THE CENTRE FOR MARKET AND PUBLIC ORGANISATION

The Centre for Market and Public Organisation, a Research Centre based at the University of Bristol, was established in 1998. The principal aim of the CMPO is to develop understanding of the design of activities within the public sector, on the boundary of the state and within recently privatised entities with the objective of developing research in, and assessing and informing policy toward, these activities.

Centre for Market and Public Organisation
University of Bristol
Department of Economics
Mary Paley Building
12 Priory Road
Bristol BS8 1TN

Tel: (0117) 954 6943
Fax: (0117) 954 6997
E-mail: cmpo-office@bristol.ac.uk

Law, Economic Incentives and Public Service Culture

Tony Prosser, Pat O'Malley, Colin Scott, Morag McDermont, Peter Vincent-Jones, Mike Feintuck and Dave Cowan

September 2005

Working Paper No. 05/129

ISSN 1473-625X

The Leverhulme Trust

CMPO Working Paper Series No. 05/129

Law, Economic Incentives and Public Service Culture

Tony Prosser[1], Pat O'Malley[2], Colin Scott[3], Morag McDermont[4], Peter Vincent-Jones[5], Mike Feintuck[6]
and
Dave Cowan[7]

[1] *School of Law, University of Bristol and CMPO*

[2] *Canada Research Chair in Criminology and Criminal Justice, Department of Sociology and Anthropology, Carleton University*

[3] *Law Department, London School of Economics and ESRC Centre for Analysis of Risk and Regulation*

[4] *School of Law, University of Bristol and CMPO*

[5] *School of Law, University of Leeds*

[6] *Law School, University of Hull*

[7] *School of Law, University of Bristol and CMPO*

September 2005

Keywords: public services; private sector; economic incentives; regulation; contractualisation

JEL Classification: K10

Address for Correspondence
Department of Law
University of Bristol
Wills memorial Building
Queens Road
Bristol
BS8 1RJ
0(044)117 331 5122
morag.mcdermont@bristol.ac.uk
www.bris.ac.uk/Depts/CMPO/

CMPO is jointly funded by the Leverhulme Trust and the ESRC

Tony Prosser
School of Law, University of Bristol and CMPO
Wills memorial Building
Queens Road,
Bristol, BS8 1RJ

Pat O'Malley
Canada Research Chair in Criminology and Criminal Justice,
Department of Sociology and Anthropology,
Carleton University
1125 Colonel By Drive
Ottawa, Ontario K1S 5B6
Canada

Colin Scott
Law Department, London School of Economics and ESRC Centre for Analysis of Risk and Regulation
Houghton Street
London, WC2A 2AE

Morag McDermont
School of Law, University of Bristol and CMPO
Wills memorial Building
Queens Road,
Bristol, BS8 1RJ
morag.mcdermont@bristol.ac.uk

Peter Vincent-Jones
School of Law, University of Leeds
Leeds, LS2 9JT
lawpvj@leeds.ac.uk

Mike Feintuck
Law School, University of Hull
Hull, HU6 7RX

Dave Cowan
School of Law, University of Bristol and CMPO
Wills memorial Building
Queens Road,
Bristol, BS8 1RJ

Table of Contents

Law, Economic Incentives and Public Service Culture

Tony Prosser

School of Law and Centre for Market and Public Organisation

The University of Bristol

Introduction

The papers that follow were delivered at a highly successful seminar held on 26 May 2005 by the Centre for Market and Public Organisation at the University of Bristol.[1] The Centre, now an Economic and Social Research Council research centre also supported by the Leverhulme Trust, focuses the interdisciplinary expertise of economists, geographers and legal academics on the intersection between the public and private sectors of the economy and on public service delivery. The seminar represented an attempt to highlight some of the most interesting socio-legal work currently being carried out on these themes.

It is hardly new to suggest that collaboration between lawyers and economists may add value to the work produced in each distinct discipline. However, much of this work, especially in the sub-discipline of law and economics, has suffered from defects which in our view have rendered it of limited usefulness in understanding key issues relating to public services. The first is that it has been dominated by the application of particular versions of economic methodology to the analysis of legal issues, whilst ignoring many of the subtleties of legal cultures which make the reasoning of those in such cultures very different from those assumed by economic models. The second is that the accounts of both law and of economics in this work is often highly formalistic.[2] In particular, there is little consideration of the contribution which specifically socio-legal work can make to understanding law, the economy and public services. It was this gap that the seminar sought, in a small way, to remedy.

One issue of considerable importance to which socio-legal work can contribute is the model of social interaction implicit in much recent work which sees social actors as essentially responding rationally to incentives which shape their actions. This has been one of the reasons for moves towards the contractualisation of the delivery of public services; contracts, it is argued, can provide clear incentives and yardsticks against which performance can be measured. Such contractualisation has been apparent in a wide range of public services, including local government, health and the reorganisation of the railways. Similarly, the increasing use of targets, league tables and performance indicators is evidence of a view that such services can be improved by the setting of goals and incentivising administrators and other staff to meet them.

A different view is however possible. Those involved in public service delivery may be perceived as actors who create and participate in cultures and thus may not be directly susceptible to incentives; instead they respond to less easily definable, and less easily malleable, values. Not only has this not been fully reflected in economic and political analysis of public service delivery; it has also not been fully expressed in English law. Traditionally, we have left the implementation of public service goals to the political process and subjected it only to political means of accountability. By contrast, on the Continent, especially in France, there is a strong tradition of public service law reflecting a distinct culture of what is required in service delivery. Examples would be equality of access to

[1] For details of CMPO see: http://www.bris.ac.uk/Depts/CMPO/

[2] For an excellent critical account, see David Campbell and Sol Picciotto, 'Exploring the Interaction Between Law and Economics: The Limits of Formalism' (1998) 18 *Legal Studies* 249-78

public services, requiring geographically averaged prices rather than basing them directly on costs; and continuity of public service, preventing frequent recourse to competitive tendering rather than use of long-term public service concessions. Moreover, the Continental concept of public service law has been influential in influencing European Community law. Indeed there is a conflict between the 'Anglo-Saxon' view of the future of the Union based on increased use of competitive markets, including those for the delivery of public services, and the Continental view emphasising the importance of social solidarity and public service.[3] Distrust of the allegedly 'Anglo-Saxon' approach in the constitutional treaty was indeed behind much of the French opposition to it as expressed so vividly in their referendum of 29 May 2005.

The relationship between markets, law and culture is by no means a new phenomenon; it was analysed as long ago as 1902 by Durkheim.[4] Nevertheless, it still offers a fruitful research agenda on the interactions of law, economics and culture, both internationally and within particular areas of public service. The papers at this seminar addressed the agenda from a number of viewpoints and promise further outstanding work in the future.

[3] For analysis of all these issues see T. Prosser, *The Limits of Competition Law: Markets and Public Services* (Oxford: Oxford University Press, 2005).
[4] Emile Durkheim, *The Division of Labour in Society*, tr. W. D. Halls (London: Macmillan, 1984), ch. VII.

POLICE CULTURE AND THE NEW POLICE CORPORATIONS.

Pat O'Malley

Department of Sociology and Anthropology

Carleton University

Abstract

There has been a convergence of private and public policing corporate sectors into a 'police industry'. In part, this process has involved the successful reshaping of public police management into a corporate executive, such that the private and public security sectors converge in various ways. Ironically the success of the transfer of business principles to the public police has revitalised police unions, giving rise to an assumption that in the face of their opposition, the transfer of business principles to will stall and eventually fail. By contrast, we identify the existence of unionised and non-unionised sectors of policing as a normal feature of modernist industry. By doing so, it appears that in the current environment of labour relations – ironically – this formation may itself contribute to a new wave of business-oriented reforms affecting police associations themselves.

'While I regard police unions as a disaster for the quality of policing, I have fairly good relations with senior police officers. Their role is in some ways comparable with mine as a private sector CEO. They have reporting relationships to police boards and authorities; they are assigned program goals; they have to devise business plans that are consistent with the goals laid out for them by their governing boards or authorities; they have to operate within a budget; and, they face the hostility of unions who try to restrict their area of managerial discretion.'

Ross McLeod, CEO of the Canadian security company *Intelligard* (McLeod 2002:75-76)

Introduction

The passage quoted above in many ways sums up changes that I will examine in the paper. On the one side there is the convergence of corporate managerial styles between public and private police, marked especially by the dis-embedding of police managers from traditional police culture, and their re-embedding in a business culture heavily marked by principles of new public administration and new managerialism. On the other side, however, one of the unintended effects of this change may have been to create a conflictful 'industrial relations' environment which is quite inconsistent with new management principles. The ironic effect of implanting new administrative ideas and practices into the public police may have created a classically 'modernist' industry, with a unionised, quasi-monopoly sector of public policing and a non-unionised competitive sector of private police.

In the context of examining these changes in public policing, I will therefore examine several issues set out as foci for the seminar, namely: tensions between administrative norms such as performance indicators, and existing public service cultures - in this case 'police culture'; tensions established when government mechanisms are introduced that involve service users

as members of governing bodies - or in this case, a 'customer orientation' and a 'service' perspective.

It is not possible to examine this entirely in terms of 'public police' – although this will be the prime focus of course. The emergence of a 'police industry' has pivoted, additionally, around certain changes in private sector policing, and consequent changes in the relations between public/private police are a key to understanding these 'tensions' and their impact.

Corporatising Private Policing

It has been argued for some time that private sector police increasingly have been taking over many roles that public police traditionally have been assigned (e.g., Spitzer 1977; Shearing and Stenning 1983; Johnston 1992). This is particularly evident at the local level, where foot patrols in many elite suburbs, public housing estates and 'mass private property' sites are most frequently carried out by private security (Shearing and Stenning 1981, 1987; Loader 1999). However, while expansion in numbers, and the ratios of private to public police officers, may register some changes underway, this is neither the only nor the most significant process at work. A critical change has been the corporatisation of private policing. In the initial 'watchman' phase, private police were mostly in-house security officers (McLeod 2002), but increasingly after World War II, private security operatives were contracted in – ringing the first alarm bells about the rise of private police (Draper 1978). While it is still the case that the large number of private police were (and still are) dispersed among many small organisations (Jones and Newburn 1998:80), the industry after 1980 was witness to the rise of a corporate sector – huge transnational corporations such as Securicor, Group 4, Chubb and Wackenhut. (Johnston 2000b). Not only do such organisations employ hundreds of thousands of people: they have sophisticated governance, including marketing, lobbying and financial corporate executive arms – characteristic of any other example of contemporary 'corporate management'. (O'Connor *et al* 2004:146). In a highly competitive 'private sector' of policing, they have become Increasingly technologically sophisticated and diversified, with expertise in fraud, infotech crime, transnational crime and government security – as well as 'security officers' or 'parapolice.' (Scheptycki 1998, Johnston 2000a: 128-32, Rigakos 2002). The importance of this is not only that public police now confront sophisticated, alternative police organisations hungry for markets, but the first time these corporate private police have emerged as plausible alternatives and competitors to public police. It is this – rather than the simple growth in numbers of private police – that marks the setting of a new environment in which public police managers must operate. (Johnston 2000a, Jones and Newburn 1998).

It is highly significant that in most of these areas, any expansion of private police activities has been relatively trouble free – either because the areas of growth are not regarded as existing 'traditional' public police areas (for example, infotech crime); or because they are areas requiring largely expert knowledge or technical expertise (in particular, corporate investigations); or again because expansion occurred in areas involving only small numbers and proportions of police, such as fraud (where the fraud squad in Melbourne, for example, numbered about 20 members out of a total complement of over 3000 members). However, where the two police have collided has been precisely those areas of 'traditional policing' such as patrol, order maintenance, and public security. In the light of the considerable literature on police culture and its foci, referred to later, it is this clash that becomes the most significant, for police culture collides with the market, and this in turn is on of a number of developments that aligns police culture and police unions in new ways.

In this respect, it should be noted that much of the labour force of the private sector police is not unionised. Indeed, corporate management has resisted traditional IR models, regarding these as out of date and counterproductive. Thus such managers argue that trade unions:

- Protect their members at the cost of providing service – keeping officers in their cars rather than requiring them to develop a face-to-face service orientation and consultation 'on the street'
- Obstruct new police initiatives and innovative planning measures necessary to bring police into 21st century
- Protect jobs that could be performed more efficiently and cheaply by lesser skilled officers at lower rates of pay, and protect lazy and incompetent officers
- Regard management as the enemy rather than as associates in a collaborative exercise

By contrast their own 'staff associations' are imagined to operate more as professional 'clubs' where interchanges easy between management and security officers because these associations were not wage/conditions negotiators (a view not supported by many officers) (eg Rigakos 2002, McLeod 2001).

While all of this may be taken as indicating the views of management, rather than any necessary reality, it outlines the way in which, in this sector of the policing industry, the union/anti-union lines were already being formulated; and it can further be understood already why unionised, traditional police, would regard the growth of corporate private police with considerable alarm and hostility.

Corporatising Public Police Leadership

One of the most evident manifestations of the corporatisation of policing has been the adoption or imposition of 'new public management' as a guiding rationality. This has provided general formulae whereby all state agencies are to become 'enterprises' in an effort to make them more 'responsive' and 'accountable', to deliver greater efficiencies and more innovative 'outputs', while at the same time subjecting their fiscal regimes to cost minimising and cost-benefit analyses. From the late 1980s and early 90s, prescriptions for a 'new police' began to emanate from government agencies in many English speaking countries. In one of the classic statements of this view, soon to have a considerable impact pushing Canadian policing toward the business model (Clarke 2002), Normandeau and Leighton (1990:1)argued that:

> Police organizations in the future will, much like private organizations, pursue excellence. They will no longer be stagnant and assume that funding will be stable or constantly increasing and that the public will remain supportive but passive. Total quality service is now being demanded. Further quality service must now be delivered within the context of a lean department because fiscal constraints are expected to be ever present in the future.

As might be recognised, such statements represented an assault on the 'stagnant' organisation and management, not merely a vision of the future. It might also be recognised that police management was likely to be the main target of reform. Accordingly, the initial responses from senior management were very hostile, with one such officer arguing that 'a non profit-making, caring public service could not be judged by economic criteria used by ICI and Marks and Spencers', and (perhaps more oddly) that the British public would reject a police service that was 'too efficient, too effective, too sophisticated' (Quoted by McLaughlin and Murji 1997:95; see also Bayley 1994, Fleming and Lafferty 2000, Loader and Mulcahy 2003:291-94).

What is perhaps surprising is how quickly this kind of opposition from management (as opposed to unions) died down in many forces. By the mid 1990s it is already easy to find a new breed of management espousing new managerial ideals Consider for instance Barbara Etter (Assistant Commissioner of the Northern Territory Police in Australia), for whom police managers need to become enterprise leaders. 'As with their public and private sector counterparts, present and futures, police leaders need …to be Change Masters, those people and organisations adept at the art of anticipating the need for, and of leading, productive change'. (1995:302) In an article liberally laced with quotes from such gurus of new managerialism as Osborne and Gaebler, Kanter, and Tom Peters, Etter (1995: 302) urges that the new police manager 'must be willing to take risks… The time has come to be more daring and to tackle the lead in institutional change. Police leaders need to accept that some change needs to be "revolutionary" rather than "evolutionary"'.

Why might this rapid shift have occurred? Perhaps the simplest answer is that police commissioners were a principal target of the new visions, while at the same time they are among the most vulnerable targets, usually being in their positions by appointment from the government. (Davids and Hancock 1998:46-8, MacDonald 1995). The Chief Commissioner of the Australian Federal Police, for example, was appointed in the wake of a critical review of that force, and has proven one of the most aggressive advocates of the new managerial style. In his view radical change 'is not simply inevitable, it is unavoidable … despite the advances, policing is only now emerging from the twilight zone: its recruitment and skilling procedures are still largely traditional; its workplace protected and its structure, funding, power base and jurisdiction, better suited to the past than the future.' (Palmer 1995) Such appointees, in their turn, set about the task of recruiting like minds.

But other techniques were adopted that had been imposed elsewhere in public service, and that had proven to be effective engines of reform, working more or less coercively on senior management. Primary among these were budget cuts and increased financial accountability. As Miller (1995) also stressed:

> police are under pressure to satisfy governments that they are cost effective and achieving the required results. Limited resources have already substantially impacted on policing as governments apply spending cuts. Police managers have been forced to achieve considerable savings through more stringent and controlled use of finance and other resources. "Lean and mean" has been the emphasis at management levels in addressing the demand to provide policing services at considerably reduced cost.

Certainly there is little that was novel about funding cuts. But the thrust of this new generation of economic stringency was directed against police organisation and management rather than merely at reducing government expenditure. It was not to be a matter of scaling down the number of officers, a budgetary struggle all police were familiar with. Rather it was demanded that police 'do more with less'. In this way, as Fleming and Lafferty (2000: 155-56) have argued, such:

> budgetary considerations forced police organisations to adopt program management schemes and to decentralise command. As responsibility for planning and budgeting was devolved to front line managers, budgetary practices, once concerned solely with the management of police numbers, were refocused on the distribution of limited financial resources and operational outcomes.

These techniques were soon matched with a battery of new instruments that not merely reflected business practice. Rather, they were designed precisely to effect the transfer of principles and practices from the business sector. By now, the image of the audit, especially as a way of making agencies responsible to their 'customers', has become something that is almost taken for granted as a governmental technique (Power 1994). But what is not always recognised is that the audit is not merely a mechanism of 'accountability': equally it is part of an assault on the inscrutable knowledge systems of 'closed' institutions and professions. As Nikolas Rose has indicated, audit is one means whereby a change was effected in the relations between expertise and government (Rose 1996:54-55). The arcane knowledges of the professions and bureaucracies, including the police, represented means of constituting 'enclosures in which their authority could not be challenged'. Whatever criticisms are offered from without have to be validated from within, or else be subject to the accusation that they are 'inexpert' or 'politically motivated'. In the case of police, this expertise was shared by rank and file and senior management who could thus find common cause in rejecting external criticisms and at the same time use their expertise to demand more autonomy and more resources. The characteristic of the new governmental techniques of audit, accountancy, marketing, budgetary disciplines and so one, however, was that they were simultaneously 'expert' but 'transparent', 'critical' but 'neutral'. They could be applied to police or to universities, to medical administration or to legal services without challenging practitioners' expertise, yet subordinating them to another 'objective' and 'universal' set of governing categories. Thus with respect to budgetary discipline, Rose suggests that

> Making people write things down, prescribing what must be written down and how, is itself a kind of government of individual conduct, making it thinkable according to particular norms. Budgetary discipline transforms the activity of the budget holder, increasing choices at the same time as regulating them and providing new ways of ensuring the responsibility and fidelity of agents who remain formally autonomous. Not merely in the setting of the budget, but in the very "budgetization" of the activity, the terms of calculation and decision are displaced and new diagrams of force and freedom are assembled. (Rose 1996:54-55).

Audit, combined with other 'accounting' technologies, thus ramped up the critical power of economic coercion for they rendered such cuts informed rather than ignorant, and at the same time distanced governments from any accusation that they were interfering in the independence and professional expertise of the police. It was for such reasons, as McLaughlin and Murji (2001:115) point out, that in Britain '(v)irtually every Home Office policy document stresses that modernization will be achieved through constant auditing, priority and target setting, monitoring, evaluation and inspection', and senior police, are advised 'that the capacity for audit and inspection will be developed to assess the performance of the criminal justice system as a whole: to provide assurance that it is operating economically and efficiently; and is achieving its aims and objectives effectively'.The position of any 'obdurate' police management thus became scarcely tenable, for the transparency of the new criteria left them open to critiques of featherbedding, inefficiency, and rigidity that are difficult to fight from a 'traditional' police knowledge base. But for much the same reason, the adoption by management of these new managerialist techniques, or even their acceptance of these as valid, goes to the heart of police solidarity in a way that distances them from the rank and file in new ways. Management working with these principles and technologies was being dis-embedded from the traditional knowledge of the police guild; a first step in attempting to re-create police as a corporation (Loader and Mulcahy 2003: 240-1, 290-1).

By the mid 1990s, the coercive mechanisms put in place to discipline management had themselves become a part of the equipment which a new generation of police managers were skilled at operating as a form of self-discipline. Through these techniques and procedures key

aspects of their own authority and organisational power were constituted. Increasingly police managers are becoming generic 'new' managers almost as much as they are police. For Rohl and Barnsley (1995:253) – the latter the Dean of the Australian Police Staff College - 'truly efficient and effective policing would only be achieved when policing developed a professional culture underpinned by superior management practices and a commitment to corporate excellence'. This view is echoed everywhere, usually associated with a vision of the 'traditional' structure of policing as a problem or obstacle to progress (e.g. Drennan 2003:2-4). Likewise, the view of the Chief Commissioner of the New Zealand Police is that the military structure and monopoly privilege of police worked against 'essential' reforms: 'whilst private companies were forced to adapt their leadership style in order to survive in a competitive environment, police organisations were slower to adapt. After all, the police tended to operate in a captive market in which law enforcement had been a growth industry'. In such an environment, he ruefully noted 'it is unlikely that a strategic plan would have existed' (MacDonald 1995:210-12). Likewise the Australian Federal Police Commissioner argued that 'the paramilitary style of police agencies, with its strict discipline, autocratic command, centralised decision-making and hierarchical structure' had become 'inadequate' in the new environment and that 'it was clear that a shift was required by senior management from control by issuing orders to the use of visionary leadership to motivate and direct the organisation' (Palmer 1995:42).

It cannot be assumed that such expressions are merely statements of convenience, evidence only of police managers putting into print views that their political masters want to see. Not only is it clear that many openly embrace the language and ideas of new managerialism, but in some cases they have promoted such change in the face of government resistance. The Commissioner of the South Australia Police David Hunt (1995:60-1) notes that in response to a 'strategic analysis' that was 'aimed at determining whether the existing functions contributed to achieving the department's mission and corporate (sic) goals', seven functions were identified as marginal to providing 'core police services' to the community. These were determined on the principle of whether or not a sworn officer was required for their performance, and included duties such as coronial investigations, the operation of speed cameras, the serving of warrants for non-payment of fines and costs, and provision of prosecution services. For each function, Hunt states, 'a review was undertaken and a business case prepared' . However, the process of implementation was slowed by resistance from other government agencies. It was not given its head until a more ideologically compatible government was elected that established an Audit Review, put in place stringent cost-reductions and 'created a climate of change which was necessary for consideration of the Department's proposals'.

Overall, it is probably fair to agree with Fleming and Lafferty (2000:155) that 'in a relatively short period these managerialist techniques came to dominate public and police administration… in most English-speaking countries today', and even with Adlam's (2002:31) more cynical view that 'most forces have chosen to ape the corporate style of the multinational companies'. In this light, it is perhaps not surprising that many of this new generation of police corporate managers find themselves at best ambivalent about traditional police culture and often hostile toward police unionism.

Police Unions and Police Culture

One of the clearest areas of convergence between the corporate public police managers and their private counterparts is their view of police associations and trades unions as obstacles to 'progress' (McLeod 2002, Drennan 2003). As suggested earlier, in part this may reflect the new managerial vision in which the oppositional divide between managers and workers has been rendered obsolete and counterproductive. New managerialism has attempted to

reconstitute 'employees into entrepreneurs' (Rose, 1999: 156-58). 'Workers' and 'employees' come to be replaced by 'partners', 'representatives', 'members'; and in the entrepreneurial organisation 'there are no "subordinates", only "associates"' (Drucker, 1993: 108). It is not difficult to find this kind of discourse in police human relations publications (see generally, Etter and Palmer 1995; cf De Lint 1999). Whether or not any of this is translated into practice, either in the public or the private sectors of policing, is another question entirely.

But while police managers were rapidly becoming corporatised during the 1990s, police associations were busy resisting the very kinds of changes to working relations, management practices and police work that the reconstituted police executive promoted and sought to realise. The British Police Federation's successful struggles beginning in the early 1990s have probably received the most attention (McLaughlin and Murji 1997, 2001), but parallel examples can be found in other English speaking countries such as Canada, the United States and Australia (e.g. De Lint 1998, Kadleck 2003, Finane 2002). There is then an apparent irony that while new managerialism seeks to dissolve trade union consciousness and organisation in favour of 'human resources' models the successful corporatisation of police management has reinvigorated precisely these characteristics of police labour at a time when trade unionism generally has been in retreat.

Two related conclusions are usually drawn from this observation. First, the continued corporatisation of policing will be hindered or halted by a revitalised trade unionism (e.g. Vickers 2000: 507), and second, this has entrenched a conservative police working culture that is dedicated to a vision that policing can only be learned on the streets (De Lint 1999). The latter, in turn, is regarded as continually reinforced because the rank and file policing experience is formed on the streets and in relation to a largely unchanged set of experiential problems and dangers. Rather than managerial principles filtering down to the lower ranks, this interpretation suggests that police 'low' culture will continue to be reproduced, change will be further resisted at the street level, and the transfer of the corporate model will fail (De Lint 1999: 145-46, 1998:280). In De Lint's(1999:142) words, 'the distance between the rank and file and administrative work is ensured because the latter is already seen by the former to have become more cautious about the mandate of "real" policing, while the rank and file is increasingly seen as "behaving badly".' For many police managers this cultural problem appears as linked to a larger issue, as by implication police union resistance and the resistance of a solidarist rank and file police culture are mutually reinforcing (Landa and Dillon 1995:135-8, Palmer 1995). As is discussed below, this has led many to argue that police unions have indeed become entrenched, and have not thus far adapted to the new environment in ways that have occurred elsewhere in the union movement. But there may be larger issues at stake. The most perceptive observation on this issue is worth quoting at a little length. Fleming and Lafferty (2000:163-64) concluded in their recent review of Australian police:

> New management techniques do not adapt readily to the police context. Police cultures articulate very different values (such as loyalty to fellow officers) from those articulated in new management techniques (such as individual performance and organisational accountability). This contradiction indicates a practical limitation to the effectiveness of organisational change practices. The implementation of new management techniques has produced a management division between senior police and rank and file officers… it may be that a stronger 'us and them' situation between police officers and their superiors is being created. Whereas once managers and police officers were members of a common, highly insular organisational culture, the restructuring processes have inaugurated a more formal employer-employee relationship. In such a situation, management will need to be very careful to avoid reigniting the very aspects of solidarity among the rank and file they sought to dismantle.

Perhaps this interpretation seems to run counter to Janet Chan's work on transforming police cultures (1997, 2003). Chan argues, quite rightly, that accepting the existence of an 'all-powerful, homogeneous and deterministic conception of police culture insulated from the external environment leaves little scope for cultural change…A satisfactory reformulation of police culture should allow for the possibility of change as well as resistance to change' (Chan 1997:67). She suggests that efforts at change have failed partly because managerial attempts to deal with changing police culture have attempted only top-down methods of implementing reforms – for example, by promoting an abstract model of 'professionalism' without providing a suitable organizational environment (1997:154; 2003:314-5). This is borne out by Clarke's study of the Royal Canadian Mounted Police (RCMP), where management had:

> assumed that members could easily adapt to a new service delivery model without education and within the current organizational structure. It was also believed that all administrative and operational support personnel would readily and willingly modify their policies and practices. We know this has not occurred …audit asserted that reform would have been more effective if the RCMP had, in fact, addressed organizational; and structural concerns before downloading to the detachment and assuming front-line officers would quickly adapt'. (Clarke 2002: 21) [5]

The conclusion that Chan draws is that changed management will not fail because of an impervious culture but because management has worked with a 'mythic vision' of what police *could* do rather than one 'based on what police can realistically do' (Chan 2003: 316). One of the features of this analysis, its that it takes attention away from the obsession with a police working culture, an analytical juggernaut that proceeds as if it has been demonstrated that this *by itself* is the key barrier to any effective reform of police. Chan's perceptive account is valuable in this respect, but perhaps it does not confront the nuanced situation that Flemming and Lafferty uncover. It is not simply that the culture is or is not resistant to change. Nor is it only that management have not understood the practical realities of policing in attempting to implement reforms. It is rather that both of these are involved an unprecedented shift, in which police management have been dis-embedded from police culture and re-embedded in a new corporate, managerial culture. In this process police managers are redefining what police work is about and how it should be performed. The old, guild-like solidarity of the police has been ruptured. What is new is that police unions, rather than police per se, come to represent the 'traditional' values of policing, against management. Union and culture begin to converge in a new fashion, overand against police management and the 'external' forces that seek change. In turn, I suggest, this threat is not simply a threat to 'traditional' policing values and practices, as a purely cultural account would have it. The changes that are in train confront police rank and file not simply with a threat to their traditional ways, *but with a management that seemingly has abandoned policing and embraced the market, and a market that is prowled by predatory commercial police, staffed by non-union police, who simultaneously threaten police culture, police work, and police working conditions.*

To the extent that this refocuses issues on unions rather than solely on cultures, this interpretation corresponds with a view put forward by certain advocates of the private security sector. For them, clearly the critical problem is not culture *at all*, so much as police unionism

[5] The RCMP provides an interesting example in other respects also. In the 1970s, the Canadian government headed off unionisation of the rank and file. In the 1990s, following current managerial practices, it introduced a system of alternative dispute resolution to deal with internal grievances, discipline and public complaints. Accordingly, the union-management divisions opening up that are discussed in this paper could not occur in the same fashion. As Deukmedjian (2003) has pointed out this was an attempt to align the workforce with new managerial principles and the service expectations created within the framework of an associated move toward community policing. Accordingly, however, this ADR arrangement has itself become the focus of conflicts between membership and management (2003:344).

(McLeod 2002, Drennan 2003). For McLeod (2002) – speaking as a private security executive - unionisation has been the critical issue *not* because it has entrenched or expresses a rigid culture. This is never mentioned. More important is that it prevents the realisation of many of the restructuring goals of market-centred initiatives, such as community policing, that allow a better customer orientation and thus the development of a more responsive and accountable police. While it is not necessary to accept all of McLeod's (probably overstated) arguments, they provide an interesting counter to some received sociological truths that centre the role of police culture *per se*. In his view unions frustrate managers' attempts to institute and carry through business plans that would facilitate greater accountability, more efficiency and a proper 'service orientation'. Private security can provide for all of these needs, he suggests, *because its labour is not unionised*. It can more readily be *required* to respond to market pressures and management directives, and to work for considerably lower pay and under more stringent economic conditions (for example, operating single person cruisers).

In short, this labour force is much more subordinate and compliant.[6] McLeod probably would not resist this last interpretation; but for our purposes, the argument is interesting because it is evident that none of his claims make any reference to a police working culture per se as a problem. Indeed, as the fieldwork of Rigakos (2002) makes clear, most of the features of public police culture are abundantly evident among private security officers, and for much the same reasons as they appear in public police work. They confront dangerous situations where great reliance is placed on collegial support and solidarity. In this context a 'macho' self image prevails. Moreover, in order to expedite their duties, they carry out activities that are often unauthorised or illegal, giving rise to occupational secrecy.[7] This defensive culture is entrenched by the fact that they are constantly under critical scrutiny by management and the public, and they are hostile to various tools that are put in place to monitor their performance according to the standards of management: management and their audit tools are regarded as out of touch with the real needs of policing. All of this appears in accounts of police culture in public forces (e.g. Cahn 1998). But police culture never appears as an issue to reform in private sector policing. The reason is obvious; private security management is better able to achieve at least some of the ends sought by public sector management because it is in a better economically coercive position to *require* a certain performance of its workforce. 'Culture' is far from irrelevant; but in the current context its potency lies in its nexus with unionism.

Converging corporatism, police unions and segmented police markets.

There is a clear irony in this analysis if we consider that in attempting to produce a postmodern organisation in keeping with new managerial principles, public police management has – by this very process - unintentionally produced a classically modernist corporate structure. Structurally, the effect has been remarkable, for in key ways the dominant 20th century model of policing was guild-like. Officers learned the job in an empirical fashion on the streets, with theoretical education playing a marginal role (O'Malley 1997). Promotion came through a mixture of seniority and merit, but the importance of seniority and common entrance meant that senior managers were all thoroughly schooled in police trade and its working culture. This did not mean that police rank and file were never in conflict with senior police officers - it is clear that in many police forces around the world, police associations and unions have frequently been directly in confrontation with police managers over issues such

[6] As Lippert and O'Connor (2003:250) point out 'now it happens that non-standard workers, those with the least income security, make up a large proportion of the workforce providing public security'.

[7] Thus, for example, Rigakos argues that (2002: 119-20) the bravado and secrecy of the security officers 'stem from conditions of dependent uncertainty and status frustration and from the fear of being swarmed by angry mobs. This constant risk taking and/or risk aversion results in a strong occupational ethic of interdependence in the face of immediate or impending dangers. This is not unlike the occupational codes of public police agencies.'

as working conditions, pay, discipline and promotions: the traditional concerns of the trade union movement (Finnane 2002; Forcese 1999). But rarely were these internal conflicts over what policing was about, what principles it should follow, and how it should be practiced. The police *forces* - senior officers *and* rank and file members - under such conditions retained militaristic solidarity against 'outside' criticisms and attempts to increase external regulation and accountability.

In most cases this has virtually disappeared or at least been heavily modified. In turn, the current struggle between management and police labour, equally ironically perhaps, has accelerated the breakdown of 'pre-modern' military and mercantilist elements in police organisation and made it more appropriate to engagement on a terrain where market principles are normal. But the market structure that has emerged is not quite the one consistent with the 'switched on' imagery of new managerialism and neo-liberalism. Rather, it is classically 1950s modernist. A common feature of modernist markets is that they break up into sectors according to the kinds of service sectors provide and the labour costs they support. While critical of police unions, the private sector nevertheless recognises exactly this. They often accept that their own service provision may be subordinate, picking up those tasks discarded or ignored by the 'expensive' public sector, and adopting the role of 'handmaiden' (McLeod 2002). It is not difficult to see this occurring in practice, as public police focus on 'core' tasks, as mentioned above, discarding such roles as the escorting of prisoners or the operation of red-light cameras. Equally, it is the private corporations that pick up these tasks (Lippert and O'Connor 2003).[8] Of course there are many instances in which the unionised sector of the police labour market objects, and may succeed in fighting off such readjustments. The point is not that a slippery slope has been created and that public police must inevitably slide down it. Rather, it is that – while local conditions will affect these processes – we are looking at the kinds of segmented market arrangements, and struggles, that are characteristic of a large number of modernist industries, with a semi-monopoly, unionised, high cost sector, and a 'competitive', non-unionised, low-cost sector. In such markets, trade unions tend to be especially active and aggressive precisely because of the threat posed by the competitive sector.

However, it cannot be assumed that, even where relations with management are hostile, police unionism will be frozen in a stance of rigid opposition forever. New generations entering the police 'service' may no longer regard the managerial principles, and the competitive market structures associated with it, as alien or out of place. For better or worse, this environment has been becoming part of everyday life for two decades, reaching into many institutions - long enough for it to become fairly 'normal' rather than 'new'. Universities compete for students on television and on the worldwide web. Former 'public' utilities have been in private hands for the lifetimes of the new generation of recruits. The themes of enterprise, individual responsibility and market competition are accepted, even embraced, by political parties on both sides of the spectrum. Thus only recently the former Chief Administrator of the Ontario Provincial Police Association (Drennan 2003:7) has warned that police associations risk losing touch with their members as the education, gender, race and values of new cohorts are changing rapidly. Police associations, Drennan suggests, face a situation in which traditional labour relations are no longer adequate to deal with a competitive market in policing, and have no choice but to embrace business principles. From this point of view the time has come 'to incorporate into the management of the police

[8] Seeming to mirror the corporate strategies of the South Australia police mentioned above, McLeod (2002:76) argues that in his experience public police officials favour 'the possibility of using parapolice organizations such as Intelligarde to provide certain non-core police services at a lower price than regular police. Most significant from my point of view they [are] becoming adept at making distinctions between policing functions requiring trained police that were at the core of their role as regular police, and those ancillary, residual or peripheral functions which we might very well undertake in a more efficient and economic manner such as issuing tickets, transporting prisoners, court security and administration, and non-emergency response.'

association the same values, practices and culture that characterise the management of police services' (Drennan 2003: 3). This includes, for example, not only the use of marketing strategies to promote the 'superior' quality of public police provision over private security, but more importantly to

> be willing to sit down with management with a view to improving overall relations within the organisation by supporting, with safeguards, such new initiatives as civilianization. Closing the door on the private security industry will be much easier if the police leadership sees that the police association is prepared to work with government' (Drennan 2003:143-44).

Indeed, this is not a startling shift, when considered in the broader context of contemporary trade unionism. Rather, as many have indicated (see the collections of essays edited by Gallie et al 1996, and Niland et al 1994) there has been a general decline in adversarial relations and an increasing tendency for management and unions to collaborate in the face of changed – and more competitive – economic conditions. Unionisation then, while appearing as an obstacle, may in fact be a medium of change.

Continued negotiation between union leaders and management, in turn, may produce unanticipated convergences simply because each side must engage with the terms of the other. Thus McLaughlin and Murji (2001:118-19) have already detected that in Britain – where this process has proceeded farthest - 'the Police Federation, the focal point for the "forces of conservatism" within the police, increasingly uses the language of managerialism to attack reforms, and to press its own case for more resources. Resistance to further managerialization tends to take place within a managerial framework'. In this sense, even though unionisation may appear antithetical to new managerialism, it may in certain respects be hastening the rate of change still further away from the old military guild of public police, toward the formation of a public business corporation, and a privileged labour force, in a segmented policing market.

Conclusion

Many analysts rightly point to the increasing difficulties of distinguishing private and public police, and to the emergence of 'hybrid' security agencies (e.g. Johnston 1992). This complexity has been dealt with by thinking in terms of networks, nodes or even 'extended families' of policing (Jones and Newburn 1998, Johnston 2003, Wood 2004). It is not the intention to deny these complexities. However, focus on these points tends to submerge, or render only of secondary interest, certain key distinctions that are salient in the politics of policing, especially as these are identified by key participants. In particular while the distinction between profit and non-profit orientations has long been recognised in this field (e.g. Jones and Newburn 1998:213), the correspondence of this with the distinction between unionised and non-unionised labour has largely been passed over. Yet this coupling has become particularly salient – in the views of managers and rank and file - and corresponds to critical structural differences in the policing industry. No doubt it is not a sharp divide. It does appear, for example, that a considerable proportion of the 'in-house' private security workforce is unionised (Micucci 1995). Despite this, in the presesent analysis, this 'industrial' distinction appears central to understanding tensions between new public administrative norms and the 'culture' of contemporary policing.

In its possible instabilities, as much as in its apparent rigidities, and because this has been much under-researched and theorised, and despite the apparently passé nature of unionism as an issue, the issue of police unionism should perhaps be moved to the forefront of our analysis of contemporary transformations in policing. In this respect, then, we follow

Shearing and Stenning's (1987: 15) suggestion that the public/private distinction not be abandoned in the face of complexities, but rather that we should 'explore the ways in which it has been successfully deployed to support political and economic orderings, and to see whether it cannot be fruitfully reframed as an analytically useful concept'.

REFERENCES

Adlam, Robert. 2002. *'Governmental rationalities in police leadership: An essay exploring some of the 'deep structure' in police leadership praxis' Policing and Society 12*: 15-36

Bayley, David. 1994. *'Its accountability, stupid'*. In Keith Bryett and Colleen Lewis, (Eds.) Unpeeling Tradition: Contemporary Policing Melbourne: Macmillan

Chan, Janet 1997. *Changing Police Culture. Policing in a Multicultural Society* Cambridge: Cambridge University Press

Chan, Janet. 2003. *Fair Cop: learning the Art of Policing*. Toronto: University of Toronto Press

Clarke, Curtis. 2002. *'Between a rock and a hard place*. RCMP organizational change' Policing: An International Journal of Police Strategies and Management 25:14-31

Davids, Cindy, and Hancock, Linda. 1998. *'Policing, accountability and citizenship in the market state'* The Australian and New Zealand Journal of Criminology 31:38-68

Davis, Edward. 1994 *'Trade unionism in the future'* in John Niland, and Russell Lansbury, (Eds.) The Future of Industrial Relations. London: Sage

De Lint, Willem. 1998. *'New managerialism and Canadian police training reform'* Social and Legal Studies 7:261-85

De Lint, Willem. 1999. *'A postmodern turn in policing: policing as pastiche?'* International Journal of the Sociology of Law 27:127-52

Deukmedjian, John. 2003. *'Reshaping organizational subjectivities in Canada's national police force: The development of RCMP alternative dispute resolution.* Policing and Society. 13:331-48

Draper, Hilary. (1978) *Private Police*. Harmondsworth: Penguin Books

Drennan, James. 2003 *Police Leadership and Labour Relations*. Toronto: Emond Montgomery

Drucker, Peter. 1993. *Post-capitalist Society, 1993, New York*: Harper Business

Etter, Barbara. 1995. '*Mastering Innovation and Change in Police Agencies'* in Barbara Etter and Mick Palmer (Eds.) Police Leadership in Australasia Sydney: Federation Press

Finnane, Mark. 2002. '*Police unions in Australia. A history of the present'*. Current Issues in Criminal Justice. 12: 5-19

Fleming, Jenny and Lafferty, George. 2000. *'New management techniques and restructuring for accountability in Australian police organisations'* Policing: An International Journal of Police Strategies and Management 23: 154-68

Forcese, Dennis. 1999. *Policing Canadian Society (2nd edition)* Toronto: Prentice Hall

Gallie, Duncan. Penn, Roger and Rose, Michael . (Eds.) 1996. *Trade Unionism in Recession*. Oxford: Oxford University Press

Hunt, David. 1995. *'Strategic Management in Policing'*, in Etter, Barbara and Palmer, Mick. (Eds.) Police Leadership in Australia, Sydney: Federation Press

Jiao, Alan and Kocher, Charles. 2000 '*Auditing and altering the police: The emerging model of planned change.'*. Police Practice. 1:527-558

Johnston, Les. 1992. *The Rebirth of Private Policing*. London: Routledge

Johnston, Les. 2000a. *Policing Britain. Risk, Security and Governance.* New York: Longman Press

Johnston, Les. 2000b. *'Transnational private policing. The impact of global security'*. In James Scheptycki (Ed.) Issues in Transnational Policing. London: Routledge.

Johnston, Les. 2003. *'From pluralisation to the police extended family. Discourses on the governance of community policing in Britain'* International Journal of the Sociology of Law 31: 185-204

Jones, Trevor and Newburn, Tim. 1998. *Private Security and Public Policing Oxford*: Oxford University Press

Kadleck, Colleen. 2003. *'Police employee organizations' Policing: An International Journal of Police Strategies and Management* 26:341-51

Kanter, Rosabeth. 1990. *When Giants Learn to Dance* London: Unwin Hyman

Keat, Russell. 1991 *'Introduction: starship Britain or universal enterprise?'* in R. Keat and N. Abercrombie (Eds.) Enterprise Culture. London: Routledge

Keat, Russell. and Nicholas Abercrombie (Eds). 1991. *Enterprise Culture London:* Routledge

Landa, David and Dillon, Hugh. 1995. *'Police Accountability and External Review of Police Conduct.'* in Barbara Etter and Mick Palmer (Eds.) Police Leadership in Australia. Sydney: Federation Press

Loader, Ian. 1999. *'Consumer culture and the commodification of policing and security.'* Sociology 33:373-92

Lippert, Randy and O'Connor, Daniel (2003) *'Security assemblages: Airport security, flexible work and liberal governance'* Alternatives 28: 331-58

Loader, Ian and Mulcahy, Aogan. 2003. *Policing and the Condition of England*. Oxford: Oxford University Press

Macdonald, Richard. 1995. *'Skills and Qualities of Police Leaders Required of Police Leaders Now and in the Future.'* in Barbara Etter and Mick Palmer (Eds.) Police Leadership in Australia. Sydney: Federation Press

McLaughlin, Eugene and Murji, Karim. 1997. *'The future lasts a long time. Public police work and the managerialist paradox'* in Peter Francis, , Paul Davis and Victor Jupp (Eds.) Policing Futures. The Police, Law Enforcement and the Twenty-First century. New York: St Martin's Press

McLaughlin, Eugene and Murji, Karim. 1998. *'Resistance through representation. Storylines, advertising and Police federation campaigns.'* Policing and Society 8: 367-99

McLaughlin, Eugene and Murji, Karim. 2001. *'Lost connections and new directions: neo-liberalism, new public managerialism and the "modernization" of the British police.'* In Kevin Stenson and Robert Sullivan, (Eds.) Crime, Risk and Justice. Portland: Willan

McLeod, Ross. 2002. Parapolice. *A Revolution in the Business of Law Enforcement* Toronto: Boheme Press

Magenau, John and Hunt, Raymond. 1996. *'Police unions and the police role.'* Human Relations 49:1315-43

Micucci, Anthony. 1995 *'The changing of the guard. The transformation of private security.'* Journal of Security Administration 18:21-45

Niland,. John, Russell Lansbury, and Chrissie Verevis, (Eds.) 1994. *The Future of Industrial Relations.* Global Challenges and Changes. London: Sage.

Normandeau, Alan and Leighton, Barry. 1990. *A Vision of the Future of Policing in Canada*. Ottawa: Solicitor General Canada.

O'Connor, Daniel, Randy Lippert, Kelly Greenfield and Phil Boyle. 2004. *'After the "Quite Revolution": The self-regulation of Ontario Contract Agencies'* Policing and Society 14: 138-57

O'Malley, Pat. 1992. *'Risk, power and crime prevention.'* Economy and Society 21:252-75

O'Malley, Pat. 1997. *'Policing, politics and postmodernity'*. Social and Legal Studies 6:363-381

Ontario Provincial Police. 1995. *Strategic Planning Committee on Police Training and Education.* Toronto: Ontario Provincial Police

Osborne, David. and Thomas Gaebler. 1993. *Reinventing Government.* New York: Penguin Books

Palmer, Mick. 1995 *'The likely environment in the year 2000 and beyond.'* in Barbara Etter and Mick Palmer (Eds.) Police Leadership in Australia. Sydney: Federation Press

Peters, Tom. 1987. *Thriving on Chaos: Handbook for a Management Revolution,* New York: Knopf

Power, Michael. 1994. *The Audit Explosion.* London: Demos

Reiner, Robert. 1992. *'Policing a postmodern society'* Modern Law Review 55:761-781

Rigakos, George. 2002. *The New Parapolice. Risk Markets and Commodified Social Control.* Toronto: University of Toronto

Rohl, Tim and Barnsley, Rowan. 1995. *'The strategic transformation of policing from occupational to professional status.'* in Barbara Etter and Mick Palmer (Eds.) Police Leadership in Australia. Sydney: Federation Press

Rose, Nikolas 1996. *'Governing "advanced" liberal democracies'* in Andrew Barry, Thomas Osborne and Nikolas Rose (Eds.) Foucault and Political Reason. Chicago: University of Chicago Press

Rose, Nikolas. 1999. *Powers of Freedom: Reframing Political Thought,* Cambridge: Cambridge University Press

Scheptycki, James. 1998. '*Policing, postmodernism and transnationalisation*.' British Journal of Criminology 38: 485-503.

Shearing, Clifford and Stenning, Philip. 1981. *'Modern private security: its growth and implications'* In Michael Tony and Norval Morris (Eds.) Crime and Justice. An Annual Review of Research. Chicago: Chicago University Press

Shearing, Clifford and Stenning, Philip. 1983. '*Private security: Implications for social control'*. Social Problems 30:493-506

Shearing, Clifford and Stenning, Philip. 1987. *'Say "Cheese". The Disney order that is not so Mickey Mouse'*. In Clifford Shearing and Philip Stenning. (Eds.) Private Policing. London:Sage

Stanko Elizabeth. 1996. '*When precaution is normal: A feminist critique of crime prevention'*, in Lorraine Gelsthorpe and Alison Morris (Eds.), Feminist Perspectives in Criminology, Milton Keynes: Open University Press

Turner, Lowell. 1992. *Democracy at Work. Changing World markets and the Future of Labor Unions*. London: Cornell University Press

Vickers, Margaret. 2000. '*Australian police management education and research: a comment from "outside the cave"*' Policing: An International Journal of Police Strategies and Management 23: 506-25

William O. Douglas Institute for the Study of Contemporary Social Problems 1984. *The Future of Policing. A Panel Report*. Seattle: William O. Douglas Institute

Wood, Jennifer. 2004 *'Cultural change in the governance of security'* Policing and Society 14:31-48

Spontaneous Accountability

Colin Scott*

ESRC Centre for Analysis of Risk and Regulation and Law Department

London School of Economics

Abstract

Contemporary ideas about the role of regulation in public policy are dominated by a loss of faith in traditional hierarchical modes of governance. This tendency has caused both scholars and public policy makers to search for evidence that other modes of governance are or might be effective in supplementing or replacing hierarchy as the basis for control {Black, 2001 #158; Gunningham, 1998 #218; Better Regulation Task Force, 2000 #273}. These other modes include governance through networks and communities, governance through competition and markets, and governance through design. If the regulatory state is represented by governance using the hierarchical instruments of state law, often with a measure of independence both from government and from regulatees, then the reconceptualisation necessary to incorporate other modes of governance involve the adoption of a new mentality which I have elsewhere labeled 'the post-regulatory state' {Scott, 2004 #1066} cf {Black, 2001 #158; Teubner, 1984 #142}.

The post-regulatory state of mind invites us to examine the full range of organizations and modes of control at play in any particular domains, for the purposes of understanding both how the regime operates and how it might be enhanced, in terms of securing appropriate outcomes. It entails identifying the ways in which variety in the modes of control match variety in the way that social and economic activities in regulated domains are carried out. This way of thinking about the post-regulatory state focuses on outcomes and outputs of regulatory regimes as sources of legitimacy. Thus the test of new modes of regulatory governance is 'do they work?' This instrumental approach neglects other aspects of legitimacy for regulatory regimes, and in particular the process-oriented concerns traditionally embraced by ideas of accountability.

Accountability is traditionally defined as the obligation to give an account of one's actions to someone else, often balanced by a responsibility of that other to seek an account {Normanton, 1966 #1082}. As applied in the public sector accountability most commonly refers to the hierarchical relationships entailed in the duty of public sector organizations to account for their activities to elected politicians, to the courts and to public sector audit institutions (political, legal and financial accountability, respectively){Mulgan, 2003 #1083}. The presence of this template of hierarchical accountability for public sector actors is a central aspect of the procedural dimension

* ESRC Centre for Analysis of Risk and Regulation and Law Department, London School of Economics. I am grateful to Michael W. Dowdle, Philippe Schneider and to Robert E. Goodin for comments on an earlier draft of this chapter and to participants in the March 2003 Workshop on Public Accountability at Columbia University for comments on the earliest presentation of these ideas. This paper will be published as Colin Scott 'Spontaneous Accountability' in Michael W. Dowdle (ed) *Rethinking Public Accountability* (Cambridge: Cambridge University Press, 2006, forthcoming).

of legitimacy claims for the public sector. Only at the margins do accountability structures have to be planned for any particular regime.

The key argument of the paper is that the recognition or introduction of hetararchical governance mechanisms in post-regulatory state thinking similarly bring with them distinctive accountability templates. The accountability templates mirror, to some extent, the characteristics of the modality of control. Thus networks and communities have distinctive accountability features which are integral to their capacity to operate as modes of control and the same is true for markets. In both cases these accountability templates are in part spontaneous features and in part supplied by state underpinning, for example with rules about charitable status, corporate governance ,and competition policy. The analysis generates a puzzle surrounding the existence of a less well explored fourth modality of control, said by some to be randomness and by others to be architecture. In my own work with Andrew Murray I have attempted to create a generic category under the heading of design-based control to capture this idea {Murray, 2002 #179}. However it is conceived, the problem with this fourth modality is that it does not appear to offer an accountability template.

A common response to the accountability problems raised by the recognition of hetararchical nature of contemporary regulatory governance is to identify deficiencies in accountability structures which might be remedied by applying traditional public accountability mechanisms to the diffuse nodes of regulatory power. In this chapter we examine the potential for the phenomenon of spontaneous accountability to offer a superior narrative for understanding the legitimacy of heterarchical governance in the post-regulatory state as being rooted within the distinctive accountability templates which attach to the particular modalities of control.

A central difficulty with thinking about accountability in post-regulatory regimes is that it is difficult to know with any precision what the effects of any functional equivalents to public accountability might be. The very strength of market and community ordering processes lies in the fact that they are not organized by government in hierarchical fashion. How can we be confident that the exercise of non-state power is legitimate without creating a fresh risk that the vitality of such spontaneous processes will be stifled? Though we identify regulatory power as being widely diffused it may be unhelpful to think that all such power should be brought within the ambit of identifiable accountability mechanisms or their equivalent. Rather we might trust to the maintenance of the distinctive control pressures which apply to market actors and community-based organizations. This idea is an application of the ‘law of requisite variety’ which suggests that control processes should exhibit at least as much variety as the activities to be controlled in order to be effective {Ashby, 1968 #1184: 134}.Here the law is extended in reflexive fashion to argue that accountability structures should similarly exhibit at least as much variety as the processes of control.

The limits to spontaneous accountability with the often discussed ‘fourth modality of control’ present an important challenge which is resolved in this chapter by suggesting that design, by itself, is less than a full modality of control precisely because it does not create responsibility on the part of the regulator or human agency on the part of the object of regulation. At best design is an adjunct to, or technique available within, the other modalities. More generally robust accountability regimes are likely to be generated where control is premised on a combination of two or more modalities of control such that forms of hybrid accountability are generated.

Introduction

Contemporary ideas about governance are dominated by a loss of faith in both hierarchical modes of control and state-centric conceptions of governing. This tendency has caused both scholars and public policy makers to search for evidence that other modes and loci of control are or might be effective in supplementing or replacing hierarchy and the state.[9] These other modes include governance through networks and communities, governance through competition and markets, and governance through architecture. Contemporary analysis of governance invites us to reconceptualize governing and challenge the centrality of the hierarchical instruments of state law and institutions. Such a reconceptualization requires us to examine the full range of organizations and modes of control at play in any particular domain, for the purposes of understanding both how the regime operates and how it might be enhanced, in terms of securing appropriate outcomes. It entails identifying the ways in which diversity in the modes of control matches diversity in the way that social and economic activities generally are carried out. This chapter extends discussion beyond the modalities of control through focusing on the question of how narratives can be developed which might give some process-based legitimacy to those regimes which displace state and hierarchy at the centre of accounts of contemporary governance. In particular we examine the regimes of accountability which emerge more-or-less spontaneously and attach themselves to different governance regimes. My use of the term spontaneous here implies the emergence of accountability regimes in a manner which is neither intended (or wholly intended) nor directed towards particular ends. This is not to suggest that the actors involved in at least some accountability structures lack intention or views on ends, but rather that accountability regimes, overall, are complex and not liable to be the product of intended actions (and therefore not directed towards particular ends).

Accountability is traditionally defined as the obligation to give an account of one's actions to someone else, often balanced by a responsibility of that other to seek an account.[10] As applied in the public sector accountability commonly refers to the hierarchical relationships entailed in the duty of public sector organizations to account for their activities to elected politicians, to the courts and to public sector audit institutions (political, legal and financial accountability, respectively).[11] The presence of this template of hierarchical accountability for public sector actors is a central aspect of the procedural dimension of legitimacy claims for the public sector and is closely linked to ideas of control.[12] Only at the margins do accountability regimes have to be planned for any particular governance regime.

A common response to the accountability problems raised by the recognition of hierarchical nature of contemporary governance is to identify deficiencies in accountability regimes which might be remedied by applying hierarchical and ex post accountability mechanisms to the diffuse nodes of power. Contrary to that approach this chapter argues that different governance mechanisms bring with them distinctive accountability templates – the modality of control shapes accountability as much as the other way around.

---

9 Better Regulation Task Force, *Alternatives to State Regulation* (London, 2000); Julia Black, "Decentring Regulation: The Role of Regulation and Self-Regulation in a 'Post-Regulatory' World" 2001 *Current Legal Problems* 103; Neil Gunningham & Peter Grabosky, *Smart Regulation: Designing Environmental Policy* (Oxford, 1998).

10 E. Leslie Normanton, *The Accountability and Audit of Governments* (Manchester, 1966).

11 Rubin (this volume); Richard Mulgan, *Holding Power to Account: Accountability in Modern Democracies* (London, 2003).

12 Robert Behn, *Rethinking Democratic Accountability* (Washington DC, 2001); Bruce Stone, "Administrative Accountability in the 'Westminster' Democracies: Towards a New Conceptual Framework" (1995) 8 *Governance* 505.

We examine the potential for the phenomenon of spontaneous accountability to offer a superior narrative for understanding the legitimacy of governance as being rooted within the distinctive accountability templates which attach to the particular modalities of control. Thus markets, networks and communities each have distinctive accountability features which are integral to their capacity to operate as modes of control. In each case these accountability templates are in part spontaneous features and in part supplied by state underpinning. The analysis generates a puzzle surrounding the existence of a less well explored fourth modality of control, said by some to be randomness and by others to be architecture. However it is conceived, the problem with this fourth modality is that it does not appear to offer an accountability template. The limits to spontaneous accountability with the often discussed 'fourth modality of control' present an important challenge which is resolved in this chapter by suggesting that design, by itself, is less than a full modality of control precisely because it does not create responsibility on the part of the regulator or human agency on the part of the object of regulation. At best design is an adjunct to, or technique available within, the other modalities.

More generally robust accountability templates are likely to be generated where control is premised on a combination of two or more modalities of control such that hybrid accountability regimes are generated. Thus spontaneity in accountability tends to be oriented around hybrid rather than archetypical accountability templates. We argue in this chapter that such hybrid accountability templates are a product of evolution in particular domains. A central consequence of this understanding of the phenomenon of accountability is that its character is more pragmatic than planned. Such spontaneous evolution of the accountability templates observable within particular domains creates a problem for any attempt to conceive of accountability structures as being amenable to processes of institutional design and planning. While we do not question the possibility of making interventions to change the character of accountability templates, such interventions are, necessarily, mediated through changes in the regime itself which may not be predictable.

I. Modes of Control and Accountability Templates

The bias towards hierarchical modes of control evident in much thinking about governance historically has derived from the idea that governance is something that is done by governments through law. It may be more helpful to displace the focus on government and its various institutional forms (for example departments, agencies and boards) with a regimes approach of the type developed in international relations scholarship and applied to regulatory governance.[13] A regimes approach invites us to look beyond governmental actors to the role of firms and non-governmental or civil society organizations as powerful participants in governance regimes, in both policy making and implementation, but also as originators and developers of governance beyond the state.[14] Firms have a key role in organizing their own management and compliance, but also in governing others through their decision making.[15] Alongside this shift in organizational focus we need to consider alternatives and supplements to the hierarchical modality of control.

Social science analysis of mechanisms of governance has long recognized the existence of three basic modalities organized around hierarchy, competition or market, and community.[16]

---

13 Marc Allen Eisner, *Regulatory Politics in Transition* (Baltimore, 2000).Christopher Hood, Henry Rothstein & Robert Baldwin, *The Government of Risk* (Oxford, 2001).

14 Peter Grabosky, "Beyond the Regulatory State" (1994) 27 *Australian and New Zealand Journal of Criminology* 192; Peter N. Grabosky, "Using Non-Governmental Resources to Foster Regulatory Compliance" (1995) 8 *Governance* 527; Neil Gunningham & Peter Grabosky, *Smart Regulation.*

15 Christine Parker, *The Open Corporation: Self-Regulation and Democracy* (Melbourne, 2002).

16 See Mashaw (this volume); Robert E. Goodin, "Democratic Accountability: The Distinctiveness of the Third Sector" (2003) XLIV *European Archives of Sociology* 359; Claus Offe, "Civil Society and Social Order: Demarcating and Combining Market, State and Community" (2000) XLI *Revue Europeennes de Sociologie* 71; Jon Pierre & B. Guy Peters, *Governance, Politics and the State* (Basingstoke, 2000).

Recognition of the distinctive structures and properties of these three sets of institutions is said to be a defining feature of the modern state.[17] The search for the appropriate balance between these three modes of governance is one of the basic questions of contemporary political theory[18] and an issue preoccupying both practitioners and analysts of public management.[19]

The analysis of variety in modalities of control enables us to see the narrowness of conceiving of governance as consisting exclusively of what state organizations do using hierarchical instruments, whilst opening up the possibility of seeing control through market and community-based control as alternatives or supplements to hierarchy.[20] Whilst the existence of three modalities of control associated with the state, the market, and the community is well established in the literature, some argue that there is a fourth distinctive modality premised upon, variously, the possibilities of contriving randomness into the control of human behavior,[21] and the use of architecture as a physical inhibitor on human behavior.[22]

The analysis of three or perhaps four modalities of control emergent within contemporary governance arrangements has been deployed chiefly with a focus on understanding the available variety of bases for governing, controlling, or regulating social and economic activity. Within the study of public management the analysis makes clear the possible alternatives to hierarchy and law as the means to make difficult resource allocation decisions, to evaluate the effectiveness of public services, or to steer such service provision in new directions.

Our interest in this chapter is on the accountability implications of recognizing and deploying these different modalities of control. Each modality has associated with it an 'accountability template' – distinctive features of the control dimension which map onto and generate distinctive dimensions of accountability. In this section we discuss each modality of control and examine the characteristics of its associated accountability template.

A. Hierarchical Governance

Within a state-centric conception of regulatory governance control is premised upon the use of law to make rules or standards, the capacity of departments and agencies to monitor for compliance, and the power to apply or to seek the application of formal sanctions to those whose behaviour deviates from the required norms. In practice, of course, much regulatory activity is rather less mechanical than the model suggests and involves the assertation of mandates over activities for which there is no legal basis, and responsive approaches to enforcement which do not routinely invoke the power to apply formal sanctions.

The hierarchical model of governance based on the activities of departments and governmental agencies is attractive because it has a good fit with theories of constitutional governance and delegation of power. It is a necessary incident of the use of public law as the basis for control that it brings into play an accountability template.[23] For example, New Public Management (NPM) reforms have been advanced as significant alternatives to hierarchy in public governance. But research in the UK found that NPM reforms, which involved a significant downsizing of the public sector, were accompanied by massive growth in

---

17 Jerry L. Mashaw (this volume)

18 Samuel Bowles & Herbert Gintis, "Social Capital and Community Goverance" (2002) 112 *The Economic Journal* 419.

19 Christopher Hood, *The Art of the State* (Oxford, 1998).

20 Julia Black, "Decentring Regulation: The Role of Regulation and Self-Regulation in a 'Post-Regulatory' World" 2001 *Current Legal Problems* 103.

21 Hood, *The Art of the State* .

22 Lawrence Lessig, *Code: and Other Laws of Cyberspace* (New York, 1999).

23 Mulgan, *Holding Power to Account.*

ultimately bureaucratic mechanisms of oversight over public sector activity.[24] The observation of these oversight structures forms a central part of claims that the UK continues to embrace the regulatory-state model of governance in the 1980s despite these NPM reforms.[25] Within the OECD generally the picture is more mixed, with evidence of effective enhancements to bureaucratic accountability template in some domains in some jurisdictions, but not in others.[26] In all this variation, it is possible to identify a distinctive hierarchical accountability template which attaches more or less spontaneously to the use of public law as the basis for organizational and normative change.

B. Governance Through Markets and Competition

Control through markets and competition is premised upon the idea that the behavior of dispersed buyers and sellers, when aggregated, creates a discipline on all actors in the market determining not only price but also the acceptable ratio between quality and price. The central mechanism of this modality is competition. Thus a form of standard is set through the interaction of buyers and sellers, which also forms the basis for monitoring and rewarding of compliant behavior through loyalty and punishing deviant behavior through exit.[27] Markets are not restricted to product markets, but also include markets for capital and labor in which similar disciplines apply.[28] In processes of public management reform one attraction of markets as determinants of how resources are allocated and used is precisely the tendency to remove from governments the responsibilities for these matters.[29]

Many market actors exercise power over others in a way that they are not simply takers of market signals as to the price and quality of products, but actually regulators of other actors. Thus insurance companies are key regulators of public and private actors in respect of their risk-related behavior.[30] Credit rating agencies similarly set standards and monitor for compliance in respect of the financial behavior of both firms and governments. There is a market for the products offered in both these sectors but the market driven behavior of the firm causes them to exercise power over others

With markets we may want to analyze the strength of the pull of market mechanisms over decision making and ask whether it can perform similar functions to more traditional accountability structures. Control through competition centrally involves the discipline that is involved in participating in a market. Accountability here emphasizes results.[31] The mechanism of "the invisible hand", as Adam Smith famously described it, is premised upon individuals acting in pursuit of their self interest[32] and it is those actions in aggregate which discipline others. The selfish pursuit of self-interest, as motivation, is liable to be condemned within many hierarchical and community settings, but applauded within the market. A key feature of market accountability is its 'intensive' nature and straightforward metrics of success and failure.[33] It is this aspect which has generated renewed faith in markets to exert accountability on public service providers under conditions where both more hierarchical

---

24 Christopher Hood *et al.*, *Regulation Inside Government: Waste-Watchers, Quality Police, and Sleaze-Busters* (Oxford, 1999).

25 Michael Moran, *The British Regulatory State: High Modernism and Hyper-Innovation* (Oxford, 2003).

26 Christopher Hood *et al.*, *Controlling Modern Government: Variety, Commonality and Change* (Cheltenham, 2004).

27 Albert O. Hirschman, *Exit, Voice and Loyalty: Responses to Decline in Firms, Organizations and States* (Cambridge, Ma., 1970).

28 Mashaw (this volume)

29 Freeman (this volume); Hugh Collins, *Regulating Contracts* (Oxford, 1999), p. 19.

30 Richard V. Ericson, Aaron Doyle & Dean Barry, *Insurance as Governance* (Toronto, 2003).

31 Goodin, "Democratic Accountability," p. 367.

32 Adam Smith, *Wealth of Nations* (Harmondsworth, 1970) [originally published 1776].

33 Donahue, "Market-Based Governance."

structures of accountability and more diffuse structures of accountability (see below) are perceived to have failed.[34]

The introduction of competition also brings with it, more or less spontaneously, new forms of accountability. This is particularly evident in those environments which use competition as a regulatory device in the absence of markets or real markets A key virtue claimed for publication of data about the performance of educational institutions is that it enables users of services to use the information to make choices. Provided users have real choices to make then those choices create competitive pressures which simultaneously offer control over service providers and a measure of accountability for the allocation, quality and, sometimes, price of those services. In the absence of such competitive pressures the management by public (and private) sector actors of contracts for provision of services can prove to be very difficult – it involves the substitution of contracts for the assertion of hierarchical accountability rather than the application of the market accountability template.[35] A key example of conditions under which competition operates to create an accountability template for governments occurs where regulatory regimes are in competition with each other to attract inward investment. The desire to attract investment may exert a downward pull on the stringency of regulatory rules to balance the upward pull which may result from constitutional politics.[36]

C. Governance Through Networks and Communities

Activities of networks and communities are able to exert control both on members of and outsiders to the community in processes of "mutual monitoring among a band of well-intentioned co-equals."[37] The mechanisms of standard setting, feedback and realignment of behaviour here are rooted in the capacities of communities to develop social norms and to police them through non-coercive mechanisms such as disapproval and, at the highest level, ostracization. Thus the central mechanisms of this modality of control are rooted in capacities for cooperation (and non-cooperation). I use the terms networks and communities to capture the idea that this modality of governance may emerge in communities which exist and gradually develop a capacity for control over members, and in networks which are formed amongst diverse actors for the very purpose of building up a form of control built upon mutuality.[38]

Mechanisms of community governance are often institutionalized within discrete organizational structures. It has long been recognized that associations of firms either formally or informally are liable to 'self-regulate' the behavior of their members. Such self-regulatory regimes often take on some of the characteristics of hierarchical control, with the promulgation of hard rules, systematic monitoring of compliance and the application of formal sanctions for breach of the rules. This kind of activity may affect firms outside the association if they feel they need to develop or meet similar standards, and even if they decide to operate different standards. Non-governmental organizations not only lobby governments on regulatory behavior and performance, but also carry out their own standard setting and substantive monitoring in fields as diverse as prison conditions and environmental performance. These activities are not restricted to the domestic level of governance, and have considerable importance at the supranational level, for example in efforts to plug the gaps in hierarchical control in European Community energy policy,[39] and for compensating for recognition of the limited capacities of national governments operating alone.[40]

---

34 Collins, *Regulating Contract*, p. 19.

35 Donahue, "Market-Based Governance," p. 12.

36 William Bratton *et al.*, eds., *International Regulatory Competition and Coordination* (Oxford, 1996).

37 Goodin, "Democratic Accountability," p. 392.

38 Pierre & Peters, *Governance, Politics and the State*, pp. 19-22.

39 Burkard Eberlein, "Competition and Regulation" (2003) 4 *Journal of Network Industries* 137.

40 Anne-Marie Slaughter, *A New World Order* (Princeton, 2004).

Participation in communities and networks brings with it an accountability template which is a product of this particular modality of control. As with markets there is not necessarily a governance organization required to account for its conduct. Rather behavior which has governance effects falls to be evaluated and responses generated by reference to the communities' norms and processes of showing approval and disapproval – the 'intangible hand'.[41] The focus of accountability is oriented towards intentions, in contrast with hierarchy (actions) and competition (results).[42]

D. Governance through Architecture

The existence of a fourth modality of control has been suggested more or less simultaneously by Christopher Hood and Lawrence Lessig, though their analysis is suggestive of markedly different conceptions of the phenomenon. For Hood, the idea of randomness as a modality of control is grounded in the observation that uncertainties as to consequences and payoffs lead us to behave in certain ways.[43] Hood's examples are drawn from attempts to regulate the public service. He suggests that contrived randomness may be explicitly deployed in public management through the use of lotteries for making decisions on the allocation scarce resources and random assignment of unannounced inspections.[44] In both these cases contrived randomness is used as a form of control in conjunction with hierarchy and it must be questionable whether contrived randomness, by itself, is a free-standing modality of control.

Architecture has received rather more attention as candidate for the fourth modality of control. It was the experience of attempts to control activities on the internet which caused Lawrence Lessig to place particular emphasis on the capacity of software code to act as an instrument of control over behavior of users in cyberspace. For Lessig the fourth modality of control (alongside his other three categories labeled 'law' 'norms' and 'markets') is architecture.[45] Thus, Lessig has revived arguments about the possibility of using physical controls over behavior as the basis for regulation.[46] Whilst IT firms have made extensive use of this possibility, Lessig's argument is that software code can be deployed, like law, for public purposes.

Hood and Lessig's version of the fourth modality have in common a link to fatalism,[47] in the sense that when contrived randomness and architecture are operating properly there is nothing the object of regulation can do to change the way these modalities are applied..[48] By the time the auditor has been randomly assigned to audit your tax file, it is too late to do anything about it. Control through architecture nevertheless involves choices about the built environment which simultaneously assert a standard or norm that is self-enforcing through the physical properties of buildings, roads and software and so on. Thus a concrete parking bollard asserts a standard that insists on no parking in a particular location through physically preventing a vehicle from entering the space. The simple presence of a physical barrier determines one's choice – free will has nothing to do with it.

Control through design presents us with a significant problem in terms of identifying an accountability template. In trenchant criticisms of the architectural modality of control Roger

---

41 Geoffrey Brennan & Philip Pettit, *The Economy of Esteem* (Oxford, 2004)

42 Goodin, "Democratic Accountability," p. 367.

43 Neil Duxbury, *Random Justice: On Lotteries and Legal Decision-Making* (Oxford, 1999).

44 Hood, *The Art of the State*, pp. 157-165.

45 Lessig, *Code: and Other Laws of Cyberspace*, pp. 235-239.

46 Clifford D. Shearing & Philip C. Stenning, "From the Panopticon to Disney World: The Development of the Discipline." in Anthony N. Doob & Edward L. Greenspan, eds., *Perspectives in Criminal Law*, (Toronto, 1985).

47 See especially Hood, *The Art of the State* (Chapter 3).

48 Andrew Murray & Colin Scott, "Controlling the New Media: Hybrid Responses to New Forms of Power" (2002) 65 *Modern Law Review* 491.

Brownsword has highlighted the extent to which this form of control removes human agency from the object of regulation. The aim of control through design is "to secure [a] pattern of behaviour by designing out any options of non-conforming behaviour."[49] We have no choice about whether to park illegally when faced with a concrete parking bollard in the ideal space. Similarly we lose the choice as to whether or not to engage in internet gaming of questionable but nevertheless possible legality when our financial intermediaries' payment software automatically blocks the transaction.[50]

This denial of human agency for the objects of regulation is mirrored by a lack of responsibility for the originator of the architectural control. Parking bollards cannot be complained to, and effective software based controls cannot be worked around. (The possibility of arguing with randomized audits of inspections results from the appearance of an official with some hierarchical authority, and it is not the randomness of the relationship of scrutiny that can be then argued with). The absence of human intermediation means that the feedback loop between the monitoring and behavior modification function found with the other three modalities is absent.[51] In many instances it may not even be apparent that design-based control is in play at all, or where it is apparent, who has initiated it and for what ends. Lessig himself recognized that the deployment of code as a modality of control is liable to be less transparent than the use of law.[52] A key consequence is that the minimal accountability associated with explaining one's regulatory position is lost.[53] Brownsword suggests that even if this problem of transparency were overcome through processes of deliberative decision making linked to the introduction of measures of control through design, we still risk losing the form of accountability which emerges from the day to day interactions of those involved with other modalities such as law enforcement officials, market actors and community members. Without such human intermediation "designed solutions might become so embedded in everyday life that it is only outsiders and historians who can trace the invisible hand of regulation."[54]

This lack of accountability for authors of control, coupled with the denial of agency for its objects, causes us to question whether design is a distinctive modality of control at all. We have observed that each of the other three modalities bring with distinctive features of an accountability template. With design the features of responsibility, accountability and agency can only be supplied through one of the three other modalities. In this sense, at best, architecture is not a freestanding modality. Put more forcefully it is merely an adjunct or technique of the other three modalities.

II. Spontaneous Accountability

The argument about problems of accountability invariably starts with an observation about the virtues and problems of hierarchical (typically public) governance. Resort to markets and competition as modalities of control appears to remove bureaucratic obstacles to efficiency and innovation,[55] whilst governance through communities and networks appears to be valued as a solution precisely because it offers an alternative to constitutional governance and the capacity to get things done which could not be done by the state using the hierarchical modality.[56]

---

[49] Roger Brownsword, "Code, Control, and Choice: Why East is East and West is West" (2005) 25 *Legal Studies* 1.

[50] Colin Scott, "Between the Old and the New: Innovation in the Regulation of Internet Gambling" in Julia Black et al., eds., *Regulatory Innovation* (Cheltenham, 2005).

[51] Lee Tien, "Architectural Regulation and the Evolution of Social Norms" (2004) 9 *International Journal of Communications Law and Policy* 1, p. 6.

[52] Lessig, *Code: and Other Laws of Cyberspace.* pp. 224-225; Tien, "Architectural Regulation," p. 2.

[53] Brownsword, "Code, Control, and Choice."

[54] Brownsword, "Code, Control, and Choice."

[55] See Freeman (this volume).

[56] See Braithwaitte (this volume)

The analysis offered thus far suggests that the problems of accountability that present themselves when governance departs from the hierarchical modality may be more apparent than real. It suggests that each modality of control (with the exception of the fourth) brings with it an accountability template as a more or less spontaneous incident of the control modality. In many instances the selection of particular modalities of control is made, with some deliberation, in order to invoke also the particular accountability template. Control and accountability are opposite sides of the same coin.

Thus, in some domains it may be appropriate to think about extending hierarchical mechanisms of accountability to embrace them. Thus self-regulatory associations may have their decision making subjected to judicial review, decisions of human rights watchers and even the scrutiny of legislative committees.[57] However, to apply such hierarchical models of oversight to market actors such as insurance companies and credit rating agencies seems less appropriate. There appear to be risks that asserting the mechanisms accountability centrally associated with hierarchy over non-hierarchical modalities of control might rob these alternative governance mechanisms of some of their key properties, undermining the particular forms of responsibility associated with the modality.[58] For example the creation of conditions under which civil society organizations compete with firms for the provision of contracted-out services neglects the distinctive benefits of community-based governance (and the potential for civil society organizations to do things the market cannot do) "undermining their distinctive accountability regime and eliminating the distinctive contribution they could have made to the overall accountability mix across society as a whole."[59] Tendering for government contracts introduces not only pressures of competition, but also locks contractors into the choices and accountability structures set hierarchically through government.

A central consequence of thinking about governance regimes, rather than organizations, is that we must then consider the aggregate accountability of the regime, rather than retain a focus on the accountability of some discrete governance organization.[60] As we will see, much of modern government involves a heterarchical mixing of these modalities of control. Conceptual problems of accountability arise because this mixing results in aggregate governance structures for which no single accountability regime seems suitable. The notion of spontaneous accountability argues that we do not need to fear a mixing of accountability regimes. The mixing of control will itself generate the proper mix of accountability structures[61]

III. Spontaneous Accountability in Hybrid Accountability Regimes

Oscar Wilde said of truth that it "seldom pure and never simple". The same might be said of patterns of control and the accountability templates which are incidental to them. Thus far we have suggested that each of four modalities of control (with the exception of control through design) carries with it a template of accountability which attaches spontaneously where the particular modality is chosen. The nature and operation of the accountability template is likely to vary in different settings. The study of any particular regime may reveal weaknesses in the operation of these distinctive accountability processes. It is common to find that the

---

57 Julia Black, "Constitutionalising Self-Regulation" (1996) 59 *Modern Law Review* 24.

58 John Braithwaite, "Accountability and Governance Under the New Regulatory State" (1999) 58 *Australian Journal of Public Administration* 90, p. 91.

59 Goodin, "Democratic Accountability," p. 390.

60 Jody Freeman, "Private Parties, Public Functions and the New Administrative Law" (2000) 52 *Administrative Law Review* 813 Peter Self, *Government by the Market? The Politics of Public Choice* (Basingstoke, 1993).

61 Compare John Braithwaite. 1997. "On Speaking Softly and Carrying Big Sticks: Neglected Dimensions of a Republican Separation of Powers." *University of Toronto Law Journal* 47: 305-361.

archetypical accountability template has been supplemented by other accountability mechanisms, sometimes drawn from other templates. Furthermore regimes in which controls occur through a hybrid of modalities are likely to involve hybrid accountability regimes.[62] Thus public management reforms which have invoked the capacity of communities and markets as alternative forms for the delivery of public services, bringing hybrid modalities of control, are also likely to involve the generation of hybrid accountability regimes, which combine the features of two or more accountability templates. For these various reasons hybridity, rather than purity, in accountability regimes is likely to be the norm.

We have noted that design-based control brings with it no accountability template. Accountability for design-based control measures is therefore dependent upon one or more of the other three modalities being linked to it, offering accountability rooted in community, competition or hierarchy. More generally accountability structures in any particular domain are likely to be more robust where two or more modalities of control are deployed because such circumstances offer multiple accountability templates and the prospect of redundancy such that the failure of one aspect of accountability may be compensated by the presence of another.[63] Hybrid accountability may not, of course, always be efficient. Redundancy may be valuable up to a point, but may also be costly in imposing excessive accountability requirements. More critically the cross-over of accountability templates with other modalities of control may cause interference. Thus accountability templates which emerge in markets may be disrupted by the imposition of the hierarchical accountability template. Community-based accountability may be disturbed where the requirement of the competition or hierarchy accountability templates intrude.

The hybridity of control regimes testify to the spontaneity of public accountability. The hybrid regimes discussed below invariably arose spontaneously. They nevertheless seem to work in acceptably accountable fashion. This combination of unplanned hybridity and undesigned accountability suggests that public accountability may be the product of techniques of control, rather than the other way around.

A. Hybrids in Public Government

Government departments and agencies do not only operate through hierarchical governance instruments. Observation of the 'Japanese paradox' is suggestive of a system of governance in which "in terms of authority to act and intervene, the jurisdictional mandate as it were, government or the state seems pervasive yet its capacity to coerce and compel is remarkably weak."[64] Whilst Japan may be an outlying case it is clear that governments in other OECD countries also exploit their membership of networks and communities to exert control which is not capable of being exercised hierarchically, but in which the state's position at the centre of information networks is a key dimension of its capacity.[65] A more recent trend has been the explicit harnessing of competition as an instrument to secure governmental objectives, not only through privatization and liberalization of utilities services and other state owned enterprises, but also with services which continue to be owned and operated by the state, and for which there no proper market, as with healthcare.

Similarly, a key aspect of NPM reforms over the past twenty five years or so has been to supplement the accountability template for hierarchical control with other accountability forms premised upon participation in communities and networks. But accountability through networks and communities for bureaucracies is hardly new. Thus, for example, an ethnographic study of the British Treasury undertaken in the early 1970s found that control over senior civil servants was largely based upon mutuality of esteem and respect which they

---

62 Goodin, "Democratic Accountability," p. 367.

63 Scott, "Accountability in the Regulatory State".

64 John Owen Haley, *Authority Without Power: Law and the Japanese Paradox* (New York, 1991), p. 14.

65 Christopher Hood, *The Tools of Government* (London, 1984).

sought for their activities.[66] Thus, to the extent that such actors were also subject to the hierarchical accountability mechanisms they were operating in a hybrid accountability template. Many areas of public service have been deliberately disrupted through the introduction of control through markets and competition. Policies of privatization and liberalization of utilities sectors in many countries have involved subjecting service providers to the twin market disciplines of performance in capital markets for securing of funds for investment and retail markets for competition for customers.

B. Hybrids in Markets

Similarly, the accountability template for markets is not restricted to pressures of competition. Foundational underpinnings of market activity, such as the recognition of property rights and the capacity to enforce contracts, generate forms of accountability to courts which are hierarchical in character. In many jurisdictions sellers acting in the course of business are subject to rules on honesty in describing products and general quality standards which do not apply to non-business sellers. Most forms of business association are subject to a myriad of rules on such matters as accounting and audits, and increasingly also guidance and codes on how they conduct their business.

Participation in stock markets entails subjection to a variety of forms of hierarchical accountability for conduct in the market to self-regulatory and or governmental agencies. In many other markets the incidents of participation include subjection to accountability to regulators concerned with such matters as protection of consumers and environment, occupational health and safety, and so on.[67] Recognition of the fragility of competition in markets causes hierarchy to be invoked in the form of competition or anti-trust law to address various forms of market failure. All forms of business association carry with them mechanisms of accountability which are perhaps most developed for listed companies. In this last case the concern is to impose accountability on firms and their senior employees to their shareholders.[68] Additionally, the market-driven behavior of firms can lead some to gain formal power over others.[69]

Thus with the modality of control based in competition and markets the accountability template may be centered on market mechanisms, but appears typically to invoke also, at minimum, elements of hierarchy. We see this also in how the process of changing the accountability structures for former state owned enterprises (often apparently regulated through community-type controls) has frequently involved introducing new layers of hierarchical regulation and thus also accountability to address risks of market failure associated with limited competition.[70]

Markets also frequently evince more communal modes of control and accountability. Empirical research has revealed that business people routinely ignore the terms of the contracts which underpin their exchange, finding appropriate solutions to problems that arise without recourse to the law.[71] Where such contractual behavior is premised upon trust in continuing relationships the mode of governance is more akin to community than competition. Whilst some might take these phenomena as evidence that markets operate less

---

66 Hugh Heclo & Aaron Wildavsky, *The Private Government of Public Money* (London, 1974).

67 Mulgan, *Holding Power to Account*, pp. 131-136.

68 Mulgan, *Holding Power to Account*, pp. 119-131.

69 Arthur Stinchcombe, "Contracts as Hierarchical Documents." in Arthur Stinchcombe & Carol Heimer, eds., *Organizational Theory and Project Management* (Bergen, 1985)

70 Colin Scott, "Privatization, Control and Accountability" in Joseph McCahery *et al*., eds., *Corporate Control and Accountability* (Oxford, 1993).

71 Hugh Beale & Tony Dugdale, "Contracts Between Businessmen: Planning and the Use of Contractual Remedies" (1975) 2 *British Journal of Law and Society* 45; Stuart Macaulay, "Non-Contractual Relations in Business: A Preliminary Study" (1963) 28 *American Sociological Review* 55.

than perfectly, for the purposes of this chapter the significance lies indicating the hybridity of control (and thus, in my argument, also accountability) within market settings.[72]

Another key example of community-based control and accountability in markets is provided by the ratings systems developed by internet selling sites such as e-bay in which deficiencies of information which would otherwise create problems of control over actors frequently engaged in discrete transactions are overcome through the building of transparent records of buyer and seller conduct in sending out goods in accordance with description, making payment and so on. A somewhat different example is provided by attempts to reorient firms away from operation by reference purely to market considerations through the corporate social responsibility movement which invites firms to open themselves to some of the values and structures associated with the community based mode of accountability. The credibility of such corporate social responsibility practices is built not only on community-based accountability, but also on the techniques of audit which are associated with hierarchy.[73]

C. Hybrids in Communities

Community organizations are also frequently hybrid in character. Community organizations which adopt charitable status are, variously, subjected to hierarchical accountability obligations to charities regulators and tax authorities concerned to ensure compliance charitable purposes. The use of formal organizational structures brings with it not only the accountability structures incidental to it, but also a sharper focus for participation in networks, both as mode of governance and of accountability. Though such networks are a feature of governance and accountability for state and market actors, they are a distinctive feature of community-based control.[74] The power wielded by NGOs, professional associations and other civil society organizations is often both substantial and more concentrated than is the case of public agencies.[75] It is vital for the legitimacy of such activities that there is a plausible narrative for their accountability rooted in the community-based modality of control and their embeddedness within networks, and/or derived from other modalities. Inevitably participation by civil society organizations in markets (for example for the provision of public services) draws in other mechanisms of accountability drawn from both competition-based and hierarchical modes of governance.

Similarly, self-regulatory regimes based on trade or professional associations may evolve in such a way as to substitute for the exercise of state hierarchical power and, linked to this, become targets of hierarchical accountability. A well established doctrine in English public law has seen self-regulatory organizations such as the City Panel on Takeovers and Mergers and the Advertising Standards Authority subjected to the discipline of judicial review over their self-regulatory decisions for this reason.[76]

Indeed, governments may deliberately invoke such self-regulatory capacity as a mechanism for delivering public objectives, steering organizations towards the introduction or development of regimes of rules and enforcement over their members so as to stave off the state version of hierarchical control.[77] Self-regulatory organizations may choose to invoke the hierarchical capacity of the state as a means to increase the credibility of their community

---

72 John D. Donahue, "Market-Based Governance and the Architecture of Accountability" in John D. Donahue & Joseph S. Nye, eds., *Market-Based Governance: Supply Side, Demand Side, Upside and Downside* (Washington DC, 2002), p. 2.

73 Sasha Courville, "Social Accountability Audits: Challenging or Defending Democratic Governance?" (2003) 25 *Law and Policy* 269.

74 Goodin, "Democratic Accountability," pp. 373-379.

75 Colin Scott, "Private Regulation of the Public Sector: A Neglected Facet of Contemporary Governance" (2002) 29 *Journal of Law and Society* 56, p. 74)

76 Black, "Constitutionalising Self-Regulation".

77 Richard Lewis, "Insurers' Agreements Not To Enforce Strict Legal Rights: Bargaining With The Government And In The Shadow Of The Law" (1985) 48 *The Modern Law Review* 275.

based activities creating accountability not only of their members but of the association itself to the state's hierarchical enforcement capacity or the 'gorilla in the closet'.[78]

Community based regimes may similarly invoke the capacity of markets for supporting the control and accountability functions which cannot be wholly effective where the community in question lacks the necessary embeddedness with the firms whose decisions are critical to its success. Thus with the Forest Stewardship Council an accreditation scheme was created through the partnership of environmental NGOS and producers in which a central driver of take-up is market positioning of major retailers.[79] As higher education institutions have scrambled to recruit students (and sometimes faculty also) from overseas, national and international rankings published in newspapers and magazines have taken on a significance that is based on more than just prestige.[80] The UK government has developed performance league tables for schools and hospitals and linked this to the rights to choose service providers as a way of harnessing competition as a mechanism for exerting control over quality of public service offerings, often alongside other modalities of control.[81]

D. Design Hybrids

As noted above, accountability structures involving design are liable to based in other modalities of accountability to which techniques of design have been applied. Thus the use of unannounced inspections for purposes of schools and prisons regulation is an adjunct to the hierarchical capacity of state inspectors to demand the right of access to such organizations. The use of software filters to block access to certain types of website is a design-based technique used both by market actors (accountable through sales figures) and community groups (mutually accountable to each other for their intentions) to offer particular opportunities for reducing alleged harmful effects of the internet.

Conclusion

In this chapter I have argued first that the contemporary recognition of the diffuse nature and fora of contemporary governance appears to create something a problem for public accountability. Public actors are liable perform their tasks through harnessing the variety of modalities of control, with an apparent risk that traditional public sector accountability mechanisms will be evaded. Furthermore we recognize the extent to which non-state actors play distinctive roles in contemporary governance, not simply through participation in the processes of constitutional governance, but through the development of their own distinctive governance forms, rooted in the institutions of communities and markets. Conventional accountability narratives, emphasizing *ex post* and hierarchical forms of accountability, with only very limited reach beyond state actors, are unable to support the burden of providing a narrative of accountability that can legitimate governance structures involving diffuse actors and methods.

The solution to the problem offered in this chapter it to reconceptualize hierarchical accountability as but one of the available accountability templates and to recognize that diffuse modalities of control bring with them to a greater or lesser degree spontaneously, variety in the ways of holding actors to account. I suggest that each modality of control has a distinctive accountability template associated with it that operates as a mirror image. But the spontaneity of accountability extends beyond these archetypical or pure accountability

---

78 Joseph Rees, "The Development of Communitarian Regulation in the Chemical Industry" (1997) 19 *Law and Policy* 477.

79 Benjamin Cashore, "Legitimacy and the Privatization of Environmental Governance: How Non-State Market-Driven (NSMD) Governance Systems Gain Rule Making Authority" (2002) 15 *Governance* 503.

80 Hood, *et al.*, *Controlling Modern Government.*

81 Peter Self, *Government by the Market? The Politics of Public Choice* (Basingstoke, 1993). See especially Chapter 5.

templates, and finds its most interesting and pervasive expression in hybrid accountability regimes which are a product of hybridity in the modalities of control which appear typical of contemporary governance across state, market, and third sectors. Hybrid accountability regimes evolve in a way that might be expected to counter-balance weaknesses that are found in pure forms of accountability rooted in hierarchy, competition and community.

Hybrid accountability regimes are difficult to locate and characterize with clarity. They are liable to change through indirect response to the changing structures of control within any particular domain. This observation makes problematic the argument made by Mashaw[82] and others to the effect that delivering credible and legitimate structures of accountability is a matter of institutional design. Such an approach appears to risk laying a veneer of legitimacy through accountability over the accountability template which operates dynamically in any particular domain, with the effect of obscuring or stifling it. A more fruitful approach may be found in the empirical observation of accountability regimes and the development of strategic and indirect interventions to address identified weaknesses. Such interventions will necessarily affect not only accountability, but also the modality of control. The effects of such interventions cannot be calculated with precision, but may rather be directed at shifting the accountability template away from undesirable effects and towards something more ideal. Furthermore such interventions, and intentions to steer accountability templates towards changed objectives, need not be a monopoly of state actors, but might equally well emerge from the institutions of markets and communities.

82 Mashaw (this volume).

References

Beale, Hugh, & Tony Dugdale. 1975. *"Contracts Between Businessmen: Planning and the Use of Contractual Remedies"* in British Journal of Law and Society 2: 452.

Behn, Robert. 2001. *Rethinking Democratic Accountability*. Washington DC: Brookings Institution.

Better Regulation Task Force. 2000. *"Alternatives to State Regulation."* London: Cabinet Office.

Black, Julia. 1996. *"Constitutionalising Self-Regulation."* Modern Law Review 59: 24-56.

Black, Julia . 2001. *"Decentring Regulation: The Role of Regulation and Self-Regulation in a 'Post-Regulatory' World."* Current Legal Problems [2001]:103-146.

Bowles, Samual, & Herbert Gintis. 2002. *"Social Capital and Community Governance."* The Economic Journal 112:419-436.

Braithwaite, John. 1997. *"On Speaking Softly and Carrying Big Sticks: Neglected Dimensions of a Republican Separation of Powers."* University of Toronto Law Journal 47:305-361.

Braithwaite, John. 1999. *"Accountability and Governance Under the New Regulatory State."* Australian Journal of Public Administration 58:90-97.

Bratton, William, Joseph McCahery, Sol Picciotto, and Colin Scott (Eds.). 1996. *International Regulatory Competition and Coordination*. Oxford: Oxford University Press.

Brennan, Geoffrey, & Philip Pettit. 2004. *The Economy of Esteem.* Oxford: Oxford University Press.

Brownsword, Roger. 2005. *"Code, Control, and Choice: Why East is East and West is West."* Legal Studies. 25:1-20.

Cashore, Benjamin. 2002. *"Legitimacy and the Privatization of Environmental Governance: How Non-State Market-Driven (NSMD) Governance Systems Gain Rule Making Authority."* Governance 15:503-529.

Collins, Hugh. 1999. *Regulating Contracts*. Oxford: Oxford University Press.

Courville, Sasha. 2003. *"Social Accountability Audits: Challenging or Defending Democratic Governance?"* Law and Policy 25:269-__.

Donahue, John D. 2002. *"Market-Based Governance and the Architecture of Accountability."* in Market-Based Governance: Supply Side, Demand Side ,Upside and Downside, edited by John D. Donahue and Joseph S. Nye. Washington DC: Brookings Institution.

Duxbury, Neil. 1999. *Random Justice: On Lotteries and Legal Decision-Making*. Oxford: Oxford University Press.

Eberlein, Burkard. 2003. *"Competition and Regulation."* Journal of Network Industries 4:137-155.

Eisner, Marc Allen. 2000. *Regulatory Politics in Transition*. Baltimore: Johns Hopkins University Press.

Ericson, Richard V., Aaron Doyle and Dean Barry. 2003. *Insurance as Governance*. Toronto: University of Toronto Press.

Freeman, Jody. 2000. *"Private Parties, Public Functions and the New Administrative Law."* Administrative Law Review 52:813-858.

Goodin, Robert E. 2003. *"Democratic Accountability: The Distinctiveness of the Third Sector."* European Archives of Sociology XLIV:359-396.

Grabosky, Peter. 1994. *"Beyond the Regulatory State."* Australian and New Zealand Journal of Criminology 27:192-197.

Grabosky, Peter N. 1995. *"Using Non-Governmental Resources to Foster Regulatory Compliance."* Governance 8:527-550.

Gunningham, Neil, & Peter Grabosky. 1998. *Smart Regulation: Designing Environmental Policy*. Oxford: Oxford University Press.

Haley, John Owen. 1991. *Authority Without Power: Law and the Japanese Paradox*. New York: Oxford University Press.
Heclo, Hugh, and Aaron Wildavsky. 1974. *The Private Government of Public Money*. London: Macmillan.
Hirschman, Albert O. 1970. *Exit, Voice and Loyalty: Responses to Decline in Firms, Organizations and States*. Cambridge [MA]: Harvard University Press.
Hood, Christopher. 1984. *The Tools of Government*. London: Macmillan.
Hood, Christopher. 1998. *The Art of the State*. Oxford: Oxford University Press.
Hood, Christopher, Oliver James, Guy Peters, and Colin Scott. 2004. *Controlling Modern Government: Variety, Commonality and Change*. Cheltenham: Edward Elgar.
Hood, Christopher, Henry Rothstein, and Robert Baldwin. 2001. *The Government of Risk. Oxford*: Oxford University Press.
Hood, Christopher, Colin Scott, Oliver James, George Jones, and Tony Travers. 1999. *Regulation Inside Government: Waste-Watchers, Quality Police, and Sleaze-Busters*. Oxford: Oxford University Press.
Lessig, Lawrence. 1999. *Code: and Other Laws of Cyberspace*. New York: Basic Books.
Lewis, Richard. 1985. *"Insurers' Agreements Not To Enforce Strict Legal Rights: Bargaining With The Government And In The Shadow Of The Law."* Modern Law Review 48:275-292.
Macaulay, Stuart. 1963. *"Non-Contractual Relations in Business: A Preliminary Study."* American Sociological Review 28:55-83.
Moran, Michael. 2003. *The British Regulatory State: High Modernism and Hyper-Innovation*. Oxford: Oxford University Press.
Mulgan, Richard. 2003. *Holding Power to Account: Accountability in Modern Democracies*. London: Palgrave Macmillan.
Murray, Andrew, and Colin Scott. 2002. *"Controlling the New Media: Hybrid Responses to New Forms of Power."* Modern Law Review 65:491-516.
Normanton, E.Leslie. 1966. *The Accountability and Audit of Governments*. Manchester: Manchester University Press.
Offe, Claus. 2000. *"Civil Society and Social Order: Demarcating and Combining Market, State and Community."* Revue Europeennes de Sociologie XLI:71-93.
Parker, Christine. 2002. *The Open Corporation: Self-Regulation and Democracy*. Melbourne: Cambridge University Press.
Pierre, Jon, and B. Guy Peters. 2000. *Governance, Politics and the State*. Basingstoke: Macmillan.
Rees, Joseph. 1997. *"The Development of Communitarian Regulation in the Chemical Industry."* Law and Policy 19:477-528.
Scott, Colin. 1993. *"Privatization, Control and Accountability."* In Corporate Control and Accountability (Joseph McCahery, Sol Picciotto, and Colin Scott, eds.). Oxford: Oxford University Press.
Scott, Colin. 2000. *"Accountability in the Regulatory State."* Journal of Law and Society 27:38-60.
Scott, Colin. 2002. *"Private Regulation of the Public Sector: A Neglected Facet of Contemporary Governance."* Journal of Law and Society 29:56-76.
Scott, Colin. 2003. *"Speaking Softly Without Big Sticks: Meta-Regulation and Public Sector Audit."* Law and Policy 25:203-219.
Scott, Colin. 2005. *"Between the Old and the New: Innovation in the Regulation of Internet Gambling."* In Regulatory Innovation (Julia Black, Martin Lodge, and Mark Thatcher, eds.). Cheltenham: Elgar.
Self, Peter. 1993. *Government by the Market? The Politics of Public Choice*. Basingstoke, England: Macmillan.
Shearing, Clifford D., and Philip C. Stenning. 1985. *"From the Panopticon to Disney World: The Development of the Discipline."* in Perspectives in Criminal Law (Anthony N. Doob and Edward L. Greenspan, eds.). Toronto: Canada Law Book Inc.
Slaughter, Anne-Marie. 2004. *A New World Order*. Princeton, NJ: Princeton University Press.

Smith, Adam. 1970 [orgi publ 1776]. *Wealth of Nations*. Harmondsworth: Penguin.
Stinchcombe, Arthur. 1985. *"Contracts as Hierarchical Documents."* in Organizational Theory and Project Management (Arthur Stinchcombe and Carol Heimer, eds.). Bergen: Universitetsforlaget.
Stone, Bruce. 1995. *"Administrative Accountability in the 'Westminster' Democracies: Towards a New Conceptual Framework."* Governance 8:505-526.
Tien, Lee. 2004. *"Architectural Regulation and the Evolution of Social Norms."* International Journal of Communications Law and Policy 9.
Wilks, Stephen. 1998. *"Utility Regulation, Corporate Governance, and the Amoral Corporation."* in Changing Regulatory Institutions in Britain and North America (G. Bruce Doern and Stephen Wilks, eds.). Toronto: University of Toronto Press.

Private Finance, Professionalisation and Corporate Governance in the Housing Association Sector

Morag McDermont

School of Law and Centre for Market and Public Organisation

University of Bristol

Abstract

Housing associations have traditionally been bound together by notions of providing for those in housing need, non-profit making and a voluntary ethos. Since the mid 1980s these understandings have altered when associations began to develop a private sector ethos leading to: increased priority given to the needs of private funders; complex group structures and a diversification of activities; professionalisation of boards of management, largely at the behest of the state regulator; and a re-imaging of tenants as 'customers'. These changes have raised fundamental questions about the appropriateness of associations' modes of internal governance through voluntary governing bodies. The shifts in culture have potentially created difficult and contradictory subject positions for members of boards, who are both subjects of governing – from regulators, funders, senior professional staff – and themselves governors. Board members must reconcile responsibilities for ensuring that the association meets financing obligations, with the needs of tenants and the 'community'.

This paper will present some preliminary observations on housing association governance in a changing environment, as a prelude to a new research project that will examine the role of tenants on housing association governing bodies. The paper raises questions about the application of the corporate governance literature to the housing association sector, and the appropriateness of applying private sector principles of corporate governance to organisations in the voluntary/quasi-public sector. Using Foucault's insights on the subject and power the paper will consider how tenant board members are constructed by others, and themselves, in relation to the norms and expectations that prevail in the social housing sector.

Board Room Dramas

In October 2003, next to a photo of cookery writer Prue Leith with head in hands, Guardian Society ran a story about a row that had broken out in the governing body of the country's largest housing association, Places for People (PfP). According to the report, some of the association's board members were 'up in arms over allegations of management dictatorship'. Five of the board's eleven members claimed that the Chairman and the Chief executive were excluding them from management decisions. David Walker, board member and editor of Society Guardian, resigned, and Prue Leith walked out, after two board members were removed from by 'a handful of "shareholder" members' (Weaver, 2003: 2).

Places for People Housing Group owns 53,000 'social housing' homes throughout the country. The Group has an annual turnover of £200 million and net assets worth £1.9 billion. Housing associations are 'not for profit' organisations whose primary purpose is the

ownership and management of rented housing. They can be charitable or non-charitable. Housing associations are not prohibited from making profits, but these profits – renamed 'surpluses' for political reasons – cannot be distributed to shareholders or members, but must be reinvested in activities that fulfil the organisation's objectives. The housing association sector is big business: in 2003 the combined asset value of housing association properties was £59.9 billion, their turnover was £7.5 billion and collectively their post tax surpluses amounted to £281 million (Housing Corporation/NHF, 2004). The row in the country's largest association was seen as not only bad news for the sector, but also for the government, for whom the sector is seen as a successful example of the private finance model for public services. In the same article the *Guardian* reported the Housing Minister as being concerned about the dispute in PfP; two weeks later the government's regulator, the Housing Corporation, took control by putting the association 'under supervision'.

It was this article that brought to the foreground some of the tensions in the current rationalities that pervade the social housing sector concerning internal governance, and in particular the role of the governing body – generally referred to as the 'board'. In a world where providers of social housing see themselves primarily as large businesses, how could boards made up of voluntary members, supposedly representative of the communities associations operated within, have any influence or control? And in particular, how could *tenant* members of those boards make any difference faced with the might of professional power, of both other board members and the association's managers? In this paper I first outline the background to the present-day housing association sector, and some perspectives on its governance, in particular the role that has come to be played by private finance. I then turn to questions of power relations within the housing association board, using in particular the insights of Michel Foucault, to think about the subject-position of tenants as board members. I use this to reflect on the role that might be played by understandings of the way tenants are 'made up', and the role that expertise might come to play in mediating the tensions arising between public service values, private finance and professionalisation.

The rise and rise of privately financed 'social housing'

Since the Housing Act 1974 the Housing Corporation has been the government's regulator *and* funder of the housing association sector. The 1974 Act established for the first time a register of associations to be maintained by the Corporation: only bodies on this register would be eligible to receive public subsidy. The Corporation has powers to supervise and regulate registered associations, including the control of the disposal of all housing association property, and the power to remove members of a housing association board, or to put its own appointees onto the Board in cases of mismanagement or misconduct.

The housing association sector was once a voluntary affair: associations were set up and run by voluntary committees, who also carried out all, or nearly all, the day-to-day management of properties and tenants. However, the 1970s saw a rapid expansion of the sector, principally fuelled by the new grant regime established by the Housing Act 1974, which enabled associations to access 100% public funding – in a mixture of grant and loan – for all new developments (new build and rehabilitated older housing). In this period the housing association sector sought to shed its image as a voluntary, amateur sector. *Growing Pains* (NHFA, 1977), a publication by the representative body of associations, the National Federation of Housing Associations (NFHA[i]) recommended that associations should seek rapid growth to enable them to take on sufficient staff to deal with the expansion in their role arising, in part, from the increased funding through the 1974 Act. It also recommended a fundamental shift in the role of voluntary management committees who should become overseerers and monitors, with the day-to day running of the organisation becoming the role of paid, professional staff.

By the 1980s the largest associations in particular had become development-led. Large development teams were reliant on a continuing, and increasing, stream of finance. With ever-increasing homelessness, there was a perception that public funding for associations would soon become insufficient to meet the need for continuing expansion, leading some members of the NFHA and the Housing Corporation to begin to look for alternative funding through private borrowing from banks and building societies. Changes in the Housing Act 1988 gave private lenders the comfort that associations would be able to pay back loans, and from 1988 mixed public/private funding became the mechanism for funding new housing association schemes.

The impact of the stock transfer programme

Another significant event occurring in 1988 was the first transfer of a local authority's housing stock to a housing association. Initially inspired by the desire of local authority senior housing officers' to escape the constraints of Department of the Environment (DoE) and Treasury control (Cowan, 1999), the *Large Scale Voluntary Transfer* (LSVT) programme has subsequently become a major feature of New Labour's social housing policy. In the shift to a mixed funding model for housing associations the Housing Corporation and the associations convinced the Treasury that associations could be counted as risk-bearing, private sector bodies. This meant that any loans they could raise from private lenders would not be counted as public borrowing (see Mullins, *et al*, 1993; Gibb, 2003: 96-99). The ability to 'lever in' private finance into the social housing sector has meant that the stock transfer programme is now the government's principal strategy for achieving its 'decent home standard' for all council and housing association property by 2010 (ODPM, 2003b: part 1).

Over the years following 1988, an increasing focus for the housing association sector and its regulator became the maintenance of a steady stream of private finance. Both the Corporation and local authorities – who could also fund associations principally through capital receipts from the transfer of their housing stock – set up competitive mechanisms for allocating funding. Vincent-Jones terms these 'quasi-markets' (2000; Vincent-Jones & Harries, 1996), with the nature of such markets being highly constructed by the regulatory players. Competition, and competition law, became a route for introducing new values; those of the private sector, values which are, at best, in tension with public service values, at worst, incompatible (Prosser, 2005: 14). However, the housing association sector rapidly internalised these values: in order to reduce the amount of public funding required for any scheme, associations increased private borrowing. Hence, both loan portfolios and rents charged to tenants increased in the following years. As borrowing levels increased, housing associations became perceived as increasingly risky operations. One impact of this increased perception of financial risk has been the introduction of new private regulators into the sector (cf Scott, 2002), particularly the Ratings Agencies. The state regulator's requirements have also shifted to reflect these new financial concerns (Day *et al*, 1993), inscribed in the Housing Corporation's Regulatory Code (below).

The governance of housing associations

Malpass (2000), in his definitive text on the history of the housing association sector, considers that governance of the sector falls into three levels: corporate, local and national (chapter 12; also see Rhodes, 1996). Clearly the three levels are interlinked; indeed, Malpass comments that

> It is clear that the governance model for RSLs in England reflects deliberate choices made in the late 1980s about weakening the power and influence of local authorities and giving priority to competition and managerialism (2000: 254).

This research is concerned with corporate governance, though the use of the term 'corporate' locates associations within the sphere of 'corporations', a location that is fairly new and still a subject of some contestation (below). Prior to the expansion of the sector in the 1970s, it was an association's management committee that was (generally) responsible for all matters to do with the day-to-day and strategic management of the organisations. In the 1970s, associations were focused on dealing with expanding operations - issues of governance did not appear high on the agenda. Housing organisations were internally focussed, concerned with the problems arising from transforming into bureaucracies and dealing with the expectations of government and the regulator/funder to deliver the annual programme. The terminology of corporate governance had not arrived: the governing body was the management committee (or for the charitable trusts, the board of trustees). The Federation's guidance in *Growing Pains* was limited to exhortations to ensure a wide membership base for the association:

> At the end of the day, associations are controlled by their Members [share-holders] and a strong representative membership can give them a broad base of support, better communications and credibility within the community as a whole (NFHA, 1977: 19).

The Housing Corporation too was not willing to be prescriptive about the nature of internal governance procedures, as the introduction to its circular *In the Public Eye* (Housing Corporation, 1978) indicates:

> 1. The purpose of this circular is to indicate ways in which registered housing associations can satisfy public scrutiny. The Housing Corporation accepts that housing associations are in essence voluntary and independent bodies, dependent on the efforts of well-motivated individuals. However, with the increasing size of housing association programmes, and the large public subsidy they now receive, certain standards of public accountability are required. A balance must be struck between these two essential concepts, and the Housing Corporation accepts that accountability cannot be carried beyond the point where the identity of voluntary housing is itself prejudiced.

However, by the late 1980s, under the impact of private finance and competition, associations in England began to expand out from being locally-based bodies, to operating across local authority boundaries – some, like PfP became national players. If share-holder membership had been appropriate for the pre-expansionist model, it now became stretched to the limits. When the communities that associations operated in spanned many counties, it became difficult to see how the share-holder basis could be seen as representing communities. By 1994 the sector perceived there to be increasingly unfavourable external representations of housing associations, coupled with a general concern about the corporate governance and accountability of these organisations which had a significant impact on the 'public' domain. The NFHA established an 'independent inquiry comprising respected professionals from a range of disciplines' to 'overhaul the governance of the [housing association] sector ' (NFHA, 1995/6). The person chosen to chair the inquiry was David Hancock, an Executive Director of Hambros Bank who had previously held the post of Permanent Secretary at the Department of Education and Science. The choice was significant given the transformation of a significant proportion of the sector from voluntary organisations to private businesses.

After receiving and considering evidence from around 200 individuals and organisations, the Inquiry produced a report and draft Code of Governance, with the message that 'housing associations should be competent, accountable, independent and diverse' in the words of the inquiry chairman (NFHA, 1995a: 5). Competence meant 'building homes that work for a

competitive price .. enjoying the confidence of tenants .. staying solvent .. discharging financial, statutory and regulatory obligations'. Independence, in the Inquiry's terms, meant being independent of party politics, pressure groups and Ministers (ibid). The Federation believed that the inquiry had pre-empted a review of housing associations by the Committee on Standards in Public Life (Nolan, 1996), which 'overwhelmingly endorsed the code's principles' (NFHA, 1995/96: 9).

How the governing body obtains its members is a matter that has in practice varied throughout the sector. Shareholding membership, referred to in the Federation's 1977 report, is considered to be anachronistic, a "historical anomaly" (NHF quoted in Weaver, 2003). However, many associations still use this model, whereby shareholders take out a £1 share (which does not pay dividends and cannot be traded) enabling them to vote for non-executive officers at the AGM – the association at the centre of the opening drama, PfP, at the time had a shareholding membership of only 40 shareholders. However, some associations have chosen to use the shareholder model as a way of widening their base, as in the case of Westlea Housing Association (an LSVT association created 10 years ago from the stock of a Wiltshire district council) which is proposing to

> undertake a recruitment drive for new £1 shareholding members in Westlea to increase the number and diversity of individuals and organisations who can play a role in supporting Westlea's work.[ii]

The LSVT 'constituency model'

The government's expectation of the LSVT associations is that the board will be made up of equal proportions of members from three 'constituencies': one-third local authority representative, one-third tenants and one-third 'independents' (ODPM, 2003a). This is in contrast to the majority of the traditional associations who grew out of 'top-down philanthropy' (Malpass, 2000: 256), which led to few members of management committees being tenants. In the LSVT associations, tenants appear to be expected to play a significant role in governance, at least in terms of numbers on the governing body. These associations are seen, in a report commissioned by the DETR, as 'blaz[ing] a trail for the rest of the RSL sector in establishing tenant involvement at Board level as a feature of RSL governance (Cobbald & Dean, 2000).[iii] One might see the make up of the board as one way of balancing the tensions inherent in organisations which have to meet a complex range of demands: tenants representing the 'user' perspective, local authority members representing 'community' interests and the 'independents' bringing in the perspective of the financiers and the private business values. However, as I will explore later, the use of a legal model to attempt to bridge gaps between different interests can tend to brush over other issues at play in the power relations, both within the association's board, and in the external regulatory space.

The role and expectations of the board and its members

The technical detail of how a board comes to be constituted is only one element of housing association internal governance. Equally significant is how governance is defined (and by whom). The Report of the NFHA inquiry into governance considered that '[g]overnance in any sector is about the exercise of power within a framework' (NFHA, 1995a: 9). The Housing Corporation considers that 'properly governed housing associations [are] ones where the governing board provides leadership and holds management to account' (Steele & Parston, 2003: 15). Chris Cornforth, in a review of the models of governance in both the business and not-for-profit sector, describes the legal position of boards 'the ultimate

authority .. responsible for appointing and supervising management and deciding the policy of the organisation' (1995: 14).

The 'Independent Commission into Good Governance in Public Services',[iv] sets out some of the complexities of governance:

> The governors of our public service organisations face a difficult task. They are the people responsible for governance – the leadership, direction and control of the organisations they serve. Their responsibility is to ensure that they address the purpose and objectives of these organisations and that they work in the public interest. They have to bring about positive outcomes for the people who use the services, as well as providing good value for the taxpayers who fund these services. They have to balance the public interest with their accountability to government and an increasingly complex regulatory environment, and motivate front-line staff by making sure that good executive leadership is in place (Independent Commission, 2004: v).

From the sector's point of view, it is the very existence of its voluntary boards that becomes a central element in the claim to independence: the fact that associations are controlled by independent boards means that they cannot simply be passed off as agents of central or local government. Malpass, however, is less optimistic:

> It is fanciful to think that they [board members] are in control of strategy in any real sense – it is the government and the Corporation that decide what RSLs will do, and therefore any strategic thinking at the level of individual organisations takes place within narrow and well-defined limits (ibid: 260).

Whilst recognising the importance of the central state in directing social housing policy and the organisations involved in its delivery, a Foucauldian perspective calls into question the ability of the central state to be as all-controlling. Alan Hunt's understanding of the state as a site where the 'capillaries of power' become condensed (Hunt, 1992) seems more appropriate. Resistances in localities or 'capillaries' problematise power relations, enabling 'local' rationalities to disrupt existing programmes and strategies and force a process of rethinking. The row in the board of a large housing association causes difficulties for the pursuance of centralised strategies. Whilst the immediate response of the regulator was to put PfP 'under supervision', the long-term solution was seen to lie within the control of the association and its board. Within this context, boards may be able to make a difference, and therefore, tenants on housing association boards may be able to become one mechanism through which marginalised voices can be heard.

Housing association governance and business norms – a question of identity

Returning to the Governance Inquiry's statement that governance is 'the exercise of power within a framework', then it is the norms and values that become accepted and internalised by an association and its board that come to intimately impact on that exercise of power. Given the expectation of many housing associations that they should be expanding to become more competent social *businesses*, it is unsurprising that the sector's perspective on governance has been coloured by events and developments in the business sector. The Federation's decision to establish its 1994 inquiry was partly influenced by high-profile issues of corporate governance in private sector organisations which had become very public following the failures of Maxwell, BCCI and others (Ashby, 1997: 68), and the Report of the Committee on the Financial Aspects of Governance (Cadbury Report, 1992). However, some have called into question such connections: in its submission to the Governance Inquiry Panel the London Voluntary Committee Members Working Group considered that comparisons with Cadbury were inappropriate because associations were not commercial organisations (NFHA, 1995b).

Similar concerns have been expressed more recently about the 'Independent Commission into Good Governance in Public Services'. The draft *Good Governance Standard* was, the Commission says, influenced by the Cadbury Code, and the more recent Higgs Report – the Higgs Committee was established by the Department of Trade and Industry to *Review of the role and effectiveness of non-executive directors* (Higgs Committee, 2003) in commercial companies, resulting in a new *Combined Code of Governance* issued by the Financial Reporting Council (FRC, 2003). However, as with the Federation's 1994 inquiry, there have been some in the not-for-profit sector who question the appropriateness of such influences. Andrew Phillips, charity lawyer, peer and charity trustee for over 30 years, considers that 'some voluntary organisations are "doctrinaire" in importing recommendations, especially those emanating from the [Higgs Review] of corporate governance in firms' (Walker, 2004: 14).

Turning to guidance from the government department with responsibility for housing and local government, the Office of the Deputy Prime Minister (ODPM), and the Housing Corporation, the intention seems to be to steer housing associations down the route of corporate governance; in government policy circles, the norms of business culture appear as a primary reference point. This domination of private business norms occurs both through both formal codes and by requiring committees to take on as 'independent' members with a professional background in business or finance.

Regulatory expectations

We saw earlier that the ODPM's preferred constituency model for housing association boards attempts to encompass a range of interests within the structure. However, the focus on the competence of the housing association board defined in terms of the market – ensuring business competiveness and financial strength – comes out as key guiding principles, not just in the Federation's Code but also through government policy. In the guidance given to local authorities contemplating the transfer of stock to an association (ODPM, 2003a), the ODPM gives an indication of some of the expectations that central government currently has for housing association boards:

> 13.17 The composition of the governing body should be such that it has the full range of business skills and financial acumen to be capable of managing a large organisation, which is likely to have significant debt at the outset. This will be important not only for the new RSL but also for funders.

The sector's regulator, the Housing Corporation, places the association's board in the front-line of corporate responsibility, ultimately taking responsibility for the association's activities and performance through 'signing off' the annual performance report submitted to the Corporation – in effect a form of self-monitoring of the sector. Such monitoring reports, along with the inspection reports of the Housing Inspectorate (a section of the Audit Commission) are critical for associations in a great number of ways. These reports provide profiles of associations for their private funders, local authority partners and other stakeholders.

Inscribed within the regulatory regime is the duty owed to the sector's private funders. The first standard of the *Regulatory Code* makes it the board's first duty to ensure that private lenders are satisfied:

> 1.1 Housing associations must operate viable businesses, with adequate recourse to financial resources to meet their current and future business and financial commitments:
> […]
> 1.1.2 fulfilling their loan-agreement covenants (Housing Corporation, 2000).

Governing in the 'public interest'?

All the attempts at defining governance detailed above appear as little more than lists of tasks for the board; there is little, if any attempt to identify the tensions between the normative values that might themselves govern the governors. What is lacking from all of these attempts to define governance is any sense of the values that might underlie the techniques and structures. The Commission comes closest in its reference to working in the *'public interest'*. However, whenever 'public interest' is set out as a standard or value in practitioner literature there is little or no attempt to define what it means – it is almost as if it is a term of common sense. However, As Mike Feintuck discusses in his paper (later in this Working Paper), the idea of public interest and public services has 'increasingly been subject to, and driven by, a process of commodification', a defining of the public within an economic framework – what I have termed elsewhere, the 'financial projection' (McDermont, 2005). This framing of public service and public interest in such terms blocks out other possibilities; the common sense understanding of 'public interest' renders invisible other possible formulations, including the potential for democratic values to be advanced (Feintuck, 2004).

The discussion above has focussed on the external norms and values which will act to influence the operation of housing association boards, values that become inscribed through various forms of legal guidance and frameworks. However, much less tangible are the values that are adopted which shape concepts of how the governing body 'ought' to behave and the understandings by which it operates, and which guide decision-making. Davina Cooper suggest that the origins of these norms may have little to do with legislative authority:

> [I]f we seek the origins of these norms, through which Kingsmead [School] governed itself, they appear to have little to do with the council. They also cannot be said simply to originate from central government. Instead, they go to the heart of liberal rule. Institutions possess a *degree* of autonomy because they operate, at least formally, according to agreed public principles (Cooper, 1998: 108).

The previous sections have attempted to describe some of the policies, pressures and tensions that go to 'govern at a distance' the decisions of the governing body. The decision-making framework for governing bodies is a complex one. External expectations – of government, regulators, and increasingly, funders – are clearly prevalent, and high on the agenda, but one suspects they become overlaid by other norms. It is into this complex quagmire of expectations and understandings that tenant board members must enter. To attempt to understand this role, we need a perspective on how power relations might operate – we want to try to uncover the possible ways in which tenant board members experience power relations within the board, and are able to intervene in these relations. Here, the work of Michel Foucault that can provide particular insights. Foucault's work on the operation of power relations is becoming increasingly influential in studies of the social housing system (e.g. Casey & Allen, 2004; Cowan & Marsh, 2005; Flint, 2002; McDermont, 2004). Foucault's project was not to study the 'phenomena of power…[but] to create a history of the different modes by which, in our culture, human beings are made subjects' (Foucault, 1983: 208). To study the power relations that tenant governors operate within, the focus of study becomes the manner in which tenants construct themselves, and are constructed by others, as both tenants and governors.

Constructing tenants, constructing governors

Foucault, the subject and power

In his essay *The Subject and Power*, Foucault (1983) identified 'three modes of objectification that transform human beings into subjects' (ibid). The first mode of objectification arises through the crucial status of the human sciences, for example, the ways in which economics makes humans into productive subjects. To this role played by the human sciences we should add the role played by professionals and experts in 'neo-liberalism' (see Rose & Miller 1992; Rose 1993). In the reshaping of the housing association sector, it is financial and legal expertise that has taken on a critical importance. Through the lens of financial expertise tenants tend to be viewed as a category of risky individuals. As financial expertise invades the domain of housing management expertise, tenants become seen as a potential risk to the income stream through non-payment of rent, damage to property, or as perpetrators of 'anti-social behaviour' that makes estates hard-to-let (Cowan *et al*, 1999).

The second mode of objectification is what Foucault has termed the "dividing practices": 'the subject is either divided inside himself or divided from others' (ibid). There is clearly an overlap here with the first mode. Take, for example, the category of 'anti-social behaviour' that has become such a dominant factor in social housing policy and practice. It is a category used to divide social housing from the rest of housing provision (when do we see owner-occupier estates imaged as sites of anti-social behaviour?); and it is used to divide one type of social housing tenant – the responsibilised tenant conforming to community norms (Flint, 2002) – from another – the "tenant from hell".

Foucault's third mode of objectification is concerned with the way in which humans turn themselves into subjects. Again, self-subjectification does not operate in isolation, but in conjunction with the other modes. It is through study of this process of self-subjectification that we can hopefully gain some insights into how tenant governors view their role, how they believe power can be exercised, and to what ends. Through the processes of self-subjectification tenants construct themselves as *moral* – even moralising – subjects, affected and influenced by ethical codes. This subjectification relates to perceptions of power and powerlessness: the state's rhetoric that tenants are empowered and have rights does not necessarily mean that they will *perceive* that they have rights (or power), either individually or collectively (see Cooper, 1998: 113). The state's emphasis on the need for financial expertise and business knowledge is just as likely to make tenants believe that their own form of knowledge is of a lesser status, and possibly invalid.

One of the most critical insights that Foucault has given us is that power is not only – in fact, we might say, not principally – exercised through domination. Rather, it is exercised through a myriad of processes by which we each become subjects; these processes are both exercised *over* us by others, and exercised through our own attempts to create truths about ourselves. It suggests that the exercise of power within the board of a housing association is not simply to be studied through examples of dominion – such as the story of PfP that opened this paper. Indeed, such examples might serve to obscure the everyday, mundane relations through which power is exercised. Tenants come to be governors of housing association boards through a variety of experiences and understandings, that in themselves construct a subject-position for tenants on the governing body. Once enrolled as a decision-maker within the board structure, there will be many forces that will attempt to mould and alter tenants concepts of public principles and responsibilities – of which the one described at the beginning of this paper, attempts at domination, will quite likely be the least effective. The final section of this paper provides a sketch of the subject-position that is created for tenants by the discourse of social housing, and then considers the role that professionalism, the norms of private finance, and the potential for creating new domains of exercise, might play in the power relations.

'Making up' tenants as governors

'Making up' tenants

In thinking about Foucault's concern with the way we are made into subjects, a starting point must be the way in which tenants see themselves *as tenants*. One way of imaging the tenant/landlord relationship, seen in the Law Commission's most recent consultation document (Law Commission, 2002) is as a commercial contractual relationship. Whilst this is part of the relationship, it is only a small part. Since Octavia Hill, philanthropic interventions into the rented sector have considered tenants as poor people who had to be 'improved', both in their physical conditions and, equally (more?) importantly, in their moral conditions. Hill is credited with being the first to devise a systematic approach to housing management (Cowan & McDermont, forthcoming): the object of her systems was to instil 'the habits of industry and effort' into her tenants (Malpass, 1999: 11). Her methods involved the 'instruct[ion of] tenants in methods of hygiene and household management, including financial management' (Brion & Tinker, 1980: 60),

Octavia Hill's housing management approach has now become a profession with its own systems of accreditation. The present-day formulation of housing management, influenced by the language of New Labour, is based around ideas of community and responsibilisation. Tenants are encouraged to become 'responsible' neighbours; behaviour, and particularly the behaviour of their adolescent sons, is expected to conform to the 'proclaimed commonly held "community" values' (Flint, 2002). So tenants become responsible for policing their own communities, but at the same time, housing associations, along with many other corporate entities, are assuming increasing levels of political authority (see Shearing & Wood, 2003: 412). Associations have increasing powers to deal with, for example, anti-social behaviour, and so tenants are becoming subject to increasing police powers exercised by their landlord.

At the same time, the government and associations are attempting to turn the tenant/landlord relationship into a more commercial one through a shift in the methods of allocation social housing. Choice-based letting, described as a 'paradigm shift' in social housing allocations policies (Pawson & Mullins, 2003: 18), is another example of shifting social housing towards the commercial, as opposed to needs-based model, 'integrating market mechanisms within what were previously wholly administrative systems' (ibid: 19). Choice-based letting treats applicants to the social housing system not as dependents, but as active consumers offered, and able to make, choices (Marsh, 2004: 189).

However, the nature of the social housing sector, a residualised and marginalised sector, means that tenants are not fully consumers, but in Bauman's words 'flawed consumers' unable to fulfil 'the most crucial of the social duties .. being active and effective buyers of goods and services' (Bauman, 1998: 90-91). As flawed consumers they assume a high risk factor to organisations whose primary duty is to meet its loan repayments.

The centrality of expertise

> The key to the technology of the self is the belief that one can, with the help of experts, tell the truth about oneself (Dreyfus & Rabinow, 1983: 175).

Housing is littered with expertise – management expertise, construction expertise, financial expertise, the list goes on. The story I have told - of the expansion of a sector from small voluntary groups to large bureaucratic organisations, a sector that has embraced professionalisation to shake off an amateurish image, a sector that has gone from charitable funding, to public funding, to private loans – suggests the primacy of the professional project, and most recently, the primacy of the 'financial projection'.

Certainly, the history of housing can be seen as a series of attempts to create a 'profession', to have the expertise of the managers of housing accredited as more than just 'common sense' (see Laffin, 1986). As far back as 1936, the Society of Women Housing Managers provided

an accredited qualification for those who wished to follow the Octavia Hill model of housing management; today the Chartered Institute of Housing, and a number of universities, accredit a variety of professional qualifications for housing managers and others seeking a professional status in the housing system. Casey and Allen (2004) point to the potential for performance management to be appropriated by front-line housing managers in a 'professional project of the self', 'by working on their attitude towards their work so as to present themselves as more professional and thus substantiate their claim to a professional status' (at 396).

And so too, it might be suggested, in the field of governance. Larner and Butler (2005: 94-5) point to the developing of partnering in communities as a technique of governance in New Zealand which facilitates new forms of expertise – an expertise that appears particularly open, in the New Zealand context, to women, and Maori and Pacific people. In the governance of public services the 'Good Governance Standard', specialised training by external agencies, and 'manuals' for governors, all suggest the formation of a new domain of expertise focused on the governor. It is into this new field of expertise that tenant governors may be able to insert themselves, coming as they do with a certain 'authorisation', a claim to 'speak authoritatively' on the subject of tenants. However, such new domains of expertise may themselves shape the power relations in such a way as to promote a certain set of values, and silence debates about the values tenants might see themselves as bringing to the board room: for as Rose has said, expertise as a mode of governing 'depoliticizes and technicizes a whole swathe of questions by promising that this machinery will operate according to a logic in which technical calculations .. will overrule a logic of contestation between opposing interests' (1993: 294). One only needs to look at the Good Governance Standard and its 'six core principles of good governance', which are descriptions of processes, practical activities – technologies, to use the language of governmentality – that hide the power relations inherent in board governance. They require 'engaging stakeholders', 'performing effectively', 'developing the capacity', 'taking informed, transparent decisions' (Independent Commission, 2004: 6).

Other elements of this new expertise seem to attempt to valorise existing professional expertise: for example, one research project that examined the roles and expectations of board members recommended that 'strategy and scrutiny can only be properly effective if governors are masters of financial information and performance assessment' (Steele & Parston, 2003: 36). And training for tenant board members by the external consultants, Priority Estates Project (PEP), appears as an attempt to responsiblise tenant board members:

> The weekend will demonstrate techniques to help Board members prioritise their workload, how to work with staff and partners and how to understand how rules – if agreed early – will encourage the Board to manage its responsibilities more effectively.[v]

Whilst this approach takes a very positive view of the role of tenant board members, it does not appear to take account of tenants as representatives of marginalised, socially excluded citizens, the 'subjugated voices' (Foucault, 2003). It does not appear to take account of the *difference* between tenant board members and others, the professionals and the local authority nominees, experienced in committee work and of working through bureaucratic structures. This stands out in stark contrast to the training for worker directors when these were introduced in the 1970s into the British Steel Corporation (BSC *et al*, 1977). In the workers' account of the training programme that they undertook prior to becoming members of the board of directors, it was the *joint* design and running of the programme by the steel industry's management college *and* the TUC College that was critical:

> 'It was absolutely essential for the training to be seen as a joint affair,' one [worker director] said. 'It would have been wrong to embark on a programme of

> participation while receiving information and tutoring from only management. People would have viewed that as brainwashing' (*ibid*: 19).

Personal experience of housing associations tells me that tenant board members are not in such a position – there seems to be little concern that training by the association staff could be 'brainwashing', it is simply seen as informative. But we should not be surprised that the housing association sector blanks out the idea of a conflict of interests, for central to its strategy is the, very New-Labourish, idea of 'stakeholders', a concept which Levitas points out, cannot take account of the conflicts of interest between the various stakeholders:

> The essence of stakeholding is the denial that there is a fundamental conflict of interest between owners, managers, workers, and the common good (Levitas, 1998: 87).

Professionalisation as a 'dividing practice'

The further difficulty for the tenant board member is that within the housing association structure, tenant and governor are divided, each holding very different interests. Does then the result of this dividing practice require that the tenant choose one side of the divide or the other? Is the 'tenant board member' a divided personality from the outset?

The experience of being a board member is potentially a 'dividing practice' in another sense. The increasing drive to the professionalisation of board members – both through recruiting professionals, and through the training process – quite possibly has the effect of dividing those who can bring expertise that is understood as being necessary, from those who equally have an expertise – their experience and understanding of being a tenant of the association, on the receiving end of governing – but whose expertise is not that of a *professional.* However, this may be too crude an analysis. The LSVT constituency model of the board enables tenant governors to claim an equal position on boards to the local authority and 'independent' members (unlike in the 'traditional' housing association sector, where tenants may only have one place on the board). The difficulty then comes in marking out territory of expertise for *tenant* board members that is somehow distinct from board members *per se*, something that appears absent in the good practice literature.

Questions for the future: possibilities for influencing change?

The fundamental question that arises in the context of the presence of tenant board members is, do they have the ability to influence change in the 'modern' housing association? The use of the term 'modern' is an attempt to encompass the shift from concepts of 'publicness' in the 1970s to 'privateness' in the 21st century; from small, philanthropic organisations to multi-million pound business centrally focussed on raising private finance; but also, hopefully, a shift from 'top-down' philanthropy to the central involvement of users in the governing of these organisations. This raises a prior question – why are tenants on the board at all? – one that requires interrogation of the modes of decision-making housing association boards see themselves as operating within. To borrow some of the understandings and observations from the corporate governance literature, there can be seen to be two possible models (Parkinson, 1993: 364-5): enlightened management discretion, underwritten by moral and ethical values; or decision-making processes open to influence by parties affected by corporate decisions. The constituency model for LSVT boards would appear to be signing up to the second model; local authority governors and tenant governors as representatives of interest groups within the association's area of operation. However, as much as this model is being held up as an example of leadership in tenant participation, it does not sit easily with the housing

association sector's fierce defence of its independence; and, in any case as discussed above, the processes of 'making up' governors may work against any concepts of interest group representation.

What emerges is a highly complex set of formulations, where the potential for tenant board members to intervene in the power structures of the board are tied up with a series of questions about identity – not just the identity of tenant members, but the identity of the LSVT association, and ultimately of the housing association sector itself. Using the public/private divide may be crude, and clouding the already muddy waters; but on the other hand, the labels 'public sector' and 'private business sector' carry with them considerable emotional baggage, and form part of a wider set of agendas. Our board members, as actors on a small stage within a much larger arena, will be at least influenced by these external agendas – the 'Defend Council Housing' campaign, the Treasury's championing of private business as the only innovators, and government and association arguments to defend the *private* nature of associations in order to enable borrowing to be *private* loans. Set against this, is the idea of that associations are providing *public* services, and boards are to manage in the *public* interest.

So within this inquiry, there are a number of sub-questions that refer back to the primary question about tenant influence:

- From where/how do 'public principles' arise for housing association boards? Do tenant members bring their own principles, and if so, do they perceive these as being in conflict with, or compatible with, the board's understanding?
- Do tenant board members see their role as representing tenants, and if so, how do they go about keeping some connection with those they seek to represent?
- Dividing practices: does the potential for the tenant board members to become the new experts enable them to intervene in pre-existing power structures; alternatively, does the tenant board member become so divided from the tenant as tenant as to make the concept of a tenant board member with a specialist contribution to the board proceedings to be invalid?

It is hoped that our future research will be able to throw some light on these problematics of the adaptation of private sector values to public service cultures.

Corporatization, Competition, and the Public Interest in Health Services Regulation

Peter Vincent-Jones

School of Law

University of Leeds

Abstract

This paper considers the question of the 'public interest' in health services regulation in England against the background of recent organizational reforms directed at both increasing competitive incentives within the NHS through corporatization, and expanding the role of private and voluntary sector bodies in a mixed market of healthcare provision. Various dimensions of the public, citizen, and consumer interest in healthcare are explored with reference to three analytically distinct modes of provision: direct delivery by a government body; quasi-market organization involving 'purchase-of-service' contracting; and provision by a private body subject to statutory regulation. Here it is argued that that proper account needs to be taken of the shifting organizational foundations of health and other human services, and of the way in which the drift to privatization is being further encouraged by the introduction of new forms of consumer choice and individual exit from traditional state provision. The paper goes on to examine the regulatory frameworks governing relationships between various actors with stakes or interests in healthcare networks, including Primary Care Trusts, the Department of Health, the Commission for Healthcare Audit and Inspection, NHS Foundation Trusts, the Independent Regulator of NHS FTs, the Council for Healthcare Regulatory Excellence, NHS and non-state service providers, and citizens and consumers. An analysis is provided of the control and incentive characteristics of three main forms of regulation within these networks: (1) 'authorization' of NHS FTs by the Independent Regulator; (2) legally binding contracts governing the relationship between Primary Care Trusts and NHS FTs and other service providers; and (3) the statutory complaints and redress mechanisms structuring relationships between citizens and service providers in the NHS and independent sectors. Finally, the analysis is related to the ongoing debate on the governance of social and healthcare 'services of general interest' in the public interest, stimulated by the European Commission's recent Green and White Papers on this subject.

Introduction

Since 1997 New Labour has given renewed impetus to the quasi-market reforms of public services begun under the Conservatives. Within the NHS, purchasers and providers are being exposed increasingly to competitive pressures and incentives directed at encouraging entrepreneurial behaviour and innovation. Health services generally are being restructured through the intensification of competition amongst a growing diversity of public and independent providers, coupled with novel forms of purchaser and patient choice. As health service networks become larger and more heterogeneous, so the task of regulation becomes more difficult, with a proliferation of regulatory agencies and instruments operating in ever more complex and overlapping governance regimes. Fragmentation has led to new problems of economic coordination. In addition, new challenges have arisen concerning the need to reconcile efficiency and competitiveness with the political goal of ensuring that high quality services be available to all citizens on an equitable basis. EU member states are under further pressures to protect citizen and consumer interests in essential services in a manner consistent with the operation of the competition rules of the Treaty.

This paper focuses on the tension between the increasing involvement of private and voluntary sector bodies in health service networks on the one hand, and certain key individual and public interests in these services on the other. Given the *de facto* occurrence of extensive privatization in the post-Thatcher era, the 'general interest' in public services can no longer be maintained through state ownership and management of assets, direct employment, and associated traditional accountability mechanisms. The expanding role of non-state bodies in public service networks implies the dispersal of regulatory functions among a wide range of actors, including agencies, independent sector providers, and citizens and consumers themselves. The principal aim of the paper is to map the main features of the current organizational and institutional landscape of health service provision in England as a prelude to the more thorough investigation and evaluation of how well the tensions between private and public, individual and collective interests in these networks are being managed in prevailing regulatory arrangements.[83] The analysis is informed by a responsive regulation approach that views public and collective interests in complex human services as best maintained through mixed institutional forms transcending the rigid boundaries of public and private law.[84]

I. Competition in Health Services

i. Corporatization

For present purposes, corporatization may be understood as the process whereby bodies performing public service functions are constituted as distinct legal entities, separate from the public organisations of which they have hitherto been part. Corporatization typically entails the separation of provider functions from direct government control in key human service sectors such as health and education, the relationship thus created being governed through contracts or 'operating agreements' in accordance with conditions set out in enabling statutes. As a regulatory instrument, corporatization shifts the balance of power among key players engaged in public service networks by altering the legal status and capacities of certain

---

[83] Devolution in the UK has resulted in significant policy divergence on a range of public service issues. While in England competition and market reforms are being embraced with enthusiasm, reform in Scotland and Wales is occurring within more traditional bureaucratic organization – see M. Sullivan and M. Drakeford, 'Devolution, Divergence and Social Policy' (2005) 3 *Wales Journal of Law and Policy* 7. I am grateful to Rick Rawlings for bringing to my attention the importance of policy divergence in the UK health sector, and for this reference.

[84] P. Vincent-Jones, The New Public Contracting: Regulation, Responsiveness, Relationality (forthcoming, OUP).

agents.[85] Under legislation introduced in the late 1980s, Training and Enterprise Councils (TECs)[86] and City Technology Colleges (CTCs)[87] were created as either charitable bodies or private companies limited by guarantee, with dual legal accountability to shareholders and the Secretary of State. More recently this model has been adopted for Academies.[88] Corporatization here serves to increase the involvement and influence of local business communities, and to inject an element of competitive discipline into the design and implementation of educational and training programs. While typically there is no legal requirement for formal competitive tendering, private and non-profit organizations or consortia are invited to bid for the right to provide defined services, with submissions being subject to rigorous assessment and comparison.

In the health sector, corporatization refers to the process of conferment of independent legal status on Foundation Trusts (FTs), accompanied by increased powers and freedom from hierarchical constraints that continue to apply to ordinary trusts. Part 1 of the Health and Social Care (Community Care and Standards) Act 2003 establishes FTs as public benefit corporations authorized under the Act to provide goods and services for the purposes of the health service in England.[89] Authorization involves application by NHS trusts or other bodies to the independent regulator established under s2, provided in both cases that the application is supported by the Secretary of State. The Government's stated intention is to offer all NHS Trusts the opportunity to bid for FT status by 2008.[90] In the meantime, the aim is to help all Trusts to achieve the standards of FT status through progressively introducing elements of the NHS FT regime, with most of the financial disciplines being introduced by 2006.[91] Powers of FTs to engage in commercial activities include the ability to borrow for capital developments, to set up subsidiary companies, and to dispose of certain assets and retain the proceeds. Further flexibility for local managers is given in determining local pay and employment conditions. FTs remain firmly within the organizational boundaries of the NHS, however, and are subject to continued central directions and frameworks of national standards, inspection, and performance information. The retention of central control is justified by the need to maintain a healthcare system that is more integrated and 'joined-up' than international

---

85 A. Dunsire, 'Tipping the Balance: Autopoiesis and Governance' (1996) 28 *Public Administration* 299.

86 Training and Enterprise Councils (TECs) were established through powers exercised by the Secretary of State under s25(1) of the Employment Act 1988 (amending s2 of the Employment and Training Act 1973) to make arrangements for training for employment – see D. Vere, 'Training and Enterprise Councils: Putting Business in the Lead', in A. Harrison (ed.), *From Hierarchy to Contract* (Oxford: Transaction Books, 1993).

87 City Technology Colleges (CTCs) were established under the Education Reform Act 1988, s.105(1), which gave the Secretary of State powers to enter into agreement with any person for establishing and maintaining a CTC. While CTCs are not subject to the same controls as schools in the maintained sector, they must be run in accordance with their funding agreements and schemes of governance. Regulation takes the form of monitoring of performance by the DfES, and inspection by the Office for Standards in Education (OfSTED) in the same way as for maintained schools.

88 City Academies were first introduced in 2000 under s482 Education Act 1996 as replacements for failing or under-achieving inner-city schools. They became simply Academies under s 65 Education Act 2002. Academies are all ability schools established by sponsors from business, faith or voluntary groups working in highly innovative partnerships with central Government and local education partners. Sponsors and the Department for Education and Skills (DfES) provide the capital costs for the Academy. Running costs are met in full by the DfES. In any agreement made in the exercise of powers under s482, payments made by the Secretary of State are made dependent on the fulfillment of specified conditions (s 4). The intention is that Academies will generally replace an existing poorly performing school, or be part of a proposal to tackle a group of under-performing schools. Where the demand for new places justifies it, an Academy may be established without the closure of an existing school.

89 Generally see A.C.L. Davies, 'Foundation Hospitals: A New Approach to Accountability and Autonomy in the Public Services' [2004] PL 808.

90 DH, 'Creating a patient-led NHS – Delivering the NHS Improvement Plan', 17th March 2005, para 5.8).

91 para 5.9.

counterparts, to coordinate research and development, and to enable 'fast-tracking' of learning and innovation through the system.[92]

Advocates of the 'third-way' view FTs as modern exemplars of the cooperative and mutualist tradition and as an alternative to centralized socialism. A kind of social ownership is argued to exist in the form of empowerment of local communities to become involved in the stewardship of their hospitals, in compensation for the loss of direct control through state bureaucracy. Mutuals are supposed to 'combine business efficiency with member benefits', offering value for money, a clearer customer focus than traditional bureaucratic provision, and increased social responsibility.[93] In another sense, FTs may be regarded as just one instance of the current fashion for Public Interest Companies (PICs). According to the IPPR, PICs (also referred to as 'non-share capital organisations', 'not-for-profits', 'not-for-dividend companies', or 'social enterprises') are neither nationalization nor privatization. Instead they 'occupy a space between services run directly by the Government and typical profit-making Public/Private Partnerships'.[94]

However, the overall efficiency benefits of PICs, and the long-term implications for the public interest of this form of exposure to market forces, remain hotly contested. In the case of FTs major doubts have been expressed about the capacity of corporate governance arrangements established under legislation to address the democratic deficit in the NHS, and adequately to hold health service professionals to account.[95] There is the question of which community is being served by the system of membership on boards of Trusts, and what other business or sectional interests are represented. A mutualized model may be successful in invigorating democracy in some sense, but there remain significant concerns over whether the cooperative and mutualist tradition is appropriate to the governance of large and complex organizations such as hospitals.

ii. Independent sector involvement in NHS provision

> Working with providers from the independent sector and from overseas is not a temporary measure. They will become a permanent feature of the new NHS landscape and will provide NHS services. Different health care providers will work to a common ethos, common standards and a common system of inspection. Wherever patients are treated they remain NHS patients because they get care according to NHS principles – treatment that is free and available according to need, not ability to pay. This is the modern definition of the NHS.[96]

In addition to corporatization and other reforms encouraging more entrepreneurial behaviour on the part of providers within the NHS, the Government is committed to further increasing the independent sector role in healthcare provision. Primary Care Trusts (PCTs) may select among a diversity of public, private, and voluntary sector bodies competing for the right to provide services to NHS patients, with services remaining free at the point of consumption.[97]

---

92 para 4.13. The NHS Institute for Learning, Skills and Innovation has been given special responsibility for raising standards of leadership and management and for fostering a culture of innovation and consistent improvement.

93 Mutuo, www.mutuo.co.uk.

94 Existing examples of PICs include Glas Cymru (the Welsh water utility), housing associations, the Local Education Authority in Hackney, and ex-local authority leisure services in areas such as Greenwich and Bristol. (IPPR, http://www.ippr.org.uk/research/index.php?current=21&project=99)

95 For a detailed discussion from an accountability perspective, see A.C.L. Davies, 'Foundation Hospitals: A New Approach to Accountability and Autonomy in the Public Services' [2004] PL 808.

96 DH, 'Health Committee's 1st first report on private sector role in NHS: The Government's Response': http://www.dh.gov.uk/PublicationsAndStatistics/Publications/PublicationsPolicyAndGuidance/PublicationsPolicyAndGuidanceArticle/fs/en?CONTENT_ID=4006251&chk=/ihJy%2B

97 The National Health Service Reform and Health Care Professions Act 2002 provided for many of the functions performed by Health Authorities to be transferred to PCTs, and for resources to be allocated directly by

For example, many of the new specialist diagnostic and treatment centres from which PCTs are being encouraged to procure services are owned or managed by international corporations, in some cases competing with services offered by the NHS.

While a mixed economy has been part of the organization of health and social care services in Britain for many years, the signing of a 'concordat' between the Government and the Independent Healthcare Association in 2000 marked the formal end to Labour's traditional ideological hostility to private involvement in health services. The concordat built on informal cooperative arrangements already operating in many areas. It covers:

- renting spare operating theatres from the private sector for hip operations and other elective surgery by NHS doctors and nurses working under their normal NHS contracts;
- commissioning private or voluntary sector hospitals to provide elective care, using their own staff;
- agreements for transfer of critical care patients between sectors, reducing the number of cancelled operations;
- joint work to develop intermediate care to improve preventive and rehabilitation services;
- sharing information on workforce supply and demand, clinical mistakes and local health improvement strategies.

The policy objective here is better integration of the services provided by the NHS and private sectors, in place of the previous practice of ad hoc recourse to private provision to deal with occasional crises. Instead of committing the NHS to particular levels of expenditure for private hospital care, the concordat affirmed the acceptability in principle of the practice of using private facilities on a routine basis. Having already been performing around 40,000 procedures a year for the NHS, private providers reported a three-or four-fold increase in NHS-funded activity within a year of concluding the agreement.[98] As early as 2001, the private sector was performing about 20 per cent of non-urgent NHS surgery.[99] This trend is set to continue following the 2005 general election. Closely connected with this development is the deliberate encouragement of new forms of consumer choice in publicly funded health services.

iii. Choice in the 'patient-led' NHS

Within the NHS choice refers to the selection, either by public purchasing agencies or by patients directly, of a different state-funded public, private, or voluntary sector provider to that otherwise available. The fourth principle of public sector reform adopted by New Labour following the 2001 general election was 'more choice for customers and the ability, if provision is poor, to have an alternative provider.'[100] Choice in this sense remains a central plank in the present government's modernisation program. NHS patients increasingly are being given the option to have operations performed privately or abroad rather than in publicly managed hospitals. NHS patients already have access to European health care in a landmark deal agreed by ministers in Brussels, which will have a major impact on the ability of patients to shop around the EU for the best or fastest treatment.[101] The agreement enshrines a formal right for members of the EU to go anywhere in Europe for publicly funded services in the same way as for other services, if treatment is not available in their own countries within a time limit that is medically justifiable. New rules are to come into force in 2005,

---

the Secretary of State to support their enlarged planning and commissioning role. While PCTs are not separate corporate entities in the sense of FTs, they may become so in the near future.

98 *Guardian*, 19th March 2001

99 *Guardian* 19th March 2001.

100 Cabinet Office, 'The Second Phase of Public Sector Reform: the Move to Delivery', 22 March 2002 (http://www.cabinet-office.gov.uk/eeg/secondphase.htm).

101 *Independent* 8 October 2002.

subject to approval by the European Parliament. Such developments are reinforced by international trade rules aimed at opening up competition for public services.[102]

The choice agenda has been reinforced by the recent Department of Health policy statement, 'Creating a Patient-led NHS', following the reform strategy set out in the NHS Development Plan in June 2004.103 The aim is to 'move from a service that does things to and for its patients to one which is patient-led, where the service works with patients to support them with their health needs.' In March 2005 the Department of Health revealed that 'NHS hospitals will be allowed to advertise to attract patients in a competitive market in which doctors and nurses will never be sure how many people will choose to use their services.'[104] The role of PCTs is not to direct patients to particular providers, but to offer a choice amongst local NHS hospitals, Foundation Trusts, and 'nationally procured' Independent Sector Treatment Centres (ICTCs). In order to offer such choice to patients, PCTs and practices will need to know which providers are accredited to deliver NHS care. Accreditation is a process of licensing control, through which only bodies that meet certain minimum standards will be permitted to be included on the list of options from which patients may choose.[105]

> Ultimately patients will be able to choose any provider that can meet NHS standards at the NHS tariff. This will include providers who are currently part of the NHS; established independent suppliers such as GPs and their teams, pharmacies and independent hospitals; other parts of the statutory sector; the voluntary sector; and new entrants from the independent, statutory or voluntary sectors.[106]

An explicit aim is to expand the range of accredited independent sector providers:[107] Choice exercised in favour of alternative, independent modes of provision is key to growing capacity in those sectors.

The emphasis on consumer choice in health service provision is problematic for a number of reasons. Choice is antithetical to the traditional welfare state conception of the role of the NHS as a vital component in satisfying citizenship entitlements. Under the old system patients were referred to hospitals on the basis of catchment areas in which they lived, unless they required specialist services not locally available. Choice is the mechanism through which the pattern of organization of health services will be determined by competitive incentives and market forces rather than by central planning. Within the NHS, choice is likely to be exercised not only as to when and where to have an operation, but also in relation to clinical teams within hospitals or surgeons carrying out certain specialisms. Under the system of payment by performance, the quality of care in NHS hospitals that fail to attract patients is likely to deteriorate due to under-funding. In extreme cases hospitals may be forced to close, with negative consequences for citizens who lack mobility or who for other reasons will suffer from the withdrawal of a local service. Furthermore, while exit and voice are typically counter-posed as alternative mechanisms for recuperating poor management performance, current government policy appears structurally biased in favour of the former.108 It remains

---

102 Under the system of formal requests for market liberalisation that came into operation under GATS in March 2003, markets for financial services abroad, for example, could be opened up for the City's business and financial services firms in return for concessions to other countries in respect of access to domestic markets for other services. GATS raises questions about the ability of government (or its intention) in the long term to protect public bureaucracies from private sector competition.

103 DH, 'Creating a patient-led NHS – Delivering the NHS Improvement Plan', 17th March 2005. Introduction by Sir Nigel Crisp, NHS Chief Executive.

104 Department of Health statement March 17th, as reported in *The Guardian*, March 18th 2005.

105 para 3.7

106 para 3.6.

107 Ch 3 'Securing Services', Introduction.

108 A. Hirschman, *Exit, Voice and Loyalty: Responses to Decline in Firms, Organizations and States* (Cambridge Mass, Harvard University Press, 1970). In Hirschman's seminal analysis, customers or members of an organization may express dissatisfaction with deteriorating management performance of firms or other groups such as political parties and voluntary organizations by either means. Both exit (where customers stop buying the firm's

doubtful how far patient choice will apply incentives and pressures for improvement within the NHS. The relative neglect of voice in this regard not only deprives the public sector of incentives for improvement, but arguably also is damaging to patients' interests. Because of the often vulnerable and disadvantaged position of citizens, the capacity to articulate needs and communicate grievances through effective voice mechanisms is an essential component of responsive governance however services are provided.[109]

II. Public and Private Services

Services that are not public goods may be provided to citizens in a number of ways,[110] with varying degrees of state involvement. In markets for pure private services (Fig. 1, (4)) the relatively limited role of the state is to secure institutional conditions facilitating exchange between providers and purchasing consumers. A key difference between private and public services is that standards are set through the market rather than by authoritative determination. Private services are allocated on the basis of choice exercised directly by sovereign consumers. The relationship involves the transfer of money at the point (but not necessarily the time) of delivery, the services being funded by payments from those who receive them. Markets may be regarded as naturally responsive in the sense of having the potential to deliver efficient satisfaction of wants by empowering individuals to act in their own self-interest.[111] Consumers make choices according to their needs and their own assessment of the trade-off between quality and price.[112]

In practice, however, there remain significant physical, financial, and social obstacles to the realization of the market ideal. This is particularly so in the human service sectors such as health and social care, where many consumers are likely to be in a vulnerable position even where they can afford to purchase services on a private basis.[113] Most human services accordingly have a 'public' dimension,[114] implying a fundamental role for government in respect of the activity in question.[115] Accordingly three modes of specifically public service organization may be distinguished *(Fig. 1):* direct state provision by a government body; quasi-market organization involving 'purchase-of-service' contracting by a public body representing the consumer interest; and provision by a private body under a public law duty or statutory regulation. In the latter two instances, provision by private or independent sector bodies in no way detracts from the 'public' nature of the services in question.

---

products or members leave the organisation) and voice (where customers or the organisation's members express dissatisfaction directly to management, or engage in some other form of public protest) may trigger a search by management for the causes and possible cures of customers' and members' dissatisfaction. Hirschman's main concern was with the comparative efficiency of the two 'mechanisms of recuperation.' Hirschman questions the efficacy of exit in this regard. In many situations exit drives out voice and assumes a disproportionate share of the burden in the attempted attainment of this end (p 120).

109 The effectiveness of voice is dependent on the existence of institutions and mechanisms that can communicate complaints cheaply and effectively. ibid, p 43.

110 In the broadest sense, the 'public service' may be equated with the role of government in providing public goods that are both non-excludable and non-rival, such as defence and criminal justice. There are no identifiable individual consumers of such governmental functions, which are performed by the state for citizens generally. Because the services are not marketable they cannot be charged for directly, so are financed from general taxation. There is no choice whether to receive the services, other than by influencing policy decisions regarding their provision.

111 H. Collins, *Regulating Contracts* (Oxford: Oxford University Press, 1999), p 70.

112 *ibid.* p 305.

113 See for example N. Ryan, 'The Competitive Delivery of Social Services: Implications for Program Implementation' (1995) 54 *Australian Journal of Public Administration* 353.

114 I. Harden, *The Contracting State* (Buckingham: Open University Press, 1992): 'A public service exists not because of choices in the market but because of a public decision that it should exist', p 76.

115 E. M. Garcia, 'Public Service, Public Services, Public Functions, and Guarantees of the Rights of Citizens: Unchanging Needs in a Changed Context', in Freedland, M., and Sciarra, S. (eds.), *Public Services and Citizenship in European Law – Public and Labour Law Perspectives* (Oxford: Oxford University Press, 1998), pp 62-63.

Type of service	Public Services			Private Services
Form of Economic Organization	(1) Bureaucratic	(2) Quasi-market	(3) Regulated market	(4) Private market
State Involvement	Traditional bureaucratic organization	'Contracting regime' Purchaser-provider split Purchase-of-service contracting	Statutory framework Independent regulatory agency Privatized utilities, telecommunications	General institutional framework Legal enforcement machinery
Demand Function	Representative government/ state	Representative purchaser agency, competition/ contestability	Limited consumer sovereignty, choice, competition	Consumer sovereignty, direct choice, competition
Funding and Payment	Publicly funded, free at point of consumption		Individually funded, payment at point of consumption	

Fig. 1 State Role in Public and Private Services

In traditional direct provision by state bureaucracies (1), there is no competition or choice of supplier, while in quasi-markets involving the purchaser-provider split (2), choice is exercised by public purchasing agencies among competing providers on behalf of consumers. Despite this difference, in both cases the demand function is concentrated in a public body or agency. The links between such 'demand' and individual preferences are 'complex and contingent.'[116] The demand function includes responsibilities for deciding the overall level of resources devoted to a service, the price paid, and the quality of provision. Finally, in regulated markets (3), in which competition and consumer choice exist to only a limited degree, aspects of supply and demand including price, availability, and quality are typically subject to regulation by independent agencies in accordance with statutory frameworks established by the state.[117]

Applying this framework to contemporary health service organization in England, the boundary between quasi-markets and regulated markets is less clear-cut than the model suggests. In some instances health services may be delivered by government or public bodies, while in others they are provided by private or voluntary sector organizations under contract with commissioning agencies, while in others again they may be funded and paid for by individual citizens. Within provider organizations such as hospitals or residential homes for the elderly, citizens are likely to be receiving the same or similar services through a variety of funding arrangements and in differing relationships with providers.[118] The blurring of the boundaries between modes of public service organization has significant implications for the way in which governance problems are conceived. Many human services are provided

116 Harden, n 12 above, p 6.

117 T. Prosser, *Law and the Regulators* (Oxford: Clarendon Press, 1997).

118 Even within the NHS, the dividing line between private and public is blurred by the presence of around 3000 'pay beds', approximately half of which are in dedicated private patient units (*The Guardian*, 19th March 2001).

through hybrid forms of organization with overlapping public and private dimensions. For example, domiciliary services and long-term care for the elderly are publicly funded at least in part, and dependent on an initial assessment of need and subsequent referral by a public agency or professional body. This is combined with a degree of consumer choice as to where or how the 'voucher' or budget earmarked for the purpose designated is spent.[119] Such a 'private' element is similarly evident in the requirement that consumers contribute towards the costs of certain services through 'co-payments' or top-up fees paid directly to the chosen provider. Dental and optical services, NHS prescriptions, and tertiary education all combine state funding with user charges coupled with an element of choice in this manner.[120] The more that patients are brought into direct relationship with non-state providers, for example through vouchering or direct payments,[121] the more the state role resembles that of market regulator rather than service commissioner or broker.

While some citizens have always chosen to 'opt out' of state services through self-funded payments in a direct market relationship with private providers,[122] exit from state to private provision has been deliberately facilitated since the 1980s by specific policies underpinned by individual and collective legal rights in the fields of education, housing, and health and community care.[123] Individual withdrawal from state provision may be a lifelong decision, or be confined to a singular event such as a private hospital operation. Citizens may opt out of a whole range of publicly provided services or only one or two. In the field of healthcare, around 12 per cent of the population has private insurance nationally, although in some middle class southern and suburban areas the proportion is much higher.[124] While treatment funded by the NHS forms an increasingly important part of the work performed by the major independent sector providers, medical insurance and direct payments by patients who can afford private fees continue to account for around 90% of the market for independent health care.[125]

A fundamental purpose of government in restructuring major welfare sectors since the 1980s has been to offload functions traditionally performed by the state onto non-state bodies. The deployment of regulatory instruments of competition, corporatization, and choice is playing a major part in increasing private sector involvement in health services. Whether the services are funded from general taxation and purchased by the NHS, or funded privately through medical insurance or direct payments, government policy has aimed to increase capacity in

---

119 Vouchering as a form of quasi-market organization combines supply-side competition with the devolution of demand decisions to consumers in the form of an earmarked budget subsidized by the state – see Le Grand and Bartlett, n 2 above. This arrangement exhibits features of regulated market provision in the sense of the more direct relationship thereby created between consumers and service providers.

120 ss 23 and 24 of the Education Act 2004 enable Higher Education Institutions to charge 'variable fees' above the minimum specified rate provided that they have in force a plan under Part 3 of the Act (Student Fees and Fair Access) approved by the new Director of Fair Access to Higher Education in England, or the body designated by the National Assembly for Wales.

121 Cabinet Office/Department of Health, 'Making A Difference: Direct Payments', April 2005. 'Direct Payments are intended to create flexibility in the provision of social services by giving money directly to service users in place of social care services. This offers people greater choice and control over their lives and decisions about how care is delivered'
(http://www.cabinetoffice.gov.uk/regulation/public_sector_team/projects/consult/dirPay.asp).

122 Clayton P. Gillette, 'Opting Out of Public Provision' (1996) 73 *Denver University Law Review* 1185.

123 I. Leigh, *Law, Politics and Local Democracy* (Oxford: Oxford University Press, 2000), p 148. Government policies may be interpreted as an attempt deliberately to break the loyalties of citizens, consumers and public managers to traditional forms of service provision. Examples include the encouragement of owner-occupation through new legal rights for council tenants to leave the public sector under 'right to buy' and 'change of landlord' legislation, vouchering and assisted places schemes in education, and various other incentives involving tax relief or transferable state set-off against the full market cost of services.

124 J. Mohan, *Reconciling Equity and Choice? Foundation Hospitals and the Future of the NHS* (London: Catalyst, 2003) p 11.

125 *The Guardian*, 19th March 2001. At this time private insurance accounted for 70 per cent of the value of the market for independent health care, with 20 per cent coming from direct payments, and only 5 per cent from treatment funded by the NHS.

both specialist and more generalist markets for health services. It may be suggested that, in the longer term, the trend may be away from regulated public contracting towards regulated private contracting in the organization and provision of health and other human services.

III. The Public Interest in Health Services Regulation

Given the loss of direct state control accompanying contractualization and privatization, this section focuses on alternative governance arrangements through which the state seeks, by more indirect means, to maintain the public interest in health services regulation. The regulatory framework consists of a complex combination of bureaucratic, quasi-market, and regulated market controls, applying in different ways to both public and independent sector providers. The limited aim here is to map key features of the regulatory environment, rather than to engage in detailed analysis or critique.

i. The Commission for Healthcare Audit and Inspection (CHAI)

The Commission for Healthcare Audit and Inspection (CHAI), also known as the Healthcare Commission, was established under Part 2 of the Health and Social Care (Community Health and Standards) Act 2003 with wide-ranging responsibilities for promoting improvement in the quality of health and healthcare. A key new responsibility is for regulating the independent healthcare sector, a task previously performed by the National Care Standards Commission (NCSC). The term 'independent healthcare' refers to any private, voluntary, not for profit or independent healthcare establishment under the regulatory remit of the Commission. This is defined as any establishment (or service, agency, practice or business) required to register with the Commission under the Care Standards Act 2000, as amended by the Health and Social Care Act 2003, and to comply also with Private and Voluntary Health Care (England) Regulations 2001. Associated responsibilities are: to maintain a register of independent (private and voluntary) healthcare providers;[126] to inspect registered services annually to ensure that they are meeting national minimum standards; to assess the performance of healthcare organizations generally; to award annual performance ratings for the NHS; to coordinate reviews of healthcare by other bodies; to encourage improvement in the quality, effectiveness, economy, and efficiency of healthcare provision; to track how well public resources are being used; to carry out investigations into serious service failures; to report serious concerns about quality to the Secretary of State; to publish annual performance ratings for all NHS organisations and produce annual reports to parliament on the state of healthcare; to collaborate with other relevant organisations including the Commission for Social Care Inspection (CSCI)(created under the same Act); and to carry out an independent review function for NHS complaints.[127]

CHAI takes over the role previously performed by the Commission for Health Improvement together with the NHS 'value for money' work previously carried out by the Audit Commission, in addition to regulation of independent sector bodies previously performed by the NCSC. The Commission claims to have developed a new system for assessing public and private health services in England. This aims to reduce regulatory burden, while giving the public a more accurate picture of performance. It will for the first time offer patient and public representatives a formal role in judging the quality of services. In its three-year strategic plan announced on May 16th 2005, the Commission has prioritized the need for

[126] It is an offence under the Care Standards Act 2000 part II section 11(1) to carry on or manage a registerable service without first being registered to do so. Failure to apply for registration may render a body liable to prosecution and may lead to refusal of an application to register.

[127] Registered service providers are required by law to have a complaints procedure and should be able to provide information on how to complain for users of the service and their relatives. The remit of the HC is to hear complaints in regard to: any service registered with the HC under the Private and Voluntary Health Care (England) Act; all aspects of the work of the HC and actions it has or has not taken; actions or failures to act by HC employees; actions or failures to act by the agents of the HC.

reduction in inequalities in healthcare (whether as a result of age, gender, ethnicity, social class, disability, or geographical area) across the NHS and independent sectors, and will check on compliance with equality and human rights legislation.[128]

ii. The Independent Regulator of Foundation Trusts (Monitor)

> If NHS foundation trusts are to succeed in their aims, the regulatory framework must allow them to make the best use of their freedoms while operating within boundaries detailed in the Terms of Authorisation ("the Authorisation"), which are designed to ensure that the interests of patients and the public are protected.[129]

Part 1 of the 2003 Act created the office of the independent regulator (known as Monitor), with various regulatory responsibilities in respect of FTs. While FTs are not subject to central direction by the Secretary of State, the regulator is required to exercise regulatory functions in a manner consistent with the performance by the Secretary of State of duties under the National Health Service Act 1977.[130] The regulator is required to make a code for determining borrowing limits of any FT.[131] The regulator is charged with administering the process of 'authorisation' of FTs to provide goods and services for purposes related to the provision of health care.

Subject to restrictions contained in the authorisation, FTs are permitted to carry out activities making extra income available in order better to discharge their principal purpose.[132] The authorisation may require the provision of education and training, or accommodation or other facilities;[133] it must authorise and may require that the FT carry out health care research, or make facilities and staff available for the purposes of education or training, or to enable research to be carried out by others.[134] In exercising this discretion the regulator is required to have regard to the need for provision of goods and services in the area, and any provision of such goods or services by other health bodies in the area.[135] The authorisation may contain requirements as to goods and services that must be provided to meet the needs of persons of a particular description, and the volume, place, and period for which such goods and services must be provided.[136] An authorisation may specifically restrict the activities of FTs in their pursuit of private health care, with a view to limiting the total income of an FT 'which was an NHS trust' in any financial year derived from private charges.[137] An authorisation may limit the amount of borrowing on the part of FTs for the purposes of discharging any of its functions, subject to annual review by the regulator.[138] However, it appears that the authorisation may not restrict the power of the FT to make independent investments by forming companies, or to acquire membership of corporate bodies, or to give financial assistance to any person whether by loan or guarantee.[139] Nor may the authorisation restrict general powers of the FT to acquire and dispose of property, to enter into contracts, to accept gifts of property, to employ staff, or to decide the level of remuneration or allowances of staff.[140]

---

[128] http://www.healthcarecommission.org.uk/NewsAndEvents/PressReleases/PressReleaseDetail/fs/en?CONTENT_ID=4017481&chk=u/RAfT

[129] William Moyes, Chairman of Monitor, Foreword to Compliance Framework, 31st March 2005.

[130] HSC(CHS)Act 2003, s 3.

[131] s 12

[132] s 14(3), (2).

[133] s 14 (5).

[134] s 14 (6).

[135] s 14 (7).

[136] s 14 (8).

[137] s 15.

[138] s 17 (1)-(3).

[139] s 17 (4)-(6).

[140] s 18.

The legislation contains a range of provisions for dealing with 'failing' FTs. Where satisfied that an FT is contravening or failing to comply with a term of its authorisation, or with any requirements imposed on it under any enactment, and that the contravention or failure is 'signficant',[141] the regulator may by notice require the trust, the directors or the board of governors to do, or not to do, specified things or things of a specified description within a specified period.[142] The regulator may further remove any or all of the directors or members of the board of governors and appoint interim directors or members of the board,[143] or may by notice require the directors to make a proposal for a 'voluntary arrangement' for the purposes of insolvency.[144] Finally, where the FT contravenes or fails to comply with a notice under sections 23 or 24, the regulator may, subject to certain conditions, order the dissolution of the trust or the transfer of any property or liabilities of the FT to another FT, a PCT, and NHS trust, or the Secretary of State.[145]

The first ten FTs were established in accordance with the statutory authorisation procedure from 1st April 2004. At the time of writing (May 2005) there are 31 FTs on the public register.[146] The Healthcare Commission is currently undertaking a review of existing policy, taking account of the challenges, difficulties and experiences of those trusts that have become FTs. The outcome of the review will be published in summer 2005. On 18 January 2005, the Health Secretary John Reid announced the next group of NHS trusts allowed to make a formal application for NHS foundation trust status. These 32 trusts – including for the first time eight mental health trusts – will make a comprehensive application to the Secretary of State who will decide which ones to support to formally apply to Monitor for foundation status. Formal application to Monitor will take place after the review by the Healthcare Commission.[147]

A major governance issue here concerns the rigour of the process of authorisation. It furthermore remains to be seen how the regulatory relationship following authorisation works out in practice. Monitor has recently published the Compliance Framework for the monitoring of compliance by FTs with the terms of authorisation, and for intervening in the event of failure to comply.[148] This policy document claims to reflect a risk-based approach to regulation with transparency in how the risks that each FT faces are assessed, so ensuring that 'the regulatory burden is proportionate with the most successful foundation trusts having less regulatory oversight.'[149]

iii. Purchaser (PCT) control through legally binding contracts

A further level of public interest control over FTs is exerted through contracts agreed with PCTs – the NHS agencies responsible for the purchasing of health services. These legally binding contracts are in marked contrast to the more informal and unenforceable 'service

---

141 s 23 (1)

142 s 23 (3).

143 s 23 (4)

144 s 24.

145 s 25.

146 http://www.monitor-nhsft.gov.uk/register1.php

147 http://www.monitor-nhsft.gov.uk/applicants.php

148 Compliance Framework, 31st March 2005. http://www.monitor-nhsft.gov.uk/publications.php?id=614

149 ibid. Monitor claims in the Compliance Framework document to be developing a 'responsive approach to regulation': 'Monitor seeks to build a trust-based regulatory framework based on a philosophy of 'no surprises' and open communication. Monitor will always attempt to adopt an informal, supportive approach to clarify and resolve significant compliance issues that may arise. By disclosing significant issues early, NHS foundation trusts should have greater flexibility over how resolution is achieved and Monitor will be better able to adopt such an approach. A failure to keep Monitor adequately informed in relation to a material compliance issue is poor governance which might lead to a change in the intensity of the monitoring framework and potentially intervention', para. 11.

level agreements' (SLAs) concluded between PCTs and ordinary NHS trusts.[150] In place of performance management by the Department of Health or Strategic Health Authorities, the key role of controlling the nature of health service activity is here performed by PCTs. While PCTs themselves remain accountable to the state bureaucracy and the Department of Health via Strategic Health Authorities, they enjoy devolved powers in spending some three-quarters of the overall NHS budget.[151] A national tariff system of fixed prices for particular treatments applies across the NHS, leaving PCTs to decide how and where to purchase health services that best meet the needs of their local communities, with payments to providers depending on work that has been carried out. Compared with purchasing based on annual funding allocations and involving SLAs, the new legally-binding are intended to enable PCTs to take a longer-term view in health service planning and development, with three-year contracts based on funding allocations over the same perid. Anticipating the possibility of disagreements between PCTs and FTs, government guidance encourages the parties to resolve disputes informally wherever possible, with provision for compulsory arbitration wherever a local settlement cannot be reached. Although contracts are ultimately enforceable in the courts, in the interests of patients judicial involvement is to be avoided except as a last resort.

Despite the relative autonomy of PCTs and particularly FTs from central hierarchical controls, the Department of Health continues to coordinate the overall provision of health services, and to perform various monitoring and oversight functions. The DH has a key role in helping PCTs to develop necessary competencies to carry out their new role and in providing support around contract negotiation and management, including the provision of a model template on which to base contracts with FTs. The DH also provides centrally funded access to legal services consisting of a panel of legal advisers to provide support for all NHS bodies charged with implementing the new legally binding contracts in place of SLAs.[152]

A major responsibility on the part of PCTs under the new system of 'practice based commissioning' is the management of risk, requiring the adoption and use of a range of new policies and procedures applying across the public and non-state sectors. As has been seen, the health service is Britain is being deliberately configured in a manner encouraging increased recourse to the independent sector, in competition with newly corporatized FTs.[153] The same competitive conditions and governance machinery are intended to apply in either case. 'Payment by results' means that PCTs need to consider carefully the affordability of funding proposed levels of activity, before signing up to legally binding commitments. In contrast with the old system of risk sharing involving flexible adjustment of prices, under payment by results contracts must require that payments are 'reconciled at standard tariff rates against actual activity delivered.'[154] PCTs have absolute discretion over the volume of activity to be purchased, and themselves bear the risk of underestimating demand or the volume of

---

150 Disputes arising from these confusingly named 'NHS Contracts' are subject to resolution by the Secretary of State for Health.

151 DH, 'NHS Foundation Trusts Information Guide': http://www.dh.gov.uk/PublicationsAndStatistics/Publications/PublicationsPolicyAndGuidance/PublicationsPolicyAndGuidanceArticle/fs/en?CONTENT_ID=4088017&chk=YcfE91

152 DH, 'Sharing the Learning – Contracting With and By NHS Foundation Trusts', http://www.dh.gov.uk/PolicyAndGuidance/OrganisationPolicy/SecondaryCare/NHSFoundationTrust/NHSFoundationTrustArticle/fs/en?CONTENT_ID=4091235&chk=UEgpc0

153 DH, 'Health Committee's 1st first report on private sector role in NHS: The Government's Response': http://www.dh.gov.uk/PublicationsAndStatistics/Publications/PublicationsPolicyAndGuidance/PublicationsPolicyAndGuidanceArticle/fs/en?CONTENT_ID=4006251&chk=/ihJy%2B

154 DH, 'Sharing by Learning – Demand Management and the Controlling of Risk': http://www.dh.gov.uk/PolicyAndGuidance/OrganisationPolicy/SecondaryCare/NHSFoundationTrust/NHSFoundationTrustArticle/fs/en?CONTENT_ID=4088986&chk=GWhn85

activity required to meet targets, whether services are commissioned from FTs or the independent sector.[155]

As with the regulatory relationship involving authorisation of FTs by the independent regulator, empirical research is needed to investigate how the contractual relationship between PCTs and FTs and independent sector providers operates in practice.

iv. Statutory complaints and redress mechanisms

In addition to the regulatory institutions already considered, procedures for the handling of complaints and the redress of grievances may also be conceived in regulatory terms as mechanisms serving the public interest in health services. While the issue of redress is often conceived in individualistic terms of the need to rectify particular deficiencies in service provision or to compensate consumers for poor performance, the ultimate purpose of a properly designed 'remedial hierarchy' is to maximize performance through incentives for the decisions of government and independent sector bodies to be made fairly and properly in the first instance.[156] The goal of responsive regulation here is to facilitate within the whole range of organizations engaged in public service networks the development of public service values, processes, and principles of good administration,[157] and to improve management processes and decision-making with a view to minimising grievances and disputes.[158]

Procedures for the handling of complaints and redress of grievances in healthcare vary depending on the public or private identity of the provider, and on whether services have been publicly commissioned or funded privately. In the NHS, complaints may be made by any person about services provided by NHS organisations or primary care practitioners such as GPs, dentists, opticians and pharmacists. Directions in 1998 required NHS trusts to have written procedures for 'local resolution' of complaints within their organization, and for a second stage of grievance-handling involving 'independent review.'[159] The aim of the informal local stage is to resolve complaints quickly and as close to the source of the grievance as possible using the most appropriate means, for example conciliation. The procedure covers services provided overseas or by the private sectors, but only where these are funded by the NHS. FTs have greater freedom in developing their own local resolution procedures along similar lines. Registered service providers, as defined above, are required to establish informal complaints mechanisms and to provide information on how to complain for users of the service and their relatives. Local resolution of complaints should be sought within six months of awareness of the grievance, although PCTs and NHS trusts have discretion to waive this time limit where there are good reasons for doing so.

Regulations made in 2004 under the HSC(CHS) Act 2003 transfer the independent review stage of the reformed NHS complaints procedure from local NHS bodies to the Healthcare

---

155 There are significant common features in Monitor's 'Compliance Framework' governing authorisation of FTs and the contracts negotiated between PCTs and FTs, for example as regards the emphasis on the management and controlling of risk.

156 The Government has recently emphasized the need for informal or alternative disputes resolution (ADR) in the handling of grievances arising from the activities of government departments and executive agencies in cases where there exists a statutory right of appeal to a tribunal – DCA, 'Transforming Public Services: Complaints, Redress and Tribunals', Cm 6243 (London: HMSO, 2004). Similarly the National Audit Office, in its more general analysis of citizen redress in public services, has stressed the importance of informal complaints procedures located at the bottom of a metaphorical 'ladder of redress' – National Audit Office, 'Citizen Redress: What Citizens Can Do If Things Go Wrong With Public Services' (London: The Stationery Office, 2005). For a discussion of 'remedial hierarchies' see P. Vincent-Jones, 'Citizen Redress in Public Contracting for Human Services' (2005).

157 P. Selznick, The Moral Commonwealth: Social Theory and the Promise of Community (Berkeley, University of California Press, 1992) p 338.

158 J. Braithwaite, *Restorative Justice and Responsive Regulation* (Oxford: Oxford University Press, 2002): 'The most efficient way for an organization to continuously reduce the injustice for which it is responsible will be dispute prevention rather than dispute resolution', p 255.

159 Primary care practitioners are required through their contracts of employment to operate a practice-based complaints procedure and to co-operate with the independent review process operated by PCTs, which took over this role from health authorities in October 2002.

Commission. As a non-governmental body, the Commission issues its own guidance based on the Department of Health regulations. Whether the iniital complaint has been made against an NHS body, an independent healthcare provider or an FT, a citizen who remains dissatisfied following attempted local resolution may make a request for an independent review to the HC. Where the grievance has not been satisfactorily redressed or the case otherwise disposed of by indpendent review, the Health Service Ombudsman is empowered to investigate complaints made by or on behalf of citizens who claim to have suffered due to unsatisfactory treatment or service by the NHS. The Ombudsman has jurisdiction over health services provided by non-NHS bodies where these are funded by the NHS, but not where they are financed privately.

One issue in the provisional assessment of these regulatory arrangements concerns the effectiveness of the remedial hierarchy even in the relatively simple setting of directly provided NHS services in providing incentives for public officials to make decisions that are 'right first time', and (where errors are made or grievances occur) in ensuring that complaints are dealt with at a the lowest possible rung of the ladder of redress. In the analogous case of local authority provision of nursing home care, for example, there are doubts about how well complaints procedures operate in practice,[160] and as to the responsiveness of regulatory arrangements in terms of knowledge on the part of citizens and consumers of complaints mechanisms, and their ability to express grievances through appropriate voice mechanisms.[161] The provision of information about grievance procedures and the existence of accessible channels of communication for complaints are essential pre-requisites for the effective operation of remedial hierarchies.

The more fundamental problem for present purposes, however, concerns the lack of uniformity in regulatory schemes governing different modes of provision of human services, and the resulting unevenness in the protection of citizens' interests. As has been seen, informal grievance procedures vary depending on whether the decision-making body is a government department or agency, an independent provider delivering a public service under contract with a commissioning public agency, an FT, or a private body delivering a public service directly to the citizen. While some degree of standardization and uniformity has been achieved across sectors in the independent review role of the Healthcare Commission, certain key differences remain. At the apex of remedial hierarchies, recourse to the Ombudsman and judicial review is possible where the decision complained of involves direct provision by the NHS or an independent provider of publicly funded services, but not where the services are financed privately.[162]

There is a need for greater consistency in the protection of citizens's interests in human services regardless of the manner of delivery, the nature of funding, or the public or private identity of the service provider. All providers and other bodies performing public service functions in human services networks should have in place adequate complaints mechanisms and procedures through which grievances can be investigated and settlements reached wherever possible, prior to submission of disputes that cannot be so resolved to more formal adjudication and ultimate judicial determination. The regulatory objective should be to minimize grievances, complaints and disputes, and maximize performance through incentives for the decisions of both government and independent sector bodies to be made fairly and properly in the first instance. Overall, the complexity of existing regulations, complaints

---

160 *Frank Cowl & Orrs v Plymouth City Council* [2002] 1 W.L.R. 803 (CA); A. Le Sueur, 'How to Resolve Disputes With Public Authorities' P.L. [2002] Sum 203-4. The *Cowl* ruling emphasizes the necessarily residual role of judicial review even in disputes involving the provision of services by public bodies that are unambiguously public in character (leaving aside the separate issue of how far the decisions of private organizations are amenable to review on the basis of their performance of a public function).

161 Ombudsman's Annual Report for 2003-4 (2nd Report – 13 July 2004).

162 Where public services are privately funded and provided in the market, the apex of the remedial hierarchy is judicial enforcement of contractual rights and duties. The level of citizen protection in such cases may be superior in some respects while inferior in others compared with that afforded recipients of services provided directly by government, or under purchase-of-service contracting.

procedures, and redress mechanisms is likely to have given rise to considerable confusion on the part of citizens as to where and how to pursue grievances.[163] Further problems associated with the centrally-driven nature of the regulatory process concern the general lack of involvement and participation of stakeholders in standard-setting and enforcement, and the likely ineffectiveness of bureaucratic regulation in achieving its goals of improved redress and responsiveness in human services provision.

IV. Services of General Interest in the Public Interest

Recent European Commission Green and White Papers have confirmed the centrality of the concept of 'services of general interest' (SGI) to the European model of society.[164] This concept is based on the acceptance of common values and goals across the Community including universality, continuity, quality, affordability, security and safety, and citizen and consumer protection.[165] The Green Paper suggested that such values should apply to the broad area of 'social services of general interest' in fields such as health, long term care, social security, employment, and social housing. The contentious issue here concerns the application of EU competition regulation to such services. The view of the Commission is that SGI objectives in this context are fully compatible with the development of an open and competitive internal market, and indeed that competition may contribute significantly to improved efficiency and affordability, as is claimed to have occurred in the telecommunications and transport sectors.[166]

Following widespread concerns expressed by a broad range of public and non-state bodies within member states about interference with national autonomy in such fundamental areas of public policy, the Commission has accepted that there is a need for greater clarity and predictability to ensure 'smooth evolution' in the social and health sectors. The White Paper concedes that it is doubtful whether a framework directive on services of general interest is the best way forward at this stage.[167] Instead member states are urged to 'pursue the modernisation of services of general interest at their level in order that all citizens have access to quality services adapted to their needs and requirements.' The Commission remains of the view, however, that there should be a systematic approach to the regulation of the development of social and health services at EU level, and according proposes to issue a further Communication on social and health services of general interest in the course of 2005.

The SGI debate is significant for present purposes in relation to the shifting organizational foundations of health and social services in contemporary Britain. At the EU level, the objective of ensuring a 'level playing field' for all providers is reconciled with the principle of subsidiarity through the distinction between public policy missions and instruments for their attainment.[168] While the former are a matter of competence of member states, Community rules 'may have an impact on the instruments for their delivery and financing.'[169] Hence

---

163 See for example: Health Service Ombudsman for England, 'Making Things Better? A Report on Reform of the NHS Complaints Procedure in England', 10th March 2005. The Report reviews five key weaknesses in the current system and approach (para. 23): complaints systems are fragmented within the NHS, between the NHS and private health care systems, and between health and social care; the complaints system is not centred on the patient's needs; there is a lack of capacity and competence among staff to deliver a quality service; the right leadership, culture and governance are not in place; just remedies are not being secured for justified complaints. http://www.ombudsman.org.uk/improving_services/special_reports/nhs_complaints/comp_c1.html

164 Green Paper COM(2003) 270, 21st May 2003. White Paper COM(2004)374, 12th May 2004.

165 The well-established concept of 'universal service' may be regarded a constituent component of the wider concept of SGI. Universal service establishes the right of access of citizens to services considered essential and imposes corresponding obligations on service providers to offer defined services according to specified conditions including complete territorial coverage and affordability. WP paras 3.3, 3.4.

166 WP para 3.2.

167 WP para 4.1.

168 WP para 3.2.

169 WP para 4.4.

although there in nothing in the rules to prevent individual states choosing to provide health and social services directly and on a publicly funded basis, once 'market-based systems' have been adopted the arrangements are likely to be subject to EU competition law and a variety of other regulatory controls.[170] For example, the model of protection of consumer and user rights envisaged by the Commission in market-based systems involves the creation of independent regulators with clearly defined powers and duties with regard to monitoring, performance evaluation, and enforcement of standards.[171] As has been shown, the organization of health services in England at least appears increasingly to be moving towards a regulated market model which is likely ultimately to become fully subject to regulation at the EU level.

Conclusion

This paper has attempted to map some of the major coordinates of regulation governing health service networks in England under recent legislation. It has stressed the importance for current debates of the shifting organizational foundations of health services, and of the manner in which this shift is being accomplished through a range of policy instruments involving competition, coporatization, and PCT and patient choice. The drift to privatization of health services has to be seen in the wider context of international competition in the major service sectors, and of governmental efforts to increase domestic productivity and therefore competitiveness in global markets. On the assumption this drift is highly unlikely to be reversed to any significant degree in the foreseeable future, the regulatory objective should be the promotion of qualities of good administration and respect for public (including human rights) values within the whole range of public and non-state bodies engaged in the performance of health service functions. The attainment of responsiveness in this sense is coterminous with the protection of a variety of individual and collective interests in the management and delivery of these services. While elements of responsiveness may be glimpsed in the Government's programme for health services reform, regulation remains highly centralized and excessively top-down in character. In addition to rendering explicit the rationale informing the Government's public service reform programme, a major challenge for future research is how to improve the responsiveness of current regulatory regimes governing health services.

170 WP para 4.4
171 WP para 3.5.

Protecting Non-Commodity Values in "The Public Interest"

Mike Feintuck
Law School
University of Hull

Abstract

This paper seeks overtly to take debate on public service culture beyond an economic framework. It will be argued that, over a long period, conventionally labelled "public services" such as education, healthcare and public service broadcasting, and also regulatory intervention in relation to matters such as food supply and the environment, have been increasingly subject to, and driven by, a process of commodification. This process has in some senses rendered the provision of such services more accountable – it may be easier to measure matters such as economy, effectiveness and efficiency if the objectives of the service are viewed as commodities. However, this paper argues that such approaches often fail to recognise adequately the democratic significance of such public services, and that therefore this phenomenon must be opposed, in pursuit of the reassertion of a meaningful public service culture which is crucial if expectations of citizenship are to be protected.

This agenda requires a rather different mode of thinking to that which currently dominates political and regulatory debate. It requires an unfashionably holistic vision which includes and recognises non-commodity values which extend beyond economic interests. It may be thought to emphasise "measuring the valuable", rather than "valuing the measurable", but therefore requires the specification of values.

Within a modern capitalist economy, adversarial political and legal processes, and regulatory systems in which such processes may be reflected, may often absorb and confirm rather than challenge market-oriented approaches. They may tend to confirm both the centrality of consumerist, private, economic expectations and the marginalisation of public, citizenship values. Participatory or perhaps, better still, deliberative processes may be thought to offer more effective avenues of challenge to the market-oriented orthodoxy. However, deliberation requires the establishment of principles around which argument may pivot, and this paper seeks to explore whether a concept of "public interest", or indeed apparently more developed constructs such as "the precautionary principle", may assist in this respect. Though often apparently an empty vessel, it is argued that a concept of public interest which is based upon fundamental democratic values, and in particular is explicitly oriented towards expectations of equality of citizenship, may indeed serve usefully to inform such debate and re-legitimise intervention in pursuit of non-commodity values.

Introduction

This paper is perhaps the most broadly based of the contributions to this seminar, yet its aim is to remain clearly focused on the event's major theme of the role of law in the relationship between economic values and public service culture.

The central thrust of the paper is that public services must be viewed within the context of a political settlement which relies for its legitimacy both on economic ***and*** non-economic values and that excessive focus on any one set or subset of these values is likely to lead to the exclusion or marginalisation of other values. This may lead to various forms of "failure" of, and/or a loss of legitimacy for, public service projects. While acknowledging significant conceptual difficulties, an attempt will be made to provoke debate regarding the potential for "public interest" (PI) responses to the actual and potential problems presented.

The themes and issues raised here have been central to my academic work since the very start of my career, but were apparent earlier still. I started my doctoral research in 1989, the year after the Education Reform Act arrived, introducing a range of market-oriented measures into the local schooling system in England and Wales. At the same time, reforms within the NHS introduced broadly parallel measures into healthcare provision. In both of these central fields of public service provision, the emphasis on economic drivers via quasi-market provisions has continued apace, and continues to exert great influence over policy development and service delivery. From the mid-1990s onwards, my attention was drawn towards the threats posed to traditional visions of public service broadcasting (PSB) and media regulation via rapid technological development and convergence, conglomeration of media empires, and the internationalisation of media markets. (Feintuck 1999) The challenge posed to the British PSB tradition, and the values it represented, by the high degree of commercialisation associated with such developments are obvious.

In each case, while starting from the perspective of a public lawyer, primarily concerned with accountability in the exercise of power, I became increasingly concerned with the limited potential for procedural devices to provide adequate responses to such phenomena. This led me on what many have considered a foolhardy quest for values and principles which might inform the legal framework for public services and regulation, and in particular whether a meaningful construct of PI might be developed which could be of value in this context. Increasingly, this is now drawing me further into exploring the value base underlying regulatory intervention in relation to the environment.

This then is the background from which I approach this seminar, and my paper is divided into three distinct sections. First, I wish to say a little more about the political and economic context in which public services must be viewed, and the problems arising from the commodification of such services in the absence of any countervailing collective values. My argument will be for a more holistic vision of the values which must be integrated into thinking about such services. From there, I will consider briefly questions relating to the potential for participatory and/or deliberative mechanisms to influence and inform debate, policy and practice in this context. The problem which arises is one that I have already referred to – the limited potential of such procedural mechanisms in the absence of proper consideration and development of the whole range of values and principles underlying debate in such areas. Finally, I wish to raise discussion regarding the adoption and application of a principle of "public interest", based explicitly on an objective of equality of citizenship, as an informing principle.

The political, economic and legal context of public services – towards a more holistic vision

In relation to public services, market-driven politics appears to offer freedom via choice. It appears to render service providers accountable via market mechanisms which seem to offer measurable performance indicators. Certainly, accountability is important, and is indeed a fundamental democratic expectation in relation to public power. Thus, measuring success or failure via numbers of hospital operations completed, or SAT scores achieved by school pupils is at one level attractive, allowing for comparisons to be made, and giving apparent measures of cost-effectiveness and accountability. Yet there is a significant risk that engaging in bean-counting exercises, treating patients and pupils as widgets, may distort priorities for the public services involved, and may indeed result in not necessarily measuring the valuable, but rather placing excessive attention on valuing the measurable. Thus, in this process of commodification, we may lose sight of the purposes and social values which underlie and should inform such institutions, failing in the objective of what has been referred to as "Valuing the priceless". (Schelling) Of course, freedom and choice are important, yet the apparent choice offered by the application of quasi-market forces in relation to public services too often results in enhanced choice only for those service users best equipped to exercise and enjoy their new-found powers. In reality, the level of freedom enjoyed by service users in this context may well correlate closely to financial and educational advantage. Choice of school is perhaps the *locus classicus* of this phenomenon, where the reality will often be of choice only really open to those able best to play the system, perhaps even with the financial clout to move house into attractive catchment areas, and indeed choice may even transfer to relatively unaccountable head-teachers and governing bodies in popular schools. (Feintuck, 1994)

However, in addition to such empirical observations, it is also possible to observe conceptual problems and inconsistencies in the application of principles of market economics to public services. The objectives of public services can be reasonably expected to relate closely to the fundamental value system of the society in which they operate. It is relatively rare, at least in modern Britain, to find clear expression given to the value base which informs the system of liberal-democracy within which public services operate. Yet it is reasonable to state that such values must nonetheless exist as imminent promises. There can be no doubt that capital is one such value, manifested in private property, as is liberal-individualism, manifested in fundamental freedoms of the person. Yet this is not the totality of values promised within our polity. Despite the onslaught of Thatcherite and post-Thatcherite politics there remains a set of collective or community-oriented values typified by the welfare state social provisions and other interventions related to the expectations of citizenship and social solidarity. Though this latter set of values may be readily drowned out by the clamour of neo-liberalism, and unfashionable though they may be, there can be no doubt that they still do form a significant part of the ongoing legitimacy basis for the kind of public services considered at this seminar. However, it is quite clear that there is a significant risk that they will be substantially marginalised in a discourse dominated by market principles.

As long ago as 1983, American scholar Richard Stewart in his classic "Regulation in a Liberal State" (Stewart 1983) was arguing for "the role of non-commodity values" as part of what he called "a more ample liberalism". This construct, which Stewart finds to include values such as "Aspiration, Diversity, Mutuality and Civic Virtue", has a strong claim to better represent the totality of the liberal-democratic settlement than the modern limited vision which asserts the dominance of capitalism and individualism delivered via market forces. While Stewart's more holistic vision may seem preferable, this is not to say that economics-derived analysis necessarily ignores non-commodity values. Breyer (1982) is quite clear that public interest intervention, and by definition the delivery of public services, is (or should be?) based on a set of principles which extends beyond economic efficiency. More recently, and closer to home, Colin Leys (2001) has identified and discussed the practical and theoretical problems which arise from an undue degree of priority being given to the values of market driven politics. If the liberal democratic settlement, with its values of capital, individualism *and* social solidarity is not to be quietly replaced by "neo-liberal democracy", with its much narrower set of market-oriented economic values, it is necessary to identify and

reconfirm principles and values which are built upon democratic legitimacy and which can be enforced in law and regulation, and which serve the broader democratic value-set.

I have already referred to matters of inequality in relation to and arising from the exercise of "choice" within quasi-markets in public services. Two things need making clear here. First, that I am referring specifically to equality of citizenship (as opposed to economic equality), and second, that equality in this context is not only to be valued instrumentally, as a means for ensuring equal exercise of expectations of individualist freedom, but that it is also embedded in the collective, community-oriented values associated with social solidarity which forms part of the liberal-democratic settlement. This latter aspect of equality, linked closely to a fundamental ideal of equality of citizenship, is perhaps the central principle which can be found underlying the post-Second World War establishment of the Welfare state, and what remains of it in public services today. To repeat, equality of citizenship is not only of value because it services individual freedoms, but is a good in itself, and in its own right a central promise of the liberal-democratic polity. It is perhaps this element of the public service ethos that is most threatened by commodification.

Legal and regulatory proceduralism and its limitations

In the context of increasingly commodified public services, there is a significant risk that political, regulatory and legal debate will centre around defined performance indicators, reconfirming the process of valuing the measurable. Adversarial political and legal processes will inevitably tend to find such "hard facts" attractive, while any principles which may be expected to inform public services may tend to be viewed as fuzzy, or problematically value-laden, or not amenable to scrutiny or review.

Certainly the UK system of judicial review offers little help in this respect, focusing as it does predominantly on matters of procedure rather than substance, and even the developing jurisprudence of substantive legitimate expectation may be thought to be inherently individualistic, dealing with the merits of individual cases rather than overarching principle. This risk extends beyond the courtroom doors to the activity of regulators, where statutory briefs to engage in relatively detailed scrutiny of particular aspects of areas of public service may exclude or marginalise the possibility of review against broader values or principles.

An obvious example of this phenomenon is the brief given to Ofcom under the Communications Act 2003. Leaving aside the curious position of the BBC, Ofcom, as the media's new "super-regulator" has now been granted powers which render it in effect the guardian of the British PSB tradition, and what might be called PI values. Under the Communications Act, which should properly be viewed as a deregulatory measure at heart, the detailed maximum holdings and regulatory thresholds relating to the media established in previous legislation are largely swept away, replaced by the general competition provisions under the Competition Act 1998 and the merger provisions in the Enterprise Act 2002. (Feintuck 2004: 106-118; Feintuck and Varney 2006, forthcoming)

In reality, the Communications Act 2003 can be seen to incorporate responses to a range of different influences:

- the pressure to reform and rationalize the pre-existing regulatory structure in the face of technological development, media convergence and corporate conglomeration;
- the pressure to encourage growth in the, economically important, media sector;
- the pressure to pursue, as a matter of government policy and ideology, a deregulatory agenda; and,
- the pressure to comply with European harmonization requirements, expressed in a series of four EU Directives issued in 2002, in pursuit of a single-market agenda.

The key question must be whether the resulting arrangements, driven by this diverse range of factors, make any significant difference, for better or for worse, on the protection of citizenship values or other public service values. The Report of the Parliamentary Joint Committee, which scrutinized the Draft Bill, chaired by the renowned film-maker Lord David Puttnam, expressed significant reservations as regards the original Draft Bill's content in this respect. The Puttnam Report constituted a wide-ranging, well-informed and in-depth critique of the Draft Bill as a whole; an example of pre-legislative scrutiny at its very best, with questions of 'public interest' and 'citizens' interest' to the fore. (Puttnam Report; Feintuck 2003)

The Report highlights a trope from "consumer" to "customer" between the language of the 2000 White Paper and the Draft Bill of 2002, (Puttnam Report: Paragraph 20), but it also observes that while the concept of "citizens' interests" had been given a high profile in the White Paper, (Puttnam Report: Paragraph 24) it had failed to appear as part of Ofcom's proposed duties in the Draft Bill. While Clause 4 of the Draft Bill sought to give effect to the EU Framework Directive, incorporating a wide range of potentially competing objectives contained therein, it contained no indication of how Ofcom should prioritize these factors in the case of them coming into conflict. Likewise, Clause 3 imposed on Ofcom some fifteen general, and again potentially conflicting, duties, with the regulator permitted to resolve any conflicts between them "in the manner they think best in the circumstances". Again, no overarching principle was established which would guide the resolution of competing claims, and the Puttnam Report identified as "an abdication of responsibility" the failure by Parliament to specify a hierarchy of duties for the new super-regulator, and went on to recommend directly the establishment of a "principal duty" embodying specifically and explicitly "the long-term interests of all citizens". (Puttnam Report: Paragraph 26)

After much tense and high-profile Parliamentary wrangling, the Communications Act 2003 as it finally emerged did incorporate some of the Puttnam Report's recommendations. In some senses, the final form of Section 3(1) may appear a major victory:

> It shall be the principal duty of Ofcom, in carrying out their functions –
> (a) to further the interests of citizens in relation to communications matters; and
> (b) to further the interests of consumers in relevant markets, where appropriate by promoting competition.

Certainly, this reference to "the interests of citizens" is to be welcomed. However, the subsequent list of "things which Ofcom are required to secure", (Section 3(2)) and to which they "must also have regard" (Section 3(4)) totals some nineteen factors, which, under Section 3(7), if these duties conflict, Ofcom must resolve, (unsurprisingly, perhaps) 'in the manner they think best in the circumstances'. Thus, though Section 3(6) does establish a priority for EU obligations, the clear hierarchy of duties sought by Puttnam otherwise remains absent, just as it had in previous legislation. This leaves wide-ranging and largely unstructured discretion in the regulator's hands, and citizenship interests vulnerable to defeat by other factors. In practice, it may well be that the deregulatory agenda established by Section 6, which requires Ofcom in effect to ensure the lightest feasible level of regulation, might prove a major factor in directing Ofcom's approach to such matters, and may certainly be expected to discourage the kind of active intervention required to ensure the protection of citizenship interests.

Late in the legislative process, as something of a concession in the House of Lords to pressure arising from the Puttnam Committee's detailed and telling scrutiny of the Draft Bill, section 375 of the Communications Act incorporated into section 58 of the Enterprise Act provisions relating to PI interventions into mergers within the media industries. Ofcom's powers under these provisions do relate to a moderately clearly specified vision of the PI, focusing in effect

on whether the proposed new company would have too powerful a presence across the media as a whole. However, Ofcom's exercise of these PI intervention powers will be engaged only at the instigation of the Secretary of State, allowing the possibility of party political influence, and hence inconsistency in their application. More generally, it is doubtful whether these measures go any significant way towards resolving the overall lack of clarity as to understanding and application of the PI in the context of media regulation. (Feintuck, 2004: 112-6)

At the most general level, it therefore seems that the vulnerability of public service values in media regulation has not been satisfactorily remedied by the Communications Act 2003. The underlying problems are perhaps most clearly illustrated by Ofcom's own summary of its roles, which it states as being, to,

- Balance the promotion of choice and competition with the duty to foster plurality, informed citizenship, protect viewers, listeners and customers and promote cultural diversity.
- Serve the interests of the citizen-consumer as the communications industry enters the digital age.
- Support the need for innovators, creators and investors to flourish within markets driven by full and fair competition between all providers.
- Encourage the evolution of electronic media and communications networks to the greater benefit of all who live in the United Kingdom.

(from Ofcom's homepage "About Ofcom")

In reality, this account of Ofcom's objectives is remarkably similar in scope to the objectives set out ten years ago in the Conservative government's 1995 White Paper, incorporating much the same range of values, and hence the same potential conflicts between them. The tension between democratic values and commercial, economic interests remains, with no overarching principle offering guidance as to which should be prioritized when they come into competition or conflict. Most obviously, worthy of highlighting here, however, is the term "citizen-consumer". It seems to me unlikely that the significantly different range of expectations which arise from these very different concepts can be swept away by deft use of the hyphen! In terms of defining PI values which underlie Ofcom's actions, there remains a failure to give due priority to the citizenship values which the Puttnam Committee sought. In this sense, the Communications Act 2003 can be viewed as a missed opportunity to provide a clear and legitimate statutory foundation for public service or PI values, in relation to the media at least.

The conclusion which might be drawn is that arguments from principle seem relatively unattractive to politicians, who will wish to seek to emphasise the promise and achievement of concrete performance indicators, and seem to a significant extent to be seen as falling outwith the brief of lawyers and regulators. This is all perfectly understandable, given the difficulties inherent in establishing and grappling with principle, especially in a constitutional setting such as the UK where informing principles and values are traditionally ill-defined. Understandable then, but inexcusable nonetheless, for it is abundantly clear that 'goal orientation', a fundamental "Law Job" which must be undertaken in order to allow a group or society to continue to function as a group, (Llewellyn 1940; Harden and Lewis 1986) involves processes for determining desired direction, and hence by implication requires consideration of the values and resulting objectives to be pursued. While the task of interpreting and articulating fundamental social values and principles is challenging, it cannot be avoided simply because it is so. Yet conventional political, legal and regulatory processes may allow just this, reconfirming the risk of marginalisation of non-commodity public service values. Hence, the potential attractions of "alternative" democratic processes involving participation and/or deliberation.

I should confess at this stage that I tend to have a very sceptical take on responses to this kind of situation which advocate participation as a panacea. While participation clearly exhibits some potential to encourage widespread input into decision–making and priority setting, there remains a significant risk that participatory processes, like the exercise of choice, will come to be dominated by those groups best equipped to take advantage of the processes. In reality, participatory mechanisms may too often simply become new fora for the playing out of interest group struggle, with the risk, as in regulation, of capture by vocal and economically powerful groups.

Though less than optimistic, this is not to write-off entirely the potential for participatory mechanisms to reassert and offer renewed legitimacy for public service values. However, participation, like choice, is also likely to occur late in decision-making processes when frameworks have been established, and fundamental choices already made and options foreclosed, and are unlikely to assist much in establishing or preserving principles and values which should centrally inform the delivery of public services. In this respect, it may be thought that deliberative processes may have more potential.

Addressing the nature of competing private and collective interests in the field of environmental regulation, Jenny Steele draws on Mark Sagoff's work to emphasize how 'immediate human interests rarely fully encapsulate the environmental impacts of development', and how, in the context of 'deliberative democracy', 'individuals should be regarded as able to divest themselves of their self-interested consumer preferences for the limited purposes of coming together as citizens and of defining public values through a process of deliberation.' (Steele 2001) In a phrase that can be equally usefully applied to marketised public services or to the regulation of the food industries or the media as to environmental regulation, she notes Sagoff's approach to deliberative democracy, which reasserts the difference noted earlier between consumer and citizen perspectives on such issues, and emphasizes how, in that context, 'Citizens are not mere maximisers of self-interest; and the public realm is not empty of values.' She goes on to note how approaching problem-solving in this kind of spirit may lead to decisions and legislation being based not simply on 'preference-aggregation or interest-group negotiation', but also on informed input from citizens, who, despite differing personal interests, can, if enabled in a deliberative context, 'contribute to a shared public culture'. It must properly be observed that the idiom used here appears more closely related to a civic republicanist tradition found in the US than the pluralist, liberal-democratic basis of the UK polity. However, it can be argued that some elements of this approach may be less alien to the UK context than they may seem. (Feintuck, 2004, Chapter 6).

Of central significance in the context of deliberation is the ability of all to act as, and be viewed as, citizens, not as mere consumers. However, this perspective also serves to emphasize an increasingly rarely offered view of the social responsibility of government, and hence public services and their regulation and delivery, being specifically that of representing community interests above and beyond sectional or individual interests. (Milne 1993)

From process to principle – in pursuit of "the public interest"

It remains abundantly clear that the framework for deliberation requires the prior establishment of a framework of public service principle around which deliberation may take place. In effect, it confirms a need for what can be called, after Sunstein (1990), "interpretative principles".

When running public services, or when establishing, utilising or intervening in market forces within them, it is necessary to hold on to Stewart's vision of "more ample liberalism", and

perhaps helpful to adopt Sunstein's expectation, admittedly in the US context, of "adhering to the original belief in the governmental process as one of deliberation oriented to the public good rather than a series of interest-group tradeoffs". (Sunstein 1990: 12)

The very obvious risk informing such approaches is that of democratically legitimate collective interests in public services, deriving from expectations of equality of citizenship, being readily defeated by individualist claims within the pluralist fray. This risk seems substantially greater given what Teubner (1987) observes as weaknesses in the structural coupling between politics, law and social life – what has also been described as the bifurcation of legal-technological concerns from moral values. (Minor 1962)

However, the need for the establishment and recognition of principles which offer support for social values which underlie and legitimate the political settlement are recognised by a wide range of writers. Rawls has been quoted by Klosko in the following terms:

> The political culture of a democratic society, which has worked reasonably well over a considerable period of time, normally contains, at least implicitly, certain fundamental intuitive ideas from which it is possible to work up a political conception of justice suitable for a constitutional regime. (Klosko 2000: 193)

More recently, and more specifically, writing on social citizenship, Bronwen Morgan (2003: 34) has talked in terms of a vision of "tempered market liberalism" which "connotes a set of substantive guarantees frequently associated with the various facets of the welfare state, guarantees that aspire to promote social citizenship, in addition to civil and political citizenship."

It seems apparent that if such ideas and values van be encapsulated within principles which can be articulated with reasonable clarity and be given operational effect, this may facilitate the legitimate resolution of conflict between competing claims which may otherwise be resolved through unstructured discretion or the exercise of raw political or economic power.

Interpretative principles of this kind are not entirely unknown to us. One such might be considered to be "the precautionary principle" which, though less than fully developed itself (Feintuck 2005, forthcoming), is increasingly applied in environmental regulation, and matters such as food safety. However, I want to consider here the possibility of mobilising and reinvigorating the PI as an informing concept for public service provision.

Though there are real problems and limitations relating to typical common interest and preponderance accounts of the PI (Held 1970; Feintuck 2004: Chapter 1), even vague notions of the PI may often seem hard to argue against, given their inherent echoes of democratic legitimacy, and it remains, even in an undeveloped form, a superficially attractive and convenient tool for defending values which may otherwise be vulnerable to becoming marginalised. Yet to fulfil its potential, it requires much clearer definition than usually exists. I have suggested elsewhere, and at length, that if a construct of PI is linked to a an expectation of equality of citizenship, it may justify regulatory intervention, and serve public service values, limiting the ever-increasing privatization of power, in pursuit of collective values which serve to cement the polity. (Feintuck 2004)

It has to be accepted that the value-laden vision of PI which I have advocated remains contestable. But, given its intimate connection to fundamental democratic values, and in particular the values of equality of citizenship, it should rarely be legitimately overridden.

However, an obvious question arises here. If the real concern is with equality of citizenship, what is to be gained by interposing a construct of PI? Why not simply pursue citizenship objectives directly? What does PI offer that reference to citizenship doesn't?

One persistent problem in pursuing citizenship interests, and especially social citizenship objectives, is that just as the legal system in this country might be said to lack any developed basis for the recognition of collective values and interests, so it also may be thought to lack any developed concept of citizenship. Though some legal definition of this term has existed historically in the context of matters such as immigration and welfare benefits, it has remained a limited notion, perhaps reflecting the historical view of Britons as 'subjects of the Crown'. Of course, debate over citizenship has been promoted in recent years via the influence of Europe, both in the context of the ECHR, and also the European Union's growing influence in this area, though there is a real risk that the latter may focus excessively on a particular vision of "economic" citizenship which does not incorporate the wider range of values properly associated with the concept. This lack of definition for an apparently central concept such as citizenship may well relate to what has been identified as the absence of a developed concept of 'state' in Britain (Prosser, 1982), at least when compared to its continental neighbours. It may be more than coincidence that we do not see in Britain the kind of more developed body of "public service law" that we see in countries such as France or Italy, where the concept of state is more developed, and which recognize a concept of "general interest" extending beyond the aggregation of private, individual interests. (Prosser, 1997) It is, of course, increasingly necessary to consider EU jurisprudence relating to "services of general interest" and their similarity or differences with the PI as envisaged here. Of course, in Britain it may prove difficult to define 'citizen', in the absence of a developed concept of 'state', and, given the legal system's dominant individualist orientation, in so far as citizenship is recognized it is likely to be in relation to individual aspects rather than the collective aspects which link to an idea of community.

In this connection, by way of summary, what might a developed concept of the PI linked explicitly to citizenship bring, which is not already adequately covered by human rights, or citizenship, or existing concepts of social regulation? Essentially, three claims can be made.

First, that in making explicit the connections between law and the full set of values inherent in the political philosophy of liberal-democracy, it serves to facilitate the objective of strengthening the structural coupling of these fields of endeavour (Teubner 1987), repairing some of the 'bifurcation' between technical legal concerns (with the likes of institutions and rule-play) and philosophical concerns and values (Minor 1962). Second, that it gives due prominence to the marginalized values of community, transcending the pluralist fray, restraining the ongoing political trend to give absolute prominence to the values of individualism and capital, and helping to address the tendency of common law systems to individualize issues. In doing so, it may serve to offer some resistance to what Marquand (2004) has persuasively described as the decline of the public domain. Third, that it provides a coherent justification for social regulation that is clearly and unashamedly independent of reliance on justifications for intervention based on market economics.

Given the functional centrality of formal law in implementing and enforcing such norms, it will inevitably be necessary to give the concept a legally recognizable form. Though this poses certain challenges for lawyers, as was indicated above, it should not offer insuperable difficulties. As John Bell has suggested, if legislators and judges are able to state and interpret fundamental principles of human rights, it might be expected that they should also be able to develop an enforceable and meaningful concept of the PI which is independent of, and serves as a restraint on, the powerful. (Bell 1993: 34)

We are increasingly familiar with the concept of "environmental impact assessments", and, new legislation is now accompanied by "regulatory impact assessments". What I want to suggest is, that both in the context of regulation and in the delivery and review of public services, reference to a concept of PI which is explicitly linked to the fundamental expectation of equality of citizenship, and the collective context within which such an expectation must

exist, can serve as a standard against which policies and practices can be judged; in effect it can serve as a form of "democratic impact assessment", or more precisely still "citizenship impact assessment". Within a polity which increasingly emphasises liberal-individualism, it may serve both as a reminder of the democratic and collective basis of our society, and as a means of justifying interventions in pursuit of such values. This seems of particular relevance and importance in the context of public services.

In drawing attention to public service values, a developed concept of PI may help to ensure that our "liberal-democratic" society remains not only ***liberal***, but also meaningfully ***democratic***. It may be that we feel that using the concept of PI is not the most attractive game in town. While I won't try to claim that it is necessarily the only game in town, I will suggest that if we choose not to pursue it, we must come up with an alternative construct which shares a very similar value orientation and fulfils the same potential function if any meaningful public service culture is to be preserved.

References

Bell, J., 'Public Interest: Policy or Principle?', in Brownsword, R. (ed.), *Law and the Public Interest* (Proceedings of the 1992 ALSP Conference), (Stuttgart: Franz Steiner, 1993).

Breyer, S., Regulation and its Reform (Cambridge, Mass.: Harvard University Press, 1982).

Feintuck, M., *Accountability and Choice in Schooling* (Buckingham: Open University Press, 1994).

Feintuck, M., *Media Regulation, Public Interest and the Law*, (Edinburgh: Edinburgh University Press, 1999).

Feintuck, M., 'Walking the High-Wire: the UK's Draft Communications Bill', *European Public Law*, 9/1 (2003), 105.

Feintuck, M., *"The Public Interest" in Regulation*, (Oxford: Oxford University Press, 2004).

Feintuck, M., "Precautionary maybe, but what's the principle? The precautionary principle, the regulation of risk, and the public domain", *Journal of Law and Society*, Autumn 2005, forthcoming.

Feintuck, M. and Varney, M., *Media Regulation, Public Interest and the Law* (2nd ed.), (Edinburgh: Edinburgh University Press, 2006 forthcoming).

Harden, I. and Lewis, N., *The Noble Lie: The British Constitution and the Rule of Law*, (London: Hutchinson, 1986).

Held, V., *The Public Interest and Individual Interests*, (New York, N.Y.: Basic Books, 1970).

Klosko, G., *Democratic Procedures and Liberal Consensus*, (Oxford: Oxford University Press, 2000).

Leys, C., *Market-Driven Politics: Neoliberal Democracy and the Public Interest*, (London: Verso, 2001).

Llewellyn, K., 'The Normative, the Legal and the Law-Jobs', 49, *Yale Law Journal* (1940) 1355.

Marquand, D., *Decline of the Public*, (Cambridge: Polity Press, 2004).

Milne, A. J. M., 'The Public Interest, Political Controversy, and the Judges' in Brownsword, R. (ed.), *Law and the Public Interest* (Proceedings of the 1992 ALSP Conference), (Stuttgart: Franz Steiner, 1993).

Minor, W. S., 'Public Interest and Ultimate Commitment', in Friedrich, C. J. (ed.), *Nomos V: The Public Interest*, (New York, N.Y.: Atherton Press, 1962).

Morgan, B., *Social Citizenship in the Shadow of Competition: the Bureaucratic Politics of Regulatory Justification*, (Aldershot: Ashgate, 2003).

Prosser, T., 'Towards a Critical Public Law', *Journal of Law and Society*, 9/1 (1982), 1.

Prosser, T., *Law and the Regulators*, (Oxford: Clarendon, 1997).

Puttnam Report, *Report of the Joint Committee on the Draft Communications Bill*, HL Paper 169-I: HC 876-I, 25 July, 2002.

Schelling, T., "Economic Reasoning and the Ethics of Policy", *The Public Interest*, 63 (1981) 37, reproduced in Katz, A.V. (ed.), *Foundations of the Economic Approach to Law* (Oxford: Oxford University Press, 1998).

Stewart, R.B., "Regulation in a Liberal state: The Role of Non-Commodity Values", *Yale Law Journal*, 92 (1983), 1537.

Steele, J., 'Participation and Deliberation in Environmental Law: Exploring a Problem-Solving Approach', *Oxford Journal of Legal Studies*, 21/3 (2001), 415.

Sunstein, C. R., *After the Rights Revolution: Reconceiving the Regulatory State*, (Cambridge, Mass.: Harvard University Press, 1990).

Teubner, G., *Juridification of Social Spheres*, (Berlin: Walter de Gruyter, 1987), extracts in Baldwin, R., Scott, C., and Hood, C. (eds.), *A Reader on Regulation*, (Oxford: Oxford University Press, 1998).

Law, Economic Incentives and Public Service Culture

Conclusion

Dave Cowan

School of Law and Centre for Market and Public Organisation

University of Bristol

It is a rare luxury to sit in a room with leading socio-legal scholars all addressing the same topic of general importance. The papers delivered, together with the high quality of questioning and debate (made possible by the efficient production of papers in advance of the seminar), made for an exciting and illuminating day. At the outset, I should say that this would not have been possible without the expert assistance of the CMPO, in particular Heidi Andrews and Alison Taylor. The idea, inspiration, and motivation for the seminar came from Morag McDermont whose paper in this collection also provides the analytical bone structure for a project on which we are currently engaging and on which the seminar papers provide the crucial ligaments. We were particularly grateful to be able to invite high-quality, internationally recognised speakers who delivered the thought-provoking papers which make up this collection.

At the end of the day, it seemed to me that there were four themes which were addressed by the participants during the course of the day. To a degree, they all hinged upon the first theme, the hybridisation of the state. It is now commonplace in academic discussion to refer to this using different metaphors and analogies – decentring, beyond the state, mapping, regulatory space – all of which have enabled us to see the regulatory and governing relationships which bind, or link, community/ies. Although we have rediscovered this hybridisation, it is, of course, not new but reflects, for example, the influence of liberal interventions in the nineteenth century. This is particularly prominent in housing, where we have rediscovered the balance which exists beyond the state in the provision of housing. After a relatively short period in which the state supported the development of publicly provided housing (albeit through private finance and development), we have rediscovered the 'mixed economy of provision'. Housing is one example of this but, as the papers in this collection suggest, not the only one; this reflects the broader context of a breakdown in the Keynesian welfare consensus which has taken place within a defined set of contestations.

The second theme then relates to *the consequences of this (re-)discovery* of the hybridisation of the state, which are significant. This discussion formed the bulk of our engagement on the day. In particular, O'Malley's discussion of the corporatisation of policing unions within the governing nexus of the police establishment, combined with Vincent-Jones' discussion of the corporatisation of health care, were suggestive of cross-border analytical tools and the production of the all-embracing 'citizen-consumer' in policy. Feintuck's refrain to this connection between citizen and consumer, however, is that the two words give rise to a 'significantly different range of expectations' and we should be careful about tying them together with a hyphen. A second major consequence lies in the hybridisation of the accountability mechanisms concomitant on the hybridisation of the state. The latter has been the basis for discovery of the former, and forms the basis of the analysis provided by Scott and McDermont. In some respects, McDermont's paper grapples with the theoretical issues and approaches discussed by Scott, although their primary sources and methodologies raise different questions. A third consequence is a return to values, or at least an attempt to map out the core values of different organisations in their changing environment. Each of the papers addresses this consequence at least implicitly, but Feintuck's paper provided an explicit

discussion of the 'public interest' paying particular attention to notions of equality and citizenship. What the discussion around this theme served to emphasise was that, by way of contrast to simplistic models of earlier generations, regulation and accountability in the hybridised state takes place within a complex, thick series of polyvocal networks, which are only made more complex by broader constitutional flux through the challenge/s of devolution.

The third major theme concerned the relationship between public sector cultures and private sector values. At a basic level, the papers addressed their relationship through their contradictions as well as their harmonies. These are relatively simple models, but provide a link with the often simplistic understandings of policy-makers about what motivates the public sector – the knights, knaves, and pawns in Le Grand's analysis. Alternatively, we might view them as 'ideas' which have their powerful mediators. A vehicle for this analysis is provided by the idea of entrepreneurialism which seems to imply a continual re-envisioning of oneself. As an aside in Vincent-Jones' paper, he refers to the transitions between TECs, CTCs and academies, each of which links with freedom of financial manoeuvrability and different accountability structures. O'Malley's paper provided an initial context for this theme through the seepage of the private sector values into the public service cultures of police networks. Again, there are many assumptions here, that private sector values are capable of underpinning better service; as well as underpinning the new managerialism of public services, controlling workers through performance measurement, thus driving out the maverick.

The fourth major theme is, perhaps, a sub-part of the third, but may be expressed as follows – it concerns the implications of *borrowing models*, or reading across the benefits (and potential pitfalls) of models from one sector to another. As one participant put it, we are at risk of 'robbing the private sector of its benefits', or, for that matter, the public sector. There is, as Scott observes, much to be said for spontaneity in accountability regimes, borrowing models which best suit at the appropriate moment in time.

It would not be possible in this short space to catch the richness of the day – it was a rare privilege to be able to focus on this specific issue for a full day in the company of such participants.

Notes

[i] The Federation was formed in 1935 as the National Federation of Housing Societies. It became the National Federation of Housing Associations in 1973 and to the National Housing Federation (NHF) after the Housing Act 1996

[ii] A consultation paper available on Westlea HA's website at http://www.westlea.co.uk/news/boardchange05.htm (site visited 20th May 2005)

[iii] http://www.odpm.gov.uk/stellent/groups/odpm_housing/documents/page/odpm_house_603911.hcsp, p 6

[iv] Established by the Office for Public Management (OPM®) and the Chartered Institute of Public Finance and Accountancy (CIPFA), in partnership with the Joseph Rowntree Foundation. The role of the Commission was to develop a common code and set of principles for good governance across public services. See the Commission's website at http://www.opm.co.uk/ICGGPS/index.htm

[v] http://www.pep.org.uk/resources/pdf/TFR%20Sept-Dec%2004-7.pdf

Bibliography

Ashby, J. (1997) 'The Inquiry into Housing Association Governance' in P. Malpass (ed) *Ownership, Control and Accountability: The New Governance of Social Housing* (London, Chartered Institute of Housing)

Bauman, Z. (1998) *Work, consumerism and the new poor* (Milton Keynes, Open University Press)

Brion, M. & Tinker, A. (1980) *Women in Housing: Access and Influence* (London, Housing Centre Trust)

British Steel Corporation (BSC) employee directors with John Bank and Ken Jones (1977) *Worker directors speak*. (Farnborough: Gower Press)

Cadbury Report (1992) *Committee on the Financial Aspects of Corporate Governance, draft report* (London, Financial Reporting Council)

Casey, R. & Allen, C. (2004) 'Public housing managers and the performance ethos: towards a 'professional project of the self' *Work, employment and society*, Vol 18(2): 395-412

Cobbald, C. & Dean, J. (2000) *Views on the Large Scale Voluntary Transfer Process*, (Great Britain, Department of the Environment, Transport and the Regions)

Cooper, D. (1998) *Governing Out of Order: Space, Law and the politics of belonging* (London, Rivers Oram Press)

Cornforth, C. (1995) 'Governing Non-Profit Organisations: Heroic Myths and Human Tales' *Open University Business School Working Paper Series* (Milton Keynes, Open University Business School)

Cowan D. (1999) *Housing Law and Policy* (Basingstoke: Macmillan)

Cowan, D., Gilroy, R. & Pantazis, C. (1999) 'Risking Housing Need', *Journal of Law and Society*, Vol 26(4): 403-426

Cowan, D. and Marsh, A. (2005) 'From need to choice: welfarism to advanced liberalism? Problematics of social housing allocations', *Legal Studies*, Vol 25(1): 22-48

Cowan, D. and McDermont. M (forthcoming) *Regulation Social Housing: Governing Decline* (London, Glasshouse)

Day, P., Henderson, D. & Klein, R. (1993) *Home Rules: Regulation and accountability in social housing*, (York, Joseph Rowntree Foundation)

Dreyfus, H.L. & Rabinow, P. (1983) *Michel Foucault: Beyond Structuralism and Hermeutics* (2nd ed.) (Hemel Hempstead, Harvester Wheatsheaf)

Feintuck, M. (2004) *'The Public Interest' in Regulation* (Oxford Oxford University Press)

Flint, J. (2002) 'Social Housing Agencies and the Governance of Anti-social behaviour' *Housing Studies,* Vol 17(4): 619-637

Foucault, M. (1983), 'Afterword: The subject and power' in H. Dreyfus and P. Rabinow (eds) *Michel Foucault: Beyond Structuralism and Hermeneutics* (2nd edition) (Chicago: The University of Chicago Press)

Foucault, M. (2003) *Society Must Be Defended* (London: Allen Lane)

Financial Reporting Council (FRC) (2003) *The Combined Code on Corporate Governance* (London: FRC)

Gibb, K. (2003) 'Transferring Glasgow's Council housing: Financial, urban and Housing Implications', *European Journal of Housing Policy*, Vol 3(1): 89-114

H.M. Treasury (2000) *Public Private Partnerships: the Government's Approach* (London, The Stationary Office)

Higgs Committee (2003) *Review of the role and effectiveness of non-executive directors* (Department of Trade & Industry, available online at: www.dti.gov.uk/cld/non_exec_review/pdfs/higgsreport.pdf)

Housing Corporation (1978), *In the Public Eye,* Circular No. 3/78 (London: Ministry of Housing and Construction)

Housing Corporation (2000) *Regulatory Code and Guidance* contained in *The way forward: Our approach to regulation* (London: Housing Corporation)

Housing Corporation/National Housing Federation (NHF) (2004) *2003 Global Accounts and Sector Analysis of Housing Associations* (London: Housing Corporation)

Hunt, A. (1992) 'Foucault's Expulsion of Law: Towards a Retrieval', *Law and Social Enquiry*: 1-38

Independent Commission on Good Governance in Public Services (2004) *The good governance standard for public services* (London: OPM & CIPFA)

Laffin, M. (1986) *Professionalism and Policy: The Role of the Professions in the Central-Local Government Relationship* (Aldershot, Gower)

Larner, W. and Butler, M. (2005) 'Governmentalities of Local Partnerships: The rise of a 'partnering state' in New Zealand', *Studies in Political Economy*, Vol 75: 85-108

Law Commission (2002) Consultation Paper No 162, *Renting Homes 1: Status and Security* (London: The Stationary Office)

Levitas, R. (1998) The Inclusive Society? Social Exclusion and New Labour (Basingstoke, Palgrave)

Malpass, P. (1999) *The Work of the Century: the origins and growth of the Octavia Hill Housing Trust in Notting Hill* (London, Octavia Hill Housing Trust)

Malpass, P. (2000) *Housing Associations and Housing Policy* (Basingstoke, Macmillan)

Marsh, A. (2004) 'The inexorable rise of the rational consumer? The Blair government and the reshaping of social housing', *European Journal of Housing Policy*, Vol 4(2): 185-207

McDermont, M. (2004) ' Housing associations, the creation of communities and power relations' *Housing Studies*, Vol 19(6): 855-874

Mullins, D., Niner, P. & Riseborough, M. (1993) 'Large Scale Voluntary Transfers' in P. Malpass & R. Means Implementing Housing Policy (Buckingham, Open University Press)

NFHA (National Federation of Housing Associations) (1977) *Growing Pains: coping with the problems of growth in housing associations* (London, NFHA)

NFHA (1995a) *Competence and Accountability: Report of the Inquiry into Housing Association Governance* (London, NFHA)

NFHA (1995b) *Much in evidence: selected submissions to the Governance Inquiry* (London: NFHA)

NFHA 1995/6 *Annual Report* (London, NFHA)

Nolan (1996) *Standards in public life: local public spending bodies: further and higher education bodies (including universities), grant-maintained schools, training and enterprise councils and local enterprise companies, registered housing associations*, Vol.1 (second report of the Committee on Standards in Public Life) (London, HMSO) Cm: 3270-I.

ODPM (Office of the Deputy Prime Minister) (2003a) *Housing Transfer Manual 2003 Programme* (London, ODPM)

ODPM (2003b) *Sustainable communities: building for a better future* (London, ODPM)

Parkinson, J. (1993) *Corporate Power and Responsibility: Issues in the Theory of Company Law* (Oxford, Clarendon Press)

Pawson, H. and Mullins, D. (2003), *Changing places: housing association policy and practice on nominations and lettings* (Bristol, Policy Press)

Prosser, T. (2005) *The Limits of Competition Law: Markets and Public Services* (Oxford, Oxford University Press)

Rhodes, R. (1996) 'The New Governance: Governing without Government', *Political Studies*, XLIV: 652-667

Rose, N. (1993) 'Government, authority and expertise in advanced liberalism', *Economy & Society*, Vol 22(3): 283-299

Rose, N. & Miller P. (1992) 'Political Power Beyond the State: problematics of government' *British Journal of Sociology*, Vol 43: 173-205

Scott, C. (2002) 'Private Regulation of the Public Sector: A Neglected Facet of Contemporary Governance', *Journal of Law and Society*, Vol 29(1): 56-76

Shearing, Clifford & Wood, Jennifer (2003) 'Nodal Governance, Democracy, and the New 'Denizens', *Journal of Law and Society*, Vol 30 (3): 400-419.

Steele, J. and Parston, G. (2003) *Rubber Stamped? The expectations and experiences of appointed public service governors* (London, Office of Public Management)

Vincent-Jones, P. (2000) 'Contracting for Public Services: Trust, Accountability and Consumer Participation in UK Local Authority Quasi-Markets', in Y. Fortin and H. Van Hassel (eds.), *Contracting in the New Public Management*, IOS Press: 143-159.

Vincent-Jones, P. & Harries, A., (1996) 'Conflict and Co-operation in Local Authority Quasi-Markets: The hybrid Organisation of Internal Contracting under CCT' *Local Government Studies*, Vol 22(4): 187-209

Walker, D. (2004) 'Boardroom dramas', *Society Guardian*, 28th April: 14

Weaver, M. (2003) 'Boiling point', *Society Guardian*, 1st October: 2-3