox LJ:* What we are concerned with in the present case are overlapping or conflicting powers. There is a power to create covenants restrictive of the use of retained land; and there are powers in relation to the user of the retained land for housing purposes. In these circumstances, it is necessary to ascertain for what purpose the retained land is held. All other powers are subordinate to the main power to carry out the primary purpose . . . Now the purpose for which the . . . estate is held by the council must be the provision of housing accommodation in the district. The council's policy in relation to the estate . . . seems to be consistent with that purpose. The estate is in bad repair and the policy is aimed at providing accommodation in the borough of higher quality than at present by means of a scheme of maintenance and refurbishment . . . If the purpose for which the power to create restrictive covenants is being exercised can reasonably be regarded as the furtherance of the statutory object, then the creation of the covenants is not an unlawful fetter. All the powers are exercisable for the achieving of the statutory objects in relation to the land, and the honest and reasonable exercise of a power for that purpose cannot properly be regarded as a fetter upon another power given for the same purpose.

Surely this formulation is too broad? The wide definition of 'primary purpose' basically deprives the no-fettering principle of legal effect. Covenants not in furtherance of a statutory power would anyway be unlawful. There is much to be said for the dissenting judgment in terms of representative democracy and electoral choice:

[157] [2006] EWHC 1892 (Admin).

[158] [1987] 2 WLR 263. See also *Dowty Boulton Paul Ltd v Wolverhampton Corporation* [1971] 1 WLR 204.

> *Kerr LJ:* The court must consider with the greatest care whether the decisions of the . . . council were actuated by policy reasons based upon the proper discharge of the authority's powers and functions as a housing authority, or by extraneous motives . . . The decision to contract . . . for the development, subject to these covenants, was an unreasonable and impermissible exercise of the powers and functions of a housing authority in the *Wednesbury* sense. Its predominant motivation was to fetter the political aspects of the future housing policy and not the implementation of the then . . . housing policy for reasons which were reasonably necessary at the time.

(c) Tendering and after: Judicial review

The sheer size of the government contracts market makes the case for legal protection of the public interest compelling. First, there is the ideal of fair access to the commercial benefits as expressed in principles of equal treatment and open competition. Secondly, the reality of informal networks fuels the argument for firm rules against bad faith and improper influence. According to Bailey:

> Hesitancy over the application of general public law standards concerning considerations, rationality and fairness . . . is misplaced. Each of these standards is sufficiently flexible to protect the legitimate interests of public authorities . . . Proper attention would then be placed, as appropriate, to the dimension of the public interest in the decision-making process in question . . . The rule of law requires public bodies to be held legally accountable in respect of abuses of power and unfairness . . . Public law principles properly applied need not distort the normal processes of commercial negotiations between parties simply because one party happens to be a public body; a remedy will only be available where the public interest is engaged.[159]

This is not however a convincing case for judicial review simply because of the public status of a body: an institutional test.[160] It is not immediately obvious either that, in ordinary commercial contracts like leases, corporate interests dealing with public bodies should have greater protection than any other contracting parties, or that, when operating in competition with private enterprise, public bodies should be subject to additional constraints. It is important to bear in mind also the practical problems of expense, delay and potential hardship to a successful bidder associated with legal action.

A suitable alternative would be the ombudsman system (see Chapter 13). However 'action taken in matters relating to contractual or other commercial transactions' is specifically excluded from investigation by the PCA.[161] The justification traditionally given is that ombudsmen are concerned with the relations between government and governed, and should be excluded from

[159] S. Bailey, 'Judicial review of contracting decisions' (2007) *PL* 444, 463.

[160] 'Core' public authorities are of course subject to Convention rights for all their activities (HRA, s. 6): p. 377 below.

[161] Parliamentary Commissioner Act 1967, Sch. 3 [9].

activities like outsourcing in which public bodies are not acting in a distinctively governmental fashion.[162] Today this will not wash. Wearing her other 'hat' of Health Services Commissioner, the PCA reviews the actions and decisions of contractors in the realm of publicly funded health and social care services.[163] In constructing ombudsman 'one-stop shops' for their territories, the devolved administrations have also taken the opportunity to align the jurisdiction with the essential fact of contractual governance.[164] The general barrier on local government ombudsmen investigating contractual and commercial transactions was recently lifted,[165] so opening up a whole new front of external administrative accountability in England. Why, it may be asked, the double standard?

The old assumption[166] that decisions relating to procurement are not reviewable on the basis of common law principles has come under pressure. In tandem with the *Lewisham case* in the 1980s was *ex p. Unwin*,[167] in which decisions to remove a firm from the council's list of contractors and to prevent it from tendering for renewal of an existing contract were held to be subject to the requirements of procedural fairness. In neither case did the court stop to consider whether there was a 'public element' to the contractual decisions, the functional test commonly associated with limitations on, or reluctance to exercise, the supervisory jurisdiction.[168] Another more liberal case is *ex p. Donn*,[169] in which the decision-making procedure of a Legal Aid Committee in awarding a contract to represent claimants was held amenable to judicial review. According to Ognall J, the 'public dimensions' of the matter took it outside the realm of a commercial function. In *Molinaro*,[170] Elias J came to the same conclusion in a case involving the licensing of premises and change of user: 'Manifestly, the Council was not simply acting as a private body when it sought to give effect to its planning policy through the contract.'

'Exceptions that prove the rule' is one way of describing this short list of judicial interventions. The Divisional Court's decision in *R v Lord Chancellor's Department, ex p. Hibbit and Saunders*[171] has stood foursquare against treating

[162] See *Observations by the Government on the Select Committee Review of Access and Jurisdiction,* Cmnd 7449 (1979).

[163] Health Service Commissioners Act 1993, s. 7(2)(a). See M. Seneviratne, *Ombudsmen: Public services and administrative justice* (London: Butterworths, 2002), pp. 162–7.

[164] See e.g. Public Services Ombudsman (Wales) Act 2005, Sch. 2.

[165] Local Government and Public Involvement in Health Act 2007, s.173.

[166] See S. Arrowsmith, 'Judicial review and the contractual powers of public authorities' (1990) 106 *LQR* 277.

[167] *R v London Borough of Enfield, ex p. T F Unwin (Roydon) Ltd* [1989] COD 466. See also *R v Hereford Corpn, ex p. Harrower* [1970] 1 WLR 1424.

[168] As with 'the *Datafin* project' (Ch. 7). Not that the 'public law' element found has always been obvious: see e.g., *R v Barnsley Metropolitan Borough Council, ex p. Hook* [1976] 1 WLR 1052.

[169] *R v Legal Aid Board, ex p. Donn & Co* [1996] 3 All ER 1.

[170] *R (Molinaro) v Kensington LBC* [2001] EWHC Admin 896.

[171] [1993] COD 326; drawing on the judgment of Woolf LJ in *R v Derbyshire County Council, ex p. Noble* [1990] ICR 808. See also *Mass Energy Ltd v Birmingham CC* [1994] Env LR 298.

contractual powers in the same way as other governmental powers for the purpose of judicial review. The dispute involved the proper ambit of post-tender negotiations, a major issue in the design of procurement procedures pitting administrative pressures for flexibility and VFM against concerns of a level playing field and equal treatment. One of the unsuccessful bidders for a contract to supply court reporting services managed to persuade the court of a breach of legitimate expectation that was 'unfair' and caused 'prejudice'. But the challenge was dismissed for lack of jurisdiction.

> *Rose LJ:* It is not appropriate to equate tendering conditions attendant on a common law right to contract with a statement of policy or practice or policy decisions in the spheres of Inland Revenue, immigration and the like, control of which is the especial province of the State and where, in consequence, a sufficient public law element is apparent.
>
> *Waller J:* In considering whether a decision can be judicially reviewed, it is critical to identify the decision and the nature of the attack on it. Unless there is a public law element in the decision, and unless the allegation involves suggested breaches of duties and obligations owed as a matter of public law, the decision will not be reviewable.

Hibbit is one of many cases, some already discussed, others to come (see Chapter 15), in which the court has attempted to set the boundaries of judicial review, at a time and in a context where the boundary lines of public and private organisation are fast being overridden. The conceptual difficulty when a 'public law' oriented jurisdiction is faced by a governmental system increasingly premised on private law techniques is manifest. Administrative lawyers must again think in terms of transcending the 'divide' or of blending public and private law methodologies. The potential of implied contract is shown by *Blackpool and Fylde Aero Club Ltd v Blackpool Borough Council*,[172] a case involving bids for a local authority concession. It was held to be breach of a right to have a bid considered when the plaintiff's tender was mistakenly treated as late and excluded from the competition. The fact that the purchaser was a public body was treated as a relevant factor in finding the contract.

The pressures for a reworking of the conceptual limitation on judicial review are unrelenting. The role of the common law principles is naturally bound up with the juridification of procurement stemming especially from EC policies. Heightened litigiousness, as well as the increased resort to contractual techniques in public services, fuels the jurisprudential argument whenever gaps appear in the relevant statutory codes. A pair of Welsh cases shows the courts holding strictly to *Hibbit*. In *Menai Connect*[173] complaints of relevant considerations being ignored and of mistake of fact failed to trigger the supervisory jurisdiction: 'It is not every wandering from the precise paths of best practice that lends fuel to a claim for judicial review.' In the second case, *Gamesa*

[172] [1990] 3 All ER 25.

[173] *R (Menai Connect Ltd) v Department for Constitutional Affairs* [2006] EWHC 727 (Admin). See also *R (Cookson and Clegg) v Ministry of Defence* [2005] Eu LR 517.

Energy,[174] the judge accepted that the tendering process was clouded with irrationality but nonetheless dismissed the challenge for going to 'the nuts and bolts parts of the exercise.' The approach taken is that exercise of the supervisory jurisdiction is appropriate only for claims of illegality, bad faith or serious misconduct (typically fraud) amounting to abuse of process. As with the light-touch approach in regulation, there is an understandable judicial nervousness about becoming embroiled in such dynamic and multi-polar forms of commercial decision-making.

The 2006 Court of Appeal case of *Supportways*[175] raised the question of amenability to judicial review at the later stages of contract management. A service review by the council had left the incumbent firm facing the loss of its franchise to supply housing-related support services to vulnerable people. Complaining of a flawed assessment of cost-effectiveness, but with no contractual entitlement to a fresh review and not much interested in damages as a remedy, the company sought to have the assessment quashed and re-done properly. The court was firm. There was no sufficient nexus between the conduct of the service review and the public law powers of the council to ground the supervisory jurisdiction. The fact that the contractual obligations in question were framed by reference to the council's statutory duties did not make them public law duties:

> *Neuberger LJ:* It cannot be right that a claimant suing a public body for breach of contract, who is dissatisfied with the remedy afforded him by private law, should be able to invoke public law simply because of his dissatisfaction, understandable though it may be. If he could do so, it would place a party who contracts with a public body in an unjustifiably more privileged position than a party who contracts with anyone else, and a public body in an unjustifiably less favourable position than any other contracting party . . . It is one thing to say that, because a contracting party is a public body, its actions are, in principle, susceptible to judicial review. It is quite another to say that, because a contracting party is a public body, the types of relief which may be available against it under a contract should include public law remedies, even where the basis of the claim is purely contractual in nature.

The Diceyan equality principle is not to be lightly discarded.

(d) Service provision: Convention rights

Ministers when promoting the HRA clearly had in mind the changing basis of public service delivery; the classical international law rubric of 'vertical' effect, protection of citizens' rights against encroachment by the state, would

[174] *R (Gamesa Energy UK Ltd) v National Assembly for Wales* [2006] EWHC 2167 (Admin).
[175] *Hampshire CC v Supportways Community Services Ltd* [2006] EWCA Civ 1035. See also *Mercury Energy Ltd v Electricity Corporation of New Zealand* [1994] 1 WLR 521.

be adapted in light of the more complex, less hierarchical, arrangements of contractual and regulatory governance.[176] Brought into sharp focus by the expanded role of the private and voluntary sectors in areas like social housing and residential care, the issue for the courts has been the *scale* of the adaptation: generous, very generous, or not so generous, in terms of the reach of protection.

Cane has said that 'the only way of deciding whether a function is public or private is to apply normative criteria about the desirable reach of human rights norms. Functions are "public" or "private" only because we make them so for particular and varied purposes'.[177] Unfortunately, the Human Rights Act did not take this route. The relevant provision is s. 6, which provides that 'it is unlawful for a public authority to act in a way which is incompatible with a Convention right'. It then gives some basic guidance about amenability to jurisdiction:[178]

> (3) In this section 'public authority' includes –
>
> (a) a court or tribunal, and
> (b) any person certain of whose functions are functions of a public nature . . .
>
> (5) In relation to a particular act, a person is not a public authority by virtue only of subsection (3)(b) if the nature of the act is private . . .
>
> (6) "An act" includes a failure to act.

This leaves the courts to navigate inside a threefold conceptual framework:

- *'Core' or 'standard' public authorities*: these are left undefined but Lord Nicholls reads in an 'instinctive classification' of 'bodies whose nature is governmental' that draws on such factors as special powers, democratic accountability, public funding, an obligation to act only in the public interest, and a statutory constitution.[179] Ranging through central government departments and the devolved administrations to the police and local authorities, 'core' public authorities are thus akin to an elephant: difficult to describe but easily recognised. They are also termed 'pure' public authorities since – irrespective of the seemingly 'private' nature of particular activities – they must act compatibly with Convention rights in all they do. Contractual activity is no exception.
- *'Hybrid', 'mixed function' or 'functional' public authorities*: these are bodies required to comply with Convention rights when exercising a function of a

[176] See especially *Rights Brought Home: The Human Rights Bill*, Cm. 3782 (1997) [2]; also, HC Deb. col. 773 (16 February 1998) (Home Secretary Jack Straw).

[177] P. Cane, 'Church, State and human rights: Are parish councils public authorities?' (2004) 120 *LQR* 41, 45.

[178] Consistent with the general policy of the statute, s. 6 also contains special exceptions for parliamentary activities.

[179] *Aston Cantlow and Wilcote with Billesley Parochial Church Council v Wallbank* [2003] 3 WLR 283 [7].

public nature (s. 6(3)(b)), but not when doing something where the nature of the act is private (s. 6(5)). The categorisation follows *Datafin* (see p. 317 above) in looking to the nature of the power, but in making no reference to the source of the power or to 'institutional' factors (relationship with government) appears to go further. Where contracted-out service delivery stands is questionable.

- *'Courts and tribunals'*: The inclusion of courts and tribunals in the section lays on those bodies a continuing duty to develop the common law in the light of ECHR requirements in cases between individuals.[180] But the proposition that s. 6(3)(a) imports, but is limited to, 'indirect horizontal effect' is now generally accepted, and properly so in view of the design of the statute.[181] It is this lack of full horizontal effect – no direct obligation on private parties to comply with Convention rights – that places a premium on the meanings otherwise ascribed under s. 6 to 'a public authority'.

Adopting a classical liberal position on the importance of private space in which actors can pursue their own conception of the good, Oliver[182] warns against using s. 6 to 'roll back the frontiers of civil society' thus undermining values of pluralism and individual autonomy. To avoid the unpredictability otherwise associated with 'functions of a public nature', she thinks that only those activities involving the exercise by private bodies of specifically legally authorised coercion,[183] or authority over others which would normally be unlawful for a body to exercise, should be caught under s. 6(3)(b). A strong dose of pragmatism is also advisable given the many pressures on non-governmental service providers and the enormous range of decisions that the statutory formula might otherwise be read to encompass:

> A generous interpretation could encourage litigation between private parties which would generate legal uncertainty and have negative effects for the many bodies, often charitable or not-for-profit, providing services for disadvantaged people . . . Litigation or the risk of it could inhibit, and divert resources from, what most of us would regard as desirable activity in civil society . . . [It] could [be made] difficult or impossible for these bodies to take important managerial decisions about closure or modernisation of facilities . . . without being exposed to. . . the risk of having to obtain clearance . . . if services are being provided under contract, or . . . of being sued and thus being second-guessed by the courts . . . It would be discriminatory . . . if the nature (as 'public' or 'private') of a function that is performed by a

[180] The best known examples are in the realm of breach of confidence and privacy law; see further below, Ch. 17.

[181] For the doomed attempt to import the value of universality into s. 6, see Sir W. Wade, 'Horizons of horizontality' (2000) 116 *LQR* 217; and see, M. Hunt, 'The "horizontal effect" of the Human Rights Act' [1998] *PL* 423.

[182] D. Oliver, 'The frontiers of the state: Public authorities and public functions under the Human Rights Act' [2000] *PL* 476 and 'Functions of a public nature under the Human Rights Act' [2004] *PL* 329.

[183] As with the detention in hospital of mental health patients: *R(A) v Partnerships in Care Ltd* [2002] 1 WLR 2610.

> private organisation . . . depended on whether it was being provided under a contract with the recipient of the services, or a contract with a public authority . . . or under no contract and voluntarily.[184]

This argument can however be turned on its head. Short of full horizontal effect, some form of 'discrimination' is inevitable. Parliament's JCHR has naturally championed a broad interpretation of 'functions of a public nature', so warning against 'a serious gap' in human rights protection for the many vulnerable people dependent on contracted out public services.[185] 'A function is a public one when government has taken responsibility [for it] in the public interest . . . A State programme or policy . . . may delegate its powers or duties through contractual arrangements without changing the public nature of those powers or duties . . . It is the doing of [the] work as part of a government programme which denotes public function.'[186]

Faced with the open-ended language of s. 6, the courts have struggled from the outset. In *Leonard Cheshire*,[187] long-stay residents of a care home run by a large charitable organisation, whose places were funded by the local authority under a contractual arrangement, wished to challenge the decision to close the home and disperse them. Partly on the basis of promises of a 'home for life', Art. 8 was invoked, as it had been in *Coughlan* (see p. 224 above).This put the reach of the HRA in issue and hence, in a very practical way, the legally recognised contours of the state. Clearly concerned about the burdens otherwise imposed on small- to medium-size service providers, Lord Woolf dismissed the argument of a 'hybrid' case under s. 6(3)(b) on the ground that the charity was not 'enmeshed' in the council's activities. Other factors mentioned were that the charity was not exercising statutory powers and the absence of material distinction between the services provided by the care home to publicly and privately funded residents. Other than requiring the residents to look to the ('core') local authority for Convention rights, Lord Woolf had, by jumbling institutional and functional factors, provided little by way of practical guidance.

A recurrent issue in the cases is the appropriate degree of alignment between the reach of judicial review in the guise of (a) Convention rights and (b) common law principles: for example, should the limitations on 'the *Datafin* project', previously established in contract-type cases,[188] be read

[184] Oliver, 'Functions of a Public Nature', p. 342.

[185] JCHR, *The Meaning of Public Authority under the Human Rights Act*, HC 382 HL 39 (2003/4), p. 26. See also P. Craig, 'Contracting Out, the Human Rights Act and the Scope of Judicial Review' (2002) 118 *LQR* 551.

[186] JCHR, *The Meaning of Public Authority under the Human Rights Act*, HC 382 HL 39 (2003/4), pp. 46–7; and see *The Meaning of Public Authority under the Human Rights Act*, HC 410 (2006/7).

[187] *R (Heather) v Leonard Cheshire Foundation* (2002) 2 All ER 936. It is interesting to compare Lord Woolf's reasoning in distinguishing *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2002] QB 48 with his *Coughlan* judgment.

[188] As discussed in Ch. 7; and see *R v Servite Houses and Wandsworth LBC, ex p. Goldsmith and Chatting* (2000) 2 LGLR 997.

across? Pragmatic concerns to do with the manageability of 'a multi-streamed jurisdiction' (see Chapter 15), as where common law and Convention rights claims arise in a single case, point to the necessity for rough equivalence.[189] Clearly concerned to preserve some flexibility, Lord Hope in *Aston Cantlow* spoke of the common law authorities being helpful but not determinative.[190]

Aston Cantlow involved a somewhat arcane dispute: whether the historic liability of a private landowner to pay for local church repairs was overridden by Art. 1 of the ECHR First Protocol (peaceful enjoyment of possessions). The Court of Appeal thought it 'inescapable' that s. 6 bit, the parochial church council being part of 'the church by law established'. The speeches in the House of Lords were indicative, in Lord Nicholls' words, of a 'generously wide' interpretation of 'functions of a public nature',[191] yet the House took a relatively narrow approach to the particular case, reversing the Court of Appeal. Section 6 (3)(b) was circumnavigated with the help of the private law analogy of a restrictive covenant[192] and property law trumped human rights. But the speeches left unanswered the authority of *Leonard Cheshire*, which had not been mentioned. The law relating to Convention rights in the context of contractual governance was now hopelessly confused.

The scene was set for the difficult case of *YL*.[193] An elderly lady suffering from Alzheimer's disease lived in a home owned and operated by Southern Cross Healthcare Ltd, a market leader in residential accommodation and nursing services as regulated under the Care Standards Act 2000. Tasked with the classic welfare-state duty to 'make arrangements for providing' accommodation and care for such vulnerable persons, the council was funding most of the cost. As well as numerous provisions about service standards, both the tripartite contract (between council, company and claimant) and the company's master contract (with the council) contained a generic compliance clause to 'at all times act in a way which is compatible with the Convention rights'. Southern Cross retained the contractual right to terminate the placement 'for good reason', a right which it sought to exercise following a breakdown in relations with YL's family. This right the Official Solicitor's lawyers aimed to trump with a direct application of the Art. 8 right to respect for a person's home, raising the question whether Southern Cross was netted by s. 6. Government lawyers intervened to support a broad interpretation but, by a three to two majority, the House of Lords chose to tread more carefully.

[189] *R (Hammer Trout Farm) v Hampshire Farmers Markets Ltd* [2003] EWCA Civ 1056; *R (Mullins) v Jockey Club* [2005] EWHC 2197. See also (post *YL*), *R (Weaver) v London & Quadrant Housing Trust* [2008] EWHC 1377.

[190] [2003] 3 WLR 283 [52].

[191] [2003] 3 WLR 283 [11].

[192] And on the basis that a public authority could not be a 'victim' for ECHR purposes. See further M. Sunkin, 'Pushing forward the frontiers of human rights protection: The meaning of public authority under the Human Rights Act' (2004) *PL* 643.

[193] *YL (by her litigation friend the Official Solicitor) v Birmingham City Council and Others* [2007] UKHL 27; noted by Palmer (2007) 66 *CLJ* 559.

The minority (Lord Bingham and Lady Hale) looked at matters through the lens of the welfare lawyer. Echoing the JCHR, their starting point was the modern state's acceptance of responsibility for social welfare. In Lord Bingham's words, 'the intention of Parliament is that residential care should be provided, but the means of doing so is treated as, in itself, unimportant'. A contextual and purposive approach was called for, centred on protection of the individual:

> Those who qualify for residential care . . . are, beyond argument, a very vulnerable section of the community . . . Despite the intensive regulation to which care homes are subject, it is not unknown that senile and helpless residents of such homes are subjected to treatment which may threaten their survival, may amount to inhumane treatment, may deprive them unjustifiably of their liberty and may seriously and unnecessarily infringe their personal autonomy and family relationships. These risks would have been well understood by Parliament when it passed the 1998 Act.[194]

In seeking so to infuse the 'mixed economy of care' with legal accountability through Convention rights, Lady Hale mentioned a series of factors, predictably more functional than institutional in character, indicative of amenability to jurisdiction:

> One important factor is whether the state has assumed responsibility for seeing that this task is performed. In this case, there can be no doubt . . . Another important factor is the public interest in having that task undertaken. In a state which cares about the welfare of the most vulnerable members of the community, there is a strong public interest in having people who are unable to look after themselves . . . looked after properly . . . Another important factor is public funding. Not everything for which the state pays is a public function. The supply of goods and ancillary services such as laundry to a care home may well not be a public function. But providing a service to individual members of the public at public expense is different . . . Another factor is whether the function involves or may involve the use of statutory coercive powers . . . Finally there is the close connection between this service and the core values underlying the Convention rights and the undoubted risk that rights will be violated unless adequate steps are taken to protect them.[195]

Viewing the case through a commercial law lens, the majority saw things very differently. Lord Scott was robust: the 'contractual revolution' could not be reduced to a matter of means; in repressing direct service provision, it had wrought substantive – capitalist – ends. 'Private' enterprise was exactly that:

> Southern Cross is a company carrying on a socially useful business for profit. It is neither a charity nor a philanthropist. It enters into private law contracts with the residents in its care homes and with the local authorities with whom it does business. It receives no

[194] *YL* [16] [19]. See further, JCHR, *The Human Rights of Older People in Healthcare*, HC 378 (2006/7).
[195] *Ibid*. [66–71]

> public funding, enjoys no special statutory powers, and is at liberty to accept or reject residents as it chooses (subject, of course, to anti-discrimination legislation which affects everyone who offers a service to the public) and to charge whatever fees in its commercial judgment it thinks suitable. It is operating in a commercial market with commercial competitors.
>
> For these reasons I am unable to conclude that Southern Cross, in managing its care homes, is carrying on a function of a 'public nature' . . . As to the act of Southern Cross that gave rise to this litigation, namely, the service of a notice terminating the agreement . . . it affected no one but the parties to the agreement. I do not see how its nature could be thought to be anything other than private.[196]

The swing votes of Lords Mance and Neuberger highlighted the difficulty of differentiating between privately and publicly funded residents, as well as the positive role for contract as a vehicle of human rights protection.[197] Engaging in a nicely 'structured dialogue' with the lawmaker (see p. 138 above) over the nature and extent of human rights protection, Lord Neuberger concluded by saying:

> It may well be thought to be desirable that residents in privately owned care homes should be given Convention rights against the proprietors. That is a subject on which there are no doubt opposing views, and I am in no position to express an opinion. However, if the legislature considers such a course appropriate, then it would be right to spell it out in terms, and, in the process, to make it clear whether the rights should be enjoyed by all residents of such care homes, or only certain classes (e.g. those whose care and accommodation is wholly or partly funded by a local authority).[198]

In honouring a commitment to reverse *YL*, however, ministers have taken a strictly limited approach. According to s. 145 of the Health and Social Care Act 2008:

> A person ('P') who provides accommodation, together with nursing or personal care, in a care home for an individual under arrangements made with P under the relevant statutory provisions is to be taken . . . to be exercising a function of a public nature in doing so.

This leaves *YL*, in the absence of general valedictory legislation,[199] as good authority across a broad swathe of contracted public service provision. In the case of care homes it leaves self-funded individuals excluded from the protec-

[196] *Ibid*. [26] [33–4].

[197] *Ibid*. [117] [149] [151]. The decisions on amenability to jurisdiction at common law were also considered of 'real assistance' at [156]. See conversely, *R (Weaver) v London & Quadrant Housing Trust* [2008] EWHC 1377.

[198] *Ibid*. [171].

[199] The government has been consulting on the matter: see JCHR, *A Bill of Rights for Britain?* HC 150 1 (2007/8) [281–5].

tion of Convention rights now afforded to publicly funded residents – a wholly unattractive form of public/private 'dichotomy'. But this is not necessarily, as Lords Mance and Neuberger hinted, the end of the story. We must not forget that *YL* was tried on the preliminary issue of whether Southern Cross, in providing accommodation and care for the appellant, was exercising public functions for the purpose of s. 6 of the 1998 Act. No other outcome was necessary, as Southern Cross had withdrawn the request to remove the appellant from the home before the House of Lords hearing. Had it been otherwise, the House might well have explored other ways round the problem, turning first to techniques of contract compliance (see p. 362 above). Had it been shown that ECHR standards were infringed, the contractual obligation to 'at all times act in a way which is compatible with the Convention rights' might have come into play. Or it might have been argued that the contractual right to terminate 'for good reason' could not cover a breach of human rights protection. More boldly, implied terms could be read into care contracts that treatment will not be degrading.

5. Contract-making: Europeanisation

Nowhere is the contemporary blending of domestic administrative law with EU law better illustrated than in the special 'administrative procedures act' on public procurement effectively comprised by the Public Contracts Regulations 2006 and the Utilities Contracts Regulations 2006.[200] The regulations are part of a convoluted legal development involving repeated use of the ECA 1972 to make delegated legislation drawing down into administrative practice and procedure the overarching legal requirements of the Single Market.[201] Typically however, the EU requirements not only drive, but are also driven by, national developments in law and administration. Reflecting classic debates about rules and discretion (see Chapter 5), the evolving regime raises general questions about the efficacy and scale of the regulation of public contract making. It is also notable for innovations in the realm of remedies.

(a) Development

The European Commission has over the years been very active in the field, targeting a mass exercise in dominium power estimated to account for over 15 per cent of Member States' total GDP. A legal framework centred on public contracts being awarded in an open, fair and transparent manner has, as policy rationales, the elimination of discrimination on national grounds, economic

[200] Respectively, SI Nos. 5 and 6 of 2006.

[201] S. Arrowsmith, 'Legal techniques for implementing directives: A case study of public procurement' in Craig and Harlow (eds.), *Law Making in the European Union* (Kluwer, 1998) and 'Implementation of the new EC Procurement Directives' (2006) 15 *PPLR* 86.

efficiency and European competitiveness in the global market,[202] VFM for awarding authorities, and anti-corruption. The paradox is immediately apparent: burgeoning regulation in the cause of market liberalisation.[203]

A major programme of legislative reform initiated by the Commission in the mid-1980s was designed to break the stranglehold of domestic preference in public purchasing.[204] As against the various 'pull factors' ranging from the consciously national ('Buy British') to the collateral or social, and on through administrative convenience or, as the contract theorist might insist, the virtues of trust and co-operation associated with 'repeat' contracting, earlier efforts had achieved conspicuously little.[205] Application of basic Treaty articles by the ECJ remained sporadic and peripheral,[206] relevant directives lacked an effective enforcement mechanism and in practice were largely ignored.[207] The reform programme involved widening control by bringing in the utilities[208] and deepening it by strengthening procedural requirements and establishing a new regime of sanctions. Different activities – works, supplies, services – were each made the subject of a specific directive, which received general underpinning from the Remedies or Compliance Directive.[209] 'Contracting authorities' were broadly defined to include central government, local government and public agencies; thresholds were used to exempt minor contracts.

The use of 'a pathway model', whereby public purchasers are prescribed a whole series of steps to follow, is significant in terms of administrative law technique. Involving stress on the transparency of decision-making and the use of objective criteria specified in advance, the design reflected the familiar assumption that whenever there is broad administrative discretion arbitrariness or discrimination follows automatically. Perhaps however 'pathways model' is the better description. In recognition of demands for competition and manageability in routine transactions, and for greater flexibility in complex (large-scale) contracts, public purchasers were given the choice of one of three award procedures:

- *open procedure* – all interested firms being allowed to tender
- *restricted procedure* – tenders being invited from a list of firms drawn up by the authority

[202] International legal ordering in the shape of the WTO's Government Procurement Agreement (GPA) underscores this aspect.

[203] M. Chiti, 'Regulation and market in the public procurement sector' (1995) 7 *European Review of Public Law* 373; S. Arrowsmith, 'The past and future evolution of EC procurement law: from framework to common code?' (2006) 35 *Public Contract Law J.* 337.

[204] Commission White Paper, *Completing the Internal Market,* COM (85) 310.

[205] Evidenced by very low rates of import penetration: W. S. Atkins Management Consultants, *The Cost of Non-Europe in Public Procurement* (1988).

[206] For an exception that proves the rule, see Case 45/87 *Commission v Ireland* [1988] ECR 4035.

[207] See Directive 71/305 (Works), Directive 77/62 (Supplies); and generally F. Weiss, *Public Procurement in European Community Law* (Athlone Press, 1992).

[208] Which were given their own, rather more flexible regime: Directives 93/38 (Utilities), 92/13 (Utilities Remedies).

[209] Directives 93/37 (Works), 93/96 (Supplies), 92/50 (Services), 89/665 (Compliance).

- *negotiated procedure* – the contractual terms being negotiated with chosen contractors, the use of which has however been strictly confined precisely because of the informality.[210]

As well as formal implementation by statutory instrument,[211] this regime in turn became the subject of mass soft-law guidance inside the domestic system.[212] We touch here on a defining feature of EU procurement law in recent years: a fast-moving jurisprudence that sees the ECJ filling gaps in the directives, elaborating relevant factors, and utilising general principles in the cause of market integration pre- and post-Enlargement.[213] Take the principle of transparency. In support of equal treatment, the ECJ has in this context afforded it an expansive meaning, to the extent of requiring elements of rule-based decision-making.[214] Again, take the vexed issue of contract compliance to achieve social objectives. Whereas the Commission typically urged market purity, the Court in a well-known line of cases mitigated this. Provided there were no discriminatory effects, it could be lawful to incorporate local policy objectives like combating unemployment in the contractual conditions for performance; likewise, as an award criterion, provided that, for example, the relevant environmental factors related to the subject matter of the contract.[215] The case law has thus accommodated New Labour's cautiously rounded approach to use of the dominium power.

Reviewing the scheme in the late 1990s, the Commission initially suggested little change. The economic impact being relatively limited, with public purchasing continuing to operate overwhelmingly along national lines, the existing framework should be given more time to bite.[216] As the consultation made clear, however, this meant skating over a series of difficulties with formal legal ordering demonstrated by the rules.[217] Take the problem of over-rigidity. Considerable compliance costs were being imposed and hard to justify. Rather than improving the efficiency of purchasing, such

[210] Case C-71/92 *Commission v Spain* [1993] ECR I-5923.

[211] See e.g. Public Works Contracts Regulations 1991, SI No. 2680.

[212] So paralleling the Commission's use of the interpretative communication: notably, *Public Procurement and Protection of the Environment* COM (2001) 274 and *Public Procurement and Social Policy* COM (2001) 566.

[213] C. Bovis, 'Developing public procurement regulation: Jurisprudence and its influence on law making' 43 *CML Rev.* (2006) 461.

[214] See especially Cases C-496/99 *Commission v CAS Succhi di Frutta SpA* [2004] ECR-I 3801, C-340/02 *Commission v France* [2004] ECR I-9845 and C–532/06 *Lianakis* [2008] ECRI–251. In Case C-324/98 *Telaustria* [2000] ECR I-10745 the Court produced the idea of positive obligations of transparency arising outside the ambit of the directives.

[215] Case 31/87 *Gebroeders Beentjes BV v Netherlands* [1989] ECR 4365); Case C-225/98 *Commission v France ('Calais Nord')* [2000] ECR I-7455; Case C-513/99 *Concordia Bus Finland v Helsinki* [2002] ECR I-7213.

[216] Commission Green Paper, *Public Procurement in the European Union: Exploring the way forward* (1996) COM (96) 583, pp. 5–6.

[217] Commission, *Communication on Public Procurement and the European Union* (1998) COM, 143.

a framework might so easily inhibit efficient practices with the rise of more formal and compartmentalised arrangements operating to undermine the important relational values of co-operation and co-ordination. Transparency, meanwhile, was scarcely a given. Whereas the Commission had spoken of 'a few rules based on common sense',[218] complaints about the un-readability of a fragmented and often highly technical legal framework were legion. And there was ample scope for 'games with rules' and for 'boiler plate' reasons (see p. 729 below).

Directives conceived at the start of the 1990s increasingly smacked of a lost world. There was now the little fact of an IT revolution to contend with which would soon be opening up whole new vistas in the shape of an electronic, pan-European, public purchasing market place.[219] Changing contractual modalities had also to be factored into the equation, ranging through PPP and PFI, and from electronic auctions to streamlining 'framework agreements' (establishing general terms for future contracts with participating suppliers). This all struck a strong chord in the UK, which proved a voluble critic.[220]

A major revamp eventually resulted (with implementation in the UK in the 2006 regulations). The talk now was of simplification, modernisation and flexibility.[221] The core directives were reduced to three in number: a consolidated public-sector directive,[222] a revised directive on utilities,[223] and the compliance directive. Many technical distinctions were ironed out; incorporation of court rulings into the legislation added clarity. 'Simplification', however, should not be confused with 'simplicity'. The re-design in fact sends out mixed messages. Better to accommodate more collaborative forms of government contracting, the regulatory framework is loosened in certain respects. Aimed at curbing discretion, there are also elements of deepening and widening.[224]

The most prominent feature is a fourth pathway:

- *competitive dialogue procedure* – providing space for discussions with suppliers to develop suitable solutions, on which chosen bidders are then invited to tender.

[218] Commission, *Public Procurement in Europe: The Directives* (1994), p. 3.

[219] See Commission Communication, *Action Plan for the Implementation of the Legal Framework for Electronic Public Procurement* (2004); and, on the internal market website, the 'SIMAP' and 'TED' (Tenders Electronic Daily) resources.

[220] HM Treasury, *Investigating UK Business Experiences of Competing for Public Contracts in Other EU Countries* (2004) ('the Wood Review').

[221] Commission, *Communication on Public Procurement*, p. 3; and see, for an upbeat assessment of the growing regulatory 'impact', Commission, *Report on the Functioning of Public Procurement Markets in the EU* (2004).

[222] Directive 2004/18/EC on the co-ordination of procedures for the award of public works contracts, public supply contracts and public service contracts.

[223] Directive 2004/17/EC co-ordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors. The directive reflects the view that purchasers in liberalised sectors (e.g. telecoms) should not be covered.

[224] Through e.g. detailed provisions on framework agreements and e-auctions. See C. Bovis, 'The new public procurement regime of the European Union' 30 (2005) *EL Rev.* 607.

Designed to facilitate the complex, longer-term, contracting commonly associated with PFI (see Chapter 9), while avoiding the opacity inherent in the negotiated procedure, it is very much a compromise; CDP offers up its own challenges. Sitting comfortably with the contract theorist's desiderata of co-operation and mutual learning, it can also be slow, expensive and resource intensive. Early planning and preparation are called for; the public purchaser must be nimble:

> Under the competitive dialogue procedure all substantial aspects of the bid need to be agreed before conclusion of the dialogue. The dialogue process should be used to identify the best means of satisfying the Authority's needs. The dialogue should continue until the Authority has identified and defined its requirements with sufficient precision to enable final bids (which meet those requirements) to be made. At that time the Authority should be able to identify one or more solutions to its requirements (since, as a result of the separate dialogues, different solutions may have been developed). A call for final bids should then be made and the winning bidder selected. After final bids have been submitted, it is only permissible to clarify, specify and fine tune. This does not necessarily mean that the Contract has to be complete in every detail at this stage, but it does mean that, after this time, no changes may be made to the basic features of the bid which are likely to distort competition or have a discriminatory effect.[225]

(b) On the straight and narrow

Let us follow the reworked pathway model (as with a public-works contract). The application of the directive/national regulations having been ascertained,[226] there are requirements to advertise (today electronically) in the EC Official Journal and on the use of European technical specifications (or a properly designated substitute). Such specifications may be defined 'in terms of performance or functional requirements' but any such requirements must be 'sufficiently precise to allow an economic operator to determine the subject of the contract and a contracting authority to award the contract'.[227] Next come selection of a contract award procedure, with the regulations making clear that from the choice of four pathways the open and restricted procedures are the standard options,[228] and selection of (an) appropriate (number of) bidders. An authority, in determining whether to exclude firms from tendering on the basis

[225] HM Treasury, *Standardisation of PFI Contracts*, 4th edn (2007) [32.1.2 –3]. See further, HM Treasury and OGC, *Guidance on Competitive Dialogue* (2008).

[226] For the thresholds see Public Contracts Regulations 2006, Art. 8 (as amended). Defence procurement, hitherto the chief subject-matter exclusion, is currently the subject of another legislative package; see Commission, Proposal for a Directive on the coordination of procedures for the award of certain public works contracts, public supply contracts and public service contracts in the fields of defence and security, COM (2007) 766.

[227] Public Contracts Regulations 2006, Art. 9(7).

[228] *Ibid*., Art. 12. Sub-sub-pathways such as electronic auctions are made the subject of separate Articles.

of standing and competence, 'shall' do so in the light of fraud or corruption and 'may' do so for other relevant offences (environmental crime perhaps).[229] This brings national officials to the actual award process and post-decisional procedures (steps 6 and 7). The pathway model, we learn, is both determinedly logical and complex. The length of the regulations – some 80 pages – speaks volumes. Perhaps fortunately, the OGC supplies public purchasers with a flow chart.[230]

The crucial award stage embodies Davis-type techniques for control of discretion (see p. 200 above). In the provisions set out below,[231] rules are thus deployed in order to minimise the scope for abuse and so that procurement decisions can be more easily monitored. Take paragraph 2, a nice example of *structuring* discretion with a checklist of relevant factors. This puts flesh on the bones of the 'most economically advantageous' test (which (translating as VFM) it is UK government policy to use). The drafting dictates a commercial outlook and, reflecting the jurisprudence, gives some additional leeway.[232] Paragraphs 3 and 4 show the attempt at *confining* discretion. Underpinned by developments in IT, and linking with audit technique, public purchasing is shaped in terms of mathematical formulae. The Commission championed these novel provisions, saying that the previous stipulation[233] had undermined the pathway model by allowing too much discretion.[234] (How much the rewording will achieve other than increased administrative cost remains to be seen.) The *checking* of additional discretions is shown in the special anti-dumping provisions of paragraph 6.

Criteria for the award of a public contract

1. 30 (1) Subject to regulation 18(27) [specifying 'the most economically advantageous' test in competitive dialogue procedure] and to paragraph 6 . . . of this regulation, a contracting authority shall award a public contract on the basis of the offer which –
   (a) is the most economically advantageous from the point of view of the contracting authority; or
   (b) offers the lowest price.

(2) A contracting authority shall use criteria linked to the subject matter of the contract to determine that an offer is the most economically advantageous including quality, price, technical merit, aesthetic and functional characteristics, environmental characteristics, running costs, cost effectiveness, after sales service, technical assistance, delivery date and delivery period and period of completion.

[229] *Ibid*., Art. 23.
[230] See OGC, *EU Procurement Guidance* (2008).
[231] Public Contracts Regulations 2006, Art. 30.
[232] Social and environmental considerations as contractual conditions of performance are also provided for: Art. 39.
[233] Use 'where possible' of the 'descending order of importance' approach (now mandated as the second string in [5]).
[234] Commission, *Explanatory Memorandum to Proposal for a Directive on the Co-ordination of Public Sector Award Procedures*, COM (2000) 275, p. 12.

(3) Where a contracting authority intends to award a public contract on the basis of the offer which is the most economically advantageous it shall state the weighting which it gives to each of the criteria chosen in the contract notice or in the contract documents . . .
(4) When stating the weightings referred to in paragraph (3), a contracting authority may give the weightings a range and specify a minimum and maximum weighting where it considers it appropriate in view of the subject matter of the contract.
(5) Where, in the opinion of the contracting authority, it is not possible to provide weightings for the criteria referred to in paragraph (3) on objective grounds, the contracting authority shall indicate the criteria in descending order of importance in the contract notice or contract documents . . .
(6) If an offer for a public contract is abnormally low the contracting authority may reject that offer but only if it has – (a) requested in writing an explanation . . . (b) taken account of the evidence provided in response . . . and (c) subsequently verified the offer . . . being abnormally low with the economic operator . . .

The pathway model needs fencing. As well as public notice of the contract award, the national regulations faithfully specify strengthened reasons-giving requirements, extending at the request of a rival bidder to 'the characteristics and relative advantages of the successful tender'.[235] Linkage with provisions on remedies is immediately apparent. A raft of information and record-keeping requirements buttresses the monitoring role of the Commission. Reflecting and reinforcing the judicial contribution, there are now clear legislative statements of general principle. Article 4(3) of the Regulations provides: 'A contracting authority shall (in accordance with Article 2 of the Public Sector Directive) – (a) treat economic operators equally and in a non-discriminatory way; and (b) act in a transparent way.'

Showing EU law as a source of judicial review, the first important case arising under the new regulations, *R (Law Society) v Legal Services Commission*,[236] is directly in point. The dispute was over the new unified contract between the Commission and solicitors wishing to undertake publicly funded work, following on the Government White Paper *Legal Aid Reform: The way ahead*.[237] Prioritising flexibility to the extent of allowing for major policy change, the Commission had included in this 'take it or leave it' arrangement wide-ranging powers of unilateral amendment. But was this sufficiently 'transparent' in light of the ECJ jurisprudence? The Court of Appeal thought not:

Lord Phillips CJ: What is . . . plain is that among the most important factors for compliance with the principle of transparency are the definition of the subject matter of the contract and need for certainty of terms. That is why . . . Regulation 4(3) requires the contracting authority 'to act in a transparent way' and why Regulation 9(7) requires technical

[235] Public Contracts Regulations 2006, Art. 32.
[236] [2007] EWCA Civ 1264. See also *Letting International Ltd v Newham LBC* [2008] EWHC 1583.
[237] Cm. 6993 (2006).

> specifications in terms of performance or functional requirements to be 'sufficiently precise to allow an economic operator to determine the subject matter of the contract. . .'
>
> It is true that the LSC could not make arbitrary or improper amendments. That would follow not only from general principles of public law, but also from the Regulations and no doubt also from an implied term to that effect in the Unified Contract or from the express term . . . that the LSC will act as a 'responsible public body'. But that would not achieve the transparency of the contractual terms . . . Nor is it achieved by the point that the parameters of the possible amendments had been published in *Legal Aid Reform: The way ahead*. The right reserved to amend the contract . . . 'to facilitate a Reform of the Legal Aid Scheme' is on its face not limited to amendments to give effect to proposals in the White Paper. The power to make amendments is better to comply with the LSC's statutory duties or fulfil its statutory functions . . . The power also includes changes consequent on 'new approaches to procurement and contracting'.
>
> It cannot therefore be said that there are any effective limitations, still less that the parameters of change will be known to the profession. The power of amendment is so wide in this case that it amounts to a power to rewrite the Contract.

How far can this reasonably go?[238] Together with the competing values of security of contract and government responsiveness, the issue is raised of the limitations to contract in terms of presentiation. Judges need to understand that bleeding out contractual discretion in the name of transparency can defeat the object.

(c) Enforcement and remedy

This regime places great reliance on private legal action to police it (the Commission can only do so much by way of infringement proceedings). Designed to promote quick and effective means of redress, the 1989 Compliance Directive introduced special provisions on remedies, which function alongside the ordinary remedies of English law.[239] Just like the famous cases of *Factortame* and *Francovich* (see Chapter 4), they operate to erode the procedural autonomy of national law in order to establish the means for the vindication of EC rights.[240]

The pre-contractual remedies are wide-ranging. The national court thus has powers to make an interim order halting progress, to set aside a decision or amend any document, and to award damages to firms for breach of duty. Once a contract is made, however, damages have hitherto been the only available remedy. Aggrieved suppliers in fact have little incentive to seek damages in this situation. The courts are not well equipped to assess relevant matters, as with

[238] The successful challenge itself prompted a more collaborative approach to legal aid reform: see joint statement by the Legal Services Commission, Law Society and Ministry of Justice, 2 April 2008.

[239] See on judicial review, *R (Cookson) v Ministry of Defence* [2005] EWCA Civ 811.

[240] Whereas the original design was typically skeletal, the ECJ has done much to fill out the rules using the general EC principle of effectiveness. See e.g. Case C-81/98 *Alcatel* [1999] ECR I-7671.

the relative economic advantage of competing bids. Essentially a contribution to company costs, the remedy has no real corrective effect.[241] Commission research confirms that the action for damages is rarely used; recourse to the pre-contractual remedies is more common, but varies considerably among the Member States.[242] The UK was found to have the lowest rate of litigation (remedies actions in just 0.02 per cent of tendering processes). One explanation would be high rates of compliance. The Commission, however, singles out the high litigation costs associated with the domestic choice of review body – in England and Wales, the High Court.[243]

Another bout of reform is currently being implemented: more prescription through codification. Bearing ample testimony to the difficulties of formal regulation, a new Compliance Directive[244] addresses two main aspects. First, pre-contractual remedies sound well, but they may be defeated by a 'race to signature' by awarding authorities. The ECJ had previously held that where, as in the UK, a national system of remedies did not allow a supplier to overturn a concluded contract, and failed to guarantee the possibility of challenging an award decision pre-contractually, it was non-compliant.[245] A good example of national administrative law being driven from Luxembourg, a mandatory standstill period between award decision and contract award was thus included in the 2006 regulations.[246] Similar requirements in the new directive underwrite this.[247]

The second aspect calls for the fashioning of a novel remedy in domestic administrative law. The Commission's research had further highlighted the limited coverage of 'the pathway model'.[248] Thresholds and exemptions aside, attention focused on what the ECJ has termed 'the most serious breach of Community law in the field of public procurement on the part of a contracting authority',[249] namely the direct award of a contract which should have been subject to a transparent and competitive award procedure. The directive accordingly provides for the remedy of 'ineffectiveness' (which will also operate to sanction breaches of the standstill period). The national authorities can choose whether this entails retrospective cancellation (of all contractual

[241] A familiar complaint among practitioners: see e.g. A. Brown, 'Effectiveness of remedies at national level in the field of public procurement' (1998) 7 *PPLR* 89.

[242] Commission, *Impact Assessment Report: Remedies in the field of public procurement* SEC (2006) 557.

[243] *Ibid.*, p. 18.

[244] Directive 2007/66/EC amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts. Member States have two years in which to implement.

[245] In Case C-81/98 *Alcatel* [1999] ECR I-7671.

[246] Of 10 days: Public Contracts Regulations 2006, SI No 5 [32(3)].

[247] See OGC, *Consultation on the Approach to Implementation of the EU Remedies Directive* (2008).

[248] With an estimated 16% of total public procurement in the Member States advertised in the EU Official Journal: Commission, *Impact Assessment Report*, p. 9.

[249] Case C-26/03 *Stadt Halle* [2005] I-1 [37]. See also Joined Cases C-20/01 and 28/01*Commission v Germany* [2003] ECR I-03609.

obligations), or, coupled with powers to impose fines and shorten the contract period, prospective cancellation (of those obligations yet to be performed).[250] Echoing recent developments in the national system (see p. 370 above), a boost for restitutionary remedies is implicit.

The practical significance remains to be seen. Intended to increase operator confidence in the fairness of the procedures across the EU, the new dispensation certainly offers more opportunities and incentives to litigate. Underlying difficulties with the enforcement model of private legal action cannot be wished away however. It is unrealistic to expect many tenderers to engage in formal legal conflict with prospective major customers. Not before time, a pan-European approach to ADR is beginning to emerge in this sector.[251] Determinedly more collaborative, and operated through official channels (giving operator anonymity), the method has much untapped potential.

6. Conclusion

The contractual revolution is thoroughgoing. Instigated by the Conservatives, and vigorously pursued under New Labour, it sees the private legal model operating to define and reconstitute the role of government and relations with the private sector, and with the citizen, and to formalise (and fragment) intra- and inter-governmental relationships. The label of 'the contracting state' is today both an accurate description and a misnomer. Grounded in the idea of contract as an alternative source of rules, the state is here seen taking on a new set of co-ordinating and activating roles; the Treasury is typically at the apex. This echoes contemporary developments in regulation; a recurring theme of these chapters is the read-across between regulatory and contractual techniques of governance.

All this presents administrative lawyers with an immense challenge. Far from a 'solution', juridification in the shape of detailed contractual provision is part of the problem. While the courts have typically played a limited role in this sphere, the statutory regulation is marked by a profusion of rules presenting its own difficulties. A closer engagement with the expanded forms of contractual governance is required for good governance values to be properly vindicated; case studies in the next chapter will highlight the importance of embedding requirements of due process and accountability in contractual schemes from the outset. In a world of mixed administrations, of heavy reliance on the creative interaction of public and private power in service provision, mixtures of law are called for, transcending the public/private 'divide'. Administrative lawyers must not be intimidated.

[250] Directive 2007/66/EC, Art. 2d. National meaning must also be given to various exemptions, etc. See further, J. Golding and P. Henty, 'The new remedies directive of the EC: Standstill and ineffectiveness' [2008] Public Procurement Law Rev. 146.

[251] European Public Procurement Network, *Complain in Good Time!* (2005).