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Local governments and the provision of public services in France and the United Kingdom

Thomas Perroud

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France and the United Kingdom¹ share some common constitutional characteristics that have a profound impact on the provision of public services at local level. Both countries are strong unitary systems where central government and Parliament have come to play a key role in the provision of public services.

Centralized administration is a strong guarantee of equality among all the citizens before the law and in this respect both countries share the same concern. Therefore many public services are performed by local branches of central government: in the UK for example, HM Revenue and Customs and the Department of Work and Pensions as well as a host of unelected spending bodies (“local quangos”) are a local emanation of central government.

However local governments in the two countries have different legal features that stem from different historical background. Also, different evolutions can be witnessed. The greatest difference for our concern is the lack of a general competence clause for British local authorities. Local authorities in England and Wales did not enjoy powers of general competence until 2011. Since the Local Government Act 2000, local authorities have had a power to act for the well-being of their area and in the Localism Act 2011² they were finally given a power of general competence. The provision of public services is impacted by this difference, for in the UK local governments could not create public services on their own motion: the power had to be delegated by Parliament. On the contrary French cities have enjoyed such powers since 1884.

¹ For the purpose of this article United Kingdom will mean England and Wales. There may be some differences in Scotland and Northern Ireland that we will not deal with in this paper.

² See G. Marcou, « Les réformes des collectivités territoriales en Europe : problématiques communes et idiosyncrasies », to be published at the Revue Française d'Administration Publique.

In addition to this difference, history has shaped local government differently.

In France, in the last decade, two conflicting tendencies have contributed to diminishing the impact of French centralization: the demand for more power at local level has meant that powers have been transferred from the central government to local entities.

Also, as Bell, Boyron and Whittaker have described, “pressing demands have led to deep changes in central-local relations”.³ As they clearly explain “originally, the 1958 Constitution had not really innovated in this area: with its organization around the communes and the départements, the local government structure had hardly changed since the Third Republic. However, the creation of the regions and the strong promotion of cooperation between communes have dramatically altered the organisation of local power in France. Furthermore, the assertion that overseas territories can adopt a status to respect their territorial specificities and the freedom for New Caledonia to choose specific provisions over and above national legislations in reserved areas, reflect deep constitutional changes. Consequently, the constitutional amendment of 2003 which states that ‘[the Republic’s] organisation is decentralised should not surprise. Still, this is an important pronouncement when compared to the strong and centralizing tendency of the 1789 Revolution, still present in the original 1958 Constitution”.⁴

In the UK, on the contrary, the history and characteristics of local government are very different. Colin Turpin and Adam Tomkins have analysed that “until well into the nineteenth century the local government of England and Wales was a Byzantine structure of borough corporations, parishes, justices of the peace and ad hoc authorities of various kinds – ‘a chaos of institutions, areas and rates’ (P. Richards, *The Reformed Local Government System* (4th edn 1980), p. 15)”.⁵ The Local Government Acts of 1888 and 1894 rationalized the system. The essential features of these statutes were to endure until the reform enacted by the Local Government Act 1972⁶: “suburban development, population growth and mobility, and the increasing scale of local government activity (including such new services as

³ J. Bell, S. Boyron, S. Whittaker, *Principles of French Law*, Oxford University Press, 2008, chap. 5.

⁴ *Principles of French Law*, by J. Bell, S. Boyron, S. Whittaker, Oxford University Press, 2008, chap. 5.

⁵ *British Government and the Constitution: Text and Materials*, Cambridge University Press, 2007, at p. 247.

⁶ *Ibidem*.

education, health, housing, environmental planning and social welfare) demanded a radical reorganisation of the structure and working of local government".⁷

The provision of public services is, in both countries, at the core of the development of local government with industrialisation and urbanisation in the nineteenth century necessitating collective action at local level to provide a variety of goods and services and local authorities were seen as well placed to undertake these tasks.⁸

Nonetheless the provision of public services differs widely in the two countries in multiple ways. Three angles will be used to analyse these differences or commonalities:

- I. Their powers to provide public services;
- II. Their means to provide public services;
- III. The control over the provision of public services.

I. Powers to provide public service

It should be noted that in both countries central power has played a key part in assigning public services functions to local governments: in France, for a long time, local authorities have had the power to provide such services (under certain conditions reviewed by the administrative judge). This was due to the lack of clause of general competence for English local government for a long time.

⁷ Ibidem. A series of Royal Commissions designed the reform: on Local Government in Greater London (Herbert Report, Cmnd 1164/1960), on Local Government in England (Redcliffe-Maud Report, Cmnd 4040/1969) and on Local Government in Scotland (Wheatley Report, Cmnd 4150/1969).

⁸ Administrative Law by Paul Craig, 6th ed., p. 174.

A. In the UK local government could only create public services under statutory authorization⁹

After reviewing the history of local government functions in the UK since the nineteenth century (1), we will present a picture of the powers that local authorities currently retain in the provision of public services (2).

1. The rise and fall of the local provision of public services in the UK

For Martin Loughlin “multi-functionality” is one of the basic features “of critical importance in shaping the institution of local government”.¹⁰ Loughlin shows that many functions (e.g., for education and for poor relief) were progressively transferred in the late nineteenth and early twentieth century from single-purpose local boards to local authorities. The idea behind this evolution was “that the local inhabitants might look to a single institution for the basic services which government should provide at the level of the locality”. However, a reverse trend began in the 1930s. Since then “local authorities have been stripped of various responsibilities, including trunk roads in 1936, electricity in 1947, gas in 1948, water and sewerage in 1974, public assistance between 1934 and 1948, hospitals in 1946 and the remaining local health services in 1974”.¹¹ In other words, after a sort of golden age of local provision of public services, the national level began to take over many responsibilities.

This trend gained new momentum after 1979. Indeed the agenda of the Conservative Government was to transform radically local authorities and to change as much as possible the way in which public services were provided at local level. Local governments should become, as a Secretary of State for the Environment said at the time “enablers and regulators rather than providers of services”.¹² In the 1980s and 1990s the powers of local governments in many areas such as education, housing, public transport and police services were limited.

⁹ On this section, see the very well informed chapter in *British Government and the Constitution: Text and Materials* (n. 3).

¹⁰ M. Loughlin, *Legality and Locality: the Role of Law in Central-Local Government Relations* (1996), pp. 80-1

¹¹ M. Loughlin, *Local Government in the Modern State*, Sweet & Maxwell, 1986, p. 6. See also on this evolution Colin Turpin, Adam Tomkins, *British Government and the Constitution*, at p. 252.

¹² *Municipal Review*, April 1989, p. 9; see also *Competing for Quality*, Cm 1730/1991, p. 22.

The House of Lords' Select Committee on Relations between Central and Local Government expressed its concern over this evolution: local authorities were becoming "mere agents of central policy, 'at the expense of an independent role in their own communities'"¹³. As the Select Committee puts it:

"For a long time, and under different governments, power in this country has been moving away from local authorities, either to central government or to appointed or elected bodies, often not involving local authorities, some of which operate at a local level, and which are mostly single-purpose bodies. We do not believe this movement to be necessarily due to any overarching central philosophy aimed at attacking local government itself. Central government has on occasions wished to promote national standards, to correct perceived mismanagement or overspending by local authorities, or to deal with those which have overstepped their place. It has found that the easiest way to achieve these aims is to take powers away from local government.

*There have been many such changes which, while individually explicable, have, taken together, resulted in a significant if incremental shift in the balance of power to the centre".*¹⁴

According to the same report the different waves of reform have resulted in a "loss of an overall view of the needs of the local area and a blurring of accountability"¹⁵. The committee concluded that there was a risk of "a continued attrition of powers and responsibilities" from local authorities "until nothing meaningful is left"¹⁶.

¹³ British Government and the Constitution: Text and Materials (n. 3), at p. 252.

¹⁴ Report of the Select Committee on Relations between Central and Local Government, vol. I, HL 97 of 1995-96, paras 6.2-6.3.

¹⁵ See Report (n. 12) paras 4.46 and 6.9; quoted in British Government and the Constitution: Text and Materials (n. 3), at p. 253.

¹⁶ See Report (n. 12) para 6.30.

2. The current functions of local authorities in the provision of public services and the scope of the Localism Act 2011

Local authorities currently enjoy a wide range of functions from consumer protection, culture and entertainment, education, environmental health, fire, highways and public transport, housing, licensing, personal social services, planning and development control.¹⁷

But, compared to France, these functions were granted to them only by statute. English local authorities did not have the possibility to create a public service on their own motion if Parliament had not previously authorized it. This was at least the situation until 2011.

Before 2011, local authorities had to obtain the necessary power to provide a public service. As Turpin and Tomkins analysed “if an English local authority need[ed] additional powers, for example, to provide some new local facility or service - say to operate a municipal caravan park - it m[ight] promote a private bill in Parliament to obtain the necessary power”.¹⁸ According to these authors “this [wa]s a rather troublesome and costly process, and sometimes the required power c[ould] be more easily obtained from the Secretary of State, who [wa]s authorised by various statutes to make orders, subject to a special parliamentary procedure, conferring powers on local authorities: the procedure allow[ed] for approval, annulment or amendment of the order by Parliament”.¹⁹

The Local Government Act 1972 seemed to give more discretion to local authorities to engage in delivering services suited to the needs of their population. Section 111 of the Local Government Act 1972 provides that a local authority “shall have power to do any thing... which is calculated to facilitate, or is conducive or incidental to, the discharge of any of their functions”. This provision is difficult to interpret. Judges have limited the scope of the power conferred upon local authorities by this provision. In *Hazell v Hammersmith* a local council engaged in financial transactions of a speculative nature (the transactions were designed to maximised gains on favourable interest rate movements). The House of Lords held in this

¹⁷ See the list in *British Government and the Constitution: Text and Materials* (n. 3), at p. 254.

¹⁸ See *British Government and the Constitution: Text and Materials* (n. 3), at p. 254. The power to do this is given by section 239 of the Local Government Act 1972.

¹⁹ *Ibidem*. Turpin and Tomkins quote the Statutory Orders (Special Procedure) Act 1945 and the Transport and Works Act 1992.

case that “it could not be said that the transactions were ancillary to any of the council’s functions, nor were they calculated to facilitate any transactions incidental to the council’s functions of borrowing within the meaning of the Local Government Act 1972 s. 111”.²⁰ The case law shows that the Courts have developed a narrow interpretation of what section 111 allows.

The ultra vires principle is another legal constraint on local authorities. Although the House of Lords’ Select Committee on Relations between Central and Local Government received evidence that this principle was considered by some as a “straitjacket”²¹ on their ability to act for the benefit of their communities, it is obviously a guarantee of the rule of law.

Against the backdrop of these limits to the local government’s powers, the two most recent evolutions show an increase in their power. The Local Government Act 2000, section 2, empowers local authorities to do anything that they consider as likely to promote or improve the economic, social or environmental well-being of their local community.²² The courts have showed a willingness to construct this provision extensively. In *R (Theophilus) v Lewisham London Borough Council* the Administrative Court of the Queen’s Bench Division considered the legality of the decision of a local authority to grant student support: it was held that section 2 “conferred a wide discretionary power on local authorities to make payments that would improve the opportunities for their inhabitants, which included the power to pay student support”.²³

²⁰ See *Hazell v Hammersmith and Fulham London Borough Council* [1992] 2 AC 1 (for a critical commentary of this case see M. Loughlin, *Legality and Locality*, 1996, ch. 6). The statutory criteria are drawn for the common law that requires that “it must be shown that the business can fairly be regarded as incidental to or consequential upon the use of the statutory power” (*Attorney General v Mersey Railway Co* [1907] A.C. 415). Another example of the narrow interpretation the House of Lords uses of section 111 can be found in *R v Richmond upon Thames London Borough Council, ex p McCarthy & Stone (Developments) Ltd* [1992] 2 AC 48 (in this case a town council decided to established a planning consultancy service for pre-planning application consultations and to charge a fee for the consultations; the House of Lords held in this case that although a planning consultancy service might be incidental to the council’s planning functions, “to charge for such an advisory service was merely incidental to that service and not to the function”). See also *Credit Suisse v Allerdale Borough Council* [1997] QB 306; *Akumah v Hackney LBC* [2005] UKHL 17, [2005] 2 All ER 148.

²¹ See HL 97-I of 1995-96, para 3.2.

²² See *British Government and the Constitution*, by Colin Turpin and Adam Tomkins, at p. 254.

²³ *R (Theophilus) v Lewisham London Borough Council* [2002] EWHC 1371. See as to the extent of this power and Howell, ‘Section 2 of the Local Government Act 2000’ [2004] *Judicial Review* 72.

But the main change comes from the Localism Act 2011 that can be considered a revolution. Section 1 provides that “A local authority has power to do anything that individuals generally may do”, which includes the “power to do it anywhere in the United Kingdom or elsewhere”, the “power to do it for a commercial purpose or otherwise for a charge, or without a charge” and “power to do it for, or otherwise than for, the benefit of the authority, its area or persons resident or present in its area” (s 1(4)). In addition, this general power ‘is not limited by the existence of any other power of the local authority which (to any extent) overlaps with the general power’ (s 1(5)).²⁴ Andrew Stunell MP (Lib Dem) commented: “In the past, local authorities could only do things that were permitted to them by legislation. We are now inverting that and saying, ‘You can do anything that isn’t forbidden by legislation.’ That does not mean that we are taking away the current forbidden territory and saying to authorities that they can go into the forbidden territory. It is not saying that they can abandon their statutory and legal duties that are imposed by existing legislation.”

Legislation now enshrines the power of local authorities to create public services, even for a commercial purpose. Therefore the current situation stands in stark contrast with the previous one and with France.

B. France: the powers to deliver public services are controlled by Parliament and the administrative Courts.

The power to deliver public service at local level depends in France on the will of the State (as in the United Kingdom) but also on the historical “general competence clause” (*clause de compétence générale*).²⁵ This general but controlled competence has allowed local governments like municipalities (*communes*) to undertake matters of local importance like social services: the action of the “*aide sociale facultative*” (optional social aide) is meant to complement the “*aide sociale légale*” (compulsory social aid) for which departments (“*départements*”) have been responsible at the local level since 1982. In this sector, municipalities can complement central action, where needed. For example, “*communes*” have

²⁴ See Andrew Le Sueur: ‘Fun-loving guys’, government ‘doing anything that individuals do’ and the rule of law at <http://ukconstitutionallaw.org/2012/03/19/andrew-le-sueur-fun-loving-guys-and-the-rule-of-law/>

²⁵ This part draws extensively from the very interesting and comprehensive study entitled: *The Provision of Public Services in Europe: Between State, Local Government and Market*, Hellmut Wollmann, Gérard Marcou (ed.), Edward Elgar, 2010.

been operating centres dedicated to social aid (called “*centres communaux d’action sociale (CCAS)*”).

Traditionally, the French communes have also been involved in the provision of public utilities, like their British counterparts.²⁶ Because of a dearth of operational resources, many municipalities have largely “outsourced” the service provision since the nineteenth century. Whereas the United Kingdom has discovered the virtues of contracting out late in the twentieth century, the use of private sector undertakings to provide public services is a traditional feature in French administrative law.²⁷

More significant for our purpose is the greater freedom of French local authorities to provide public services to meet the needs of their population. At first the Conseil d’Etat (France’s highest administrative court) seemed reluctant to allow local government to create, without parliamentary approval, services that would compete with private undertakings. This view is well reflected in the Casanova case from 1901.²⁸ In this case the question was whether a municipality could create a free medical service for all its inhabitants without distinction, when, on its territory, there were two doctors whose practices were regular and permanent. The judge held that even though “local councils may, in exceptional circumstances, act to ensure the provision of medical care for inhabitants in need thereof, it is clear from the proceedings that no such circumstance existed in Olmeto, where two doctors were in practice; that it follows therefrom that the local council exceeded its powers when the challenged resolution allocated a yearly stipend of 2,000 francs to a local authority doctor employed to treat free of charge all inhabitants, rich and poor indiscriminately, and that the Prefect was wrong in approving that resolution”. It derives from this case that “exceptional circumstances” were needed to allow local authorities to create a public service. Such intervention on the market was deemed to be in contradiction with the principle of the freedom of trade.

²⁶ These public services were traditionally called “public services of industrial and commercial character” or, in French, “*services publics industriels et commerciaux*”.

²⁷ See X. Bezançon, *Essai sur les contrats de travaux et de services publics : contribution à l’histoire administrative de la délégation de mission publique*, L.G.D.J., 1999.

²⁸ Conseil d’Etat, 29 May 1901, Casanova. The translation from Professor Bernard Rudden is available at: http://www.utexas.edu/law/academics/centers/transnational/work_new/french/case.php?id=1035

Later however, the Conseil d'Etat took a milder view, allowing greater discretion to local authorities to create public services. This is reflected in a 1930 case.²⁹ Under this new line of authority “local authorities cannot set up an economic activity as a public service unless, because of special conditions of place and time, their intervention is justified in the public interest”.³⁰ Two conditions were thus required for the intervention of local government: the existence of a public interest and of special conditions of time and space. However, the administrative judge has adopted a large view of these two conditions for public intervention: “the public interest that can justify economic intervention by local authorities is based on the needs of the local population. Such needs can arise as a result of either the absence or the inadequacy of private enterprise. The inadequacy can be quantitative or qualitative... Case-law has, for example, allowed local authorities to engage in cinematographic activities (Conseil d'Etat, 12 June 1959, Syndicat des exploitants du cinématographe de l'Oranie), to organize free legal aid (23 December 1970, Prefect of the Val d'Oise), to run a municipal butcher's shop at which prices are lower than in private butchers' shops (Ass., 2 November 1933, Zenard) and to operate a municipal dental surgery providing a cheaper service than the private surgeries (Sect., 20 November 1964, Municipality of Nanterre)”.³¹ This overall trend has even been reinforced in the case on this subject, the so called “Ordre des avocats au barreau de Paris” case which gives even more freedom to local government. This case holds that the public interest can result from the special conditions, which means that a local government wanting to set up a public service would only need to prove these special conditions (for example the lack of initiative from the private sector).³² Therefore, one can see that only one condition – instead of the previous two – is currently needed to justify local intervention, namely the existence of special conditions.

The above analysis shows that British and French local authorities are both under the influence of central government and especially derive their powers from statutes. But, in France, local governments have more freedom, under the control of the judge, to provide

²⁹ Conseil d'Etat, 30 mai 1930, Chambre syndicale du commerce en détail de Nevers.

³⁰ Council of Europe, Conference on the European Charter of Local Self-Government: Barcelona, 23-25 January 1992: “What Have You Done with the European Charter of Local Self-Government?” Report on France by Jean-Marie Woehrling, 1993, at p. 144.

³¹ Ibidem.

³² See Conseil d'Etat, 30 mai 2006, Ordre des avocats au barreau de Paris.

public services that meet the needs of the local population. The biggest difference between the two countries lies in the legal tools available to them to provide these public services.

II. Means to provide public services

The legal tools available to British and French local authorities can be studied using two lenses: the institutional means (i.e. the legal vehicle used to deliver the service) (A) and the operational means (i.e. the legal act used to convey the service) (B).

A. Institutional means: from in house to contracting out vs. from public to private institutions

In both countries many different kinds of institutions are used for the purpose of delivering public services. However, the picture is straightforward to understand in France (1), whereas the institutional setting for the provision of public services in the UK is complicated/intricate (2).

1. In France: from in house to contracting out

In France, two situations can be found: either the service is delivered in house or it is contracted out.

In the case where the service is carried out internally, one municipality can deliver it single handedly but increasingly (due in part to the extreme fragmentation of the French local government landscape where one finds more than 36,000 cities) public services are carried out in association with other municipalities (“*intercommunalité*”).

If an external institution delivers the service, several institutions can be used. Public institutions can be used (on the model of public corporations) or private institutions such as the new “*société publique locale*” (local public company) used by municipalities or private companies. The last row of this scale would be the contracting out of the service to a private company. This has happened very often and it is still the case for many important public utilities such as water.

To summarize the picture in France two situations can be found:

- Either the service is delivered internally by the local authority itself: in this case the most common in house institution is called the “*régie*”;
- Or, an external institution provides the service: then, the traditional public law institution used will be the public corporation (“*établissement public*”). Very often public services are delivered by private companies.

What is the picture in the United Kingdom?

2. In the United Kingdom: a myriad of different bodies deliver public services

John, writing in 1997, listed the different bodies responsible for the provision of public services at local level:

- “Companies/management buyouts supplying contracted out services such as waste collection;
- Private or semi-public bodies providing services purchased by local authorities, such as nursing homes;
- Hospital trusts;
- New central government agencies administering new or formerly local government functions, such as urban development corporations and Housing Action Trusts;
- Partnership organisations such as Business Links;
- Micro agencies formerly under the umbrella of the local authority, such as schools running their own budgets, or schools which opted out of local authority control”³³

This list does not classify the bodies according to their legal nature or their relationship with the local authority. The public corporation, as in France, has also to be mentioned. Trusts

³³ P. C. John. “Local governance”, in *Developments in British Politics*, ed. Dunleavy, P. Gamble, A. Holliday, I. Peele, G., Basingstoke Macmillan, 1997, at p. 255-256. See also P. Craig, *Administrative Law*, Sweet & Maxwell, 2008, at p. 180-181.

seem to be used a lot also. The Localism Act 2011 provides that when local authorities want to perform activities for a commercial purpose they have to do it through a company.³⁴

The main difference between the two countries lies in the legal nature of the operational means to provide public services at local level: a public model opposes a private one.

B. Legal Means: public vs private law model

To the UK model of common law (1), France opposes a public law model that has designed specific legal tools to deliver public services (2).

1. The private law model of the common law

In the UK the provision of public service is under the sole regulation of private law. The idea of competition for the attribution of public service contracts was late to arrive in the UK, although the French model of competition for the market attracted British attention in the nineteenth century.³⁵ It is only with the conservative government in the 1980s that the idea of competition and contracting out became important whereas in France public procurement has a long history.

As Paul Craig describes “The Conservative government’s approach to the provision of local services was, not surprisingly, imbued with the same market ethos that it applied to the provision of services by central government. This was overlaid by measures designed to restrict local financial autonomy. This strategy was implemented in three main ways:

- Competitive procedures;
- The exclusion of non commercial considerations;
- Contracting out and compulsory competitive tendering: The market-oriented strategy of the Conservative government stretched beyond the commitment to ensuring that

³⁴ Section 4(2) of the Localism Act 2011.

³⁵ See the seminal study by E. Chadwick, Results of Different Principles of Legislation and Administration in Europe; of Competition for the Field, as Compared with Competition within the Field, of Service, Journal of the Statistical Society of London, Vol. 22, No. 3 (Sep., 1859), pp. 381-420.

procurement was based upon commercial considerations. It extended to the decision whether a service should be performed “in house”, or whether it should be “contracted-out” to a private undertaking. The objective was to further market-based practices in order to make sure that the activity was undertaken most efficiently, whether this was in-house or through a private firm”.³⁶

The Localism Act 2011 forces local authorities that want to undertake a commercial activity to do it through a company, which means that private law will apply.

2. The French public law model

On the contrary in France, as previously described, public services have been contracted out and outsourced since the nineteenth century. As Sabine Kuhlmann and Paolo Fedele have showed: “in the utility sector, municipal suppliers are in a minority position almost everywhere. One example is the water supply sector, where 60 per cent of the population was served by private suppliers in 1983 (Lorrain, 1995, p. 108) and 80 per cent in 2000. Similar developments have occurred in other sectors, such as sewage and waste disposal, road cleaning and public transport (Huron and Spindler, 1998, p. 57). Typically, nearly all the firms with which French municipalities collaborate are contracted by the same big companies (grands groupes) operating at the national if not international level”.³⁷

This board³⁸ shows, taking the water sector as an example, the models of service delivery:

³⁶ P. Craig, *Administrative Law*, p. 144.

³⁷ Sabine Kuhlmann, Paolo Fedele, “New public management in continental Europe: local government modernization in Germany, France and Italy from a comparative perspective”, in *The Provision of Public Services in Europe: Between State, Local Government*, Hellmut Wollmann, Gérard Marcou (ed.), at p. 54.

³⁸ *Ibidem*. The board is taken from W. Hansen, N. Herbke, 2004: *Länderstudie Frankreich*. In: W. Schönböck, G. Oppolzer, A. Kraemer, W. Hansen, N. Herbke: *Internationaler Vergleich der Siedlungswasserwirtschaft*. Band 3, 153/3. Informationen zur Umweltpolitik. Österreichischer Städtebund/Bundesarbeitskammer. Wien.

Table 1: Modes of Local Service Delivery in the French Water Sector, 2000

| Mode of service provision | % of the municipalities | % of the population |
|---|-------------------------|---------------------|
| Water provision | | |
| Direct service provision (local government) | 48 | 21 |
| Delegation (to private companies) | 52 | 79 |
| Sewage | | |
| Direct service provision (local government) | 62 | 48 |
| Delegation (external provider) | 38 | 53 |

Source: Hansen/Herbke 2004: 300

The difference between France and the United Kingdom lies in the legal regime applicable to the delivery of the public service. The public service is an activity as well as legal principle commanding the application of a special legal regime in France. This means that whereas the service may be operated under “public or private-law rules, and performed by private companies as well as by public bodies, public-law rules are always involved in the establishment of the public service and/or in control by the public authority responsible for provision”.³⁹

Finally, the control of the provision of public services at local level opposes also two models. France, having developed a strong public law regime, has endeavoured to strengthen the control of the judge in the provision of public services and to develop a set of principles applicable to the operation of the service. In the United Kingdom, private law seems to be the principle but new developments may challenge this view.

III. Control over the provision of public services

Two elements will be studied here: how central government controls the operation of public services at local level (A) and how public law principles apply in the provision of such services (B).

³⁹ G. Grossi, G. Marcou, C. Reichard, “Comparative aspects of institutional variants for local public service provision”, in *The Provision of Public Services in Europe – Between State, Local Government and Market*, ed. by Hellmut Wollmann and Gérard Marcou, at p. 219. The writers are quoting J.-F. Auby, *Les services publics locaux*, Paris, Berger-Levrault, 1997; J. Fialaire, *Le droit des services publics locaux*, L.G.D.J., 1998.

A. Control by central government

1. In the United Kingdom: fragmentation

Under many different statutes central government enjoys a wide range of administrative controls over local government's action.⁴⁰ Here are some illustrations of the diversity of the legal tools available to central government to exercise this supervision

- In some instances, particular acts of local authorities are subject to ministerial approval: for example, local development schemes, compulsory purchase orders and sales of school playing fields.⁴¹
- The issuance of guidance by ministers may be another tool ensuring that local authorities abide by central government commands (e.g., the code of guidance on homelessness issued under section 182 of the Housing Act 1996)⁴².
- The issuance of directions to local authorities empowers ministers to force local authorities into compliance.⁴³
- The use of "default powers" is of particular interest when a local authority "has failed to perform its duty". According to Turpin and Tomkins "Default powers are a radical expedient and their use may raise in critical and dramatic form the constitutional issue of the respective roles of central and local government".⁴⁴

⁴⁰ See C. Turpin, A. Tomkins, *British Government and the Constitution: Text and Materials*, at p. 261.

⁴¹ *Ibidem*.

⁴² *Ibidem*.

⁴³ *Ibidem*. Turpin and Tomkins quote many examples of such powers: the Local Government, Planning and Land Act 1980, section 98 allows the Secretary of State to require an authority "to dispose of land which in his opinion is not being used for the authority's purposes", and the School Standards and Framework Act 1998, section 19, as amended authorizes the government to issue a "direction to a local education authority to close a failing school" (*Ibidem*, p. 261).

⁴⁴ *Ibidem*. The case-law cited by the writers is: *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014; Bull, 'Tameside Revisited' (1987) 50 MLR 307; and *R v Secretary of State for the Environment, ex p Norwich City Council* [1982] QB 808.

- Another way to control the conduct of local authorities is the making of regulations, where this is authorised by statute.⁴⁵

2. In France

The prefect plays an important role both as checking the legality of local government's actions and ensuring that compulsory public services are effectively carried out. The prefect enjoys default powers as well when a local authority is failing to observe its statutory duties. Furthermore, the acts of local authorities have to be presented to the prefect who can ask the administrative judge to review their legality if s/he thinks that their legality may be questioned. The latter procedure called "*déféré préfectoral*" (prefectoral referral) is a capital institution of French administrative law, designed to ensure that all local authorities abide by the law. Local authorities have to send their decisions to the prefect and these decisions will enter into force only two months after this formality, this is the time the prefect has to make his referral. The administrative judge has held that the refusal to refer an act that is obviously illegal can engage the State's liability in tort (for "*faute lourde*").⁴⁶

Also, the audit courts ensure that public services are carried out efficiently, respecting the principles of public accounting.

B. The principles of public law

Whereas in the United Kingdom it is still uncertain whether a public law of local governments' provision of public services will emerge thanks to the Human Rights Act 1998 (1), there is no doubt in France that the provision of public services at local level can be reviewed according to public law principles (2).

⁴⁵ Ibidem.

⁴⁶ See Conseil d'Etat, 6 oct. 2000, *Ministre de l'Intérieur c. Commune de Saint-Florent et autres*, RFDA 2001. 153, note P. Bon.

1. In the UK, the uncertain future for a public law of public services

In the UK no such principles of public law existed until the passing into force of the Human Rights Act in 1998.

The basic problem (for which French public law found solutions) is that of the contracting out of public services. If public services are performed directly by the local authority there is no doubt that the protections of the HRA will apply. However, there is still doubt as to whether these protections apply when the functions are contracted out.

Although the jurisprudence is still uncertain, many important cases have already been decided that attract the protections of the HRA to actions of local governments. For example in *Donoghue*⁴⁷ a housing association had been created by a local authority that had transferred to it a substantial proportion of the local authority's housing stock. The issue was whether the housing association was a public authority for the purpose of article 6 HRA.⁴⁸ In this case the housing association was deemed to be a public authority by the Court of Appeal. The judges considered that the association "was so closely identified with the local authority that it was performing public functions". Several clues were used here to conclude that the body in question was performing a public function. These clues were the following:

- Statutory authority: "statutory authority for what was done could help to mark the act as being public";
- Control: "the extent of control over the function exercised by another body which was a public authority" could also give the act a public nature;
- Closeness: "the more closely the act was enmeshed in the activities of a public body, the more likely it was to be public, although the fact that the act was supervised by a public regulatory body did not necessarily indicate that it was of a public nature";
- The nature of the function: judges took also into account the fact that the function in question "was so closely assimilated to that of the local housing authority".

⁴⁷ *Donoghue v Poplar Housing & Regeneration Community Association Ltd* [2001] EWCA Civ 595; [2002] Q.B. 48.

⁴⁸ Article 6 of the Human Rights Acts provides that: "It is unlawful for a public authority to act in a way which is incompatible with a Convention right".

Taking all these elements into account “including the closeness of the relationship between the local housing authority and the housing association and the fact that the defendant, at the time of the transfer of the tenancy to the housing association, was a sitting tenant of the local housing authority, the role of the housing association in providing accommodation for the defendant and then seeking possession was so closely assimilated to that of the local housing authority that it was performing public functions and was, to that extent, a functional public authority”.⁴⁹

However, in the Leonard Cheshire Foundation (LCF) case⁵⁰ a home for long-term patients run by the Leonard Cheshire Foundation funded by a public authority was not considered as a public authority. The reasoning of the Court in this case is not very clear. For Paul Craig, it is not clear if functions contracted out fall under the HRA.⁵¹ The Court found three reasons to come to this conclusion:

- The nature of the function: “there was no material distinction between the nature of the services Leonard Cheshire Foundation provided for residents funded by a local authority and those provided to residents funded privately”;
- The degree of public funding: “while the degree of public funding of the activities of an otherwise private body was certainly relevant as to the nature of the functions performed, by itself it was not determinative of whether the functions were public or private”;⁵²
- The public flavour: “there was no other evidence of a ‘public flavour’ to the functions of LCF or LCF itself. LCF was not standing in the shoes of the local authorities. Section 26 of the NAA provided statutory authority for the actions of the local authorities but it provided LCF with no powers”. Here, the Court will be looking at whether the Foundation enjoys statutory authority.

⁴⁹ Donoghue v Poplar Housing & Regeneration Community Association Ltd [2002] Q.B. 48, paras 58, 59, 65-66.

⁵⁰ R. (on the application of Heather) v Leonard Cheshire Foundation [2002] EWCA Civ 366; [2002] 2 All E.R. 936; [2002] H.R.L.R. 30.

⁵¹ P. Craig, Administrative Law, at p. 137; P. Craig, ‘Contracting Out, the Human Rights Act and the Scope of Judicial Review’ (2002) 118 Law Quarterly Review 551.

⁵² R. v. HM Treasury, Ex p. Cambridge University [2000] 1 W.L.R. 2514.

2. In France, the protections of public law for the local provision of public services

On the contrary, in France, public services functions whether carried by public or private companies must obey public law principles, namely the principles of “continuity, adaptability, and equality, to which neutrality is usually added”.⁵³

The principle of continuity is of utmost importance when public services are concerned. As Bell, Boyron and Whittaker explain, the principle has two consequences: the Dehaene decision of the Conseil d’Etat, given constitutional status by the Conseil constitutionnel, holds that the right of public sector workers to strike can be limited in order that continuity of the public service is assured.⁵⁴ The principle means that “a minimum service must be maintained, even on strike days” and even justifies that some civil servants may be barred from striking (in the military for example). The second consequence of the principle lies in the doctrine of un-foreseeability in public contracts. As the same scholars put it: “the principle also justifies the duty of the State to pay compensation to a contractor who meets unforeseen circumstances under a government contract which would otherwise make it impossible for him to continue”.⁵⁵ This case illustrates well how French public law has resolved the problem of contracting out because in this case it was a provider of gas that was challenging the refusal of the city of Bordeaux to increase the price of gas. Here a public law remedy is available and the principle of continuity justifies the granting of damages to the provider under the justification that otherwise he would have been bankrupt and the service interrupted.

Local public service should also abide by the principle of adaptability. This principle means that, even though contracted out, the local authority remains in control of the service and should be able to command changes in the provision when they deem it to be in the public interest. As Bell, Boyron and Whittaker explain: “in private agreements, sanctity of contract

⁵³ J. Bell, S. Boyron, S. Whittaker, *Principles of French Law*, at p. 170.

⁵⁴ Conseil d’Etat, Ass. plén., 7 July 1950, Dehaene, RDP 1950.691 concl. Gazier; Conseil constitutionnel, 25 July 1979, *Droit de grève à la radio et à la télévision*, n° 79-105 DC.

⁵⁵ Conseil d’Etat, 30 March 1916, *Compagnie Générale d’Éclairage de Bordeaux*, D 1916.3.25 concl. Chardenet.

or promises is a dominant value and this means that changes to a construction contract or a service agreement must be made consensually. In public law, the public interest is paramount and its requirements can be imposed on the contractor. Thus, in *Compagnie nouvelle du Gaz de Deville-les-Rouen*,⁵⁶ the commune was authorized to change the requirements for street lighting from gas to electricity and, should the company be unable to provide it, then another company could be sought. Of course, the gas-supply contractor would be compensated, but the existence of a contract does not prevent the local authority giving effect to the public interest”.⁵⁷

Equality of users is also of utmost importance in French administrative law, and it applies also to local public services. It is a general principle of the law,⁵⁸ thus enforceable against local regulations, as well as a constitutional principle.⁵⁹ This principle means that all the people that are in the same legal situation should be treated similarly by the body in charge of the public service: if a commune runs or contracts out a public service, then all users should be charged the same, and discriminations should be objectively justified on the ground that users are not placed in the same legal situation.⁶⁰

Finally public services should be neutral as regards religion. Bell, Boyron and Whittaker explain this position saying that “neutrality reflects the way a liberal state does not seek to impose its ideas of the good life on citizens, rather it facilitates the choice of a diversity of lifestyles. This neutrality principle has particular application in two areas. In the first place, the French state is secular (article 2 of the Constitution of 1958) and so it respects all religious beliefs”.⁶¹ For public services it means first that civil servants cannot be allowed to show their

⁵⁶ Conseil d’Etat, 10 January 1902, S 1903.3.17 note Hauriou.

⁵⁷ J. Bell, S. Boyron, S. Whittaker, *Principles of French Law*, at p. 171.

⁵⁸ Conseil d’Etat, Sect., 9 March 1951, *Société des concerts du conservatoire*, Rec. 151 (Dr. soc. 1951.168, concl. Letourneur, note Rivero ; S. 1951.3.81, note C.H.).

⁵⁹ Conseil constitutionnel, 27 December 1973, *Taxation d’office*, n° 51 DC.

⁶⁰ Conseil d’Etat, 10 May 1974, *Dénoyez et Chorques*, Lebon p. 274. See M. Borgetto, *Services publics locaux et principe d’égalité - Sur la nature juridique du service de distribution d’eau et le traitement jurisprudentiel du principe d’égalité*, RFDA 1993 p. 673.

⁶¹ J. Bell, S. Boyron, S. Whittaker, *Principles of French Law*, at p. 171.

religious beliefs and that users should also restraint from expressing their belief in an ostentatious way. The debate on the Islamic veil in public schools epitomizes this issue.

The legal regime applicable for the local provision of public services differs widely between the two countries. France has built progressively a whole body of principles applicable to these activities, whereas the United Kingdom, as Dicey famously said and foreseen, would ever refuse to apply different principles for the activities of the State. This situation may however change. The Human Rights Act may progressively attract the protection of human rights to public services run by private entities and public services (especially network utilities) have more and more a basis in EU law. EU law has established some autonomous principles applicable to public services.⁶² In this respect, one may find in ECHR and EU laws a basis for a *ius commune* of public services in Europe.

⁶² See the principles of universal service in the relevant directives in electronic communications for example.