

The Limits of Solidarity: Relational Contracting in Perspective and Some Criticism of Traditional Sociology

by

SIEGWART LINDENBERG and HENK DE VOS

1. Introduction

Almost a hundred years ago, Georg Simmel pronounced that “every interaction is properly viewed as a kind of exchange” (SIMMEL [1971], p. 43), and he went on to say that “exchange is just as productive, as creative of values, as is so-called production.” (SIMMEL [1971], p. 47) Production of value is seen as grounded in the terms and conditions of exchange relations. Simmel’s insight is part of a long tradition in Western thought which had reached its prior peak elaboration in the work of Adam Smith. For him social science had to be a useful science which meant that it had to be able to produce useful suggestions for institutional reform. Social science could fulfill this role thanks to the combined analyses of exchange and conditions of exchange.

In this paper, we will deal with a recent suggestion for institutional change: Macneil’s quest for a new legal framework in which the guiding norms are oriented towards contracts as relations rather than as spot exchanges¹. We will be rather critical of his analysis because in our view it fell pray to many pitfalls of traditional sociology. In other words, we would like to pursue two objectives simultaneously: to present a critical evaluation of some aspects of Macneil’s suggestions and to underline the importance of a reintegration of the social sciences.

Contributions to institutional innovation by the social sciences require that exchange and conditions of exchange (e.g. institutions) be studied simultan-

¹ We will base our analysis on MACNEIL [1978] and [1983] in which the author himself presented and reworked the prominent arguments of his more detailed publications on the subject. Macneil covered a great diversity of issues many of which fall outside our sphere of competence. In particular, he gives much attention to norms implicit in contracting and the values attached to these norms. Our analysis will concentrate not so much on the analysis of norms and values as on the social science context within which Macneil works. For this reason, we will also not shy away from paying close attention to what he says in footnotes and asides. We will concentrate on the sociological base but we will not analyze historical trends in contract law. In footnote 8, we make certain suggestions in this direction.

ously. It is quite typical of the separate (i.e. non-exchanging) development of sociology and economics that the two aspects had been severed: economists concentrated on exchange and production without much attention to the conditions of exchange and sociologists looked at varying conditions of exchange (such as social class, roles, norms) without simultaneous analysis of exchange and production. Until quite recently, nothing would have been gained by attempts to integrate these two sides into one whole because they proceeded from different models of man. But in the last twenty-five years, things have begun to change, both in economics and in sociology and the convergence is in full swing (cf. LINDENBERG [1985a]). Predictably enough, differences in emphasis still reflect a major orientation towards either sociology or economics. A strong emphasis on exchange and economics can be seen in the works of exchange sociologists (e.g. HOMANS [1958], COLEMAN [1975]); transaction costs and property rights economists (e.g. COASE [1960]; ALCHIAN and DEMSETZ [1973]; WILLIAMSON [1975]; NORTH [1981]; and public choice analysts (e.g. BUCHANAN and TULLOCK [1962]). With this revival, interest naturally also focused on the powerful combination of *exchange with promise*, i.e. the contract: "Only twenty years ago the word 'contract' was confined to the 'contract curve' in the Edgeworth-Bowley box; now it has become a household word in the discipline." (CHEUNG [1983], p. 20)

Those who draw their inspiration mainly from sociology emphasize conditions of exchange, such as norms, status, role etc. For them, Durkheim's view on contract may summarize the major concern:

"a contract is not sufficient unto itself, but is possible only thanks to a regulation of the contract which is originally social ... moreover, exchange, as we have seen, is not all there is to a contract. There is also the proper harmony of functions concurring. They are not only in contact for the short time during which things pass from one hand to another; but more extensive relations necessarily result from them, in the course of which it is important that their solidarity be not troubled." (DURKHEIM [1933], pp. 215, 217)

Some examples of scholars who have worked in this direction are SELZNICK [1969]; HIRSCHMAN [1970]; HIRSCH [1978]; WHITE [1983]; AKERLOF [1982]. They had to avoid the many pitfalls erected within traditional sociology by almost a hundred years of separation from the analysis of exchange. One of the most prominent of these pitfalls is the systematic lack of attention to limits of solidarity and the concomitant exaggeration of the powers of socialization and internalized norms and values². Macneil fits into this last group of sociologically inclined analysts but, it seems to us, his analysis unne-

² Durkheim's statement that there is more to contract than exchange, viz. the relational aspects, promised that exchange would be studied in the context of relational aspects. But this did not happen. Instead, relational aspects and exchange became each the subject matter of a different discipline.

cessarily clings to traditional sociology with the result that his suggestions will in all likelihood just add yet another voice to the large sociological choir that sings in unison: “social relations matter”.

2. Reconstruction of Macneil's Main Argument

Ian Macneil believes that it is time that a new legal framework was developed in which contracts are seen as relations rather than as analogues of spot exchanges (cf. MACNEIL [1978, 1983]). This future framework would be a “relational” contract law as opposed to the “classical” contract law of the late 19th century. The classical contract law is oriented towards discrete transactions and thus generates norms that put a premium on a predictable future, no matter what happens to disrupt performance. Present-day “neoclassical” contract law attempts to accommodate relational aspects but it remains committed to the basic norms of classical contract law and thus remains a poor compromise.

According to his own words, he followed the lead of Philip SELZNICK [1969], a sociologist, and he does not have much confidence that within his own profession guidance or initiative in this direction can be expected: “Just as contractual relations exceed the capacities of the neoclassical contract law system, so too the issues exceed the capacities of neoclassical contract law scholars. They must become something else – anthropologists, sociologists, economists.” (MACNEIL [1978], p. 898). At the same time, Macneil does not expect much from the social sciences either: microeconomists typically persist in thinking of contract in a fallacious manner (MACNEIL [1978], p. 865); transaction cost economists come closer to the truth but are still far away from a relational conception of contract, and western sociology is at present in a state of disarray (MACNEIL [1983], pp. 385, 398, *passim*). Maybe due to this apparent lack of initiative from elsewhere, Macneil concentrated his own considerable efforts on relational contracting. He did so by postulating a general trend onto which changes in contract law can be projected. Since this postulated trend is exactly the opposite of the received sociological wisdom, it becomes even more of a challenge for critical analysis.

2.1 From Contract to Status?

In 1861, Sir Henry James Sumner Maine published *Ancient Law* in which he maintained that, especially in Western Europe, a secular trend from “status” to “contract” could be observed. The individual has been steadily substituted for the family as the unit of which civil law takes account and the powers and privileges residing anciently in the family (i.e. assigned rights and duties) have gradually given way to relations based on free agreement.

This thesis was to become very famous and it had considerable influence on sociology and anthropology.

While Macneil does not attack Maine's thesis, he is convinced that "since the time of Maine the 'progress', i.e. movement, of law in Western states has been from contract to status." (MACNEIL [1983], p. 391). He himself prefers to speak of a movement from the "transactional" to the "relational" pole.

To make things slightly more complicated: Macneil's detailed characterization of the dichotomy "relational/transactional" (MACNEIL [1978], p. 902ff.) is even more reminiscent of the famous distinction *Gemeinschaft/Gesellschaft* by TÖNNIES [1887] than of Maine's "status/contract" duality. The following is a fair summary of Macneil's characterization: at the *transactional* pole, the relation involves only a segment of the participants; it has a specific purpose based on the agreement to exchange measurable quantities, and it ends sharply after exchange has taken place. Future contingencies are maximally anticipated in the formal agreement the terms of which involve conflict over the allocation of risks and benefits. Both participants expect self-interested behavior from the other and both rely on third-party enforcement of obligations.

By contrast, the *relational* pole is marked by a relation that involves the whole person; it has no specific purpose and extends into the future; to the degree that the future is seen as something separate, the present is conceived as a preparation for that future. While exchanges take place, the quantities exchanged are difficult to measure and remain unmeasured. The participants, of which there are likely to be more than two, expect altruistic behavior from each other as burdens and benefits are shared undividedly.

The similarity with Tönnies' polar types is uncanny, but the conclusions of the two authors are quite opposite. Tönnies saw a development from *Gemeinschaft* (relational) to *Gesellschaft* (transactional) with a possible blending of the two in the future. Macneil sees a progression from the transactional to the relational pole since the late 19th century.

2.2 Defense of His Thesis

The evidence he offers in defense of this thesis is three-fold: first, the increasing government interference with freedom of contract (MACNEIL [1983], p. 391); second, the developmental direction of neoclassical contract law (MACNEIL [1978], pp. 883ff.); and third, the loss of subject areas to which the (neo)-classical contract law is applied (MACNEIL [1978], p. 885f.).

This evidence is suggestive but it is not so conclusive that he could rest his case on it. Rather, he buttresses his thesis by offering us three good reasons why the development must have turned in the directions of relational contracting.

First, ongoing contractual relations play an ever increasing role in the American economy. For this reason the pressure exerted on the legal system

to respond in relational ways is also constantly increasing (MACNEIL [1978], p. 885). Second, the modern economy requires both stability and flexibility and these two needs constantly clash given the legal framework of classical contracting. The impossibility to achieve complete predictability in planning for long term contracts prevents the possibility that future contingencies are brought into the present and worked into the agreement. Flexibility can thus only be achieved through short-term contracts. While neoclassical contract law allows somewhat more flexibility through its recognition of possible conflict between planning and subsequent changes in circumstance it remains chained to the norms and ideals of classical contract law (MACNEIL [1978], pp. 859ff.).

This latter point, third, is related to the classical idea of contract as promise (cf. also FRIED [1981]) which demands that one assumes full consent at the time of initial contracting (MACNEIL [1978], pp. 883 ff.). According to Macneil, this consent is likely to be a legal fiction because it is very unlikely that people can agree to all the terms of a transaction. Yet, classical and neoclassical contract law is forced to take the “original consent” as the major reference point when conflict arises. Relational contract law looks at the entire relation as it had developed up to the point in question. “Original consent”, if it played a role at all, would only be one part of this development (MACNEIL [1978], p. 890). Thus, ongoing contractual relations put pressure on legal frameworks that focus on the original consent as the major point of reference.

There are many sociologists who would welcome the reversal of the *Gemeinschaft/Gesellschaft* trend for society’s sake (from old sociological utopians such as Saint-Simon and Comte to sociological neo-utopians such as NAROLL [1983]). But very few would have thought reversal to be likely (WALLERSTEIN [1985] being one of the exceptions). Thus, from a sociological point of view, Macneil’s insistence that the reversal is “as real as the ‘progress’ of the automobile in the same period” (MACNEIL [1983], p. 391) is very curious and it deserves close attention for some time to come. Our response can only be a modest beginning.

3. Critical evaluation

One way of beginning a critical evaluation is to present a difficult case: marriage and the family. What would we predict about the development of marriage and the family and their legal regulation on the basis of Macneil’s analysis? The reader is invited to help answer this question.

There is a famous study of Polish immigrants in Chicago by THOMAS and ZNANIECKI [1918]. Among other things, it describes the clash between two radically different ideas on marriage. Marriage in the traditional Polish village constituted a social unit and conflict within it was seen as a disruption of the local community the solidarity of which had to be restored. In the United

States, marriage was seen as a union and in case of conflict the marriage partners were taken to be adversaries, each pursuing his/her own happiness rather than the smooth functioning of the community. In Macneil's terms, the traditional Polish marriage was at the far relational end, while the American marriage was close to the transactional pole. Yet, one could also say that in the traditional Polish case, couples were simply forced to suffer the consequences of a partly fictitious initial agreement (never to part again) while the American marriage considered the relationship as it had developed up to the point of conflict. Seen this way, the Polish case is transactional and the American is relational. Depending on the interpretation of the Polish and American marriage, one can turn Macneil's thesis right side up or upside down. The actually observed historical development cannot help us decide what is right side up and what is upside down. The trend in marriage law itself had its zigzag movements, but it definitely seems to head towards increasing liberalization in Western societies after Christianity had successfully regulated marriage in the Middle Ages (see RHEINSTEIN [1968]); GOODE [1963]; WEISS [1979]; WEITZMAN and DIXON [1980]). Does this confirm or contradict Macneil's thesis?

Similarly, the family as a whole can be treated in ways which Macneil would have to assign to opposite poles. For example, does the law encourage family relations as a going concern and therefore discourage legal arbitration or does it allow legal adversarial relations between various members of a family? In the first case it would be relational and in the second it would be transactional according to Macneil's scheme. Or could it be the opposite? We fail to see how any testable proposition could possibly be deduced from Macneil's thesis.

3.1 A Traditional Sociological Package

The major source of confusion, it seems to us, comes from a form of argument frequently found in traditional sociology: vague types are established and relevant phenomena are successively assigned to one or the other, each time enriching the semantic connotations until, finally, each type forms a *gestalt* which in turn is itself only part of a larger whole formed by the constellation of types. As the argument unfolds, the progress in understanding is entirely due to the intuitive appeal of each stage of the *gestalt*. Goethe's "elective affinity", a term at times also used by Max Weber to indicate objective relations of fit between ideas, would serve Macneil well. At first, he has the suggestive pair "discrete" and "relational", and successively, each acquires a variety of attributes until the poles hum with semantic vibrations: transactional is impersonal, money oriented, selfish etc., while relational involves the whole person, is long-term, not monetized, altruistic etc. The changes in contract law are also worked into these types: "transactional" is clinging to the original promise while "relational" is taking the whole relation as a

point of reference; “transactional” is dependent on external sources of obligation while “relational” is also blessed with internal sources of obligation etc.

Sometimes this form of argument is referred to as a kind of “interpretation” (cf. DE VOS [1981]) but the name is more respectable than the form of argument³. Why then would a renowned legal scholar revert to this style? We could think of the following reason: for him, traditional sociology seemed to be the only social science not contaminated by the same spirit that haunted classical contract law. Until quite recently, the social scientists who supported the claim that social relations and norms matter were almost exclusively sociologists. Those who felt this claim justified and important had only sociology to turn to. Choice was assigned to economics, norms to sociology, and if you thought norms matter, you stood under great pressure to claim that choice is irrelevant (cf. LINDENBERG [1985b]). Once you abandon choosing man, you have little incentive to look for tradeoffs and choice dilemmas. Worse, tradeoffs and choice dilemmas may even appear as the stigma of a decadent social system, fitting nicely the sociological message that more *Gemeinschaft* and solidarity was needed because *Gesellschaft* and purposive contracts are impersonal and alienating and they plunge society into a state of anomie (lack of social norms).

This sociological package is wholeheartedly accepted by Macneil. According to him, our “major modern social problem” is the scarcity of nonbureaucratic production of a common conscience (MACNEIL [1983], p. 852). ‘Common conscience’ is Durkheim’s expression for value consensus for the production of *Gemeinschaft* or “mechanical solidarity”. Macneil’s behavioral assumptions that make a common conscience so important are also adapted from Durkheim⁴. “Man is both an entirely selfish creature and an entirely social creature, in that man puts the interests of his fellow ahead of his own interest *at the same time* that he puts his own interests first,” he observes (MACNEIL [1983], p. 348). Thus man is irrational and alternates between selfish and self-sacrificing behavior. The *only* way such a creature can survive, in Macneil’s account, is thanks to two principles that allow man to be selfish and social at the same time without inconsistency: solidarity and reciprocity. Getting something back for something given (reciprocity) would satisfy the selfish side if one could be reasonably certain that it also holds in the future. The belief in being able to depend on one another (solidarity) satisfies the social side of man and at the same time allows reciprocity to be projected into the future.

³ The combination of interpretation with an underlying arrangement of advantages and disadvantages into separate categories has been analyzed in some detail by LINDENBERG and OPPENHEIM [1978].

⁴ Interestingly, Macneil ignores an important aspect of Durkheim’s theory of “dual” man: that the relative weight of the “individual” part of his conscience increases during the development of societies, thereby increasing the need for a stronger social part at the same time. Solidarity is not produced simply because there is a need for it, given the strong “individual” part of human conscience. (cf. LINDENBERG [1975]).

Seen this way, the quest for solidarity and reciprocity is plain human nature and while both are *in nuce* present in every contractual transaction, they come truly in their own only in extended contractual relations. Thus, human nature itself pushes towards relational contracting.

In the *Gemeinschaft/Gesellschaft* kind of analysis there is one decidedly anti-Hobbesian state of nature: *Gemeinschaft* (MACNEIL [1983], p. 354), and more likely than not, this state is seen as harboring all the good things (altruism, sharing, harmony and personal involvement versus selfishness, zero-sum conflict and impersonal contact for the fall from the natural state). Macneil even went one important step further: human nature is a kind of homing device that will lead man back into the good natural state. Relational contracts form a sprawling network of solidary minisocieties each operating according to norms it has generated itself (MACNEIL [1978], p. 898; [1983], pp. 361, 367). In short, solidarity is then ubiquitous and not precarious. Neither political institutions nor the factual distributions of goods would need to be looked at on that account.

3.2 *Weber's State of Nature*

If man's selfish and social sides are completely bound up in his/her own group, there is obviously no need to look at the behavior towards people outside the group; it must be uninteresting if it occurs at all. Not so in Weber's state of nature in which plunder, pillage and cheating is "normal" without being a Hobbesian "warre of everyone against everyone". Weber characterizes the natural state by strong solidarity within the group and complete lack of ethical restrictions vis-a-vis strangers⁵. Transactions inside the group are ethically based on precepts of sharing and mutuality. Contact with strangers is ethically unrestricted and thus includes pillage, plunder and cheating. Inside the group, there is *no* ethical base for improving one's personal position and thus there is no room for explicit trade between members of the group. Vis-a-vis the outside, there is no ethical base for any long-term relation, let alone any long-term economic relation. Under these conditions, possible gains from trade are not realized.

Such a state of nature is self-reinforcing because the internal solidarity is exclusive and makes every stranger an enemy, and the fact that the outside is hostile strengthens the internal solidarity. Thus transaction costs for any kind of trading are high and remain high and exchange does not produce

⁵ Weber wrote about this state of nature in various places and under various headings. See for instance WEBER [1961], p. 261 f.

It should also be mentioned that SELZNICK [1969] who greatly influenced Macneil, was much less taken by the lures of strong solidarity than Macneil.

much value. Weber also pointed out that if there is any kind of contracting at the relational pole, it is likely to be a “status contract” (WEBER [1967], p. 105), sealed by blood or oath and bonded by magical beliefs or strong conceptions of honor. The whole purpose of such voluntary contracts was the creation of strong bonds of solidarity. For this very reason, the original consent, reinforced by ritual sealing, was paramount. In this sense, marriage had become a status contract in the Christian Middle Ages. Breach of contract could not be dealt with by looking at the relation as it had developed up to the point of change. Rather, breach of contract was breach of original agreement and expiation, not compensation, was the appropriate form of dealing with it.

Macneil clearly arrived at the contrary conclusion, viz. that strong solidarity is linked to taking the relation over time as a point of reference when problems arise, while contracts at the transactional pole cling to the original agreement. This is a very important point for him because taking the entire relation as a point of reference is *the* feature that distinguishes neoclassical contracting from the future relational contracting, and the dynamics for getting from one to the other is supplied by the move towards solidarity. As far as we can see, Macneil did not base this conclusion on historical evidence or a critical discussion of Weber’s thesis. More likely, he arrived at it by assigning, on a good/bad basis, phenomena to his evolving types. Taking the entire relation into account is good in his scheme and must thus “go with” solidarity. The possibility cannot be dismissed out of hand that the importance of the original agreement in classical contracting (including the stress on formality) derived its importance from the historical remnants of solemn solidarity contracts. Situations of strong solidarity are likely to put an extra premium on the original promise. If trust is important but not overwhelmingly so (as in weak, i.e. inclusive, solidarity), then the partners can afford to see how the relationship can be mended despite the breach⁶.

According to Weber it took a long and complex development to break this state of nature, temper the unbridled quest for gain in transactions with outsiders and adopt some measure of gain orientation inside the group. We will not attempt to summarize Weber’s elaborate description of this development, nor are we committed to its detail. For our purposes it is enough that from Weber’s and others’ accounts, it seems clear enough that the fruits of this development, no matter how much they originally depended on religion, are preserved in the constitutional and legal systems of Western democracies.

⁶ The point, then, does not seem to be whether or not the core principle of contract is promise (FRIED [1981]) or norms (Macneil) but under what conditions what weight is given to promise as opposed to other principles (which Fried also acknowledges). Interestingly enough, Macneil observes himself that Fried’s results are practically quite compatible with his own (MACNEIL [1983], p. 415). However, without explicitly including a choice theory, Macneil will not be able theoretically to identify the conditions under which various mixes are paramount. (see also footnote 9)

What these systems have in common is, among other things, that they attempt to limit the degree to which our societies are allowed to revert back to the Weberian state of nature. This includes limiting the degree to which strong solidarity is allowed to influence decision making and interaction⁷. Ideally, bases for solidarity and enmity such as race, color, creed, gender etc. shall not be allowed to govern any but the most private decisions. Only weak solidarity is inclusive and it is flanked on both sides by Weber's state of nature. Proposals for institutional change in the direction of strong solidarity are likely to be so much out of tune with the overall development that they will be ignored on the long run⁸. On the short run, however, they may help undermine respect for all the institutions that have evolved to keep solidarity from its polarizing extremes⁹.

⁷ See also von HAYEK [1976], pp. 107ff.) who also does not expect much from strong solidarity.

⁸ We believe that the values for the results of weak (i.e. inclusive) solidarity, including individualism, are strongly entrenched in the institutions and accumulated past decisions in the Western culture. Such entrenchment means that by and large transactions costs for agreements that run against these values will often be higher than for agreements that accord with them. By channelling transactions costs, values are historically tenacious. The way we see it, there have been important changes in the direction of more institutionally acknowledged importance of social relations, but these changes have been the result rather than a reversal of the movement against the Weberian state of nature.

If we were to analyze these changes, we would definitely have to look at least at the following:

a. the role of moral entrepreneurs specializing on organizing protest against incongruities between cultural values and observed behavior (may be many traditional sociologists acted this way as well);

b. the role of the contract enforcing agencies (state, judiciary, police, arbitrators, etc) and their incentives for restricting contracting in such a way that their job becomes more manageable. In all likelihood this point will be connected to the first.

c. the interest of the state in preventing welfare-externalities by restricting contracting. If you can fire me easily, the state may have to take care of me. Established welfare states should have more restrictions on contracting than less established welfare states.

d. a change in asset specificity (sunk costs), uncertainty and frequency, the three major dimensions of transactions as WILLIAMSON [1979; 1984] has elaborated them. This investigation would also lead us to the *general* agency problem (WHITE [1983]) and some specific relational solutions (cf. for instance OUCHI [1980]). This investigation would also have to consider the possibility that many relational contracts (in the sense of agency) in the 19th century were masked by family relations.

e. the role of increasing income and its effect on the destruction of strong solidarity and the rise of weak solidarity (cf. LINDENBERG [1982]).

⁹ Macneil's own confidence in the strong solidarity direction of society and contracting is at times weak itself. The authors he quotes to show that a new legal framework is arising are decidedly not influenced by the pitfalls of traditional sociology (MACNEIL [1978], p. 886, mentions Eisenberg, Goldberg and Williamson).

He also writes that the need for a contract law system such as the classical system will never disappear (MACNEIL [1978], p. 888), that modern society actually has an insatiable demand for planning and that a large measure of respect for the major norms of the classical system will remain (MACNEIL [1978], p. 889).

4. Conclusion

Useful suggestions for institutional change have been seen as one of the very important tasks of social science. Yet this task has been hampered by the peculiar split between sociology (norms and social relations) and economics (choice and exchange). The situation had gotten so bad that if somebody thought norms and social relations matter, he was virtually pushed into claiming that choice is irrelevant and vice-versa. As a result the study of exchange and choice was severed from the study of important conditions of exchange (norms, social relations).

The legal scholar Macneil suggested institutional change but he did so on the basis of traditional sociology. As a consequence he did not manage to avoid all important pitfalls of traditional sociology. May be the most important pitfall of all is the systematic lack of analysis of the limits of solidarity. One can claim with Max Weber that the Western cultural values are geared towards achieving a weak and therefore inclusive solidarity. Macneil's suggestion for a new legal framework based on values of strong solidarity is, in our view, wide of the mark but may be it does have the useful result of spreading the most useful message of traditional sociology to those who may not have yet taken it to heart: social relations matter.

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*Professor Siegwart Lindenberg
Dr. Henk de Vos
Rijksuniversiteit
Sociologisch Instituut
Grote Markt 23
9712 HR Groningen
Netherlands*