Foreword

Public–private partnerships (PPPs) have become popular with governments and the European Union as a way of providing public infrastructure and public services. There are a number of reasons. One is the sense that the private sector will do a better (and less bureaucratic) job. Another is that the private sector is used to paying attention to cost and that the provision of private finance will reduce the need for the taxpayer to pay the cost in a period when public sector budgets need to be kept in check. These instrumental aims of PPPs do not give the full picture of the legal and social mechanism that has been created. Many lawyers would treat a PPP like any other contract made with a public body – a set of terms to regulate the provision of services by the private sector and the money provided by both to a design made by the public body. But PPPs are not just any other contract. They are contracts built to last. A twenty-five- or thirty-year PPP between a contractor and a public body will last longer than a typical marriage or even the typical relationship between a customer and her bank. That length, over a generation, has profound consequences which the concept of ‘contract’ does not capture.

It is the merit of this work by Yseult Marique that she takes the distinctiveness of PPPs as her starting point. For her, a PPP is a set of relationships, not just a set of terms (or duties) agreed by the parties. As in any long-term relationship, a PPP is not just a set of reciprocal obligations, but a way of life. The relationship between the contractor who builds and runs a school and the local education authority will be one of constant interaction. The relationship will not work well if either side insists on its contractual rights and duties; there needs to be flexibility. Most of all, as Marique points out, there needs to be a commitment to make the PPP project (for instance a PFI school) work. The PPP sets a relational context within which the parties need to view their contractual responsibilities. That perspective of the project brings into the understanding of the contractual relationship the beneficiaries of the public service – in the case of the school, the pupils, parents and teachers whose place of learning it is. The PPP contract thus requires a sense of ‘community’, a sense of belonging together. Passengers on a train all have contracts with the train operator, but their short moment of

sharing that common relationship does not create a real community. Within the school PPP, it is the constant need to interact in order to fulfil the project of delivering a place of learning which creates a community. Over many years, parents, pupils and teachers will place (typically non-legal) requirements on the contractors and on the local authority, and the commitment of the latter to the project makes them keen to satisfy those legitimate needs.

This regular and long-term interdependence requires a sense of community to make it work. The sense of community also brings with it values which are distinct from the classical one-off contract – the single train journey which will not be repeated. If parties have a common project and need to belong to a community of interest to achieve it, then the idea of each contracting party as a rational maximiser of their own self-interest is inadequate. Alongside the need to ensure that their own interests are satisfied through the project, Marique carefully points out that they have to adopt an ‘ethic of care’ for the interests of the other contracting party and of the third party beneficiaries of the public service. Such an ethic is not pure benevolence. It is rather a recognition that, in a relationship of interdependence, one’s personal fulfilment is bound up with the fulfilment of other people. A proactive ethic of caring for the interests of the others ensures the project succeeds and that one can satisfy the goals that you have for yourself. Ultimately, commitment to the project, rather than playing by the rules determines the culture of the PPP.

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