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Public Services in the UK: the Ongoing Challenges of Delivery and Public Accountability

Les Services publics britanniques : les défis permanents de leur réalisation et de la responsabilité des autorités publiques

Emma Bell, Clémence Fourton and Nicholas Sowels (dir.)



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Public Services in the UK: the Ongoing Challenges of Delivery and Public Accountability

Introduction

Emma Bell, Clémence Fourton and Nicholas Sowels

- 1 This special edition of the *French Journal of British Studies* was prompted by the eruption of a number of scandals concerning private companies involved in the running of public services in the UK, notably the liquidation of Carillion in January 2018. Carillion was a multinational construction and facilities management services company based in Wolverhampton, employing 19,000 people in the UK alone. It was heavily involved in the provision of public services in Britain, such as building infrastructure and hospitals, maintaining prisons, providing school meals and defence accommodation – it is estimated that its work for the UK government accounted for 38 % of its declared revenue in 2016.¹ When the company was liquidated, there were significant costs, not just to the thousands of people who lost their jobs, but also to the British taxpayer, as the government was forced to pay out just under £150 million in order to keep essential services running.² Ultimately, it is the State that remains, and is expected to remain, responsible for public service delivery and to guarantee the smooth functioning of regulatory mechanisms so that there is accountability between service providers and users. In the case of Carillion, a House of Commons Report found that the company's governance suffered from “a chronic lack of accountability and professionalism”.³ Yet the existing legislative and regulatory framework was inadequate to respond to, or even to pick up on, these problems. How was it possible for such a large company and government contractor to go into compulsory liquidation, despite concerns having been raised about its finances as early as 2015? Why were the firm's financial weaknesses not exposed and acted upon, notably by the regulators? Why did public organisations and officials continue to pass the company contracts?
- 2 The papers in this collection do not specifically analyse the case of Carillion. But they do focus on private sector involvement in the provision of public services in a range of different areas, from probation to education and social housing through to

infrastructure building, energy and regulation. As a result, they provide some insight into the way systems of regulation and accountability function in the UK, thus giving some answers as to why these often prove inadequate. Indeed, the Carillion incident was not isolated but is rather representative of wider systemic problems: in the words of the House of Commons report on the subject, “Carillion could happen again, and soon”.⁴ Carillion was but one further instalment in a litany of failures and scandals affecting private providers of public services in recent years, leading to considerable losses to the public purse and/or seriously affecting service delivery, as well as failing on accountability standards. The UK government’s bail-out and then renationalisation of the Stagecoach/Virgin East Coast rail franchise for passenger transport has also been highly controversial, while the flagship project of creating a high-speed rail link between London and the north of England (HS2) risks huge delays and cost over-runs.⁵ Atos, Capita and G4S have also come under public scrutiny for failing to fulfil their contracts adequately, accused of incompetence, fraud and serious social harm, notably in the field of welfare provision.⁶ Yet they continue to be regarded by British officials as viable outsourcing options. In particular, British governments keep resorting to a spatial division of markets such as asylum seeker housing, welfare-to-work schemes, or rail, in which a small number of large companies reap the benefits of State-sanctioned market opening.

The Challenges of Delivery

- 3 Alongside increasing private-sector involvement in public services, there has been a simultaneous rise of performance monitoring, driven by the move to New Public Management (NPM), whereby managerial practices from the private sector were transferred to the public sector. From the 1980s onwards, and especially in the wake of John Major’s Citizen’s Charter, public services have been encouraged to adopt evaluative measures such as Key Performance Indicators (KPIs), commonly used by private companies, in order to demonstrate their efficiency and facilitate public accountability. In an attempt to move from an ethos of bureaucratic paternalism, whereby the State and its agents determine what is in the best interests of service users, successive neoliberal governments have sought to render public services more consumer-focussed, notably through evaluative mechanisms aimed at measuring satisfaction – often in a quantitative way. Service quality is considered to be an essential element of performance measurement using survey-based instruments. It is increasingly regarded as one indicator of competitive performance, yet the notion of quality is by no means straightforward:

The practice of quality management... is characterised by tensions between different definitions of quality, diverse attempts to ‘speak for’ the user/consumer and uneasy compromises between professional attempts to define quality and the creation of bureaucratic systems (and empires) which regulate quality.⁷

- 4 Indeed, there is no agreed definition of what might constitute a measurement of quality in public services and it may differ significantly depending on whether we examine quality from the perspective of users or providers of services. For example, Françoise Granoulhac shows here how school buildings built under Private Finance Initiative schemes are subject to heated debate regarding their “quality”. Whereas buildings can be said to be of good architectural quality, this criterion does not necessarily match the lived experience of the people actually using the buildings on a daily basis, for whom

issues such as the amount of natural light available, or more generally the ergonomics of their workplace are paramount.

- 5 That said, quality in public services might commonly be understood as encompassing some or all of the following elements: accessibility, competence, integrity, reliability, responsiveness and safety.⁸ These may be incompatible. For example, a number of the contributors to this special issue highlight the problems of safety that negatively impact on the quality of service provision. David Fée, for instance, notes the failure of private contractors providing public housing to refugees to meet KPIs regarding health and safety issues. Steve Tombs documents the catastrophic consequences of local authorities' safety oversights in the tragic case of the Grenfell tower fire, leading to a breakdown of social protection. Lucie de Carvalho focuses on the failure of regulatory mechanisms vis-à-vis private energy providers to respect climate transition targets and thus protect public health by mitigating the damaging effects of pollution. She also emphasises an interesting clash between different public interests. Whilst it may be in the public interest to reduce pollution for health and safety reasons and to tackle climate change, doing so may threaten another aspect of service quality, namely value for money. Significantly, the Electricity Act of 2010 effectively rendered consumer interests to access cheap energy subservient to the need to reduce greenhouse gas emissions and guarantee a reliable supply of electricity.
- 6 Pierre Wokuri examines one, interesting alternative for trying to square the circle of these conflicting interests through the development of community energy groups. These emerged notably during the 2010s as alternative suppliers of electricity from renewable resources. They are community-led, controlled and owned, and have the twofold advantage not just of promoting renewable energy but also getting citizens involved locally in the production and distribution of electricity. However, their impact has remained limited on the whole, as they remain squeezed between the dominant State and market mechanisms which provide the bulk of the UK's electricity. More generally, there are obvious structural reasons why grass-roots, "small is beautiful" alternative systems struggle to provide services which generally rely on vast infrastructures to deliver to minimum guaranteed services to entire populations.

The Challenges of Accountability

Defining accountability

- 7 The discrepancies that may arise between policy objectives and outcomes raise the question of accountability for the delivery of public services. Here again, we run up against a complex notion that is far from being straightforward, both conceptually and politically. Most people assume they know what accountability means, but the term is extremely difficult to define. What does it mean to be accountable? Who is accountable? To whom or what? What for? According to the International Institute for Democracy and Electoral Assistance:

We can say that there is democratic accountability in service delivery when citizens or their representatives question or provide feedback on a public service, and the political actors and service providers either act on that feedback or face consequences.⁹

- 8 Whereas accountability is of relatively little importance in the private sphere, because failing companies simply go bankrupt, the notion has a specific meaning in the public domain: firstly, by definition, collective services provided are often essential both to all citizens' day-to-day existence and very survival and to society's smooth functioning. For instance, in the case of the provision of healthcare or clean water, those responsible for providing these services must be held to particularly high standards of probity, given that these services are funded through public money and that any failure to deliver entails huge social liabilities. Moreover, the functioning of public services tends to be all the more difficult to monitor, as continuity of service must be guaranteed and there are strong limits to how market forces can operate. Business failure leading to an end of operations is simply not an option. At a pinch, a hospital or university could be shut. But the same is hardly possible for major rail services or water supplies.
- 9 Accountability for delivery is therefore essential to the proper functioning of public services, and constitutes a key element of a functioning democracy: if officials fail to fulfil the social contract through the universal provision of quality services at reasonable cost, they can expect to be ejected from public office. Public officials are therefore individually responsible, but accountability also comprises the notion of *systemic* responsibility: given that individuals are obliged to work within a particular legislative or administrative framework, responsibility must also apply to the overarching system in which they work.⁹ *Who* is accountable for public service delivery is often difficult to establish: is it the individual public servant – the police officer or the nurse – and/or the minister responsible for the particular government department responsible for ensuring the proper delivery of a particular service, or indeed local authorities, or the government that has failed to guarantee effective mechanisms of accountability? Historically, British government has been based on the principle of ministerial responsibility, as Lucie de Carvalho points out: the Haldane Report from 1918 stated that “the act of every civil servant is [...] regarded as the act of his minister”. This principle was later restated during Labour's creation of the welfare state after World War II, in the famous (if probably apocryphal) words of Aneurin Bevan: “The sound of a dropped bedpan in Tredegar Hospital will reverberate round the Palace of Westminster”.¹⁰ But since then, such direct ministerial responsibility has become considerably more difficult to ensure, even if still desirable, given the extent to which the private sector has become involved in public service delivery, thus diffusing real, operational responsibility for delivering services across many organisational levels, and so requiring more varied accountability processes. These questions are not theoretical, but may have substantive legal, material and human implications: Steve Tombs shows here, for example, how in the face of such a lethal accident as the Grenfell Tower fire in June 2017, accountability has been viewed as crucial to social reparation and the application of justice and yet it has been difficult to pinpoint responsibilities for this tragedy.
- 10 Another complex issue entails determining *who* exactly providers of public services are accountable to. If we assume that accountability is fundamental to democracy, then these providers are primarily responsible to the *demos* and to their elected representatives. Again, the issue becomes more complex once private companies are involved, as they are also accountable to their shareholders, which may of course lead to conflicts of interest. This is especially the case when individuals repeatedly pass

through the revolving door between the public and the private sectors, a phenomenon particularly common in the energy sector.¹¹ Indeed, one study in 2016 revealed that nearly 90 per cent of people leaving the Department for Business, Energy & Industrial Strategy took up jobs in the energy sector, including six former Energy Ministers.¹²

- 11 Furthermore, it is difficult to determine exactly how accountability should be measured. Firstly, *what* should public service providers be accountable *for*? It is widely assumed that there are two aspects to accountability here. There is the original, financial, notion of accountability which entails providers submitting themselves to audit and inspection to ensure that money is spent wisely. However, such measurements are not in themselves straightforward, as there may be much conflict over the interpretation of what it means to spend money wisely. Efforts to save money may also of course conflict with the second measure of accountability, namely the quality of service provision. Again, there may of course be disagreement over what constitutes good quality service provision, as highlighted above. Secondly, it is difficult to determine which methods might best ensure accountability: can this be done by instilling a positive culture; by improving transparency; and/or by audit and inspection?

The Challenges to Upholding Accountability

- 12 Perhaps the biggest obstacle to ensuring accountability in public service delivery is that the regulatory mechanisms designed to uphold it are often derided as unnecessary ‘red-tape’ encouraging excessive bureaucratic control and hindering the freedom of enterprise. In the context of the move towards NPM, it was assumed that the State and the services it provided had often acted unaccountably beforehand. Indeed, the old Morrisonian model of state ownership and control of utilities and services provided the general public with very little say in how those services were delivered and little means of redress should they find them wanting. Incidentally, this is why recent plans advanced by the Labour Party to renationalise utilities proposed more horizontal, participatory forms of ownership and management to facilitate democratic accountability.¹³ On the Right, Margaret Thatcher famously railed against state bureaucracy and believed that privatising utilities and introducing managerialist reforms into public services would improve accountability. Contrary to traditional public sector accountability that was thought to flow upwards between civil servants and politicians who would make paternalistic decisions about what was in the best interests of service users, these reforms were meant to provide service users with more power by allowing them to exercise consumer choice and to participate in user evaluation surveys whereby they could give feedback to providers.¹⁴
- 13 In practice, however, the trend towards the increased involvement of the private sector in the provision of public services has not provided significantly more choice for consumers, nor always improved accountability. As Mary Corcoran points out in her contribution examining the contracting out of probation services, over the past decade there has actually been a trend away from competition towards oligopoly. Whilst the Conservative-Liberal Democrat Coalition government’s decision to contract out probation services in 2013 was meant to advance the ‘Big Society’ agenda by encouraging private and third sector providers to bid for contracts, eight private consortia were awarded all of the twenty-one contracts to run probation services in

England and Wales. This trend is not confined to probation services, but to public sector contracts more generally. Research by *The Financial Times* found that in 2018, 23% of all public sector contracts went to a sole bidder.¹⁵ Companies such as G4S, Serco and Capita dominate the growing market for outsourcing and contracting which is estimated to cost the UK government £251.5 billion per year.¹⁶

- 14 Given the market dominance of these actors, it is particularly difficult to hold them to account. The fact that the government has repeatedly awarded them contracts despite obvious failures of service delivery, such as when G4S was found to have charged for electronically monitoring offenders who were in prison or dead, suggests that they, like the banks in 2008, are widely considered to be “too big to fail”. Should regulatory regimes be considered too hostile, regardless of whether or not they improve accountability, these multinationals can easily hold the UK government hostage by threatening to move elsewhere¹⁷. This may go at least some way to explaining what de Carvalho describes in this issue as “the inherently *ad hoc* and flexible British accountability culture”.
- 15 A significant accountability problem has also arisen as marketisation processes and private sector interests have seeped into the regulation process itself. Steve Tombs again here notes how Local Authority Environmental Health Officers, charged with upholding food safety, occupational health and pollution control, are now increasingly trained with private sector concerns in mind and complete work placements as part of their training with the principal UK supermarket chains such as Asda, Sainsbury’s and Tesco’s. Furthermore, private companies are now increasingly involved in the regulation process, notably under the Primary Authority Scheme, initially introduced in 2009. This allows companies operating in a number of regulatory jurisdictions to register with just one local authority which then becomes responsible for its regulation on a national basis. According to Tombs, this considerably weakens the capacity of local authorities to adequately carry out their regulation duties, especially given that many of them apply a light-touch approach out of fear of losing jobs and business for their local area. Under what the Blair government marketed as ‘better regulation’ but which has actually led to a significant decline of regulatory enforcement, regulation is increasingly about facilitating the actions of private capital rather than regulating it *per se*. Even when local authorities do seek to impose strict regulations, in many cases, as David Fée points out here, private companies simply opt to pay a fine for breach of contract and carry on business as usual.
- 16 Holding private companies to account is further complicated by the fact that there have been simultaneous trends towards marketisation and centralisation, as the State still seeks, often ineffectively, to maintain its regulatory function. As Mary Corcoran notes in her contribution, outsourcing has had the paradoxical effect of “reproduc[ing] and multiply[ing] [state power] through the diffusion of obligatory accountability to greater numbers of agents who carry out public welfare or penal work in the local state or in civil society”. Rather than reinforcing accountability, this has instead generated such complexity that regulatory enforcement becomes inefficient. Similarly, de Carvalho argues that the creation of regulatory quangos in the energy sector has created what she describes as “an institutional in-betweenness for accountability”, meaning that accountability becomes further removed from both the State and independent regulators.

Contextual Challenges: Complexity, Democratic Deficits, Brexit, Covid-19 and beyond

- 17 The current state of public services and accountability – as presented here – may therefore seem to be unsatisfactory. Yet, it may well be asked if there are simple, overarching conclusions to be drawn about where policy should go. NPM, which is actually now quite old, has many failings, and in its election manifesto in December 2019, Labour did commit itself to bringing rail, mail, water and energy back into public ownership.¹⁸ It recognised that there cannot be any return to the Morrisonian, vertically-integrated model of nationalised industries implemented after World War II, when Britain on the one hand was a far more disciplined and politically egalitarian society than it is today as a result of the War, while goods and services in both the public and private sectors were far less complex than they are now. In fact, Labour plans for re-nationalisation partly acknowledged these issues *de facto*, by proposing hybrid structures for new publicly-owned services: e.g. energy industries would be managed by a national agency, as well as regional and municipal agencies. Nevertheless, even leaving aside the cost of the whole project, a short assessment of Labour’s proposals, published by the non-partisan Institute of Fiscal Studies, was somewhat sceptical about how much better-run the industries would be. In particular, the authors of the study noted that Labour plans to pursue extra objectives like increasing the number of workers in rail and strengthening renewable energies while “maintain[ing] prices at or below current levels would add additional layers of complexity to this challenge”.¹⁹
- 18 This issue of complexity is explored here by Nicholas Sowell, in a brief introduction to complexity theory and how it relates to public services. Put at its most simple, complexity theory draws on developments in natural sciences which go beyond Newtonian physics and its strong, predictable causalities to understand how the various elements of complex systems may interact in variable and sometimes unpredictable ways. Such analyses in natural sciences have been progressively applied to social sciences over the last twenty years, and to public services too, especially as NPM has led to far more complex system architectures compared to the bureaucratic structures which dominated public (and private) organisations for much to the 20th century. Almost by definition, recourse to complexity theory suggests that looking for simple solutions or policy prescriptions to complex issues is unlikely to work particularly well.
- 19 From a public policy point of view, the notion of rising complexity also has its role to play in the growing democratic deficits which have emerged in liberal democracies in recent decades, and which are one of the contributory causes of national populist reactions, such as the drive to Brexit since 2016. In a special issue of *The Political Quarterly* on *Rethinking Democracy* (published in January 2019), leading British political scientists examine the flaws of the British political and economic system which ultimately led to the Brexit vote,²⁰ which in turn is perhaps leading to the greatest constitutional upheaval Britain has known since the Glorious Revolution, even threatening the very existence of the Union. Thus, on the issue of accountability that we are examining here, for example, Tony Wright notes that even as markets had “implanted themselves into the public realm”, leading to a “sense of control lost and responsibility dissolved”, “in many respects the accountability of governments has

dramatically increased in recent times”.²¹ Yet he also goes on to note that “the explosion of accountability that has taken place has not been accompanied by a strengthened attachment to, or trust in, the institutions of democratic government”. The sheer increased complexity of public policy has surely a role to play in this paradoxical situation: after all, are we – even as informed readers – able to assess the merits of extending the working lives of nuclear power plants, say, building third generation pressurised water reactors (as at Flamanville or Hinkley Point), or pulling out of nuclear energy rapidly, given its low carbon emissions? And what of the people we send to Parliament or the *Assemblée Nationale* to represent us? Indeed, for Wright, it would help if politicians were more open about the limits of what they can do.

- 20 More generally, greater complexity surely also has its role to play in the widely-discussed gap that has emerged between internationally integrated “elites” and “left behind” populations. In Vernon Bogdanor’s contribution on *Rethinking Democracy*, he states boldly that “[s]ince the 1980s, the British people have made great strides towards citizenship in the economic sphere and in their relationship with public services”.²² He attributes this to the extension of share ownership under Thatcher, and the long term impact of John Major’s Citizen’s Charter, which he claims have improved standards and rights of redress. Yet at the same time, citizens have been “expected to remain passive in their political lives”, while the constitutional reforms of the Blair era led to sharing power among the elite, but little transfer of power from the elites to the people. For Bogdanor, the future lies especially in injecting direct democracy into the British political system, notably at local government level. For its part, Labour under Jeremy Corbyn did indeed suggest greater citizen involvement in managing public services²³.
- 21 While such institutional and constitutional change may no doubt provide some solutions to aspects of Britain’s democratic deficit(s), it ignores the economic and social trends brought on by neoliberalism and globalisation and the fundamental way it has strengthened capital at the expense of labour. Here, Colin Crouch’s contribution, building on his work on post-democracy, is more relevant. He too identifies the shift in the “vital energy of the political system”, which no longer rests in the institutions of liberal democracy, as it has “disappeared into small private circles of economic and political elites”.²⁴ In his original arguments on post-democracy, he argued that movements emerging from the population at large are therefore needed to give the system a shock from time to time, raising new questions; and these could be feminism, environmentalism and xenophobic nationalism. In the event, it has been the latter that has triumphed in the UK (and in the US), as questions of migration, the “added frisson of occasional acts of Islamic terrorism” and “feeling of loss of national control facilitated by globalisation” have “apparently threatened national identities”.²⁵
- 22 So much for some of the causes of Brexit. What now of its consequences for public services? Clémence Fourton here examines how constitutional change in the UK, and especially devolution have affected public services across the nations of the United Kingdom, and how such changes could well be amplified by Brexit. More specifically, she points to the diverging welfare systems that now exist within the UK, as powers for most welfare services have been devolved. She notes that EU membership, on the other hand, has acted to create an overall legal framework which nevertheless ensures a certain homogeneity on the basis of EU social and employment laws, as well as human rights legislation. As Britain will now be repatriating all EU laws, with a view to changing them, Brexit may well lead to further divergence in welfare systems within

the UK. Tensions may also arise between England and the other nations of the Union should EU social funds and agricultural subsidies not be replaced by domestic programmes. Finally, the Conservatives have specifically weakened their commitments to ensuring that labour rights will remain the same after Brexit, and will most likely undermine protective legislation in line with their penchant for deregulation.

- 23 As for the Brexiteers-national populists' record in government so far, it has been a very mixed bag indeed. At the time of writing (late summer 2020), the Chancellor of the Exchequer, Rishi Sunak, seems to be having a good Covid-19 crisis, and has generally been applauded for providing massive and rapid financial support to households and businesses. Otherwise, the Johnson government is not deemed to have handled the Covid-19 crisis especially well so far, with policies often seeming to be inconsistent and involving U-turns. The "A" levels fiasco too suggests considerable incompetence by the government, while its sacking of the senior civil servant at the Department of Education reveals an unwillingness to take responsibility for its actions on the one hand, and provides further evidence of the apparent upheaval which Downing Street is planning for the civil service on the other hand. More generally, according to Martin Wolf (chief economics commentator of *The Financial Times*), Johnson's team, as populists elsewhere, pursues politics more as a matter of performance than as a question of government, for which they care little.²⁶ Quite how the Conservatives under Johnson will act to improve public services, especially in the light of Brexit and as Covid-19 rolls on, remains to be seen, and whether they succeed may well be doubted.
- 24 It is of course impossible to know what the lasting impact of the "coronacrisis" will be on our societies and public services, in the UK and worldwide. For all the talk of emerging from Covid-19 with a different set of political, social and economic priorities – say to fight global warming, defend biodiversity, combat plastic pollution and perhaps reduce inequalities in recognition of the importance of "front line" workers – there will most likely be an overwhelming attempt to get back to business as usual: just as there was after the financial crisis and Great Recession in 2007-2009. Yet the immediate impact of the crisis has been to see governments intervene absolutely massively to support households and businesses – for the time being. The macroeconomic policy environment has changed significantly in many ways, as interest rates are likely to remain low for the foreseeable future, giving governments much more leeway to maintain active policies. The current health situation also reminds us that States are what we turn to in times of crises, and that accountability is not the priority when institutions need to be urgently adapted to fast-changing circumstances: indeed, accountability seems to be an after-thought, rather than built in to structures and processes in the first place. Yet, as this issue indicates, there are always further ways of institutionalising accountability. The longer the Covid-19 crisis goes on, the greater the challenges to public policies and services will be and more will likely be demanded of government. Enhancing accountability will surely be one vital component to ensuring that greater State action remains compatible with the largely-open and pluralistic societies of today's liberal democracies.

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NOTES

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Le Régime social britannique à l'heure du Brexit, entre complexité constitutionnelle et incertitude politique

The British Welfare Regime in the Context of Brexit, amidst Constitutional Complexity and Political Uncertainty

Clémence Fourton

Introduction

- 1 En 1990, Gøsta Esping-Andersen change durablement l'analyse de l'État social en lui substituant la notion de *régime social*, dans son ouvrage *The Three Worlds of Welfare Capitalism*¹. Cette proposition épistémologique allonge considérablement la liste des objets d'étude pour quiconque s'intéresse aux politiques sociales d'un pays : au-delà des institutions sociales à proprement parler, comme le *National Health Service*, le régime social inclut aussi les normes qui les sous-tendent, les discours qui s'y rattachent, les effets qu'elles produisent. En somme, le régime social inclut tout ce qui détermine, et qui est déterminé par l'État social au sens strict. Prendre au sérieux cette épistémologie implique alors aussi, en retour, de considérer ce qui contribue à façonner le *welfare state* sans pour autant relever du social proprement dit. C'est à ce titre que cet article se penche sur la matrice constitutionnelle de l'État social britannique, à l'heure où celle-ci est transformée par la sortie du Royaume-Uni de l'Union européenne (UE).
- 2 Il va sans dire que les développements qui font l'objet de cette étude sont, précisément, des développements, et qu'à ce titre ils sont récents, voire en cours, et, en tout cas, volatiles. Nous faisons l'hypothèse que cette volatilité n'empêche pas l'analyse, pourvu que l'on ne lui demande pas plus que ce qu'elle peut fournir. Les analyses qui suivent n'ont pas de valeur prédictive ; il s'agit, à la lumière des dynamiques institutionnelles, juridiques et politiques qui marquent le Royaume-Uni dans le contexte du Brexit, mais

aussi avant celui-ci, de dégager des points saillants et des tendances quant à l'articulation entre changements constitutionnels et changements sociaux. En cela, ce texte est, plus qu'un diagnostic du régime social à l'heure du Brexit, une invitation à observer le Brexit par le prisme du régime social.

- 3 Au cœur de l'articulation entre arrangements constitutionnels et dispositions sociales se trouve la question de la citoyenneté telle que conceptualisée par Thomas Marshall dès 1950² – une conception tridimensionnelle de la citoyenneté, non seulement comme civile et politique, mais aussi sociale. Que change donc le Brexit pour la citoyenne de Marshall, c'est-à-dire pour une Britannique qui n'est plus européenne, et qui est usagère d'un système de santé, d'un système de protection sociale, d'un système éducatif auxquels les normes européennes ne s'appliquent plus ? En d'autres termes, considérer l'articulation entre Brexit et *welfare state* amène à se pencher sur les effets du premier en termes de définition et d'accès au second ; en cela, la question du contenu *social* de la démocratie est au cœur de notre réflexion, qui procède en trois temps. Dans une première partie, on se concentre sur les effets de la sortie du Royaume-Uni de l'UE sur les institutions sociales du pays. Ensuite, on se tourne vers les conséquences juridiques du Brexit, en termes de droits sociaux pour les Britanniques. Enfin, la troisième partie propose d'analyser comment les changements constitutionnels en cours s'articulent avec les orientations des gouvernements britanniques en matière de politique sociale.

Brexit et institutions sociales

- 4 Le bouleversement constitutionnel que constitue la sortie du Royaume-Uni de l'UE ne peut être examiné, en matière d'institutions sociales, indépendamment d'un autre changement qui marque le paysage constitutionnel britannique depuis la fin des années 1990 : la dévolution, autrement dit la décentralisation du pouvoir législatif et exécutif depuis le parlement et le gouvernement britanniques vers d'autres niveaux de pouvoir. Vers les nations écossaises et galloises et la province d'Irlande du Nord à partir de 1998³, puis vers certaines métropoles⁴. Au niveau des nations, sur lequel on se concentre ici, en dépit de différences quant au processus d'identification des domaines dévolus et réservés dans les trois territoires, les domaines *in fine* dévolus sont d'une remarquable homogénéité entre les trois gouvernements : les compétences dévolues concernent principalement les politiques sociales, si bien que la dévolution a pu être analysée comme la création de trois parlements dédiés à la politique sociale (*social policy parliaments*⁵). Ainsi, les domaines qui relèvent de l'État social figurent presque tous au rang des compétences dévolues : santé, éducation, logement, sport et culture, transports... Avec une exception notable, qui est celle de la législation portant sur le travail (sauf pour l'Irlande du Nord) et, dans une certaine mesure, la protection sociale, c'est-à-dire les aides financières de l'État aux individus (retraites, chômage, allocations familiales...). La dévolution a donc créé des possibilités de différenciation en matière d'institutions sociales, qui sont à comprendre à la fois à l'échelle de l'Écosse, du pays de Galles et de l'Irlande du Nord, et dans leurs rapports avec les politiques britanniques⁶.
- 5 La dévolution revêt alors une importance toute particulière dans le contexte du Brexit, car l'UE était l'un des facteurs de convergence entre les institutions sociales des différents territoires du Royaume-Uni : Derek Birrell estime ainsi que les trois-quarts des prérogatives du gouvernement écossais étaient, avant la sortie britannique de l'UE,

influencées par des décisions prises à Bruxelles⁷. En dépit de ce facteur de convergence, deux éléments de différenciation en matière d'institutions sociales sont à noter à l'échelle des nations : la mise en avant, au pays de Galles et en Écosse, du principe d'universalité dans les politiques sociales⁸ et dans une moindre mesure dans l'éducation⁹, ainsi que la part du secteur privé dans le fonctionnement des services d'intérêt collectif.

- 6 Par exemple, concernant les aides financières aux individus, le parlement écossais a adopté, dans la foulée du *Welfare Reform Act* britannique de 2012 une loi¹⁰ permettant une compensation, au niveau de l'Écosse, de la baisse de certaines aides sociales décidée au niveau britannique. De même, la dynamique de marchandisation du système de santé, tandis qu'elle va *crecendo* en Angleterre, tend au contraire à régresser dans les autres territoires britanniques depuis l'introduction de la dévolution. Ainsi, si en Irlande du Nord le principe de mise en concurrence de différentes composantes du NHS (ce qu'on appelle le « marché interne ») est également en vigueur, mais soumis à une plus forte régulation¹¹, dans les deux autres nations, celui-ci a été tout simplement aboli – en Écosse en 2004 puis au pays de Galles en 2009. Outre le fait que, une fois hors de l'UE, les différentes nations britanniques ne seront plus soumises au même cadre législatif communautaire et que donc, ces différenciations sont susceptibles de s'accroître, deux autres questions se posent : une question économique et une question de gouvernance.
- 7 Premièrement, il y a la question économique des fonds européens jusque là alloués au Royaume-Uni, dont le Brexit signe l'interruption. Parmi eux figurent les Fonds structurels et d'investissement européens et le Fonds européen agricole de garantie, qui sont administrés directement par les nations britanniques. Le Fonds européen agricole de garantie constitue le premier pilier de la Politique Agricole Commune (PAC) et a représenté 22,5 milliards d'euros sur la période 2014-2020, versés directement aux agriculteurs britanniques¹². Les Fonds structurels et d'investissement européens, quant à eux, comptent notamment le Fonds européen de développement régional, le Fonds social européen, et le Fonds européen agricole pour le développement rural (connu comme le second pilier de la PAC) et ont représenté 17,5 milliards d'euros sur la période 2014-2020. Or, ces Fonds structurels et d'investissement européens sont attribués en fonction du développement économique régional : si l'on ramène les totaux à la population, sur la même période, le pays de Galles est de loin le plus subventionné, à hauteur de 140€ par habitant(e), devant l'Irlande du Nord (57€), l'Écosse (47€) et l'Angleterre (27€)¹³. Dans ces conditions, le gouvernement britannique sera-t-il en mesure de suppléer aux budgets reçus par les nations via ces fonds, et si oui, selon quelles modalités ?
- 8 La question du remplacement de ce manque à gagner, à l'issue de la période de transition, n'est pas tranchée. Si la formule de Barnett, habituellement employée par le gouvernement britannique pour établir les enveloppes budgétaires dévolues aux nations, était utilisée dans la perspective d'une compensation britannique des fonds européens, elle substituerait aux politiques européennes, basées sur les inégalités régionales et donc les besoins spécifiques des nations et régions, une logique basée sur le nombre d'habitant(e)s. Alan Greer souligne donc que le Brexit agit là comme le révélateur des limites des arrangements constitutionnels en vigueur, et que la formule de Barnett doit être, sinon abandonnée, du moins réévaluée¹⁴. De fait, le Brexit, s'il n'est pas voué à accentuer les inégalités socio-spatiales britanniques, vient rappeler leur

existence, et l'absence de prise en compte de celles-ci dans les mécanismes budgétaires liés à la dévolution.

- 9 Deuxièmement, en matière de gouvernance, se pose la question du rapatriement des compétences jusque là gérées au niveau des institutions européennes et qui sont elles-mêmes, à l'échelle du Royaume-Uni, dévolues aux nations. En matière d'agriculture, de pêche, de commerce et d'environnement, les nations vont donc être en mesure de mettre en œuvre des politiques susceptibles de s'écarter de l'orientation non seulement communautaire, mais aussi britannique. Dans cette perspective, le gouvernement britannique a évoqué la nécessité d'identifier des « cadres communs » (*common frameworks*), à l'échelle du Royaume-Uni, pour limiter les différenciations territoriales. Des orientations générales ont été posées : il s'agit notamment d'assurer le fonctionnement du marché britannique, de respecter les engagements internationaux du pays, et d'optimiser la gestion des ressources¹⁵. Là encore, la question des inégalités régionales se pose. D'une part, une augmentation des prérogatives des nations qui ne serait pas corrélée à une marge de manœuvre budgétaire accrue les laisserait finalement incapables de mener des politiques à la hauteur de leurs besoins spécifiques. D'autre part, la définition des cadres communs fait, à l'échelle britannique, l'objet de négociations dont l'issue dépendra du rapport de force à l'œuvre entre les gouvernements nationaux et le gouvernement britannique. Or, ce dernier est par définition en position de force, puisque l'existence-même de la dévolution peut être remise en cause par la législation britannique – et si cette proposition peut sembler irréaliste, elle ne l'est sans doute pas plus que ne l'était la perspective d'une sortie de l'Union européenne il y a quelques années.
- 10 Ainsi, la sortie de l'UE vient se combiner à des arrangements constitutionnels pré-existants, au premier rang desquels la dévolution, qui a été mise en œuvre dans un contexte où la participation à l'UE était pensée comme pérenne. Dans ces conditions, le Brexit vient renforcer la dynamique initiée par la dévolution en matière d'institutions sociales. D'une part, la dévolution est une force centrifuge, puisqu'une partie du pouvoir exécutif et législatif est transférée au niveau des nations qui composent le Royaume-Uni. D'autre part, l'UE peut être vue comme une force centripète, puisqu'elle a un effet d'homogénéisation légale et politique sur ses territoires. Cette homogénéisation passe également par une prise en compte des disparités économiques et sociales entre les nations, puisque l'UE alloue des fonds de développement aux régions les plus en difficulté. Certes, les contributions versées par le Royaume-Uni à l'UE étaient plus importantes que les subventions qu'il en recevait – 9,2 milliards d'euros de contributions par an en moyenne entre 2010 et 2017, contre 6,8 milliards d'euros de subventions¹⁶. Mais l'UE jouait ici un rôle redistributif, en favorisant les anciennes régions industrielles galloises et la Cornouailles en premier lieu, par rapport à d'autres régions plus dynamiques. Quitter l'UE, c'est donc aussi, pour le Royaume-Uni, renoncer à cette dimension non seulement unificatrice mais aussi redistributive. Le Brexit est donc susceptible de produire une différenciation accrue des institutions sociales à l'échelle des territoires britanniques, ce qui en soi ne présage en rien de la forme de cette différenciation. En revanche, il est certain que cette différenciation prendra la forme d'une aggravation des inégalités territoriales si la prise en compte de celles-ci n'est pas intégrée au fonctionnement et au financement des institutions sociales du pays.

Brexit et droits sociaux

- 11 Parmi la multitude de débats et de textes législatifs qui ont jalonné la période courant du 23 juin 2016, date du référendum, au 31 janvier 2020, date de sortie de l'UE, deux lois revêtent une importance particulière quant à la question de l'impact de la sortie de l'UE sur les droits sociaux des Britanniques¹⁷. La première de ces deux lois est appelée *European Union (Withdrawal) Act 2018*, ou Loi sur la sortie de 2018, et la seconde est la loi adoptée le 23 janvier 2020, baptisée *European Union (Withdrawal Agreement) Act*, ou Loi sur l'accord de sortie de 2020. La seconde de ces lois dérive directement de la première, qui impose au gouvernement britannique d'obtenir l'aval du parlement pour la ratification de l'accord de sortie, et vient la compléter et remplacer certaines de ses dispositions¹⁸.
- 12 La Loi sur l'accord de sortie de 2020 comporte à la fois des dispositions spécifiques à la période de transition (entre le 31 janvier 2020 et le 31 décembre 2020), et des dispositions de long terme, notamment quant à la mise en œuvre de l'Accord de sortie qui doit être signé par le Royaume-Uni et les différents pays de l'UE avant la fin de la période de transition : celui-ci sera contraignant pour la législation britannique future. La Loi sur la sortie de 2018, prévoit, quant à elle, d'une part l'abrogation de la législation en vertu de laquelle le Royaume-Uni était membre de l'UE, et statue d'autre part sur le devenir du droit européen affectant le Royaume-Uni. Une partie des normes européennes en vigueur au Royaume-Uni sont ainsi incorporées à la législation britannique ; elles sont « conservées » (*retained*) pour assurer une continuité législative¹⁹.
- 13 L'incorporation du droit européen comporte plusieurs exceptions : d'abord, le principe de supériorité du droit européen sur le droit britannique, s'il est conservé pour les textes datant d'avant le 31 décembre 2020, ne s'appliquera plus après cette date – autrement, la loi britannique serait restée « subordonnée » au droit communautaire, et le Royaume-Uni n'aurait pas retrouvé son autonomie législative. Ensuite, et c'est un élément majeur pour notre étude, la Charte des droits fondamentaux de l'Union européenne, signée en 2000, intégrée au Traité de Lisbonne de 2007, et à l'application de laquelle veille la Cour de justice de l'Union européenne, n'est pas transférée en tant que telle dans le droit britannique. En revanche, le Royaume-Uni est un des membres fondateurs du Conseil de l'Europe, créé en 1949 et a été le premier pays à ratifier, en 1950, la Convention européenne des droits de l'Homme, dont la Cour européenne des droits de l'Homme veille au respect du contenu. En 1998 a été adoptée au Royaume-Uni la loi *Human Rights Act*, qui incorpore en droit national la Convention. Cette transposition en droit britannique, si elle ne s'est pas faite sans controverses, a intégré le régime des droits de l'homme au droit national, et a provoqué un développement du langage des droits de l'homme dans le discours politique britannique²⁰.
- 14 Pourtant, le fait que le Royaume-Uni ne remette pas en cause – pour le moment – sa ratification de la Convention ne constitue pas une garantie des droits des citoyen(ne)s britanniques à hauteur de celle apportée par la Charte, et ce pour deux raisons. La première est que la Convention ne porte pas sur les mêmes droits que la Charte : il y figure moins de domaines, et pour les domaines qui sont représentés dans les deux textes, les droits de la Convention sont moins détaillés que ceux contenus dans la Charte. Par exemple, l'Article 31 de la Charte précise que « *Tout travailleur a droit à des conditions de travail qui respectent sa santé, sa sécurité et sa dignité* » tandis qu'il n'y a rien à

ce sujet dans la Convention. Les deux textes, en revanche, comportent des éléments sur la liberté de réunion et d'association. La Convention indique que toute personne a droit à la liberté de réunion pacifique et à la liberté d'association ; la Charte étend les droits à la liberté de réunion pacifique et à la liberté d'association à *tous les niveaux*, et précise que sont notamment concernés le domaine politique et syndical.

- 15 La seconde faiblesse de la Convention par rapport à la Charte est que les procédures légales utilisables par les citoyen(ne)s pour faire appliquer les droits présents dans la Convention sont moins robustes que celles liées à la Charte²¹. Les citoyen(ne)s britanniques ne pourront plus s'en remettre à la Cour de justice de l'Union européenne au sujet des droits sociaux présents dans la Charte et qui seraient bafoués. En somme, la Charte jouait, pour les citoyen(ne)s britanniques, l'un des rôles d'une constitution formalisée, au sens où elle constituait un document unique, opposable, dans lequel figuraient les droits qui leur incombait. Elle représentait notamment une garantie pour les citoyen(ne)s située en-dehors du parlement britannique, et donc des changements de majorité politique. En l'absence d'une constitution rédigée, et selon la doctrine de la souveraineté parlementaire, tout parlement britannique peut en effet modifier les droits des citoyen(ne)s au moyen d'une simple loi.
- 16 Pour la citoyenne britannique, la sortie de l'UE équivaut donc à une perte de garanties juridiques en matière de droits sociaux, d'autant plus qu'elle perd le bénéfice de la jurisprudence de la Cour de justice de l'Union européenne sur ceux-ci. Si le fonctionnement des tribunaux britanniques n'empêche en théorie pas les juges de continuer à se servir de la Charte des droits fondamentaux de l'Union européenne pour rendre leurs jugements, rien ne les oblige à le faire. Il faut ajouter à cela un enjeu de taille : en Irlande du Nord, les Accords de Belfast garantissent une égalité des droits entre les citoyen(ne)s britanniques d'Irlande du Nord et les citoyen(ne)s irlandais(e)s de la République d'Irlande. Or, l'Irlande est toujours membre de l'UE, et la Charte s'y applique. Dans ces conditions, soit les Irlandais(e)s bénéficient d'une protection juridique dont les Nord-irlandais(e)s sont privé(e)s à l'issue du Brexit, soit les Nord-irlandais(e)s bénéficient d'une protection juridique dont les habitant(e)s de Grande-Bretagne sont privé(e)s. Dans les deux cas, il y a une rupture d'égalité susceptible d'avoir des conséquences politiques majeures²².

Brexit et politiques sociales

- 17 À partir du 1^{er} janvier 2021, le parlement britannique sera en mesure d'adopter des lois qui pourront éloigner progressivement le droit britannique des directives communautaires, dans les limites fixées par l'Accord de sortie qui aura été ratifié par les vingt-sept et le Royaume-Uni²³. Dans ce contexte, le discours programmatique du gouvernement nouvellement élu de Boris Johnson, le 19 décembre 2019, revêt une importance particulière. Comme tous les Discours de la Reine (*Queen's Speech*), il identifie les domaines des politiques publiques qui constitueront les priorités du gouvernement au cours de son mandat. Mais dans ce cas précis, il indique aussi quels sont les domaines du droit européen incorporé au droit britannique qui seront prioritairement examinés, et, le cas échéant, modifiés. En somme, il identifie les domaines sur lesquels le gouvernement a l'intention d'exercer dès que possible, sur le plan politique, le « contrôle repris » à l'UE.

- 18 Les domaines ayant trait au régime social sur lesquels le parlement va se pencher dans les mois suivants la sortie de l'UE sont nombreux. Figurent parmi les priorités du gouvernement Johnson le soin à la personne, les aides sociales et en particulier les retraites, l'éducation, le handicap, le logement, la justice, la famille, la recherche, les transports et les infrastructures²⁴. Les projets sur la santé sont particulièrement développés dans le Discours, de même que le droit du travail. Le fait que le gouvernement ait l'intention de réformer le droit du travail européen incorporé à la législation britannique – qui comprend des dispositions quant à la réglementation du temps de travail, aux congés payés, aux droits liés à la parentalité, et la protection contre la discrimination – n'est pas, en soi, significatif quant au contenu futur de ces modifications : le Royaume-Uni pourrait même choisir d'étendre ces droits. On pourrait ainsi imaginer qu'une fois affranchi du cadre réglementaire de l'UE sur le marché commun, le Royaume-Uni choisisse d'augmenter les régulations portant sur les conditions de travail, et les cotisations sociales. Mais ces développements sont très improbables à l'aune de la coloration résolument néolibérale des politiques de l'emploi adoptées ces dernières années²⁵.
- 19 Là encore, la combinaison du Brexit à la dévolution est susceptible, selon l'échelle de gouvernance qui se verra attribuer la gestion des compétences rapatriées de l'UE de renforcer, ou à l'inverse de tempérer les orientations politiques britanniques. À ce titre, il est à noter que l'adoption de la Loi sur la sortie de 2018 et de la Loi sur l'accord de sortie de 2020 s'est faite, au parlement britannique, sans tenir compte de l'absence de consentement législatif de la part des nations – de l'Écosse dans le premier cas, et de tous les territoires dans le second. Cette situation a donc *de facto* consisté en un non-respect de la Convention Sewel, en vertu de laquelle les lois britanniques concernant des domaines dévolus aux nations ne sont pas adoptées sans leur consentement législatif, et laisse à penser que Londres est susceptible d'essayer d'infléchir le rapatriement des compétences européennes dans le sens d'une re-concentration du pouvoir. L'un des facteurs explicatifs à cela est le jeu des équilibres politiques entre les différentes composantes du Royaume-Uni au cours de la dernière décennie.
- 20 En effet, depuis 2010, les gouvernements écossais (mené par les nationalistes du *Scottish National Party* depuis 2007) et gallois (mené par les travaillistes depuis les premières heures de la dévolution) ont constitué une force d'opposition aux gouvernements britanniques successifs, dominés par les conservateurs. La politique sociale s'est alors imposée comme un champ permettant aux nations de se distinguer des politiques sociales menées depuis Londres, et de modérer leur dimension néolibérale, donnant naissance à une forme de nationalisme social (*welfare nationalism*²⁶) à l'échelle écossaise, et dans une moindre mesure à l'échelle galloise.
- 21 Outre les dynamiques politiques des deux dernières décennies, les débats qui ont accompagné l'adoption de la Loi sur l'accord de sortie de 2020 donnent également des indications quant à l'orientation politique que le gouvernement Johnson entend donner au surcroît de marge de manœuvre en matière sociale que lui confère le Brexit. Ainsi, concernant la réforme du droit du travail à venir, baptisée *Employment Bill*, tout porte à croire qu'elle n'ira pas dans le sens d'une protection accrue des travailleurs et travailleuses britanniques. En effet, la Loi sur l'accord de sortie adoptée le 23 janvier 2020 diffère en un certain nombre de points du projet de loi sur le même sujet, présenté au parlement en octobre 2019²⁷. L'une de ces divergences est significative en termes de protection des droits des travailleurs et travailleuses : la loi du 23 janvier 2020 n'inclut

pas la clause 34 et le planning 4, à savoir une clause de non-régression en matière de droit du travail. Cela signifie qu'une fois hors de l'UE, la législation britannique n'aura non seulement plus à respecter les standards minimums imposés par l'UE sauf si cela figure dans l'Accord de sortie, mais que ses évolutions n'iront pas non plus nécessairement dans le sens d'une progression des droits des travailleurs et travailleuses.

- 22 Dans ces conditions, l'Accord de sortie qui sera signé avec l'UE et qui fixera un cadre pour les réformes futures de l'acquis communautaire au Royaume-Uni pourrait alors constituer un garde-fou pour le droit du travail britannique. La protection des travailleurs et travailleuses est en outre un enjeu crucial des négociations menées entre le Royaume-Uni et l'UE, et cela pour des raisons pragmatiques. En effet, la régulation du marché du travail se doit, dans l'optique du maintien de relations commerciales étroites entre les deux parties, d'être homogène. C'est en tout cas un engagement posé par les deux parties dans la déclaration politique fixant le cadre des relations futures entre l'UE et le Royaume-Uni, prélude aux négociations en vue de trouver un accord de sortie définitif. Toutefois, une note gouvernementale à ce sujet, révélée par le *Financial Times*²⁸ indique clairement que le gouvernement britannique veut minimiser les contraintes liées à l'alignement réglementaire (*level playing field*²⁹). Ces signaux indiquent donc une ambition politique de déréglementation accrue du monde du travail, qui suscitent des réactions hostiles. Du côté des acteurs européens, par ailleurs perçus par une partie de la classe politique française comme laxistes en matière de réglementation sociale, on se dit inquiet de ce que le Royaume-Uni, en déviant des standards européens, ne bénéficie d'un avantage compétitif³⁰. Du côté des syndicats britanniques, réunis au sein du *Trade Union Congress*, on a dès 2016 publié un rapport alarmiste sur les effets du Brexit sur le droit du travail³¹. Il apparaît donc que les modifications majeures du fonctionnement de l'État qu'induit le Brexit, dans un contexte de politiques néolibérales d'effritement du *welfare state*, produit une incertitude quant à la préservation des droits sociaux des Britanniques. Cette incertitude n'est pas seulement celle des observateurs des développements en cours, elle s'applique aussi à la population britannique, pour qui le processus de sortie de l'UE provoque nécessairement un manque de lisibilité quant à la définition à moyen et long terme du régime social qui est le leur.

Conclusion

- 23 Au terme de cette étude des effets de la sortie de l'UE sur le régime social britannique, deux conclusions s'imposent. Premièrement, avec le Brexit, des droits sociaux sont susceptibles d'être affaiblis par des réformes postérieures à l'incorporation en droit britannique du droit européen, du fait de l'absence de garde-fous constitutionnels : une fois hors de la juridiction de la Charte des droits fondamentaux de l'Union européenne, aucune loi fondamentale ne garantit les droits eux-mêmes, ou les changements susceptibles de les affecter, et la Cour de justice de l'Union européenne ne sera plus un recours possible pour les Britanniques. En l'absence de constitution, c'est donc sur les décisions judiciaires nationales et sur les forces politiques britanniques que repose la garantie des droits sociaux. Ces droits vont donc être, dans les prochaines années, davantage soumis aux alternances gouvernementales, et aux logiques d'opposition qui

se jouent entre le pouvoir britannique central et les gouvernements gallois, écossais et nord-irlandais.

- 24 Deuxièmement, le fait que la dévolution ait commencé après l'entrée du Royaume-Uni dans l'UE en 1973 implique que les institutions dévolues n'ont, jusqu'ici, jamais fonctionné en dehors du cadre communautaire, qui fournissait une législation supranationale, commune au Royaume-Uni et à ses différentes composantes. Dans ces conditions, deux dynamiques s'enclenchent : d'une part, la possibilité d'une différenciation accrue des modèles sociaux à l'intérieur du pays, et, d'autre part, la possibilité d'une re-concentration du pouvoir à Londres à l'occasion du rapatriement de compétences européennes. Ces deux dynamiques peuvent se cumuler, puisque, face à ce qui peut être perçu comme un abus du pouvoir central, les gouvernements d'Écosse, du pays de Galles et d'Irlande du Nord sont susceptibles d'utiliser, en réponse, au maximum leurs possibilités de contre-pouvoir. Les électors entrent aussi en jeu, puisque les tensions constitutionnelles autour de la dévolution peuvent se traduire par des victoires politiques nationalistes. Derrière ces tensions, c'est aussi l'égalité de traitement entre tou(te)s les citoyen(ne)s britanniques qui est en jeu, et la prise en compte des inégalités socio-spatiales. Il y a donc, dans la superposition de la dévolution et de la sortie de l'UE, une forme de paradoxe. Paradoxe car la présence du Royaume-Uni dans l'UE, si elle était source de divisions politiques importantes, notamment entre les nations, était aussi une source d'unité, dans les politiques mises en œuvre, et de compensation des inégalités territoriales. À l'inverse, la sortie de l'UE va très certainement accentuer encore les différences nationales au sein du Royaume-Uni, alors même que le renforcement d'une entité politique britannique était l'un des arguments avancés en faveur du Brexit.
- 25 Aux effets strictement législatifs et constitutionnels du Brexit susceptibles de modifier le régime social britannique, il faut ajouter les effets macro-économiques de l'ensemble de la séquence³² : les projections économiques, si elles varient dans les chiffres, pointent toutes un ralentissement de l'économie britannique lié au Brexit. Or, une baisse de la croissance entraînera aussi une baisse des revenus de l'impôt, et donc des fonds publics susceptibles d'être alloués aux services publics. De plus, les restrictions migratoires que les Britanniques mettent en place posent une sérieuse question de main d'œuvre, notamment dans le secteur de la santé, du soin à la personne, et dans l'enseignement supérieur et la recherche.
- 26 Finalement, la sortie du Royaume-Uni de l'UE agit donc comme un révélateur à bien des niveaux : économique – puisque l'intégration des économies continentales et britanniques est désormais indubitable ; politique – puisque les lignes de fracture internes au pays sont exacerbées ; social – puisque le vote *Leave* en 2016 est directement corrélé à de faibles revenus et un faible niveau d'éducation ; territorial – puisque la disparition des fonds européens de soutien aux régions les plus défavorisées oblige Londres à trancher quant à leur remplacement ; et constitutionnels – puisque les institutions britanniques, entre dévolution et intégration européenne, fonctionnaient jusqu'en 2020 selon des équilibres d'autant plus fragiles qu'ils ne sont pas codifiés dans un texte constitutionnel fondamental. Cela vaut tant pour les rapports entre les différents niveaux de l'État que pour les rapports des citoyen(ne)s à ceux-ci. C'est donc vers une politisation accrue des questions sociales que l'on se dirige dans les prochaines années ; des rapports de force politiques dépendra le visage du régime social britannique hors de l'Union européenne.

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NOTES

1. ESPING-ANDERSEN Gøsta, *The Three Worlds of Welfare Capitalism*, Princeton, Princeton University Press, 1990.
2. MARSHALL Thomas H., *Citizenship and Social Class*, Cambridge, Cambridge University Press, 1964 (1950).
3. La dévolution d'une partie du pouvoir exécutif et législatif de Londres vers Édimbourg, Cardiff et Belfast s'est faite de manière différenciée selon les territoires. En Écosse, elle a pris la forme d'un parlement directement élu, assorti d'un pouvoir exécutif responsable devant celui-ci (*Scotland Act 1998*) ; au pays de Galles, celle d'une assemblée à laquelle a été assorti un gouvernement (*Government of Wales Act 1998, 2006*). En Irlande du Nord, la dévolution des pouvoirs (*Northern Ireland Act 1998*), s'est faite selon les termes des Accords de Belfast de 1998 (*Good Friday Agreement*) : l'assemblée nord-irlandaise, élue directement, doit fonctionner avec un gouvernement où sont représentés à la fois les unionistes et les nationalistes.
4. *Greater London Authority Act 1999* et *2007*, *Local Government Act 2000* et *Cities and Local Government Devolution Act 2016*.
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7. BIRRELL Derek, *The Impact of Devolution on Social Policy*, *op. cit.*, p. 17.
8. BIRRELL Derek, *The Impact of Devolution on Social Policy*, *op. cit.*, p. 43.
9. On pense à l'établissement de plafonds nationaux différenciés pour les frais d'inscription à l'université : en Angleterre et au pays de Galles, celui-ci est fixé à £9,250, contre £4,030 en Irlande du Nord, et £1,820 en Écosse.
10. *Welfare Reform (Further Provision) (Scotland) Act 2012*.

11. Les modalités de mise en concurrence des composantes du NHS nord-irlandais ont été réformées en 2009, dans le sens d'une réduction du nombre d'acteurs économiques en jeu, d'une concentration des ressources dans les services médicaux plutôt que dans l'administration, et d'une valorisation de la coopération, plutôt que de la compétition.
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16. BRIEN Philip, *UK funding from the EU*, *op. cit.*, p. 6.
17. COWIE Graeme, DE MARS, Sylvia, KELLY, Richard et TORRANCE, David, *Constitutional implications of the Withdrawal Agreement legislation*, Briefing Paper n°08805, House of Commons Library, 20 février 2020.
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19. Le développement qui suit est largement basé sur le rapport de la Chambre des Communes à ce sujet. COWIE Graeme, *The status of « retained EU law »*, Briefing Paper n°08375, House of Commons Library, 30 juillet 2019.
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22. DE MARS Sylvia, MURRAY Colin, O'DONOGHUE Aoife et WARWICK Ben, *Continuing EU citizenship « rights, opportunity and benefits » in Northern Ireland after Brexit*, Belfast, Northern Ireland Human Rights Commission, mars 2020.
23. Alors même que la sortie de l'UE n'avait pas encore eu lieu et que la Loi sur l'accord de Sortie de 2020 n'avait pas encore été votée, le parlement britannique avait déjà adopté cinq lois, ne concernant pas la législation européenne incorporée, mais anticipant les effets de la sortie de l'Union en matière de relations internationales.
24. THE QUEEN'S SPEECH, London, Prime Minister's Office, 19 décembre 2019.
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30. Voir par exemple les déclarations de Michel Barnier, qui mène les négociations du côté européen, dans cet article du Monde : DUCOURTIEUX Cécile et PETITJEAN Sophie, « Négociations du Brexit : Londres prêt à tout face à l'UE », *Le Monde*, 26 février 2020, https://www.lemonde.fr/international/article/2020/02/26/negociations-du-brexit-londres-pret-a-tout-face-a-l-ue_6030900_3210.html, consulté le 9 avril 2020.

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32. Voir également le rapport suivant pour une vue d'ensemble : STEWART Kitty, COOPER Kerris et SHUTES Isabel, *What does Brexit mean for social policy in the UK ?*, Social Policies and Distributional outcomes in a Changing Britain, Research Paper n°3, février 2019.

RÉSUMÉS

Cet article examine les conséquences de la sortie du Royaume-Uni de l'Union européenne (UE) sur le régime social britannique, entendu comme l'ensemble complexe formé par les institutions sociales, leurs effets et leurs déterminants. En particulier, le rapatriement des compétences européennes, l'intégration et la réforme de l'*acquis communautaire*, et la rupture avec les institutions européennes posent des questions de gouvernance et d'équilibres politiques, car ces développements surviennent dans un paysage constitutionnel marqué par l'absence de codification et par la dévolution d'une partie du pouvoir exécutif et législatif aux nations. Hors de l'UE, la différenciation des régimes sociaux anglais, écossais, gallois et nord-irlandais est donc vouée à s'accroître. Hors de l'UE, le Royaume-Uni devra mettre au point de nouveaux mécanismes de lutte contre les inégalités régionales, sous peine de voir celles-ci s'accroître. Hors de l'UE, le Royaume-Uni renonce également à la protection des droits sociaux par la Cour de justice de l'Union européenne, et ceux-ci relèvent à nouveau de la souveraineté parlementaire. Hors de l'UE, le régime social britannique est donc plus que jamais le produit de rapports de force conjoncturels, marqués notamment par la tentation de la concentration des pouvoirs à Londres, l'héritage conservateur en matière de politiques sociales, et les logiques de différenciation territoriale. Enfin, le processus de sortie de l'UE provoque, en parallèle de cette politisation des questions sociales, un déficit de lisibilité quant à leur définition à moyen et long terme.

This article considers the effects of the United Kingdom's exit from the European Union on the British welfare regime, in other words the country's social institutions, together with their effects and determiners. In particular, the repatriation of European competences, the integration and reform of the *acquis communautaire*, and the break from European institutions raise questions of governance and political equilibria, since these developments take place against a constitutional backdrop characterized by an absence of codification as well as the devolution of some executive and legislative powers to the British nations. After Brexit, the differentiation between the English, Scottish, Welsh and Northern Irish welfare regimes is therefore bound to increase. The United Kingdom will also have to come up with new mechanisms in order to mitigate regional inequalities, lest these keep growing. Outside of the EU, social rights are no longer protected by the European Court of Justice, and are back within the remit of parliamentary sovereignty. The British welfare regime is thus more than ever subjected to conjunctural balances of power, these being marked, by, among other things, the temptation of

power concentration in London, the conservative inheritance in terms of social policy, and logics of territorial differentiation. Last but not least, the process of exiting the EU provokes, jointly with its enhanced politicization, a lack of visibility as to the definition of British social policy in the medium and longer term.

INDEX

Keywords : social policy, Brexit, welfare state, European Union, devolution

Mots-clés : politiques sociales, Brexit, welfare state, Union européenne, dévolution

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Reframing Regulation: ‘Privatisation’, De-democratisation and the End of Social Protection?

La Réglementation réformée : « privatisation », déficit démocratique et fin de la protection sociale ?

Steve Tombs

Introduction

- 1 Since 2010, what had previously been New Labour’s approach to business regulation – ‘better regulation’ (who could possibly object?) – has become turbo-charged under conditions of ‘austerity’, an umbrella term commonly used to capture reductions in public spending in the UK, legitimised ostensibly as a fiscal and economic response to the financial crisis of 2008/09, but which cohered with Conservative party political commitments to shrinking the welfare state and public services. ‘Better regulation’ has in effect meant ‘less regulation’: it is a formal policy shift from enforcement to advice, a concentration of formal enforcement resources away from the majority of businesses onto so-called high risk areas, and consistent efforts to do more with less.
- 2 In the context of the onslaught on public services and their regulation, fire protection has been particularly vulnerable: in December 2018, HM Inspectorate of Constabulary, Fire and Rescue Services reported that fire safety inspections across England had fallen by 42% since 2010/11 – a reduction worth bearing in mind in light of the fire at Grenfell Tower in June 2017 which killed 72 people and devastated the lives of many more.¹ Perhaps most alarmingly, a National Audit Office report noted that the government had “*reduced funding most to fire and rescue authorities with the highest levels of need....as defined by the social and demographic factors.*”² In other words, the cuts to fire and rescue services have fallen hardest on the poorest – just like all austerity cuts³.
- 3 But this is not simply a sorry tale of anti-regulatory zeal, of austerity and cuts, of the non-enforcement of regulation, nor simply of the broader undermining of social

protection. Rather, this is about a process of the long march of profit-seeking institutions through what was public service and public provision – a process characterised by privatisation, marketisation, de-democratisation and de-regulation for the business world. Thus, the austerity policies implemented from 2010 onwards are not simply to be understood as economic necessities nor as opportunities to advance Conservative social and labour market policies, but are to be understood within this wider framework of the neoliberal transformation of services of public interest.

- 4 In what follows I focus upon the central role that regulatory institutions play in public provision in the form of social protection – protection, that is, for communities, workers and the environment from the destructive effects of economic activity, ostensibly achieved through regulation and its enforcement. These are relatively ignored areas of academic scrutiny – a research myopia that has only been accelerated by the march of neo-liberalism through our institutions, not least academia.⁴
- 5 The focus here is upon the effects of both ‘better regulation’ and austerity as political initiatives, each fuelled by and furthering neo-liberalism and their effects upon the capacities of regulators to undertake that with which they are formally charged – enforcement of law with respect to business. Alongside this, and again in the contexts of both better regulation and austerity, the article examines how private organisations are increasingly encroaching upon the public provision of social protection – through infecting the ethos, intervening in the practices and formally usurping some of the roles of public regulators. It is argued that these are processes of de-democratisation.
- 6 I do so in particular through a focus upon dynamics at local state level, drawing upon qualitative data gleaned from those at the front-line of local regulatory enforcement – Environmental Health Officers – a group who have been virtually entirely absent from social scientific research in general, and not least that focussed on ‘policing’, regulatory enforcement and public service provision. My geographical focus here is on Merseyside, a sprawling but relatively poor conurbation in the North-West of England.
- 7 Finally, some of the effects of these processes are examined through a focus upon the fire at Grenfell Tower, which killed 72 residents in a relatively poor West London housing estate in June 2017. The links between the less visible decline of social protection documented in this article, their de-democratising effects, and how Grenfell was politically and socially produced are considered.

Making ‘Better Regulation’

- 8 In 2004, New Labour’s Chancellor of the Exchequer Gordon Brown established the Hampton Review, with a remit to reduce regulatory “*burdens on business*” across all (63) major, national regulators, as well as 468 local authorities.⁵ It was to be a key moment in Labour shedding its image as an anti-business, pro-regulation party, instead embracing business-sympathetic, pro-entrepreneurial, anti ‘red-tape policies which benefit New Labour in government.’⁶
- 9 Hampton’s subsequent 2005 report – *Reducing Administrative Burdens: Effective Inspection and Enforcement* – proved to be the consolidation of ‘Better Regulation’. Combining ideological attacks on regulation *per se*, undermining the role and capacity of regulators, and engaging in pro-business legal reform⁷, it produced significant

reductions in all forms of enforcement activity across a swathe of national and local forms of regulation.

- 10 By the General Election of 2010, much in the regulatory landscape across Britain had been transformed. Moreover, in the years immediately preceding the Election, the financial crisis had erupted, resulting in massive bailouts of banks by the state and a tide of criticism of the level of regulation of the financial sector. Yet, quite remarkably, the political consensus, at least in Britain, remained that business was *over-regulated* – and all three mainstream political parties campaigned on manifestos to further reduce regulation. The five years of Coalition Government which followed went on to act on that commitment with a feverish intensity. Nor did the post-2015 Conservative government relent on its attack on regulation and enforcement – its anti-regulation practice, if not rhetoric, barely changed in the wake of Grenfell.
- 11 At national and local levels, then, across a swathe of areas of business regulation, on virtually every indicator – be this inspections, all forms of enforcement action or prosecutions – one finds significant and consistent downturns in regulatory activity. These trends were clearly evident from 2004 onwards,⁸ and then again as marked, if not exacerbated, in the post austerity period from 2009/10.⁹ What we see in these trends in enforcement data – across environmental protection, fire protection, food standards, health and safety, minimum wage, pollution control and trading standards – is staggering in that they all follow the same trajectory and, this article argues, are all effects of the same processes, that is, the effects of the ‘better regulation’ agenda which began under New Labour, which was pursued further under the Coalition from 2010 onwards, albeit latterly overlain by the effects of austerity.

Austerity, ‘Cuts’ and Local Regulation

Effect of austerity on local authorities

- 12 From 2009/2010, local government funding from Westminster came under pressure. Indeed, it soon became apparent via analyses of the distribution and impacts of these cuts that they impacted most heavily upon poorer Local Authorities:

Councils covering the 10 most deprived areas of England – measured according to the index of multiple deprivation – are losing £782 on average per household, while authorities covering the richest areas are losing just £48 on average. Hart district council in Hampshire, the least deprived local authority, is losing £28 per household, while in Liverpool District B, the most deprived area, the figure is £807.¹⁰

- 13 One of the most deprived regions in the UK is Merseyside – and this section draws upon a case study of regulation and enforcement in the local authorities which make up this region. Merseyside is a populous conurbation: the combined population of the five local authorities¹¹ under examination here is 1.4 million. There are some 40,000 businesses registered across these authorities. Merseyside is also one of the poorest regions in England, if not the poorest. On the Index of Multiple Deprivation (2015), Knowlsey is the second poorest local authority area in England, Liverpool the fourth poorest. Residents across all five local authorities are particularly reliant upon the local state for a range of welfare, social and public services, as well as employment opportunities, so that changes in any of these impact disproportionately upon local people, as residents, consumers, and workers.¹²

- 14 The focus in the case study is on three functions of Local Authority Environmental Health Officers (EHOs) who, through their respective specialisms, enforced law relating to food safety, which is enforced entirely at local level, and occupational health and safety and pollution control, each of which involves a division of enforcement responsibilities between local authorities and national agencies (The Health and Safety Executive and the Environment Agency, respectively).
- 15 In a series of interviews with 35 EHOs across Merseyside,¹³ during 2014-15, the strongest, most consistent theme to emerge focused on ‘the cuts’: these had clearly begun to bite, in ways that threatened workers, consumers and communities. Typical indications were thus: “*at present, we can’t meet our statutory duties*”; “*to be honest we’re now doing statutory stuff only*”; “*there’s nothing left to cut now*”; “*there is no padding left, we’re below the statutory minimum ... there are no areas of discretion left*”; “*where we are now, we’re at the point where worker safety is being jeopardized*”; “*it’s going to come to the point where it’s going to affect the residents, the local population; in many ways we are at that point now, public health and protection is being eroded*”; and, most tellingly perhaps, “*we’re at the point where there is no flesh left, this is starting to get dangerous, a danger to public health*”. There are various dimensions to these cuts and their relationship to wider pressures on local authority enforcement against the private sector – which are worth greater exploration in the context of this paper.

Staffing

- 16 Most starkly, staffing levels across each of these three functions across all of the local authorities had, virtually across the board, been radically reduced. It is worth noting the absolutely low numbers of staff is at issue here, in any authority in any year, but notably by the final year for which data is provided, that is, 2017. At its most extreme, by April 2017, Knowsley had no dedicated pollution control EHOs, and neither Liverpool nor Sefton had any dedicated health and safety EHOs. It is little wonder, then, that during interviews EHOs expressed remarkably similar views, to the effect that local authority enforcement capacities had been so undermined that public health and safety was endangered. In terms of EHO staffing in the five Local Authorities, there emerged, as indicated, a remarkably consistent picture. In every Local Authority, EHO numbers had fallen significantly between April 2010 and April 2015. Overall, total numbers across the three functions fell by over 52% – from 90.65 Full-Time Equivalents [FTEs] to 47.78 FTEs. The declines were across all functions and Authorities, with health and safety EHO numbers falling most starkly; indeed, in two authorities, Liverpool and Sefton, by 2015 there were no dedicated health and safety inspectors – food EHOs said they would “*keep an eye out*” for health and safety issues. At the same date, there were no pollution control EHOs in Knowsley.

Increased Obstacles to Enforcement

- 17 With fewer staff, it is hardly surprising that many interviewees raised the issues of a long-term decline in the number and duration of inspections, a long-term decline in the use of formal enforcement tools, and a decreasing use of prosecution. On the latter, another clear message from the data was of increasing obstacles to the ability to prosecute. The latter included: a lack of staff time; fear of losing cases, and ‘wasting’

precious resources on them; lack of support from Legal Services departments to prosecute; and an increased political risk (“flak”) in prosecuting. Moreover, these types of responses are indicative of a political context for regulatory enforcement where the very idea of regulation is under attack, and are a useful illustration of how discourses and policies at national level can translate into barriers to enforcement at local levels. What appear to be quite mundane, technical changes – in budgets, staffing, activities – are at the same time part of a wider political project. If ‘better regulation’ meant achieving deregulation, then austerity increased the opportunities for so doing significantly.

A Loss of Expertise

- 18 Reductions in staff also meant the loss of a particular kind of resource, that is, expertise and experience: redundancies did not only mean that staff were not replaced but this also entailed a loss of specialist expertise, alongside pressures for regulators to become generalists. As one respondent put it, “*it’s the experienced staff who have gone, so we have lost numbers and expertise*”. In fact, the shift from regulators being specialists to generalists was one consistent theme across the interviews, referred to by numerous respondents and in every authority: “*People have had to become generalists*”; “*most of them are just thankful they’ve still got a job*”.
- 19 Of course, such dynamics of broader ranges of competence being expected from staff in the contexts of organizational pressures (external and internal) is not confined to this context – indeed, it would be familiar to the readers of this journal who work in education or academia, where teachers are increasingly expected to be generalists across subjects, actively researching and generating income, engaged in impactful work and public engagements, and undertaking a range of administrative tasks, whilst performing pastoral and an increasing range of non-teaching but student facing roles.

A Lack of Training

- 20 Moreover, the loss of staff combined with a shift from a specialist to generalist inspection focus had made re-training necessary. However, another clear theme to emerge from the interviews was of declining opportunities for training at the time when it was most needed. As one Regulatory Services manager put it, “*We have a training budget, but it is now business hardened*” – by which he meant that there was “*little access*” to training, “*except to free online courses*”. An EHO translated this into the effects on an individual: “*I used to go on 6 to 10 courses a year, now perhaps one or two, I’m supposed to do 10 hours of CPD [Continuous Professional Development] a year but am struggling to manage that*”.

The Reach of the Private Sector into Public Service

- 21 Alongside the resource constraints within which Local Authorities are struggling to meet their statutory duties as regulators is a related development – the creeping influence of the private sector in those regulatory efforts. Here we find clear instances of austerity as a key vehicle for further neo-liberalism – and, in their combination, austerity and neo-liberalism are changing the role of local regulation and enforcement,

perhaps irrevocably. This not only undermines the idea that regulation is something which is aimed at controlling business, but it also creates an increasing democratic deficit, as public services designed for social protection come under ever increasing private influence.

Educating EHOs

- 22 We can see the creeping influence of the private sector in changes to the education of EHOs. Such education is crucial not simply for its formal substance but for the ethos and priorities of the profession which are shaped through it.
- 23 EHOs attain professional status through a University degree course accredited by the Chartered Institute of Environmental Health (CIEH). In 2011, the curriculum was overhauled, partly, in the words of one interviewee, a programme leader of one such course at a North West University, to reflect *“the shift in the profession from not being seen as inspection focused”*. In the words of another respondent, a student EHO, *“CIEH is increasingly making the content of degrees more private-sector friendly”*. This process had already begun as a result of Local Authorities’ inability to offer paid placements for students, while students require placements in order to complete the main assessment on their degree course. Several respondents said that local authority-funded students simply no longer exist – the one student EHO of the panel was working in the authority part-time, unpaid. More commonly, since students still have to undertake a placement, they now take these where they can be paid, or at least receive expenses, that is, in the private sector – Asda, Sainsbury’s, Tesco’s were all mentioned as significant sites for such placements in the food sector. This also means that the values and perspectives of the private sector (the regulated) are prioritised for the student EHO over those of the regulator. In such subtle ways are the mind-sets and thus practices of a profession shifted.

Forms of Privatisation

- 24 When respondents were asked where they thought their service might be in five to ten years, responses were a variation on a theme, encapsulated pithily by the response, *“I don’t know if I’ll be here in one year let alone five years”*. Those who expanded upon this rather dis-spirited response indicated that the function would become increasingly subject to market forces and logics, with reforms taken towards partial (through outsourcing) or full privatisation, the latter being the wholesale ownership of functions by private companies. Such observations were couched in the context of more general prognoses of how local authorities would respond to the pressures of funding cuts¹⁴.
- 25 Such indications are hardly pure speculation. The wholesale outsourcing of regulatory functions – contracting these out to private contractors in a prefiguration of wider privatisation – has been realised in two local authorities. In October 2012, North Tyneside Council announced the transfer of 800 employees to Balfour Beatty and Capita Symonds. Then, in a much bigger contract, in August 2013, the London Borough of Barnet saw off a legal challenge to a contract to hand over its services to two wings of Capita, under what has become known as the ‘One Barnet’ model. Business services – estates, finance, payroll, human resources, IT, procurement, revenues and benefits administration, and customer and support services – have been outsourced to Capita in

a ten-year contract worth £350m. A range of other services – including regulatory services – were contracted to its subsidiary Capita Symonds, in a £130m contract, also for ten years. From January 2016, Burnley Council’s environmental health services were outsourced to Liberata.

- 26 These wholesale shifts from public to private provision are the mere visible tip of a significant iceberg. Councils in Bromley, Chester West, Cheshire, and Wandsworth have all publicly considered wholesale privatisation of regulatory services. Moreover, recent research by the New Economics Foundation for the Trade Union Congress calculated that, “*Environmental and regulatory services is the sector with the second biggest proportion of expenditure paid to external contractors, at 44 per cent*”,¹⁵ second only to social care. The arrangements under which this outsourcing proceeds are complex and opaque, confounding accountability and often even transparency under clauses of ‘commercial confidentiality’, and include diverse arrangements such as the use of Strategic Service Partnerships (SSPs), Joint Venture Companies (JVCs), shared services, and collaborative outsourcing.¹⁶

The Primary Authority scheme

- 27 The transformation of social protection within the broader context of the neo-liberal transformation of welfare states is not simply about non-enforcement – it also involves a concerted effort to change the relationship between the state, the private sector and regulation. Indeed, this changing relationship is increasingly one in which the private business, ostensibly the object of regulation, becomes a key vehicle in that regulation. A paradigmatic instance of this is being achieved through the Primary Authority scheme, itself illustrative of how the economics and politics of Better Regulation have combined to produce a fundamental shift in the practice and principles of regulation and enforcement. The Primary Authority (PA) scheme was introduced by the Labour Government in 2009, but given considerable impetus by the Coalition Government from 2010, notably following the establishment of the Better Regulation Delivery Office (BRDO) in 2012, for which oversight of the scheme was a key priority.
- 28 According to the BRDO, the scheme;
- allows businesses to be involved in their own regulation. It enables them to form a statutory partnership with one local authority, which then provides robust and reliable advice for other councils to take into account when carrying out inspections or addressing non-compliance. The general aim is to ensure that local regulation is consistent at a national level, but sufficiently flexible to address local circumstances. The business can decide what level of support it requires, and the resourcing of partnerships is a matter for the parties concerned. A primary authority can recover its costs.*¹⁷
- 29 When this statement was issued, in April 2014, 1500 businesses had established PA relationships across 120 local authorities. The PA scheme has mushroomed in recent years. By 27 March, 2017 there were 17,358 such relationships across 182 authorities. In a prelude to *The Enterprise Act 2017*, the Government stated that “*The number of businesses in Primary Authority is expected to increase from 17,000 to an estimated 250,000 by 2020 and simplification of the administrative arrangements for the scheme is required to support this expansion*”.¹⁸ PA schemes apply across a vast swathe of areas of regulation, but their main areas are pollution control, occupational health and safety and other local environmental health enforcement areas, such as food safety, trading standards, fire safety, licensing, petrol storage certification and explosives licensing. It allows a

company – and, since April 2014, franchises and businesses in trade associations – operating across more than one local authority area to enter an agreement with one specific local authority to regulate all of its sites, nationally. So, a supermarket brand like Tesco’s may have stores in every one of the local authorities in England and Wales and, under the PA scheme, it can reach an agreement with one local authority to regulate its systems across all of its stores in every local authority for complying with a relevant body of law – occupational health and safety or food hygiene, for example. This guarantees a homogeneity of regulatory treatment – often, a homogeneity of regulatory acceptance and tolerance – across geographical areas.

30 To regulate its systems, the company makes a payment to the local authority, agreed through contract. It should be immediately clear that this structure through which contracts are agreed enormously favours the businesses – these are few as opposed to the many local authorities who want the contract and the associated economic benefit from the business, so that such highly unequal terms of trade should be thought of as a distorted market of few sellers and many buyers.

31 Aside from the power to impose more rather than less favourable contractual conditions, the key benefit of the Primary Authority agreement *per se* for the company is the absence of effective oversight in the vast majority of its sites. These can be visited in other areas, but any enforcement action needs to be undertaken through the local authority which is the PA. Should a local authority wish to prosecute a company in a PA agreement, for example, it can only do so with the permission of the local authority which is party to that agreement. Then, under the scheme, any consideration of a potential prosecution must entail prior notice being given to the company; the company can then request that the matter be referred to the Better Regulation Delivery Office (BRDO) for determination.¹⁹

32 The Government’s directives to local authorities leave no doubt that the scheme is a way for enforcement action against business to be reduced:

Primary authorities generally report low levels of enforcement action against the businesses they partner with. In the event that an enforcement officer decides to take action against a business that is in a direct partnership with you, or covered by a co-ordinated partnership with you, he or she is required to notify you via the Primary Authority Register. As a primary authority you can direct against (block) an enforcement action being taken against the business when you have issued relevant Primary Authority Advice and the business was following it.²⁰

33 While civil servants at the Better Regulation Delivery Office (BRDO) stated²¹ that the PA scheme is “a big success”, it is proving highly problematic for local regulators, even as they sought to enter into PA agreements in order to generate income – “this is why we are really pushing the PA scheme”, one local authority interviewee told me. But as another respondent put it, while “in theory it could work well, in practice it protects large companies from local authority enforcement”. Others noted similar problems with the scheme, for example: “under PA they [companies] only have to demonstrate the existence of systems”, referring to paper-based plans and methods rather than actual practices; Local Authorities have a “disincentive to take enforcement action because PA schemes are a source of income”; PA schemes “protect companies from inspection and enforcement”; they operate “in my experience at the level of a tick-box [exercise] rather than real co-operation or taking responsibility”; PA schemes “work on paper only, there are hundreds of businesses in the scheme and I can’t see how these can all be genuine”.

- 34 In general, then, as one enforcement officer noted, “*Primary Authority has had a real impact on what we can and cannot do*”; the claim was made at length that businesses “*pick and choose*” which local authorities to enter into PA agreements with, with the insistence that they will pick the “*no-one knows anything authority*”, that is, local authorities with no experience of the particular industry or business. Moreover, in the processes of negotiation to draw up the contract which represents the PA agreement, local authorities are at a distinct disadvantage – there is an asymmetry of expertise²² between local authority negotiators and private companies in such contractual negotiations, as well, of course, as a structural power accruing to private companies operating across numerous authorities to drive down the terms of contract with any one local authority.
- 35 The Primary Authority scheme, then, represents a fundamental shift in the nature of local regulation and enforcement. It is a classic vehicle of ‘Better Regulation’, since it reduces inspection, builds in checks *against* regulation and enforcement, exacerbates the power imbalance between regulators and regulated, and operates on a marketised, contract-based system. It is crucially indicated in the demise of social protection – a demise gruesomely illustrated by the fire at Grenfell Tower which came at the end of the period of research discussed in this paper, and which horrifically illustrated many of the themes generated through that research.

The Grenfell tragedy: from lack of regulation to loss of lives

Grenfell and the Shield of Primary Authority

- 36 Understandably, the fire at Grenfell generated a torrent of media, public and political attention. But within this torrent of 24-hour, 7-days-a-week, 52-weeks-a-year comment, the role of Whirlpool and certainly of its Primary Authority, Peterborough City Council Trading Standards, received what ranged from little to no scrutiny.
- 37 Within days of the fire, with the national and local state still absent from the scene, as controversy around the numbers of lives lost raged, and as mounting evidence of the public and private cost-cutting involved in the fatal refurbishment of the Tower spewed into the public domain, the Metropolitan police (the Met) stated that they suspected the immediate cause of the fire to be a Hotpoint fridge freezer. As part of their press release in response to this, the manufacturers of the Hotpoint brand, Whirlpool, stated that,
- We are working with the authorities to obtain access to the appliance so that we can assist with the ongoing investigations. Under these circumstances, we are unable to speculate on further details at this time. We are addressing this as a matter of utmost urgency and assisting the authorities in any way we can. We will provide additional updates as our investigations progress. The government said that consumers do not need to switch off their fridge freezer pending further investigation.²³
- 38 It is of interest that neither that brand name nor the manufacturer have featured very much at all in the mass of coverage around the fire and its aftermath.
- 39 It is also worth noting that the consumers’ organisation *Which?* and the Chartered Institute for Trading Standards (CTSI) had been campaigning for several years for a ban

on plastic-backed electrical goods. Whirlpool and other manufacturers had opposed this. In this opposition, Whirlpool had been consistently supported by Peterborough Trading Standards – on which more, below.

- 40 When the Phase 1 report from the Public Inquiry was published, some 28 months after it occurred, Sir Martin Moore-Bick, the Chairman of the Grenfell Tower Inquiry, concluded that, “*Although some questions remain unanswered, the evidence, viewed as a whole, leaves me in no doubt that the fire originated in the large fridge-freezer*”.²⁴ Wherever the truth lies – and on balance it seems that the fridge freezer was the trigger for the atrocity – there is a backstory to the fridge freezer and Whirlpool: one of corporate power, regulatory failure and the victimisation of consumers.
- 41 In August 2016 – ten months before the Grenfell Tower fire – that latter fire was chillingly foretold in a relatively unreported event. In a tower block in Shepherds Bush Green, West London, just over a mile from Grenfell, a fire caused the 18-story tower block to be evacuated. No-one was injured but images of the tower block burning closely resemble those of Grenfell.²⁵ Moreover, the cause of the fire was found to be a faulty tumble drier, the Hotpoint brand made by Whirlpool. In fact, having acquired Indesit (and thus all of its brands, including Hotpoint) in 2014, Whirlpool began a series of appliance testing which identified faults in three brands of tumble driers, namely Hotpoint, Indesit and Creda, whereby a build-up of fluff could lead to fires²⁶. Parliamentary hearings later revealed that the problems with some Whirlpool driers had first come to light in 2005, and the Chartered Trading Standards Institute believed they should have been recalled by 2006²⁷. In November 2015, Whirlpool estimated about 3.8m tumble dryers were affected by the fire risk. Owners were told to contact Whirlpool for a repair, a response supported by Peterborough Trading Standards, its regulator under the Primary Authority scheme. Despite some political and consumer group pressures, it perfectly legally resisted calls for a product recall. Owners were told they could use the dryers, but should be in attendance whilst in use, and not to use the timer button. In fact, it was only in February 2017, following intense pressure from the London Fire Brigade, that Whirlpool advised its customers to unplug and not to use the dryers.
- 42 In September 2017, an inquest found that a fire in a flat which killed two men in Conwy county in October 2014 was most likely caused by a fault in a Whirlpool tumble dryer. The coroner concluded, “*On the balance of probabilities, the fire was caused by an electrical fault in the tumble dryer in the laundry room of the flat*”. The one occupant who survived said the dryer had been switched off at the time of the fire.²⁸
- 43 Alongside this emerging evidence of the hazards associated with some of its tumble dryers, Whirlpool were also more broadly associated with safety problems with its white goods in the UK. In November 2017, the London Fire Brigade responded to a Freedom of Information request revealing that white goods had triggered 2,891 fires in houses, flats and public settings such as care homes and nurseries, from January 2009 to September 2017. These had led to 10 deaths and 348 injuries. Brands under the Whirlpool umbrella accounted for 895 fires – the highest of any manufacturer.²⁹
- 44 Such data helps to explain the establishment, in 2017, of a House of Commons cross-party committee on *The Safety of Electrical Goods in the UK*, which produced its report in early 2018. Aspects of the hearing were astonishing, and the report itself damning. On the issue of Whirlpool’s dangerous tumble driers in particular, the Select Committee’s

Report found that there were 5.3m driers affected and that only about half had been repaired.

- 45 The report also noted that cuts to local government budgets had affected local Trading Standards' abilities to deliver consumer protection services, so that

[b]etween 2009 and 2016 total spending on local Trading Standards fell from £213m to £123m... This has led to a reduction by 56% of full-time equivalent Trading Standards staff between 2009 and 2016.³⁰

- 46 It further questioned "*the independence of... Primary Authority partnerships... because they provide both advice to local businesses whilst also ensuring enforcement*",³¹ noting that it was

shocked to hear that Whirlpool and Peterborough Trading Standards continued to advise consumers they could use defective appliances, even after a major fire and in the face of criticism from consumer safety organisations. The advice to consumers to attend appliances while in operation was unrealistic and – given that a fire occurred when this advice was followed – patently inadequate.³²

- 47 This latter relationship – between Whirlpool and Peterborough Trading Standards – is one of the crucial aspects of this whole episode.

- 48 The broader fallout from Grenfell therefore illustrated that it was in effect the shield of Peterborough Trading Standards, through their contractual Primary Authority agreement, which allowed Whirlpool to continue to refuse to recall products they knew were not fit for purpose and indeed posed a proven safety risk, which had led to fatalities. Regulation, ostensibly in existence to protect consumers, residents, workers and so on, is being transformed into a form of state-corporate collusion by contract which protects the private sector from law enforcement.

"We're dying in there because we don't count"

- 49 So spoke one teenage resident on the morning of 14 June 2017 as he stood outside the still burning shell of Grenfell.³³

- 50 Both the fire and the 'not counting' are partly the outcomes of the economic and political initiatives outlined in this paper. Once regulation is viewed as hindering business, and thereby economic growth, whilst at the same time a drain on already stretched state resources, then the momentum against regulation is accelerated. In some areas such as those at issue in this paper, much less visible and of lower profile than, say, financial and market regulation, the tendency to see regulation as interference becomes virtually unstoppable – and once less state regulation and enforcement is to be preferred, then how little is little enough?

- 51 As has also been indicated in this paper, the rationale for regulation has shifted under 'Better Regulation' – from one ostensibly aimed at delivering some level of social protection to one whereby regulation is vehicle for private growth and profitability, where regulators promote and protect the interests of economic actors. At local levels, this shift has been stark, with local authorities increasingly servicing private business rather than providing public service, and even with public provision being replaced wholesale by private regulation of private capital. In other words, what is at issue here is not just reducing, but changing the shape and nature of local government even if any focus on local responsibilities for social protection is often absent from even critical analyses of this process.³⁴

- 52 The trends at issue in this paper, therefore, also amount to a process of de-democratisation. It is in this context of de-democratisation that Tenants' Management Organisations (TMOs), like the Kensington and Chelsea TMO, need to be understood. Tenants' Management Organisations were allowed in UK law from mid-1994, ostensibly to allow residents in council housing or housing associations to assume responsibility for their management. In fact, in breaking the management and financing of local housing from the local authority, for some commentators a TMO came to be best understood as an arms-length organisational arrangement within local neo-liberalism which breaks formal lines of accountability and undermines democracy.³⁵ And this is also the context within which we better understand both the conditions in which residents of Grenfell Tower and the Lancaster West Estate within which it sits lived and, most crucially, their relationships with the Royal Borough of Kensington and Chelsea (RBKC) Council and the Kensington and Chelsea TMO to which the Council had transferred the management of the borough's entire council housing stock, 9,700 homes, in 1996.³⁶
- 53 Stanning has argued that KCTMO was universally hated by those it housed across the Borough, a hatred which "goes beyond the usual suspicion of residents towards those who have power over them. KCTMO has for years been an unaccountable and deeply resented part of life for many Kensington and Chelsea residents".³⁷ This relationship is best characterised as one of contempt by the KCTMO for Grenfell residents,³⁸ nowhere better captured than in the refurbishment of the Tower which was ultimately to prove fatal for at least 72 of its residents – and the disastrous decision to clad the Tower "because it was an eyesore for the rich people who live opposite".³⁹ Such relationships typify wider processes of gentrification and social cleansing in many of the UK's inner cities, but most notably in London.
- 54 Formed in 2010, the Grenfell Action Group (GAG) joined with Unite Community Membership – formed by the trade union Unite to extend membership and organisation beyond workplaces – from 2015 principally as a result of concerns about the refurbishment of the tower block⁴⁰. In this context, the Group documented "threatening and intimidatory tactics" being used by the TMO and Rydon, the lead contractor in the Tower's refurbishment, to get access to flats – access which had been denied in response to what GAG saw as sub-standard and dangerous work. The Group set out a long list of residents' "primary concerns with regards TMO/Rydon", at the top of which was the "(l)ack of meaningful consultation with residents and feeling of total disregard for tenant and leaseholders' well-being".⁴¹ Safety concerns relating to the lack of fire safety instructions, power surges, the single staircase egress in the event of a fire and the exposure of gas pipes within the flats as a result of the refurbishment were commonly expressed.
- 55 The starkest of these warnings had been published in November 2016, under the soon-to-be-proven prescience of a headline which read *KCTMO – Playing with fire!*, which included the following passage:
- It is a truly terrifying thought but the Grenfell Action Group firmly believe that only a catastrophic event will expose the ineptitude and incompetence of our landlord, the KCTMO, and bring an end to the dangerous living conditions and neglect of health and safety legislation that they inflict upon their tenants and leaseholders. .. [O]nly an incident that results in serious loss of life of KCTMO residents will allow the external scrutiny to occur that will shine a light on the practices that characterise the malign governance of this non-functioning organisation...⁴²*

56 Such chillingly prescient words were ignored, as virtually all of the claims, warnings, concerns of local residents were ignored by a Council who not only did not represent them but would have preferred to have them out of the borough, allowing luxury developments for the world's super-rich to expand north-westwards. This is almost democratisation in action – the GAG was attempting to reinject democracy into a context where it was absent, and even such stark whistle-blowing was denied legitimacy. While it was the fire which caused loss and devastation of lives, it was in many respects a class-contempt which was the cause of this outrage – a contempt that continued in the wake of the fire through the initial absence of the national and local state, and then through the lies, broken promises, and half-truths which characterised the response of state actors and bodies when they did eventually arrive on the scene.⁴³

Conclusion

57 Social protection is a complex project, and one which, in Britain at least, has a very long history, dating back to the 1830s.⁴⁴ For most democratic states, it is also a key source of legitimacy. As this paper has indicated, however, it can be quickly undermined, if not dismantled. The combination of an undermining of the culture of, resources for and practices which constitute public regulation and enforcement have at the same time been intimately linked with a creeping involvement of private businesses in regulating private business – a process which is at best beset by potential conflicts of interest, at worst disastrous. This combination of trajectories cannot be said to have caused Grenfell of course – the atrocity has a much deeper and wider aetiology. But if contextual, and hardly proximate, they are a crucial part of its economic and social production.

58 Grenfell illustrates better than anything that the processes outlined in this paper do not amount to a story about rules, regulations or red tape. Nor is it about the juxtaposition of public versus private. Rather, this is a story about social harm and social inequality – lives lost and shortened, the health of communities, workers, consumers made poorer. It is a story about processes of de-democratisation, being heard, and an “*accountability vacuum*”.⁴⁵ It is a story about the concentration of wealth and power and the insatiable desire for more of each. It is a story about contempt for those who, in the eyes of the powerful and the rich, simply ‘don’t count’. It is a story about the intentional removal of social protection – and thus a story about avoidable business-generated, state facilitated violence: what Engels called over 150 years ago, “*social murder*”⁴⁶.

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ABSTRACTS

This paper considers how the re-framing of regulation, in ways that have allowed an inter-penetration of private sector mentalities and actors with state regulators, have combined in the UK to produce both a de-democratisation and the erosion of social protection. It does so through an exploration of the enforcement of law designed to regulate business. In particular, I examine enforcement and regulatory policy at Local Authority level under the guise of the Better Regulation initiative and, then, conditions of austerity. These contexts have produced the opportunities for reframed – that is, specifically, marketised – forms of regulation which prioritise the interests of business over social protection. The paper also argues that they have been crucial in producing conditions whereby the fire at Grenfell Tower must be partly understood – conditions of de-democratisation and the decline of social protection.

Cet article examine comment la réforme de la régulation au Royaume-Uni, dans le sens d'une interpénétration entre, d'une part, les mentalités et acteurs du secteur privé, et, d'autre part, les acteurs publics de la régulation, a produit un déficit démocratique et une dégradation en matière de protection sociale. L'article se concentre sur l'application de la législation destinée à réguler les activités commerciales, et en particulier sur l'application de cette législation et les politiques de régulation à l'échelle des collectivités locales dans le double contexte du programme baptisé *Better Regulation*, puis des mesures d'austérité budgétaire. Ce double contexte a favorisé des formes de régulation réformées – plus précisément marchandisées – qui font primer les intérêts marchands sur la protection sociale. Cet article montre également que ces éléments ont contribué à produire les conditions dans lesquelles l'incendie de la Tour Grenfell a eu lieu et qu'il doit au moins partiellement être analysé à l'aune d'un déficit démocratique et du déclin de la protection sociale.

INDEX

Mots-clés: déficit démocratique, application des lois, Grenfell, collectivités locales, secteur privé, politiques publiques, régulation

Keywords: de-democratisation, enforcement, Grenfell, Primary Authority, private companies, public authorities, regulation

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Finding the Eye of the Octopus: the Limits of Regulating Outsourced Offender Probation in England and Wales

À la recherche de l'œil de la pieuvre : la difficile réglementation de la complexité et des services judiciaires de probation après leur externalisation en Angleterre et au pays de Galles

Mary Corcoran

Introduction

- In 2013, the Ministry of Justice in the United Kingdom embarked on radical reform of the national probation service – in a policy known as Transforming Rehabilitation (TR) – by dissolving 35 public Probation Trusts and replacing them with 21 contract zones, operated by Community Rehabilitation Companies (CRCs) on a commercial, for-profit model. These CRCs ‘managed’ individuals who were sentenced to custody (including community supervision), and were assessed as posing ‘low’ or ‘medium’ risk to public safety. Clients deemed ‘higher-risk’ remained under the jurisdiction of a smaller National Probation Service (NPS) which stayed in public ownership. This was a classic private/public split, where the state remained responsible for ‘risky’ clients while the private sector secured business volume, allowing profit to be made by fee per client plus bonus payment if a client did not commit further crimes. In 2015, an oligopoly of eight consortia won all of the contracts to run probation services until 2022. By July 2019, a succession of parliamentary inquiries and regulator’s reports concluded that “mismanagement, risk taking, and the lack of properly considered planning has badly let down offenders”.¹ After five years of firefighting to maintain an evidently unsound structure, the end was precipitated by commercial failure: the liquidation of Working Links (which operated three contract areas) in Spring 2018, and confirmed when Interserve,

(which ran five contract areas under the brand, “Purple Futures”) went into administration in March 2019.

- 2 Shortly after, the Ministry announced the early termination of contracts (by 14 months) and the case management of clients deemed low and medium risk would return to the National Probation Service (NPS). This did not amount to the renationalisation of probation, as the revised model (Transforming Rehabilitation II (TRII)) was conceived along the same lines of competitive contracting, but with only ten contract lots on offer, which restricted competition and potentially made the state even more dependent on provider oligopoly. These proposals immediately aroused criticisms that the cosmetic changes would reproduce the same structural weaknesses as the original version. However, on June 11, 2020, the Secretary of State [hereafter Minister] for Justice made a statement to the House of Commons that all probation work was to return to the public, state-run probation service from June 2021. Community-based rehabilitative services (amounting to about a fifth of probation expenditure), which were previously undertaken by the private and charitable sectors, would revert to the state sector, along with the workforce of the private Community Rehabilitation Companies.² This renationalisation marked a full reversal of the Transforming Rehabilitation experiment.
- 3 From the very start of this affair in 2014, revelations of political incompetence and financial waste regularly reached the public domain via the findings of several parliamentary inquiries and regulators,³ but these scarcely disturbed the incumbent government, at a time when British politics was dominated by the Brexit question. At first glance, the lack of sanctions or political resignations for the momentous failure of TR provided prima facie evidence of the desensitisation of senior politicians to the constitutional obligations set out by the principle of Ministerial responsibility, and their sense of imperviousness to democratic accountability in the United Kingdom at present. (The retirement in 2018 of Michael Spurr, the Chief Executive of the National Offender Management Services (NOMS) and foremost civil servant with responsibility for probation at the time, was widely viewed as having paid a personal price for the failings of his political masters). Yet, this outward defiance of political and public disquiet did not fully prevent accountability structures from eventually providing some operational correctives and robust political counternarrative. Yet, prior to the dramatic climbdown of June 2020, legislators and regulators had been unable to prevent this unfolding “*policy disaster*”, and scarcely mitigated its worst effects.⁴ Throughout the lifetime of TR, regulatory mechanisms had seriously failed to hold government to account.
- 4 As there is voluminous commentary on the political and ideological rationales behind TR, the future shape of the probation service, and damage to the public interest as well as to probation staff, providers and clients, this paper will confine its focus to: (i) identifying the structures of accountability that were nominally in place to regulate and govern this policy; (ii) considering the robustness or weaknesses of those systems for eliciting transparency and accountability, especially given the complications generated by outsourced service markets; (iii) conclude with a discussion of the impact and limitations of regulatory interventions. Up to now, there has been little by way of explicit focus on regulatory systems and their role. This is not because of a lack of such systems. The UK has highly competent and sophisticated mechanisms for managing, steering, advising and eliciting accountability from those contracted to undertake

public works at macro (political), meso (operational) and local (quality assurance and performance) levels. The puzzle, rather, is why highly developed regulatory systems were apparently unable to fulfil elicit full accountability or make appropriate interventions to correct policy errors?

Accountability in outsourced public service markets

- 5 In public administration in the United Kingdom, systems of accountability derive from strong claims about the democratic imperative which informs the rules of transparency, regulatory fairness and political responsibility. This understanding of governance has in turn developed into a variety of more specific normative theories such as civil service independence, concepts of the public interest, or accountability for the decisions of actors acting for, or on behalf of, the state. “‘Accountability’ is a prerequisite to maintaining democracy in the Westminster system because it ties together the ‘doctrine of ministerial responsibility...which bind[s] ministers into supporting all aspects of government policy’” (otherwise known as collective responsibility) and “‘endows individual Ministers with political responsibility for the conduct of their department’”.⁵ However, from the 1990s, political scientists observed “‘the impact of a new accountability dynamics’” which followed “‘political and administrative reforms and developments that have resulted in changing modes of accountability across various levels of government within the UK’”.⁶ Public administration and service delivery involving commercial businesses as well as NGOs, outsourcing and privatisation, and the rise of mixed (commercialised) service markets in criminal justice, are making it more difficult to sustain consistent accountability, as there are far more actors and regulatory considerations in play. In parallel, the diffusion of regulatory responsibilities across state and non-state spheres, has necessitated the rise of disruptive new “‘modes of governance and New Public Management (NPM)... Increasingly there are managerialist, governance and regulatory perspectives of accountability. Thus, the very concept of accountability has become a contested one’”.⁷
- 6 Regulating outsourced public services in the UK (also called economic regulation) is a case in point where procurement of public services is now oriented towards market facilitation and management, supplanting traditional public sector management systems with New Public Managerialist (NPM) practices. Since 2011, public procurement practice in the UK has been based on the following core normative principles. First, there is the position that public infrastructures are best provided through market competition. Second, economic regulation should promote effective competition where this is possible, or provide a proxy for competition “‘where it is not meaningful to introduce competition’”.⁸ Thirdly, economic regulation should be a “‘critical enabler’” of infrastructural investment, meaning that regulation is positively disposed towards investors; and fourthly, regulation must provide the “‘right degree of clarity, certainty and consistency’” if investors are to be incentivised and if public and political confidence is to be maintained.⁹
- 7 This approach has further developed in a variety of more specific contexts, where, for example, the original regulatory framework, which was developed for transport, energy, or public utilities, for example, needed to be extended to ‘non-infrastructure sectors such as healthcare and criminal justice. Accordingly, the marketisation of erstwhile natural monopolies such as probation services necessitated the installation (or extension) of economic regulatory powers to these ‘markets’. Subsequently, “‘five

principles of good regulation” were formulated to “*inform*” both the design or reform of services, as well as to “*form the statutory basis of regulators’ duties*”. These five principles hold that any regulation should be transparent, accountable, proportionate, consistent and targeted.¹⁰ In the absence of political accountability, as in the case of TR, a sixth rule could be added, which is only tacitly assumed in the guidelines; that regulatory judgements ought to be independent.

- 8 What emerges are profound challenges for securing transparency in outsourced public service markets, in terms of establishing public rights of scrutiny, putting regulatory and reporting mechanisms in place, and keeping pace with fluid, fast-moving and changing configurations of supplier chains involving several state and non-state (business and NGO) actors in public contract delivery. These new conditions render the current hierarchical system of transparency obsolete, inducing new concepts of ‘accountability layers’ which start with “*basic answerability*”, build towards “*amendatory accountability*” (changing systems, processes or policies which have caused problems) towards “*accountability which would allow for the exposure of office holders to sanctions in cases of serious error*”.¹¹ Taking Miller and colleagues’ useful approach as a starting point, this article identifies how governance and regulation proved to be complicated projects with limited efficacy. The challenges to transparency seem to be threefold. Firstly, eliciting accountability within the political process; secondly, rendering non-state agencies accountable in the process of market regulation and thirdly; navigating system complexity in the design and implementation of the TR framework. These fields shall be analytically treated as discretely constituted by a distinct rationale or mission, set of internal procedures, formal and informal rules, and so forth. The discussion identifies the principal dynamics in their formation (the policy field, the market, the implementational field) and the subsequent influences in facilitating and implementing TR.

Political accountability in the policy field

- 9 We start with executive political authority, which in turn implies that the conventions of collective and ministerial responsibility ought to provide safeguards and constraints against acting beyond their powers or harmful executive action. This emphasis on political accountability becomes critically important for establishing the nature and source of responsibility for subsequent systemic deficiencies with TR. The impact of the work of parliamentarians exercising their powers of democratic scrutiny, mainly through the influential Justice Committee and Public Expenditure Committee of the House of Commons, is salient, and is discussed later in the paper. Given the opacity of decision-making processes with regards to TR, the analysis also draws on rare insider perspectives from within the Ministry of Justice.
- 10 By the consensus of the wide range of perspectives referred to in this article, TR is a textbook example of a policy which was implemented in the knowledge that its design, costings, funding, and delivery systems were deficient. The TR model which was launched in 2013 carried forward some of the original plans for a “*rehabilitation revolution*”,¹² but differed crucially in its object and implementation. The Green Paper on *Breaking the Cycle* (2010) was premised on addressing the:
- fundamental failing of policy [which] has been the lack of a firm focus on reform and rehabilitation, so that most criminals continue to commit more crimes against

more victims once they are released back onto the streets. The criminal justice system cannot remain an expensive way of giving the public a break from offenders, before they return to commit more crimes.¹³

- 11 Future reforms, therefore, would comprise “*an intelligent sentencing framework coupled with more effective rehabilitation*”, with the proposition that businesses, social enterprises, local authorities, and NGOs (third sector) would be contracted to provide programmes and services as agents of rehabilitation. In order to make room for this innovation “*a comprehensive competition strategy for prison and probation services*” (i.e. future outsourcing of public resettlement services would follow in 2011).¹⁴
- 12 There is insufficient space to recount the revision from a mixed market approach which “*continued to envisage a coherent and wholly public service*” to the later version where “*localism [and] the continuing centrality of public sector probation of the earlier period shifted dramatically to a form of heavily centralised contracting-out to the private sector*”.¹⁵ TR offered a seemingly comprehensive solution to a cluster of political exigencies including crime, chronic recidivism (reoffending), supposedly failing public probation (and prison) services, and the cost of crime, for example. The Probation Service was a more vulnerable political target for radical dismantling than more publicly visible services, such as prison or policing.¹⁶ Spending reviews (2010-11 and 2014-15) cut all public expenditure in the UK by 27 per cent. In order that the Ministry of Justice could adhere to heavy budgetary reductions, it became a political imperative to establish that outsourced probation could be ‘cost neutral’, i.e. pay for itself with savings accrued. Yet, some of these core premises were either wrong, or at best: “*highly questionable and evidence for them thin and lacking ... Like most politicians, Grayling avoided the salient issue on crime in our time: its collapse*”.¹⁷
- 13 These comments from the former Director of Finance for Prisons reflect a degree of animus for the legacy of Chris Grayling, Secretary of State for Justice (2012-15), who moved the legislation for part privatisation of the probation service, the Offender Management Act (2014).¹⁸ Grayling pursued probation reforms along the hardest of centralised, marketised lines with singular determination, contrary to the available evidence or advice of his officials and by circumventing protocols for signing off on the national implementation of policies.¹⁹ Trials of the programme and of the payment-by-results system which were held in two prisons (HMP Doncaster and HMP Peterborough) were terminated after interim findings reported marginal impact on reconviction rates, and questioned whether the model could be replicated nationally.²⁰ The Ministry was subsequently censured for making “*a mistake*” in proceeding with “*reforms without completing thorough piloting*”.²¹
- 14 More serious was the culture of secrecy, exemplified by the suppression of a risk assessment conducted by the Major Projects Authority in 2013.²² This body, which appraises cost and logistical risks for major government projects, placed TR at the highest levels of risk in several categories including estimations of an 80 per cent risk of unacceptable drop in performance and a 51-80% risk that the programme would not save public funds.²³
- 15 Interviews with legislators and senior civil servants at the Ministry during this period bring into sharp focus how overdetermined ministerial resolve can “*destabilise the system, knocking out the whole system of checks and balances*”.²⁴ Annison’s ethnographic research with Ministry of Justice officials revealed “*the monomaniacal fervour to get probation reforms through*”, and a culture of unrelenting pursuit of goals despite rational

grounds for doubt as to their viability.²⁵ Yet Annison shows the nuanced approach of public servants who balanced “*the delivery perspective*” with their traditional civil service code which constrained them from crossing into ‘political’ decision-making terrain. Julian Le Vay, an architect of prison outsourcing and enthusiast for competition, also witnessed at first hand the transition from reform to ideological mission:

There was a strong case for exposing some probation services to competition ... [but] ... The TR changes lack compelling rationale or evidence; are uncoded; require extremely rapid implementation of new, highly complex organisational and relational models for all participants simultaneously; use payment mechanisms that are entirely untested and carry major risks of unforeseen consequences; rely on new and untested suppliers; require high levels of competence in contracting and contract management that the [Ministry of Justice] has recently been shown to lack; and are being implemented at breakneck speed for no reason – and there appears to be no recovery plan if TR goes badly wrong.²⁶

- 16 Throughout the period of privatisation/outsourcing of probation, there was always a divergence between ideology and the capacities that were achievable given existing economic and political constraints. This does not reflect a simple technocratic/political divide, as throughout the lifetime of the programme to the present, TR was a contested field where technocracy and politics combined and divided, sometimes along unfamiliar lines, sometimes creating unexpected alliances and outcomes in others. Nevertheless, the policy can be viewed as an example of hubris (generated at the behest of an intractably punitive, pro-free market, right-wing Minister), which created the context for later confrontation with his own officials, with parliament, with civil society, and eventually with the Community Rehabilitation Companies and subcontractors, including charities, who were servicing the TR system.
- 17 The “*rushed implementation*” of TR introduced significant risks that its chosen commercial approach “*left it badly placed to manage.*”²⁷ The consequences are far-reaching, so we now turn to examine questions of transparency, leading to risk management and damage limitation exercises.

Accountability and the probation market

- 18 Perspectives on the relationship between public service markets and accountability fall into three broad positions: the first is that transparency is a functional necessity for making markets work – by facilitating the exchange of accurate information, which in turn underpins informed decisions and competitiveness – and therefore compliance is in actors’ self-interest. The question for this approach is whether regulatory accountability is as effective, or necessary, as free (i.e. unregulated) market forces can be. Whilst deregulation is often spoken of as a means to achieving free market ends, these means can generate conflicting outcomes which merit closer analysis when applied to probation service markets. Firstly, outsourced public services are not fully competitive markets, but quasi-markets, that is, artificial economic hybrids that are partially protected from full exposure to supply and demand. Those favouring the discipline of free markets find fault with the impurity of quasi-markets on the grounds that they increase the likelihood that the government will step in to protect strategic public services, thereby creating actor complacency, leading to market failures or operational laxity.²⁸ By this logic, however, transparency ought to be even necessary in

the case of such monopsony (a market situation in which there is only one ‘customer’ – the state, in this case) or oligopoly (dominance by a few market leaders), yet market homogeneity is rarely a target of regulatory scrutiny.

- 19 A second perspective reflects the status quo whereby regulatory structures are thought to be pragmatic necessities for protecting public assets as well as the public interest, but this duty must be balanced against unjustified disruption to the market or to market actors. This paper has already discussed this approach, so will not elaborate further.
- 20 A third position correlates state-created market building in offender resettlement with corporate welfarism in the guise of privatisation and outsourcing.²⁹ In denaturalising claims that healthy self-interest incentivises market actors to abide by ‘light touch’ or self-regulation, Ludlow remarks that free markets are misnomers in at least two senses. The first is that the “free” market does not go unregulated; it means regulated in ways to which most neo-liberals do not object.... The second sense...is that where public services are subjected to competition, the market needs to be created and cultivated by its single customer, the state: a public service market does not spontaneously arise.³⁰
- 21 Another version of this critique inverts the “*fabricated image of a lazy state and a dynamic private sector*”, pointing instead to the state’s largesse in creating de-risked rent-extraction opportunities where the public interest ultimately loses out: “*when the appropriation of rewards outstrips the bearing of risk in the innovation process, the result is inequity.*”³¹ Aspects of each of these arguments manifested in the internal incoherence of the market model for probation, the features of which are discussed below.
- 22 But first, to reprise the rationale for adopting a market model, it is official policy that private sector companies can be a highly effective option for public service delivery, but their performance depends on the competitive pressures of the market. It is believed that they perform at their peak when there is a financial incentive to do so, but that more than one provider should ideally be contracted to perform similar tasks to maintain competitive discipline. Competition, in turn, introduces a source of friction into the operation of the sector in question. The commissioning framework for probation, accordingly, comprised potentially conflicting objectives. The first entailed attracting providers with significant resources, up-front capital and large-scale operational capacity, and therefore signalling that large corporations or ‘supercharities’ could be preferred Lead or Prime contractors. This model envisaged a classic, trickledown subcontracting pyramid where the prime contractor (or contractor consortium) handed out subcontracts to smaller, local outfits who would deliver the programmes, while taking overarching control for delivering the contract. At the same time, however, the Ministry also wanted the competitive benefits of “*a market model that supports a wide range of lead providers, and partnerships which*”³² “*will encourage providers to draw on local expertise with the voluntary and community sectors and local delivery agencies*”³³ by introducing a widespread programme of competition and inviting “*providers from the private and voluntary sectors to deliver the majority of current probation services*”.³⁴

Squeezing out public and charitable sectors

- 23 The early phase of preparing the market for probation (2012-13) was structured around commitments to creating diversified and inclusive markets which would comprise “a mix of expertise”, and signalled that bids from not-for-profit prime contractors were encouraged.³⁵ The ministry invested in “capacity building” for the market, reportedly spending £15 million (€16.8m) on management consultants and £4m (€4.48m) on legal services between March 2012 and April 2013.³⁶ A reported £10 million (€11.21m) was spent on hiring financial services consultancy firms to provide training and advisory services to small social enterprises and charities requiring support to work up potential bids as contractors or subcontractors, in order to equalise their chances against the superior forces of large multinational corporate bidders. Diversifying the market was thought to fulfil varying premises: to assure NGOs that they had a realistic stake, to expand the competitive base, and to allay public disquiet at the oligopolistic dominance of large transnational security corporations. Opening up the marketplace did not apply to public sector probation trusts, who were barred from bidding for contracts unless they formed consortia to prepare bids as Probation Mutuals.³⁷

Oligopoly

- 24 As it transpired, all but one of the CRC contracts were awarded to large consortia headed by for-profit companies. One probation mutual was successful. Ministry sources briefed that unsuccessful bids were “due to [the] more limited resources and (lower) appetite for risk” of charities and non-profits.³⁸ However, unsuccessful bidders argued that the competition had been stacked in favour of for-profit/large charity consortia who could absorb financial risks; had made multiple bids for different areas; and could deliver to economies of scale. For charitable and probation mutuals, “the rushed process” lacked “genuine consultation” and affected their “capacity to understand and influence what was going on”, especially as new criteria were being demanded “up to the deadline for tenders.”³⁹ Finally, at an advanced stage in the competition (in 2014), the Ministry introduced a requirement that each bid should have a Parent Company Guarantee (PCG), a mechanism whereby bidders had to “stake assets equivalent to the size of the annual contract value as a precondition for ownership of a CRC.”⁴⁰ This requirement is standard practice in defence or large capital spending contracts, where it acts as security against supplier bankruptcy, but in this case it effectively priced charitable, medium sized for profits and mutual bidders out of the market.

Alienation of social investors

- 25 The ambition that TR would be cost neutral (i.e. would not cost the Treasury because of savings by outsourcing) prompted government to reach out to social entrepreneurs and philanthropic investors. Funders who had invested heavily in special investment bonds to part-finance the Peterborough and Doncaster trials were subsequently alienated when the Ministry terminated them early. Philanthropic trusts had initially shown interest but eventually offered lukewarm and qualified responses towards investing in TR. This was reportedly (by NOMS) based on their supposedly ideological objections to privatisation *per se*. However, their refusal to invest was because many perceived that

they would in effect be ‘subsidising’ the profitability of private sector CRCs, which was incompatible with their covenants and missions.⁴¹

Built-in design failures

- 26 By 2016, it was publicly acknowledged that a number of CRCs were losing money. The CRCs attributed these losses to flaws with the payment-by-results mechanisms and inaccurate forecasts by the Ministry of Justice which allegedly inflated the figures for referrals (clients) that they would receive (which depressed their client turnover, and thus decreased payment per client). An alternative perspective, vindicated by events, argued that the incoherent and ill-considered payment-by-results formula which underpinned the contracting system meant that the economics of TR were unworkable).⁴² In late 2017, it was reported that several CRCs had approached government to favourably adjust payment mechanisms and for additional money to compensate for losses and to “*provide greater financial certainty and to support the delivery of core operational services*”.⁴³ News that the Ministry was engaged in “*rolling contract negotiations*” with the CRCs – in effect, renegotiating the terms of their original contracts – confirmed earlier suspicions that companies had originally under-estimated costs in their tenders in order to win contracts, or factored in significant losses in the expectation that they could press for more favourable terms once this vital strategic service was in their hands. Estimated extra payments cost £476 million (€531.5m) in 2017 alone but the Ministry of Justice has not disclosed particulars on the grounds of commercial confidentiality.⁴⁴

Barking watchdogs eventually bite

- 27 Because the part-privatisation of probation was so novel and controversial, it was in the sights of parliamentary, regulatory and quality assurance scrutineers from the outset.⁴⁵ Therefore, we encounter a contradiction whereby the problems with TR did not proceed unseen, but carried on despite regulatory hyperactivity. This puzzle can firstly be addressed by reference to ministerial disregard for conventional rules and procedures, and the exclusion of contrary advice from senior civil servants (in this sense, TR presages what has become normalised since the 2019 election). As the administrative debacle unfolded, parliamentary committees seemed to be the only bodies with powers to hold a non-compliant political executive to account.⁴⁶ The watershed began when the Justice Committee of the House of Commons published findings from its inquiry into Transforming Rehabilitation (2018). The Committee opened with the statement that members felt obliged to seize the momentum for obtaining overarching parliamentary accountability, in the light of a succession of critical reports from regulators and inspectorates, which, however insightful, were limited in their powers of scrutiny and recommendation:

*At the beginning of this Parliament we agreed that in light of... the generally poor reports... (both inspection reports of specific Community Rehabilitation Companies and National Probation Service areas as well as cross-cutting thematic reports) and oral evidence taken by our predecessor Committee in March 2017, that an inquiry into Transforming Rehabilitation would be one of the first inquiries that we launched in the 2017 Parliament.*⁴⁷

- 28 Once oversight moved to the more adversarial domain of parliament, it was anticipated that the issue would become susceptible to political partisanship. Yet, bipartisanship

prevailed on TR partly due to Grayling's loss of political capital within his own party, and partly because the executive "*knew internally that [TR] was a mess*", according to his own Minister of State (junior minister).⁴⁸ These damning verdicts added political weight to a rising wave of censorious reports which reached a tipping point in May 2019, when the outgoing Chief Inspector of Probation, Dame Glenys Stacey, pronounced that TR was "*irredeemably flawed*" and "*not fit for purpose*."⁴⁹ The source of this criticism was significant, as the probation and prison inspectorates have generally enjoyed credibility on basis of their rigorous and balanced scrutiny (although there is also a tradition of trenchant parting commentary from departing chief inspectors). In this instance, Stacey's comments and final report carried significant moral authority that breached the government's previously impervious stance.

- 29 The contemporary struggle over accountability also derives from the system complexity which is introduced to the hybridised market-state. Outsourcing changes the shape of the state, in the process shifting loci of accountability from central government to external and non-state actors. The paradoxical outcome is that, far from decreasing, state power is reproduced and multiplied through the diffusion of obligatory accountability to greater numbers of agents who carry out public welfare or penal work in the local state or in civil society.⁵⁰
- 30 Whilst this iteration of neo-liberal, penal governmentality produces governmental net-widening via non-state actors, TR also facilitated the growth of *state* bureaucracy in two ways. Firstly, marketisation and privatisation led to the creation of new bureaux and workforces to monitor outsourced public contractual activity. Contract management was not only prioritised as an activity within HMPPS/NOMS⁵¹, but the only workforce in the prison and probation services that expanded was a new stratum of employees with specialist contract and market management skills drawn from the financial sector to strengthen contract management and address "*capability gaps*".⁵² These were supplemented with "*senior commercial professionals*" (consultants) were as well as secondment of specialists from the Cabinet Office.⁵³ The investment and size (84 full-time equivalent employees) of the contract management team was critically contrasted with working conditions for prison regulators by Peter Clarke, Chief Inspector of Prisons:

*We are surprised that it costs HMPPS and HMPPS Wales more staff and money to manage the Ministry's contracts with the 21 CRCs, than HMI Prisons has to inspect more than a hundred prisons, as well as young offender institutions, secure training centres, immigration removal centres, short-term holding facilities, police custody, military detention and court custody.*⁵⁴

- 31 With this double movement the asymmetry was made clear; market management not only took precedence over conventional regulatory concerns with prison conditions, standards of treatment for prisoners, safeguarding and maintaining public transparency, etc., but the apparatus of market management exceeded the scale and resources of established regulatory bodies.
- 32 This expansion also refuted the orthodoxy that marketisation dispenses with unnecessary bureaucracy. Productivity monitoring of TR generated multiplying lines of accountability which are characteristic of outsourced public services as all providers must become arms of complex audit and reporting regimes. CRCs complained that they were accountable to a plethora of governing bodies, structures and protocols. The House of Commons Justice Committee accepted that providers had been subject to

“overlap, duplication, differences in recommendations from... different auditing bodies auditing at the same time”.⁵⁵ One contractor, Sodexo, itemised the typical inspection and contract regime with which they had to comply: submit data for monthly (desk-based) scrutiny by the HMPPS/Ministry of Justice Contract Management unit; produce monthly data in relation to contract oversight for Relationship Management Groups (held quarterly), produce quarterly performance reports for HMPPS Operational Assurance Audits. Additionally, contractors had to fulfil the requirements for HMPPS Accredited Programme Audits and Ofsted Inspections (the inspectorate for schools and educational providers); attend and produce material for Accuracy meetings, Contract and Performance meetings, and prepare for Joint Targeted Area inspections.⁵⁶ In turn, these companies harvested from their subcontractors – often charities and smaller social enterprises – voluminous and often meaningless data in order to meet criteria for claiming payment.

- 33 Here the discrepancy between deregulatory ideology and what the market wants is clarified. The conceptual mistake comes from the neoliberal rhetoric which conflates deregulation with freeing up markets, whereas the former is highly selective in demanding only ‘freedom from’ obligations such as taxation,⁵⁷ employment rights and conditions⁵⁸ and pension and labour costs.⁵⁹ In other respects, market players require clear regulatory structures (albeit in preferential terms) in order to formalise their interests vis-à-vis that of the buyer (the state).
- 34 Ludlow’s rebuttal of the “*fictitious divide*” between regulatory and market interests applies here because the market demands and relies on credible terms, conditions and protections in order for contestability or outsourcing to work. Substantial sweeteners and guarantees were necessary to attract potential private providers. This was evident during the market-building preparations for TR which sought to ensure that the right contractors (i.e. large capital providers) were incentivised, and where terms were subsequently renegotiated.
- 35 Additionally, risk mitigation (underwritten by the state) is a prerequisite for offering the market reassurance of profitable and stable business when they tender for and win public service contracts. This can be defended as the state acting properly in ensuring the continuity of critical public services which have been outsourced. However, the state concedes considerable bargaining power in proffering further and further assurances. Contracts can be written to deter perverse outcomes, for example, where payment-by-results incentivises ‘cream skimming’ (where contractors select clients most likely to reach targets). However, such constraints on profit may have to be offset with supplementary payments for higher-risk clients.

Conclusion

- 36 It is ill-conceived to position regulation in binary opposition to market efficiency in public services. In practice, for-profit contractors are more or less reconciled to viewing regulation as a pragmatic necessity – where it services their interests – and this question of degree of regulation remains a core contention. The regulatory burden is a trade-off for the greater rewards of obtaining access to markets (for contractors) in exchange for creating saving for the state (although savings do not accrue in many cases). Deregulatory agendas seek to eliminate conditions that are deemed to be unnecessarily expensive where contractors are allowed to operate more cheaply by

taking fewer precautions to protect workers, consumers, standards and society. In other respects, bureaucratic overkill did not arise because of incessant state regulation, but because it was supplemented with actuarial governance in the form of target-setting, performance measurement and data-harvesting which are characteristic of payment-by-results regimes in marketised public services.

- 37 To return briefly to Miller and colleagues' accountability layers, we can see that the rule of 'basic answerability' was satisfied to the degree that participants were obliged to produce elementary and routine data about performance outputs, where information of importance might be subsumed within the details. Nevertheless, this level of accountability is slippery as answerability is displaced onto 'front line' and peripheral actors. "*Amendatory accountability*" which is gauged towards securing "*the redress of grievances and correcting errors*" likewise occurred reactively and after the fact, where regulators were able to identify "*instances of proven error causing difficulties for clients or service users*".⁶⁰ Here, commissioners had recourse to contract management techniques with a view to disciplining contractors through the use of financial sanctions, although ultimately contract leverage worked to the advantage of corporate welfare by subsidising and shoring up strategic markets. Our inquiry thus rests on whether the problem lies with the 'wrong kind' of regulation or whether TR characterised systemic lacunae in the regulatory structures. Certainly, the pursuit of political accountability by parliamentarians potentially allowed for the censure of office holders, although little by way of sanctions were applied in cases of serious error. Even parliamentary committees reached their limits of sanction in the face of a strong ministerial will to proceed in defiance of evidence or normative rules and procedures.
- 38 The privatisation of probation in England and Wales revealed strains in regulatory systems as conventional methods of oversight proved inadequate to holding complex, networked supply chains of contractors and subsidiary agents to account. The public management of outsourced public services is now a complex and multi-layered prospect where conventional state regulatory agencies need to be augmented by new para-state governmental techniques, ranging from commissioning to new public managerialist-style performance measurement to micro-management at the point of service delivery. While conventional regulators are restricted to scrutiny and making recommendations, new managerialist technocratic measures create proliferating demands which give the *appearance* of regulating while failing to elicit robust accountability on the substantive problems. Although many critics focused on the weaknesses of outsourcing, fewer paid attention to the limits of accountability in the context of an ideological assault on probation. The lesson is that regulatory accountability and governance structures are limited in their capacity to trump bad policy or rectify structural asymmetries and systemic flaws.

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NOTES

1. House of Commons Public Accounts Committee, *Transforming Rehabilitation: Progress Review* (London: House of Commons, 2019), p. 3.

2. House of Commons Hansard, *Probation Services: Statement by the Right Hon. Richard Buckland, Secretary of State for Justice*, 11 June 2020 (London: HMSO, 2020). Vol 677, cols 425-427.
3. See: National Audit Office, *Transforming Rehabilitation: Report by the Comptroller and Auditor General* (London: National Audit Office, 2016); House of Commons Committee of Public Accounts Committee, *Transforming Rehabilitation: The 17th report of Session 2016-17* (London: HMSO, 2016); HM Inspectorate of Prisons & HM Inspectorate of Probation, *A joint inspection by HM Inspectorate of Probation and HM Inspectorate of Prisons* (London: HMPPS, 2016); HM Inspectorate of Prisons & HM Inspectorate of Probation, *An Inspection of Through the Gate Resettlement Services for Short-Term Prisoners*, October 2016 (London: HMPPS, 2016); HM Inspectorate of Prisons & HM Inspectorate of Probation, *An Inspection of Through the Gate Resettlement Services for Prisoners Serving 12 Months or More, June 20* (London: HMPPS, 2017); Communities and Local Government Committee, *Third Report of Session 2016-17, Homelessness* (London: HMSO, 2017); House of Commons Work and Pensions Committee, *Fifth Report of Session 2016-17, Support for ex-offenders*, (London: HMSO, 2016); HM Inspectorate of Probation, *Report of the Chief Inspector of Probation* (London: HMIP, 2019).
4. Harry Annison, "Transforming Rehabilitation as Policy Disaster", *Probation Journal* 66.1 (2019), pp. 43-60.
5. Karen Miller, Duncan McTavish, Robert Pyper, "Changing modes of official accountability in the UK" in Taco Brandsen and Marc Holzer (eds.) *The Future of Governance* (New Jersey: Rutgers University, 2009), pp. 187-206.
6. Miller, *Changing Modes*, *ibid.*
7. Miller, *Changing Modes*, p. 188.
8. Department for Business, Innovation and Skills (DBIS), *Principles for Economic Regulation* (London: DBIS, 2011), p 1.
9. *Ibid.*, p 3. emphasis added.
10. *Ibid.*, p. 7
11. Miller, *Changing Modes*, p. 189.
12. The 'rehabilitation revolution' was devised by the Ministry of Justice to launch the 'Transforming Rehabilitation' programme. This kind of grandiose language for reforms reflects a typical strategy for popularising controversial policies that came in with the era of New Labour.
13. Ministry of Justice, *Breaking the Cycle: Effective Punishment, Rehabilitation and Sentencing of Offenders* (London: HMSO, 2010), pp. 1-2. .
14. Ministry of Justice, *Breaking the Cycle*, para. 38.
15. Annison, *Policy Disaster*, p. 48.
16. Lawrence Burke, Stephen Collett, Stephen. and Fergus McNeill, *Reimagining Rehabilitation: Beyond the Individual* (London: Routledge, 2018).
17. Julian Le Vay, *Competition for Prisons: Public or Private?* (Bristol: Policy Press, 2016), p. 240.
18. Le Vay is being polemical here: overall recorded crime was decreasing, but recorded violent crime rose, as did the number of serious offences committed by offenders on parole after privatisation. Technically, this meant that fewer community-based and short sentences, coupled with higher risk assessments, jeopardised client turnover and therefore undermined the business model of commercial probation providers. Le Vay's overall thrust, however, is against the seriously compromised design and implementation of TR.
19. Annison, *Policy Disaster*, pp. 52-54.
20. National Audit Office, *Report by the Comptroller and Auditor General. Ministry of Justice: Transforming Rehabilitation*. (London: HMSO, 2016), p. 13
21. House of Commons Justice Committee *Transforming Rehabilitation, 9th report of the session 2017-19*, (London: HMSO, 2018), para. 18.
22. Le Vay, *Competition*, p. 250.
23. This author has seen a copy of the report which was accurate in its calculation of most major risk variables. The claim that such information was subject to commercial confidentiality

subsequently reappeared to obstruct disclosure both to the public, researchers and parliamentary committees of inquiry.

24. Annison, *Policy Disaster*, p. 47.

25. *Ibid.*, p. 49.

26. Le Vay, *Competition*, p. 251.

27. HM Probation & Prison Service, *Transforming Rehabilitation: Progress Review*. (London: HMPSS, 2019), para. 9.

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42. Kevin Albertson and Chris Fox, "The marketisation of rehabilitation: Some economic considerations", *Probation Journal* 66 (1), (2002) pp. 25-42.

43. House of Commons Public Accounts Committee, *Written Evidence from the Ministry of Justice* (London: HMSO. 2019), para 42.

44. House of Commons Justice Committee *Transforming Rehabilitation, 9th report of the session 2017-19* (London: HMSO, 2018), para. 42.

45. The privatisation of probation services is not unprecedented outside of the UK, and the existence of a single, public national service is not the universal norm, even in European countries. In the United States, Florida and Maryland have outsourced their parole and probation services since the 1970s to corporations and to large charities, notably the Salvation Army. Direct privatisation (as distinct from grant funded service delivery) in England and Wales was experienced as a cultural and political shock.

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47. Justice Committee, *Transforming Rehabilitation - 9th report*, paras 7-9.

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ABSTRACTS

This article discusses the constraints on, and conflicts over, the oversight and regulation of mixed public-private entities, using the part-privatisation of the probation service in England and Wales – a policy called Transforming Rehabilitation (TR) – as its case study. The article shows how TR embodied a policy and set of practices that effectively undermined both institutional and political forms of scrutiny. Actions informed by neoliberal political dogma effectively strained regulatory systems, and short circuited the most important dimension of accountability in a liberal democracy – accountability of ministers to parliament. Ironically, although TR was subject to extensive regulatory scrutiny, the article concludes that these mechanisms were controverted by ministerial disregard for rules, procedures or the advice of civil servants, demonstrating that regulatory structures struggle to trump willfully pursued but ill-advised policy.

Cet article analyse les contraintes et conflits qui entourent la supervision et la régulation des partenariats public-privé, en prenant comme étude de cas la privatisation partielle du système de liberté conditionnelle en Angleterre et au pays de Galles, programme baptisé *Transforming Rehabilitation*. L'article montre que ce programme, par l'orientation et les pratiques qu'il a instaurées, a dans les faits fragilisé les mécanismes de régulation politiques et institutionnels. Des actions entreprises au nom de la doxa politique néolibérale ont ainsi mis les systèmes de régulation sous pression, et court-circuité l'incarnation la plus importante de la transparence dans une démocratie libérale – la responsabilité des Ministres devant le Parlement. Bien que le programme *Transforming Rehabilitation* ait, paradoxalement, fait l'objet d'importants dispositifs de régulation, l'article conclut que ces mécanismes ont été contournés par des ministres qui ont fait fi des règles, des procédures et des conseils de hauts fonctionnaires, ce qui montre finalement que les systèmes de régulation ne parviennent pas à prendre le pas sur des actions politiques menées avec beaucoup de volonté mais peu de clairvoyance.

INDEX

Mots-clés: privatisation, liberté conditionnelle, néolibéralisme, transparence politique, pouvoir exécutif

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Delivering the UK Energy Transition with an Accountable and Competitive Electricity Sector: Theory and Realities

Le Secteur britannique de l'électricité face à la transition énergétique : la responsabilité publique mise à l'épreuve

Lucie de Carvalho

Introduction

- ¹ In June 2019, the May government ramped up their efforts to set ambitious targets to phase out fossil fuel energies from the domestic energy mix by amending the 2008 Climate Change Act. The amendment established a new legally-binding target of net zero greenhouse gas emissions by 2050, in line with the 2016 Paris Agreement. As things now stand (in mid-2020), UK greenhouse gas emissions have dropped by 43% since 1990, meaning that the country is well underway to meet its 2022 target; yet, projections beyond this first yardstick do not look as encouraging. As climate change mitigation has become increasingly pressing, electricity efficiency and sustainability have attracted intense political and academic interest since the energy sector stands at the forefront of any transition to a low-carbon economy. Today more than ever, these two issues have become symbiotically interrelated, as “*you cannot deal with climate change without dealing with energy, and you cannot deal with energy without dealing with climate change*”, as Lord Deben recently stated.¹
- ² For the past 12 years, electricity and climate reforms have thus formed two sides of the same coin. From the 2008 Climate Act to the 2012 Electricity Market Reform,² the 2016 Paris Agreement and the more recent 2019 Net-Zero Roadmap,³ recent UK governments have sought to reform the UK energy system to adapt it to the new demands of the ecological transition and to face the challenges of what is now known as ‘the energy

trilemma', namely affordability, security of supply, and sustainability.⁴ Affordability relates to the electricity sector's core function as a public good and a matter of public interest, since electricity services are critical, not only to sustain economic and industrial activity, but also to guarantee a decent standard of living for all.

- 3 Yet, tackling the energy trilemma does not only involve political decisions or leaps in technological innovations; it also requires popular trust and political leadership. In 2017, a research paper on UK public attitudes towards the energy transition by Demski *et al* concluded that public acceptance was not only affected by immediate pragmatic concerns, such as affordable prices; it was affected by value-laden priorities, such as equitable cost-sharing, and trust: it has to do with whom respondents deemed responsible for making the necessary changes to the UK energy system.⁵ Public acceptance is thus entrenched in the founding principle of accountability.
- 4 Now, although accountability is one of the most frequent concepts used in administrative literature, it is also one of the most difficult to define.⁶ Its very definition varies, and goes much beyond the most immediate meaning of accounting or being responsible for a specific action or behaviour.⁷ A running thread in accountability literature connects this concept to imperatives of integrity, responsibility, ethical and professional standards, control and popular oversight – all of them included in the democratic concept of 'good governance'.⁸ Accountability dynamics are visible through performance and efficiency scrutiny, regulation, and transparent reporting to determine "who does what and why?".⁹ In short, accountability involves five key components to uphold public interest: a) institutional frameworks and environment; b) clearly allocated responsibilities and duties and clearly established mandates; c) clearly defined expectations according to public interest imperatives; d) established scrutiny procedures and capability leading to potential sanctions and penalties in case of failure; and e) a solid degree of social participation in regulatory decisions.¹⁰
- 5 For public services, accountability underpins a system of checks and balances, which plays out between four major poles of actors expected to act for the public interest: public administration (government, parliament, the civil service), the courts of law, vested industrial interests, and consumers. At a crossroads between all four stands another key actor, the regulator, expected to operate independently from political, industrial or financial interests,¹¹ and, theoretically at least, be vested with a statutory capacity to demand answers and enforce sanctions.¹²
- 6 Given the many challenges the energy transition and climate change mitigation policies have raised about accountability in the UK electricity sector, this article offers to explore how new public management restructuring has impacted the regulator's and the executive's mandate, authority, and capacity to address new climate imperatives while upholding taxpayers' interests. The aim will be to assess whether accountability dynamics have acted as a facilitating or a hampering variable on the country's path to decarbonisation and whether accountability mechanisms have proven efficient enough to scrutinise both the government and the regulator. Since regulation can be either pre-emptive or reactive, I shall look into two separate regulation stages, on the one hand, policy formulation and on the other, policy implementation.

The Impact of Privatisation on Accountability in the UK Electricity Sector

Towards the network accountability paradigm

- 7 The UK electricity sector underwent major structural and regulatory upheavals through the 1989 Electricity Act as part of the third step in Thatcher's privatisation campaign. Market liberalisation, often dubbed deregulation, was completed when an independent regulatory authority was established, Offer (the Office of Electricity Regulation). The mandate of the regulator was three-fold: first, it was expected to regulate the enduring monopolistic network companies to guarantee 'good value for money' through cost-efficiency and good customer services; second, to monitor competition for generation and supply markets to mitigate oligopolistic activities and market failures in the newly-privatised electricity market; "*finally, the regulatory body was to guarantee supply security and sustainability for present and future generations of consumers*".¹³ In short, the regulator was entrusted with fiduciary duties, alongside Parliament and the government, while service-delivery functions were removed "*from public administration and [contracted] out to firms operating in the private sector*".¹⁴
- 8 Often held up as a textbook example of a successful case study, the UK has regularly been praised as "*the poster child of energy market liberalisation*,"¹⁵ for its pioneering approach to electricity regulation by economists and energy experts alike. The early success of privatisation has mostly been ascribed to Offer's initial strategy to embrace 'incentive regulation'. By leaving private utilities flexibility to improve service efficiency, this strategy was the epitome of the 'light-handed approach to electricity regulation' embraced by Offer and promoted by its first director (1989-1998), renowned British economist Stephen Littlechild. The regulator would rather set price caps for generation than go for more rigid rate-of-return regulation. According to Littlechild, the regulator's prime focus should be to abide by the motto "*competition where possible, regulation where not*".¹⁶ Offer therefore took a backseat in regulation, only interfering when concerns over market dominance for electricity generation erupted, as was the case in 1994 when Offer compelled two generating utilities, National Power and Powergen, to sell off 6,000 MW capacity to avoid market duopoly. Overall, price caps were thus key mechanisms for Offer to protect the interests of consumers, given that privatisation did not fully achieve its original purpose, namely to break down monopolies and foster natural competition between companies to lower prices.¹⁷ How have 1990s' reforms affected accountability?
- 9 Privatising and liberalising the UK energy sector featured as a prime example of key principles of New Public Management (NPM) gaining ground in UK politics. The impact of NPM theories on the electricity sector were first the introduction of managerial imperatives into public services provision, now geared towards the rationalisation of public action through budget-keeping, target-setting and short-term strategic planning. Besides, the new constellation of public-private energy actors was meant to foster more transparency, plural accountability and participatory involvement in proceedings and decision making by establishing new sources of accountability.¹⁸ Dalingwater described deregulation as "*disaggregation, which refers to the strengthening of central strategic capacity by decoupling policy and executive functions; tighter central control over policy and frameworks and a move from concentrating on process to output in control and*

*accountability mechanisms.*¹⁹ A key part of this dynamic, the electricity regulator, was established as an arm's length body, theoretically independent from executive or ministerial oversight to inject more transparency and impartiality into the energy sector and thus foster confidence from both the public and sectorial interests. This structural reform came to be known as the 'accountability-network paradigm'.²⁰

The limits of accountability-network reforms: grey zones and accountability loopholes

- 10 Despite its first successful results, the UK experimental regulatory regime soon attracted academic criticism.²¹ Although the regulator's mandate was rather clear theoretically speaking, its action capacity has remained limited in practice, as its powers have been limited to prosecutorial and adjudicatory powers without being granted rule-making prerogatives, still vested in government. Furthermore, as for most arm's length bodies, Offer's directors-general have been appointed by the Secretary of State for the Department of Trade and Industry – a recruitment process that has been the target of much criticism not only for the lack of public oversight,²² but also because it has turned out that regulation directions have been quite subservient to the approach and the personality of the director-general, as demonstrated by Littlechild's influence over Offer's original trajectory. Finally, regulatory oversight remained isolated at the national level, limiting its accountability to local authorities. In that sense, the British regulatory approach differed greatly from the US regime, in which regulatory authority was broken down and distributed between several regional regulatory commissions.²³ In other words, decentralisation of service delivery was not accompanied by decentralisation of decision making or even revenue allocation.
- 11 Moreover, NPM reforms have not provided a clear answer to who is accountable for what and how. By separating executive and regulatory remits, the establishment of independent quangos like Offer created an institutional in-betweenness for accountability. If they became more independent from ministerial encroachment, quangos also eroded Ministers' leverage to make their frontline services accountable, offsetting all the unquestionable democratic virtues of independent regulation.²⁴ Moyes also adds that:²⁵
- This fracturing of responsibility and accountability would see Ministers remaining accountable to Parliament without having control or even, necessarily, the basis to intervene, and commissioners, providers or regulators potentially exercising control without being accountable to Parliament.
- 12 Furthermore, the complexity of current policy matters has also inflated the departmental silo effect, whereby responsibilities over certain policy areas cut across several departmental boundaries, thereby creating a dispersion of accountability. Although Ofgem is sponsored by the department in charge of energy matters, electricity regulation for instance is not only the remit of the present Department of Business, Energy and Industrial Strategy; it can also be connected, among other things, to environmental matters, land planning, health, or devolved questions.
- 13 Finally, an extensive literature on the matter has raised the alarm about the introduction of private actors defending separate vested interests that do not necessarily align with the public interest due to inherently diverging ambitions. Although, as Farnetti noted, "[a] public-sector company is not necessarily a not-for-profit

company, and a private-sector company is not necessarily a for-profit company,"²⁶ it is safe to say that private actors, such as electricity generation or supply utilities, remain driven by value creation and marketability. They are first and foremost accountable to their shareholders before their contractors, while essential public services like electricity provision are geared towards good value for money, but also the defense of the public interest.

- 14 As called out in a 2014 report from the Public Administration Committee, the institutional system thus remains "*full of anachronisms and anomalies*"²⁷ and tensions abound regarding the actual precinct and responsibilities of each authority. Instead of improving accountability, these reforms further inflated the chameleonic nature of the concept due to the fact that much is still left to each actor's interpretation and shaped by the country's regulatory and policy culture.²⁸ Consequently, to assess accountability in electricity regulation since 2010, we need to look at specific episodes when good governance debates over climate change mitigation have surfaced, starting with the first stage of regulation: policy design.

Policy Design: the Impact of the Sustainability Agenda on Policy Directions and Decision-Makers' Mandates

- 15 By the early 2010s, the pace of target-setting quickened as a flurry of new roadmaps and carbon reduction targets bridged Labour and the Coalition's tenures. This new climate change agenda impacted the relations between the government, the electricity utilities, Parliament and the regulator, by introducing a new goal in domestic policy, that of striving to roll in sustainability on top of vetting efficiency and price mitigation. Given that 27% of greenhouse emissions are produced by the energy sector, responsibility to shift primary electricity generation from fossil fuels to green energy sources, renewables and nuclear power, has befallen both markets and government.
- 16 The energy transition thus stood as a major accountability test for the government since failure to meet such statutory objectives would then be ascribed not only to industry and market participants but also to the government. In the context of liberalised markets, the primary role of the government as a policy designer was thus to set clear directions and make sure that transparency and confidence were firmly established, to guarantee that industry utilities would take on the risks of changing their operating practices.
- 17 Government policy came in the form of the 2012 Electricity Market Reform, which aimed at overhauling the rules of the market game to meet the energy trilemma. The reform spelt out stronger state intervention in the electricity market through the use of specific market mechanisms to steer electricity utilities towards low-carbon production and boost private investments in renewables by the late 2020s. In order to compensate utilities for potential labour and effective costs of sustainability incurred by staff training, potential job losses, technical improvements and overall need for investments to shore up domestic wind and nuclear energy capacity, the 2013 Reform entrenched the use of two specific subsidy schemes, the Contract-for-Difference (CfD) and Feed-in-Tariffs (FiT).

Scrutinising government electricity policy through judicial oversight

- 18 As constantly underlined in accountability literature, the ability to use administrative action to protect basic liberties, including property rights, against governmental encroachment is fundamental to all healthy democracies, as restated by the European Convention of Human Rights. Consequently, judicial bodies fulfil their accountability function when addressing whether or not a government measure meets its public purpose.
- 19 In October 2011 the then UK energy Minister, Greg Barker, announced that cuts to the FiTs for small-scale solar projects would be introduced on 12 December 2011. Yet the FiT rates were only to be reviewed 6 months later, in March 2012. Such a decision thus challenged one principle underpinning the original subsidy scheme, stating that “no retrospective change for low carbon investments” could be applied.²⁹ This so-called grandfathering principle guaranteed that no future government could alter the established legislation, to ensure long-term investor confidence in government policy and support. As a response to this sudden U-turn in government strategy that led to the cancellation of nearly 15,000 planned solar installations, 14 solar industry companies filed a claim against the Department of Energy and Climate Change (DECC) before the British High Court and then defended their case before the Court of Appeal.
- 20 The claim was run by energy specialist law firm *Prospect Law* which sought damages on the grounds that the government’s premature decision had incurred major prospective losses in earnings for these companies. As illustrated by the Ernst & Young Renewable Energy Attractiveness Index, the government’s change of heart regarding subsidies to the solar sector had indeed visibly dented consumer and investor confidence in solar power.³⁰ Rebuke came from the courts: both the High Court and the Court of Appeal, in December 2011 and January 2012 respectively, ruled against DECC,³¹ arguing that the government’s move was “illegal and unfair,”³² and that DECC was operating “outside its code of practice”. Solar companies won £132 million damages as compensation. The legal ruling confirmed that the government’s move had stifled the performance of the budding solar sector and its retroactive character had greatly hampered investor confidence.
- 21 The UK Supreme Court then rejected DECC’s permission to appeal in May 2012. Consequently, DECC’s decision was overruled and solar installations set up between December 2011 and March 2012 obtained a 25-year guaranteed FiT, as originally planned. Undeterred by this first failure, the Government attempted to introduce another cut in FiTs in August 2012, leading to a new instalment in the legal battle between the government and solar industry companies, resulting in the 2015 *DECC v. Breyer Group PLC and Others* case ruled by the Supreme Court of Judicature.³³ In this court ruling, UK judges gave a slightly different assessment of DECC’s 2011 decision, arguing that the fundamental fault lay in the fact that DECC’s measure went against the 1998 Human Rights Act upholding the right to goodwill. In this case, ‘marketable goodwill’ is to be understood as a ‘possession’ thus protected by the right to property.³⁴ By providing retrospective changes to the economic foundation of solar energy investment, DECC thus acted *ultra vires*, interfered with “this possession” and violated the ECHR.
- 22 In short, these various judicial cases presented before Britain’s most senior judges contributed to avoiding setting a most dangerous precedent by preventing the

government from unilaterally altering incentive mechanisms, even more so as those mechanisms were still deemed crucial to ensure the industry's survival. At that stage, all indicators revealed that the private sector was indeed unable to shoulder the cost of expanding the solar industry alone. A 2013 DECC report on Renewable Roadmap would later confirm that roughly £100 to 110 billion needed to be injected into the electricity sector by 2020 to meet the 15% renewables target.³⁵ These court rulings also testified to the efficiency of judicial oversight, by holding the government to account. They demonstrated that government action encroached on property rights, and that the public-interest or value-for-taxpayers'-money rationale was void. Eventually, the government's unilateral decision to pick the winners and only sponsor offshore wind and nuclear power came through the UK's project in 2016 to build new nuclear power plants, as the subsidy scheme came to its natural end and was not renewed in 2018.³⁶

- 23 In short, the Supreme Court and the lower Courts have upheld the founding principles of ministerial and executive accountability. Just like any parliamentary proceeding, energy decisions are judiciable and bound not only by convention or practices, but also by constitutional law. These cases provide further evidence that the UK senior courts are morphing into constitutional courts whose primary mandate is to defend democratic oversight and accountability. As Hogarth contends, these two cases can be seen as crowning precedents indicating that the courts, including the Supreme Court, had become:³⁷

a guardian of democracy in the UK, policing the boundaries of constitutionally proper behaviour. Any ministers tempted to defy constitutional norms or conventions should beware: The Supreme Court has put them on notice.

- 24 Yet, such a reassertion of ministerial and executive accountability to the courts remains inherently bound by either subsequent judicial decisions and the executive's alternative means of policymaking that may still incapacitate, override or limit the scope of judicial scrutiny.

Scrutinising government electricity policy through parliamentary oversight

- 25 The government's energy policy strategy and incentive mechanisms have not only come within the scrutiny radar of the Courts but also that of Parliament. Although scrutinising the government's energy policy is complexified by the silo effect, parliamentary oversight has primarily been the responsibility of two separate bodies: the Commons' Energy and Climate Change Select Committee (ECC) and a separate advisory quango, the Committee on Climate Change.
- 26 The Commons' ECC select committee was established through the 2008 Climate Change Act to scrutinise DECC. In its 2015 Progress Report to Parliament, the ECC select committee investigated the government's generation policy, and their controversial decision to scrap the subsidy incentives to onshore wind, in an approach quite similar to the solar affair. In this inquiry, the ECC select committee interviewed Lord Deben, director-general of the Committee on Climate Change, who challenged the government's management of public money, arguing that scrapping support to onshore wind would cost roughly £1 billion to consumers every year.³⁸
- 27 In 2015 the ECC Select Committee also issued their Priorities for the 2015-2020 parliamentary session based on a public consultation that had received evidence from

249 industry, academic and public contributors.³⁹ This new roadmap revealed that the Committee intended to further investigate the government's energy strategy in terms of consistency and transparency over subsidy schemes. In 2016, the Committee also issued a scathing report on *Investor Confidence in the UK Energy Sector*, here also challenging the Cameron government for their handling of energy subsidy schemes, deeming them to have seriously harmed investor confidence and the UK's attractiveness. The government's sudden changes of heart had "raised serious questions about the government's plans for meeting long-term carbon objectives".⁴⁰

- 28 Yet, the investigative capability of this parliamentary select committee came to be restricted by executive reshuffling decisions. Its 2015 inquiry was interrupted by the 2016 referendum, and Theresa May's election to the party leadership led to the dismantling of DECC, as energy and climate change matters migrated to another newly-established department, the Business, Energy and Industrial Strategy Department. The new parliamentary BEIS committee, which began operating on 10 October 2016, has so far proven less keen to investigate energy regulation matters; the lines of scrutiny identified by their predecessors in their 2015 roadmap have been shelved and only one inquiry has been run so far on the government's Net-Zero policy since 2016.
- 29 Parallel to the now defunct ECC Select Committee, another statutory body, the Committee on Climate Change (CCC), has also been involved in scrutinising government policy since its inception in 2008 – even more since the ECC select committee was disbanded in 2016. Its original mandate was two-fold: first, to advise government on emission targets; and second, to report to parliamentary select committees on the progress made, thus acting as a bridge between the executive and the legislative powers. In the summer 2019, the CCC published two very critical reports, questioning the government's approach to meet the Net-Zero targets. In its second report, *Reducing UK Emissions 2019 Progress Report to Parliament*, the CCC renewed the central premise that "the government of the day holds the responsibility to act to protect future generations", as established through the 2008 Climate Change legislation.⁴¹ The report also revealed that the Committee found "a substantial gap between current plans and future requirements and an even greater shortfall in action."⁴² This report thus called the government out on their inconsistent approach of establishing a Net-Zero target while at the same time disbanding DECC and downgrading climate change as a secondary policy priority. Yet, just like that of the Select Committee, the CCC's work has remained fundamentally advisory in nature, generating little reaction from the government. Consequently, parliamentary accountability seems restricted to a conventional process that is pursued with more or less interest by the MPs involved with little sanction capacity, potentially reducing MPs to barking dogs without biting power. Overall, parliamentary oversight of executive and ministerial decisions thus remains a transparency device that has restricted Parliament's capacity to check the government's progress and policy decisions.
- 30 Overall, the government's decision-making mandate has been scrutinised by "multiple accountabilities", be they judicial (the Courts), political (Parliament's select committee), or advisory (the CCC). The examples presented tend to suggest that government accountability to these bodies remains fundamentally elusive, diluted in a "tangled web" of accountability.⁴³ Partisan bias could be a likely parameter determining Parliament's degree of involvement in questioning the government's steps to meet the demands of

the energy trilemma, to quicken the pace of the energy transition, through affordable prices, and long-term sustainability.

- 31 Since 2010, the UK government has thus sent very contradictory signals and the judicial and parliamentary responses to their policy have nonetheless dented political credibility and predictability, in turn undermining market and investor confidence. As Heller and McCubbins underlined: ⁴⁴

incentives for investing in infrastructure industries are not credible within a given regulatory structure unless there is a political context that makes them sustainable. Regulatory predictability is a key feature for gaining credibility, and hence the important role of political institutions in enhancing this predictability.

- 32 Let us now turn to a second regulatory stage, policy implementation to examine the electricity regulator's accountability.

Policy Implementation: the Effectiveness of Ofgem as a Regulatory Watchdog

Ofgem's waning ability to protect consumer interest

- 33 At the other end of the policy spectrum, electricity reforms will most likely affect consumers through price variations. Recent literature on decarbonisation has demonstrated that transition to a low-carbon economy, whatever the pathway chosen, will be costly.⁴⁵ Ever since the early 1970s, energy prices and affordability have been a continual public and political concern. A 2014 YouGov survey revealed that energy prices were the third top political concern of 40% of the respondents, behind the economy (59%) and immigration (49%).⁴⁶ According to a study run on public perceptions about accountability for energy prices, Demski *et al.* showed that most respondents believed that energy utilities, despite being bound by their public service mandate, were not trustworthy and not “contributing their share to fund the energy transition.”⁴⁷ As previously stated, private companies have little to no interest to lower their prices, as it narrows their profit margins. That is one of the reasons why the UK's approach to electricity regulation has been geared towards price regulation, under the responsibility of the regulator, Ofgem (which replaced Offer in 2000).
- 34 Since the rise of climate change concerns and the introduction of climate change legislation in the late 2000s, Ofgem has faced mounting criticism over its independence and autonomy from executive control, thus challenging its mandate as guardian of consumer interest against political and sectoral interest:⁴⁸
- 35 Firstly, in an analysis of Ofgem's *Decarbonisation Action Plan* published in February 2020, John Constable argued that Ofgem had demonstrated very little interest in actually running independent cost analyses, as the report only relied on government's cost assessment.⁴⁹ Similarly, Constable contends that the same report “argues that costs of wind generation will fall in the long term without referring to debates in academic circles about it, nor does it question the success of the CfD contracts.” And yet why would they, especially considering the present CEO's background: before being appointed Ofgem CEO in October 2019, Jonathan Brearley was part of Tony Blair's Prime Minister Strategy Unit; between 2006 and 2009, he headed the Office of Climate Change, which contributed to drafting the 2008 Climate Change bill, and from 2009 to 2013, he was Director of Energy Markets and Infrastructure Networks, operating within DECC. Brearley actually was a

key architect of the Energy Market Reform and a major proponent of the very same *Cfd systems* in 2012, which Ofgem has been expected to scrutinise.⁵⁰ In other words, his previous involvement in climate-change policy making could constitute a potential conflict of interest and compromises his impartiality and independence.

- 36 Finally, the 2010-2012 reforms have actually infringed on Ofgem's capacity to guarantee electricity affordability in the defence of consumer interests. The 2010 Electricity Act indeed amended the very definition of 'consumer interest', which no longer merely covers "*the interests of existing and future consumers*" in a competitive environment, as defined in the 2000 Utilities Act, but also now states that those interests are subservient to the need to reduce greenhouse gas emissions and guarantee supply security. It follows that the 2010 Act in effect defanged Ofgem, preventing it from effectively challenging the government, even if it would later befall on consumers to foot the bill through price or cost hikes. Similarly, average electricity prices paid by UK households have been rising constantly since 2000, soaring by 67% since 2000, and by 20% since 2007.⁵¹ Ofgem has thus shown little capacity to either rein in the six major electricity utilities, or incentivise them to lower their prices while curbing their greenhouse gas emissions.⁵² Evidence thus tends to suggest that decarbonisation has greatly eroded Ofgem's capacity to bring either the government or the utilities to account, and the other way round:⁵³ consumer interests have been sacrificed to the demands of the government's green agenda. In line with the original light-regulation approach embraced in the early 1990s, Ofgem has implicitly embraced the Machiavellian imperative that, in the context of decarbonisation, the end justifies the means.

When heads must roll: accountability for electricity blackouts

- 37 A final avenue to test sectoral accountability in policy implementation would be operational failure. In the electricity sector, blackouts are a good example, as accountability involves identifying where the responsibility lies to make sure 'lessons have been learned'. Due to their spectacular consequences, blackouts often attract intense media attention, as was the case in May 2008,⁵⁴ December 2013⁵⁵ and August 2019 when a gas power station and a windfarm unexpectedly went into shutdown, leading to severe disruption in public transport and leaving over one million households in England and Wales without electricity for up to 9 hours.
- 38 In these instances, scrutiny immediately fell on both the National Grid and the regulator. The subsequent inquiries and investigations into the 2019 outage, the biggest in the decade, failed to provide a clear view of the situation as each actor engaged in a blame-game to avoid shouldering the cost of compensating customers.⁵⁶ The focus of attention was directed at the National Grid's responsibility and the inherent conflict of interest rising from the fact that the National Grid owns and operates energy transmission infrastructures in the UK and interconnectors with the Continent, while also being in charge of balancing electricity supply and demand. For the Labour Opposition, this instance furthered their renationalisation agenda as calls to counter privatisation have gained momentum within Labour ranks, especially under Jeremy Corbyn's leadership.
- 39 In other words, the 2019 power blackout reignited debates over structure, ownership and role assignment. Yet investigations failed really to investigate further the technological capability or resilience, let alone sustainability, of the UK electricity

network. By directing all political and media attention onto one specific stakeholder in a fundamentally interconnected system, the government somehow deflected attention away from the question of government investment in technological innovation.

- 40 All in all, accountability at the delivery stage seems more geared towards immediate blame and sanction, rather than learning lessons; while media attention was short-term, little political reaction actually emerged in the wake of the outage – Parliament’s BEIS Select Committee did not launch any inquiry and the matter seems today to have been overshadowed by other more pressing issues. Yet, this recent blackout episode brings to light the political nature of accountability which “*overemphasises the role of blame in holding individuals and organisations to account. This, ironically, undermines the focus on improvement that the public wants to see following failures.*”⁵⁷

Conclusion

- 41 This article has aimed to identify the impacts of NPM reforms on accountability in electricity services in the light of the present decarbonisation agenda. Rather difficult to fully delineate in practice, accountability remains both an ideal and a democratic imperative embedded in rules, practices, frameworks, but also in culture. NPM reforms were primarily justified as a means to solve “*the problems of remoteness, unresponsiveness, and unaccountability associated with twentieth-century nationalised industries*”.⁵⁸ Yet the present case study suggests that they have not fully met their original purposes.
- 42 NPM reforms have not fundamentally deconstructed the existing regulatory and accountability culture in Britain. The previous vertical, executive-centred, command-and-control decision-making pattern has endured; unremitting executive interference has made economic and political interest hard to reconcile with sustainability, while the other institutional or statutory sources of accountability have shown little leverage to influence governmental policies. On the one hand, although parliamentary and judicial oversight has proven rather efficient in calling the government out on their policy inconsistencies and their lack of staunch support for the renewable energy industry, their scope remains limited due to inbuilt time limitations, be they parliament’s lifespans or procedural restrictions, and their enduring *ad hoc* nature. Nevertheless, evidence tends to suggest that Britain’s parliamentary democracy is growing increasingly legalistic.⁵⁹ On the other hand, due to an enduring lack of independence, the regulator’s leverage has progressively been eroded along with its capabilities to monitor and bring either private service providers or the government to account. Recent policy changes tend to suggest that climate change mitigation has pushed the key component of affordability onto the backburner, sapping Ofgem’s drive to act in the consumers’ interest.
- 43 Although service reliability and performance have improved since privatisation, electricity prices continue to follow an upward trend,⁶⁰ and the issue of fuel poverty has been gaining increasing academic and media attention. Given that affordability, energy prices and the question of ownership are fundamentally ideologically driven, being tightly intertwined with issues of equity, public interest and social justice, climate change mitigation has not depoliticised accountability in energy questions – quite the opposite.

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ABSTRACTS

This article discusses accountability in UK electricity services against the backdrop of the energy transition. Today’s decarbonisation imperatives stand as a major accountability test for the UK government and the electricity regulator, which have been grappling with the energy trilemma since the early 2000s. The analysis will determine the extent to which both have responded to these new goals while still abiding by their original mandate to uphold the public interest. Climate change imperatives have actually brought to the surface enduring faulty accountability dynamics, which had at first been obscured – by practice or design – by the new public management reforms of the early 1990s. The inherently *ad hoc* and flexible British accountability culture therefore appears to have contributed to hampering the country’s progress towards decarbonisation.

Cet article propose d’étudier la responsabilité publique (*accountability*) dans le secteur britannique de l’électricité, à la lumière de la transition énergétique. Les enjeux liés aux obligations de décarbonisation du système économique ont mis à l’épreuve la capacité du gouvernement britannique et de l’autorité de régulation de l’énergie à répondre à ce qu’on appelle communément le trilemme énergétique. Il s’agira d’analyser la façon dont ces nouveaux impératifs ont eu un impact sur leurs capacités à remplir leur mission publique de défense de l’intérêt général. Cette analyse démontre que les enjeux climatiques ont révélé des dysfonctionnements profonds en termes de responsabilité publique, que les réformes néolibérales des années 1980 avaient, volontairement ou involontairement, participés à occulter. La nature même de la culture britannique en matière de responsabilité publique, traditionnellement caractérisée par le pragmatisme et la flexibilité, apparaît ainsi comme un frein majeur à une mise en œuvre efficace de la transition énergétique.

INDEX

Keywords: accountability, electricity, decarbonisation, climate change, energy regulation

Mots-clés: responsabilité, électricité, transition énergétique, réglementation de l’énergie

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Community Energy in the United Kingdom: beyond or between the Market and the State?

L'énergie coopérative au Royaume-Uni: quelle place par rapport au marché et à l'État ?

Pierre Wokuri

Introduction

I do not see the government's task as being to try and plan the future shape of energy production and consumption. It is not even primarily to try to balance UK demand and supply for energy. Our task is rather to set a framework which will ensure that the market operates in the energy sector with a minimum of distortion and energy is produced and consumed efficiently.

(Nigel Lawson, Secretary of State for Energy, Cambridge, 28 June 1982)

- 1 Delivered by the then Secretary of State for Energy in the United Kingdom, this speech introduces one of the key characteristics of the British energy policy from the 1980s until the mid-2000s: the hegemony of a “*pro-market energy policy paradigm*”, or PEPP (Kern, Kuzemko and Mitchell, 2014: 516). Through the latter, “*energy was understood as a ‘normal’ tradable commodity and the market was seen as the most efficient vehicle for energy supply. The role of the state was simply to create and maintain a level playing field open to competitive forces, by establishing and enforcing fair market rules. (...) In terms of the goals of energy policy the PEPP’s principal aim was to establish and maintain a competitive, freely trading energy market*” (Kern, Kuzemko and Mitchell, 2014: 516). This interpretive framework fitted well within the overall approach of less State involvement in the economy that had dominated elite UK circles since the 1980s (Kern, Kuzemko and Mitchell, 2014: 516) and shows the embeddedness of energy policies within UK’s ‘liberal market economy’ (Hall and Soskice, 2001). In this macro context, the British energy policy regime is depicted as large-scale, centrally-planned and private-sector led sector with limited citizen involvement in energy planning and development (Walker et al,

2007), and with successive systems of market support for renewable energy that have been more effectively exploited by large, incumbent energy businesses, rather than smaller, new entrants (Strachan et al, 2015).

- 2 However, since 2000, a new theme has emerged in both the policy discourse and the investment of public resources around the concept of *community* renewable energy development with notions of community-led, controlled and owned development of renewable energy installations (Walker et al, 2006). From five in 2010 to 157 in 2019, the number of electricity generation projects owned by community groups has risen dramatically (Community Energy England, State of the Sector Report, 2019). The emergence of this type of initiative raises a key question: does community energy represent an alternative model beyond the market and the State? This interrogation is related to a broad range of issues regarding public services generally and electricity in particular, especially the democratisation of these services with greater participation by the general public in management processes and the role of the State in the emergence of new economic models within markets. By examining the former, this article takes stock of the contribution of community energy to a process of energy democracy with decentralised energy provision, collective forms of ownership of energy and energy sovereignty over resources (Becker and Naumann, 2017: 5).
- 3 To think over whether community represents an alternative model beyond the market and the State, this article draws on a research design structured around three levels of analysis: 1) a micro level looking at specific community energy initiatives on the ground; 2) a meso level looking at the collective organisations and networks supporting such initiatives in the United Kingdom; and 3) a macro level looking at the interplays between community energy projects and the British policy regime.
- 4 To analyse the micro level, I used a similar approach to the advanced preparation fieldwork (APF) developed by Boudet and McAdam in their work on the opposition to energy projects in the United States. This method includes semi-structured interviews with key actors of local energy projects and has been mobilised to study three community energy organisations (table 1).

Table 1: Case studies analysed in the article.

Name	Starting year	Technology
Meadows Ozone Energy Services (MOZES)	2009	Photovoltaic
Bristol Energy Cooperative (BEC)	2011	Photovoltaic
South East London Community Energy (SELCE)	2014	Photovoltaic

- 5 The meso level has been analysed by looking at the framework (Snow et al, 2019) developed by the collective organisations and networks supporting community energy in the United Kingdom. To do this, I specifically focus on the political work (Smith, 2019) developed by these organisations to influence and change energy policies.
- 6 To capture the macro level, the policy regime approach developed by Michael Howlett¹ has been the starting point to build a specific theoretical tool in line with community

energy issues at the macro level (for a detailed presentation of this approach on community energy in Denmark and France see Wokuri, 2019).

- 7 To set out whether community represents an alternative model beyond the market and the State, this article is organised in two sections. In the first section, I show that community energy in the United Kingdom constitutes an alternative model to market and State arrangements with the opening of three possibilities: ownership with energy infrastructures owned by local community groups, participation with higher level of citizen involvement and economic benefits with profits made from electricity generation distributed within local areas. In the second section, I will show that the transformative power of this model is limited because community energy is embedded between the State and the market. I will show that this embeddedness is characterised by the fact that community energy organisations struggle to institutionalise advantages and to challenge decisions that affect them negatively, and by a corrective role with a provision of services (e.g. fuel poverty alleviation) that was previously assured by State and market actors.
- 8 The data used in this article stems from semi-structured interviews with key actors (e.g. citizens involved in organisations developing renewable energy projects), participant observation (e.g. meetings of networks supporting community energy groups) and an extensive content analysis of policy documents (e.g. public hearing transcripts).

Community Energy in the United Kingdom: an Alternative Model to Market and State Arrangements

What makes us different from a typical commercial enterprise? Our co-operative model democratises energy ownership. There is one-member-one-vote irrespective of shareholding, and a strong participatory ethos. As a member you will have an equal say in the strategic development of BEC through general meetings, and you can get further involved through joining working groups and standing for election to the Board (...) Our rules forbid the sale of our assets to commercial organisations should BEC be wound up, and we are bound by them to act for the benefit of the community. We do this in a number of practical ways: Our existing and future solar installations help communities reduce their energy bills and use green energy, thereby cutting carbon emissions. We promote the benefits of community energy and 100% renewable energy. We run an energy-switching scheme, produce regular newsletters, and provide volunteering opportunities (...) We contribute revenue from our projects to a community benefit fund.

(Bristol Energy Cooperative Community Share Offer No. 3 Phase 2 2015: 5).

- 9 This extract from a share offer document written by the Bristol Energy Cooperative (BEC) highlights that renewable energy cooperatives present a certain degree of hybridity because they “*simultaneously engage in activities typically performed by three distinct organisational forms – community groups, environmental NGOs and corporations*” (Huybrechts and Haugh, 2017: 8).
- 10 Citizen mobilisation, environmental activism and income generation from energy production, activities usually carried out by three separate organisations, are brought together by community energy organisations like BEC (table 2). This combination is critical to understanding the alternative dimension of community energy organisations. They borrow from community groups by emphasizing local political

participation but they also borrow from green NGOs and from corporations by supporting renewable energy and by looking for income generation related to energy generation.

Table 2: Community energy organisations as hybrid organisations: evidence from Bristol Energy Cooperative

Activities	Examples from BEC
Citizen mobilisation	<i>“1. Support the work of community organisations Coexist in Hamilton House and Knowle West Media Centre by providing them with substantial energy savings (...) 2. Take part in our decisions about where surplus money goes and which projects to support in Bristol – each member gets one vote.”</i> (Bristol Energy Cooperative blog, Seven reasons to become a member of Bristol Energy Cooperative, 15 May 2012)
Environmental activism	Cooperative incentivising its members to switch to a <i>green</i> energy supplier, lobbying members of the House of Commons to support wind power and the feed-in-tariff for renewable energy generation, involved in a mobilisation against a Coal Bed Methane project (Insights from interviews)
Energy generation	Owner of rooftop solar installations on 12 community buildings across the Bristol region and two ground-mounted solar farms – one in Lawrence Weston in Bristol and one in Somerset (BEC website)

- 11 When it comes to income generation, a key element makes community energy organisations different from conventional energy companies: the use of community share offers to raise investment for project development. Five of their characteristics make them different from a traditional investment in a private company: 1) shares can go down in value, but they cannot increase in value above their original price which prevents any speculation dynamics; 2) any shareholder has one vote regardless of the number of shares owned, while a majority stakeholder can make all the decisions in a private company; 3) the dividends paid on every share are capped – 4% in the case of BEC; 4) there are limits on individual shareholdings, £20,000 in the case of BEC ; and 5) the sale of shares is protected by an asset lock (mentioned in the previous extract).
- 12 In addition to the hybridity mentioned above, the extract from the share offer also introduces the three dimensions that make community energy different from commercial and market arrangements: 1) ownership; 2) participation; and 3) economic benefits.

Community energy as a tool for the democratisation of public services through collective ownership

- 13 A first difference between community energy groups and commercial companies, public utilities lies in the ownership organisation. When it comes to renewable energy implementation, the community approach has been distinguished from public utility and private supplier approaches in terms of ownership. Through the second approach, the technology and energy infrastructures are owned by the State with economic benefits returned to public authorities while through the third approach ownership is private with differentiated returns to financial investors (Walker and Cass, 2007:

461-462). With a community approach, the technology and energy infrastructures are collectively owned through cooperative-based share ownership or partnership arrangements between a local authority and/or community institutions (Walker and Cass, 2007: 461-462). With this ownership organisation, community energy helps to democratise public services by opening two dimensions within energy projects: “a process dimension, concerned with whom a project is developed and run by, who is involved and has influence (...) an outcome dimension concerned with how the outcomes of a project are spatially and socially distributed – in other words, who the project is for; who it is that benefits particularly in economic or social terms” (Walker and Devine-Wright, 2008: 498). This collective form of ownership prevails in BEC with around 600 shareholders owning different photovoltaic generation sites with a total capacity of 9Mw. To become a shareholder, the minimum to invest is £50 with a maximum of £100,000 with a return of 5% on the investment. The collective dimension of ownership is protected by the legal structure used by community energy groups to formalise their existence with most of them having an “asset lock” clause which prevents them from selling the infrastructures to a commercial organisation (Braunholtz-Speight et al, 2018).

- 14 This form of ownership is one the key characteristics of community energy and is connected to criticisms of the market concentration of electricity supply in the United Kingdom. As in other national contexts, “dissatisfaction with the outcomes of previous privatisations spurs demands for collective ownership” (Becker and Naumann, 2017: 7) and fuels the motivation to develop community energy projects. This connection, which exists in other markets, between dissatisfaction with market domination by big corporations and the development of initiatives willing to collectively own market shares prevails in the frameworks proposed by community energy actors in the United Kingdom (Snow et al, 2019).² According to them, the role and power of large corporations, in particular the Big Six³ is a major problem that community energy can tackle (Table 3).

Table 3: Community energy as a solution to tackle the “corporation hegemony problem”

“The Co-operative model allows investors to see where their money is invested and have a say on how their investment is managed. In this way they are entirely different from large scale renewables such as offshore wind farms, which require large utility companies and investment from beyond the UK to develop their projects. At this large scale development provides a supply of electricity to the UK public, but cannot provide any direct/transparent benefit from a return on investment to the UK public” (Written evidence submitted by OVESCO Limited, House of Commons Energy and Climate Change Committee Local Energy Sixth Report of Session 2013–14 Volume I: 75).

“The current energy system that is dominated by large multinational corporations leads to a great proportion of profits leaving the local area where the work is done and bills are paid. Community Energy organisations are driven by the need to stop this leakage by developing an energy system that creates value for the local economy through local investment, income, jobs and unemployment” (Community Energy England, Community Energy Coalition and 10:10, Non-traditional business models: supporting transformative change in the energy market, 2015: 3)

“I think people are a bit sceptical about what we call the Big Six, the big energy owners, they just see it as someone coming in and taking all the money away so with community energy the money coming from energy generation is possibly going back into their community” (Interview with an E4All⁴ employee, Godalming, June 2017).

- 15 Community energy organisations also present themselves as different from commercial developers by focusing on one practice used by them: community benefits. The latter are “*financial packages that make payments directly, or in kind, to local communities*” (Kerr, Johnson and Weir, 2017). By promoting collective ownership, community groups want to distinguish themselves from the practice of community benefits:

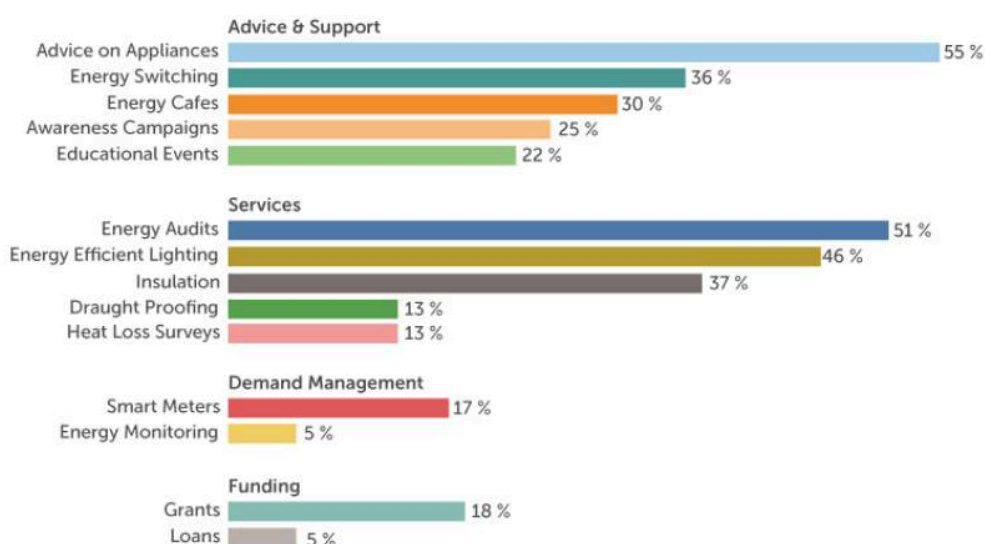
The Government should promote community ownership as the route to increased community engagement and acceptance. This entails moving away from the notion of ‘community benefit’ towards community ownership. Community benefits can include varying degrees of financial, environmental and social benefits, often accounting for a tiny fraction of the profit being generated by the development. Community ownership, however, ensures total control and the retention of maximum benefit for the community (...) Community ownership also helps to reassure communities that development is not being foisted on them by large unaccountable energy generators via processes over which they have little control.

- 16 (Community Energy Coalition, Manifesto for a community energy revolution, 2014: 15).
- 17 By focussing on the issue of control, this extract from a manifesto written by the Community Energy Coalition⁵ refers to a second possibility opened by community energy: a deeper and increased participation of the public within energy projects.

Community energy as a tool for higher public participation in energy development

- 18 When it comes to public participation, the alternative dimension of community energy initiatives is twofold: they help to broaden the scope of the role played by citizens and the type of activities developed by energy companies.
- 19 While community benefits provided by commercial developers allow the neighbours of energy infrastructures to be *local beneficiaries*, this approach does not allow them to become *project participants* or *energy producers* which is the case with community initiatives. Through a second role, citizens can get involved by becoming members of organising groups, by attending meetings; or by being involved in hands-on installation or maintenance (Walker and Cass, 2007: 465). Through a third role, they can directly own and operate generation technologies (Walker and Cass, 2007: 465). In addition to new roles taken on by citizens, community energy projects also increase public participation by carrying out activities traditionally not undertaken by public utilities and private suppliers.
- 20 We already mentioned that one activity done by community energy groups is electricity generation: 157 projects of this type were producing electricity in 2017, mainly photovoltaic energy: 135.6 mW out of the 168 mW of community energy in the United Kingdom (30.5 mW of wind power and 1.47 mW of hydro power, Community Energy England, State of the Sector Report, 2018). However, community organisations have also pursued two other activities that are not carried out by energy companies involved in the generation market: energy efficiency and fuel poverty alleviation. The former was implemented by 76 organisations in 2017 with different modes of action and participation (Figure 1).

Figure 1: Energy Efficiency Actions Carried out by 76 Community Energy Groups



Sources: Community Energy England, State of the Sector Report, 2018.

- 21 One of these actions increases citizen participation more than the others: the energy café. “Energy Cafés are community-led initiatives providing energy advice in a ‘café’ or ‘shop’ setting (...) They have been located in various places, ranging from village halls to libraries and city farms. First and foremost, Energy Cafés provide help for people to understand and manage their energy bills, but they also offer advice on energy efficiency, behavioural measures and renewable energy” (Martiskainen, Heiskanen and Speciale, 2017: 3). One of the three case studies analysed in this article organises such a café: SELCE. The latter describes this type of action in the following terms:

An energy café is a drop-in energy advice service that aims to take away the stigma associated with fuel poverty issues by providing a friendly one-to-one consultation over a cup of tea and a slice of cake. Last winter alone our experienced energy advisors worked with 280 vulnerable residents to identify savings through energy market engagement, access to water or energy discounts, debt write-offs, energy-saving tips and accessing grants. The SELCE team attends community events aimed at those who are at risk of fuel poverty. Last winter, we ran 35 workshops attended by 479 people and provided one-to-one advice to 145 clients following these workshops. The total reduction in energy costs for people who took part in the one-to-one advice sessions was £142,163.59 over three years (using conservative assumptions). However, ultimately we aim to provide more tangible benefits in terms of health and wellbeing and give those who are most financially vulnerable a sense of control through understanding how their energy costs relate to their energy use.

(South East London Community Energy, South Share Offer 2019: 18).

- 22 This form of action is particularly important with regard to the participation of people that are usually not involved in community energy projects like populations with migrant background. According to one employee of SELCE in charge of two energy cafés, this action helps to get in touch and involve this type of population:

For people on low incomes, particularly people who are of colour or of different ethnic background that won't necessarily identify with climate change as an issue, or energy use as an issue because of their identity. You know, I'm an activist, I go along and I go, my identity is all about that... but, you know... It's really different for a mum who's struggling to find enough time to take care of her kids and pay the bills and keep the house, and keep the kid from being a criminal... to keep the kid

on the straight and narrow. It's really hard for those people. If you want to talk about energy you've got to talk about something that responds to one of their needs. And you know, being able to keep the home warm is where their level of need is. Now, we do talk about climate change, we do talk about energy, when we're doing our fuel poverty alleviation work, but really it's in the context of the needs that they present (...) The starting point has to be something that they feel they need, which is to be able to pay the bill or to keep their home warm.

(Interview with an employee of SELCE, September 2019, London).

- 23 The effects of energy cafés mentioned by SELCE in its share offer are directly connected to the third possibility opened by community energy: higher economic benefit for the local areas.

Community energy as a tool for greater economic benefits in local areas

- 24 Whereas many community energy initiatives are guided by climate change concerns, in many cases community energy is primarily perceived as a tool of local economic development and regeneration (Walker et al, 2007: 73). This dimension is key to explaining why organisations like the National Trust, which are usually not involved in renewable energy development, support community energy initiatives. Accordingly, it was mentioned in a National Trust report published in 2013 that “*community renewables schemes can deliver a range of social and economic benefits to local communities including increased autonomy, empowerment and resilience by providing a long term income and local control over finances, often in areas where there are few options for generating wealth*” (National Trust, Social and Economic Benefits of Community Energy Schemes, 2013: 2). The fact that community energy can be a tool for local economic development also attracts organisations that tend to be sceptical about renewable energy projects like the Campaign to Protect Rural England:

To many people in the countryside, rural energy conjures up images of big infrastructure and the realities of the high bills that they face. Up until now large power stations, commercially owned renewables, pylons, leaky homes and expensive fuels have contributed to this negative picture. But it doesn't have to be like this. Community energy offers a different way forward where communities are in control, leading and owning projects, and where small can be beautiful. Community energy is not yet commonplace in England, but the Campaign to Protect Rural England (CPRE) and a growing number of organisations and people believe it should be. Rural communities have been at the forefront of this agenda. The essence of community energy is that – whether it is about saving energy through improving the energy efficiency of local buildings or producing renewable electricity or heat locally – it is led and owned by communities. This means that a range of benefits, including financial payback and reduced energy bills, will go directly to all of those within the communities taking them forward. This is particularly important in rural communities where, on average, energy costs are higher and home energy efficiency lower than in urban areas. The vast majority of UK energy projects – mainly generation – are led and owned by large commercial developers. As a result, too often the benefits flow out of the communities.

- 25 (Nick Clack presentation, 17 July 2015, Workshop on community energy, Newcastle).
- 26 The effects of community energy development on local economies are twofold: direct through reduced energy bills and contracting local installers; indirect through the funding of activities beyond energy projects.

- 27 Regarding the direct effects, a report on 80 community organisations published by Community Energy England highlights the following elements:
- Small-scale community energy projects almost invariably use very local contractors, and this is explicitly part of the aim of many of these organisations. The 38 organisations with existing projects have provided work for 161 local contractors. Of the £50 million raised for investment in existing projects: 45% was spent with local businesses (£23 million); 43% was spent with national businesses (£21 million); 12% was spent with non-UK firms (£6 million). (Community Energy England, *Community Energy: Generating more than renewable energy*, October 2015: 24).
- 28 Regarding the indirect effects, beyond paying dividends to shareholders, community energy projects also use some of the income to support initiatives and infrastructures outside the energy sector, for instance by buying existing infrastructures or creating new ones. The former was done by 14% of the surveyed community organisations by Community Energy England in 2014, that purchased existing infrastructures to renovate them (e.g. a community hall) or contribute to new ones (e.g. a local shop or pub). In addition to higher public participation and ownership democratisation, these economic benefits contribute to the fact that community energy initiatives in the United Kingdom provide services that make them different from public utilities and private suppliers. However, the second section of this article will show that the transformative power of the alternative model developed by these initiatives is limited because community energy is embedded between the State and the market.

A Limited Transformative Power

The reality is that all the cooperatives members of Community Energy England are struggling to survive so they stick together as part of this organisation to deal with this vulnerable situation but they can hardly change and influence the market rules because they are too busy struggling to survive and reacting to changes in public policy. (Interview with the Shadow Chancellor's Advisor on Sustainable economics for the Labour Party, London, January 2018).

- 29 This extract from an interview with the Shadow Chancellor's Advisor on Sustainable economics for the Labour Party and Member of Parliament for Nottingham South between 1992 and 2010 introduces one of the key elements explaining the limitations encountered by community energy when it comes to constituting an alternative beyond State and market arrangements: the difficulties of the community energy movement to act as rule-makers (Streeck and Thelen, 2005) within the British policy regime. These difficulties are twofold, and concern issues to institutionalise advantages, as well as issues to challenge decisions that have negative effects on their developments.

Community energy organisations: playing the market without ruling it

This 5 year period was a kind of golden age for community energy because the Energy Department was held by a Lib Dem Ed Davey very supportive of community energy and right now is a chairman of cooperative (...) We were administrating a fund which was meant to be a 10 million fund to help community groups to do early stage technical work, to do feasibility studies and once you knew that your project was feasible we were supposed to be able to borrow a loan of up to £120,000 to move

forward to the next steps. But it was very clear as soon as the elections happened that the Conservatives didn't want that to continue and when they won the elections they just cut it (...) The biggest problem was when the new government came in, first they cut the UCEF fund but they also cut the FIT [feed-in-tariff] at the same time and community groups built their financial models based on the revenues coming from the FIT and that amount of money was cut by 83%.

(Interview with a Programme Director at the Centre for Sustainable Energy, Bristol, June 2018)

- 30 With loan and funding programs, relatively high levels of feed-in-tariff supporting the generation of electricity by renewable energy producers, as mentioned by this extract from an interview, the Coalition government from 2010 to 2015 was a *golden age for community energy* in the United Kingdom. Funding programs like the Urban Community Energy Fund (UCEF) were part of a broader policy framework: the Community Energy Strategy. In addition to UCEF, this strategy included a broad range of working groups: a grid connections working group, a community energy finance roundtable, a shared ownership taskforce, and a community energy contact group. They were meant to tackle the specific issues encountered by community energy initiatives in the United Kingdom. However, as with the UCEF and the decline of the FIT, these working groups have been abolished. These abolitions show that while community energy groups can achieve short term gains, they struggle institutionalising them. These difficulties to institutionalise advantages is key to explaining the difficulties for community energy actors to be rule-makers within the British policy regime. They are related to one key weakness of community energy in the UK: the challenge to build a social movement with collective organisations. *“Financial and time resources are important constraints: simply developing and managing a community energy project is often the main goal of the actors concerned, leaving little scope to lobby government or create networks (...) Although intermediary bodies are emerging, their development has been late and slow. Limited resources also affect their scope to act”* (Strachan et al, 2015: 105). An example of these limited resources is evidenced by the staff resources of Community Energy England, the main intermediary organisation for community energy initiatives, with five employees in 2019, and only one dedicated to lobbying activities. These difficulties are also shown by issues to challenge decisions that have negative effects on their developments.
- 31 At the level of the British policy regime as a whole, such constraints are borne out by the unsuccessful challenge of the decline and then removal of the FIT from 2015 onwards. At the level of projects on the ground, these difficulties are shown by the unsuccessful bargaining related to the financial model of Meadows Ozone Energy Services (MOZES). Based on the idea of establishing an Energy Service Company (ESCO) to install solar panels for free on tenants roofs and to tackle fuel poverty within a deprived area of Nottingham, MOZES was created in 2009 by a steering group with different actors. This group was formed with representatives from the Meadows Partnership Trust (MPT), the Nottingham Energy Partnership (NEP), Nottingham City Council and local Residents Associations, a former MP of Nottingham South (Alan Simpson) and National Energy Action (NEA), a national charity undertaking a range of activities to address the causes and treat the symptoms of fuel poverty.
- 32 In 2009, MOZES won a £615,000 grant from the Department of Energy & Climate Change (DECC) low-carbon communities competition. Following this, the organisation installed 67 photovoltaic systems between February and April 2010. When starting the project, the grant and FiT payments were supposed to be compatible. The income stream

generated through the payments was planned to be used to install new solar panels and to reduce fuel poverty within the Meadows. However, in May 2011, DECC, based on an interpretation of European Commission State aids ruling (European Commission. State aid N 94/2010, C (2010)2445, JOCE 2010/C 166/02), decided that community energy groups which received grants would not be allowed to receive FiT payments as well. Whereas this decision might be considered as a simple translation of EU legislation, a member of the Meadows board analysed this policy choice as “*a restrictive interpretation of EU rules because it is not about market distortion because the MOZES project is not big enough to be market distorter and it is not a commercial enterprise, it’s a social enterprise.*” (Interview with Alan Simpson), Nottingham, January 2018). Some analysts developed similar views about this decision, outlining that “*particularly when considered in the context of EC decisions on comparable schemes elsewhere in the EU, it is far from clear that the UK scheme should constitute state aid at the level of FiT generators such as community projects*” (Payne and Steeden, 2012; Wokuri and Pechancová, 2018: 38). Assuming that this decision was unfair, MOZES challenged it through three channels of action (Beach and Pedersen, 2013). The first one was the creation of a working group including lawyers and a business-led charity financing community energy projects, Pure Leapfrog. This group was launched to negotiate with DECC civil servants. Through this negotiation, MOZES developed a political work (Smith, 2019) to change the governmental decision with elements highlighting the specificities of community energy and the effects of DECC’s decision for MOZES. This working group was not able to influence the decision so then MOZES made bilateral contacts with the Secretary of State in charge within DECC. These bilateral meetings did not modify the decision either, which led MOZES to try a third course of action: publicising the case within parliamentary arenas. This was done through a written question made by a Labour MP from Nottingham in the House of Commons to the Secretary of State for Energy and Climate Change in March 2015. Yet this too failed.

- 33 In addition to difficulties institutionalising advantages and challenging policy evolutions that affect negatively the development of community energy, the limited transformative power of this sector in the United Kingdom is also characterised by its corrective role in the provision of services (e.g. fuel poverty alleviation) to mitigate some of the consequences related to the UK’s liberalisation of electricity markets.

The action of community energy groups on fuel poverty as an example of their corrective role

How do you help people manage their fuel debts?

If the problem has to do with energy, then we will help them to apply to a trust fund for debt relief. So British Gas, EDF, E.ON, they all have trust funds where you can apply for debt relief if you’re a vulnerable person. Or alternatively it may be that they have built up debt and their repayments are too large. They can’t afford the repayment, we might reschedule the payment (...)

And you mentioned the warm home discount⁷. Not all of the energy suppliers do it? No, they don’t (...) So for a warm home discount, you have the core group. If you’re a pensioner on pension credit, you automatically get it. If you’re not, you’re part of what’s called a board group. Each energy supplier is allowed to define their own board group criteria. So, if you have a low income and you’re a pensioner you’ll be eligible with one energy provider but not with another. It’s really confusing. (Interview with an employee of SELCE, September 2019, London).

- 34 This extract from an interview with an employee of the SELCE cooperative in London shows two dimensions of the corrective role of community energy regarding fuel poverty alleviation: the provision of services to mitigate the consequences of market liberalisation and the lack of autonomy to do so.
- 35 The debt issues raised by the previous extract highlights that when it comes to fuel poverty, community energy action can be characterised as a partial fix of the social consequences of electricity market liberalisation in the UK. *“In liberalised markets there is an inherent conflict between the legislation and the way in which the vulnerable in society are treated: to attract new, attractive accounts will require a discount that inevitably has to be raised from the least desirable customers, who are often the fuel-poor”* (Boardman, 2010: 255). The tension mentioned here has led the main utilities, in particular the Big Six, to *“penalise the unwanted customers in order to attract those that are more profitable”* (Boardman, 2010: 256). This twofold dynamic has been characterised as *cherry-picking, social dumping* strategies with poorest domestic customers increasingly paying high deposits for services or directed towards prepayment systems, similar to phone cards, so that customers can manage their own consumption (Graham and Marvin, 1994: 4-7). In this context, *“Energy Cafés to some extent fulfil a service that incumbent energy utilities in the UK used to provide, i.e. by providing a presence and energy advice in a high-street shop setting to the general public”* (Martiskainen et al, 2017: 33). By organising such cafés, community energy groups like SELCE try to fix and mitigate some of the consequences of the market liberalisation. As shown by the previous extract from an interview, this corrective action also lacks autonomy with dependence towards the main market players.
- 36 This dependency is illustrated by two actions mentioned by the employee from SELCE’s cooperative: one connected to debt issues and the other to the Warm Home Discount. As noted in the extract, one way to act on energy bill debts is to apply to a Trust fund to cancel, reduce or reschedule debt. These trusts are managed by big energy suppliers like British Gas or EDF. This design shows that a key avenue to deal with energy debt is closely related to the energy company’s willingness to grant a favour towards customers that have set out their deprivation in an application form. Community energy action on debt issues is then very constrained by the power of the main market actors. This constraint and lack of autonomy is also at play for the Warm Home Discount. Through this government scheme introduced in 2011, the access to the discount it is not automatic and it is up to every energy supplier to decide the conditions of eligibility. The transformative power of community energy is here again limited by the fact that, as for the trust application for debt relief, the action on fuel poverty is closely controlled by the energy companies. This limited transformative power of community energy in the UK is finally shown by a third element: the small market share owned by community energy projects.

Community energy in the UK: a small tolerated niche

- 37 *“When making comparisons with other European countries it is clear that community renewables are only playing a very small part in helping to secure EU renewable energy and broader climate change targets in the UK”* (Strachan et al, 2015: 105) This small part can be captured by looking at the small share of community energy projects in the generation of electricity in the UK.

Given that the total energy generation capacity across the UK is 97.8 GW (BEIS 2017c), with 38 GW coming from renewables alone (BEIS 2017b), community energy clearly makes up only a very small proportion with 0.19 per cent of total supply. Partly this is because projects involving community ownership are relatively small, both physically and in terms of generation capacity—the mean project capacity size (total capacity/number of projects) amounts to 676 kW. Larger solar projects of up to 9 MW in capacity are emerging, although these are relatively rare. (Willis and Simcock, 2019: 373).

- 38 Other authors have reported similarly low shares of community energy, showing that “it represented just under 0.4% of the UK’s renewable energy capacity by 2014, supplying the equivalent of only ~65,500 homes” (Mirzania et al, 2019: 1282). This small share highlights that community energy is a small, tolerated niche between the State and the market rather than a third way likely to replace traditional supplies in the UK.

Conclusion

- 39 With the democratisation of public services through collective ownership, higher public participation in energy development and higher economic benefits for local areas, community energy constitutes a tool for energy democracy with new value propositions (Braunholtz-Speight et al, 2018). The different actions developed to alleviate fuel poverty constitute an example of these innovative value propositions. By opening collective ownership, participation in energy development and economic benefits for local areas, community energy can be characterised as an alternative model to market and State arrangements with significant transformative power. However, this transformative power is limited, due to: i) difficulties for community energy organisations to institutionalise advantages and to challenge adverse policy evolutions within the British policy regime; ii) a corrective role of *market failures* in the case of fuel poverty; and iii) the small market share owned by community energy projects. These three dimensions underline the way community energy is embedded between the State and the main market actors in the UK. This embeddedness is shown in the difficulties encountered by the collective organisations supporting community energy to act as rule-makers of energy policies and by the fact that the Big Six energy companies remain veto players within the British policy regime (Willis and Simcock, 2018).

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NOTES

1. According to Howlett, “A policy regime can be defined as a persistent and regular political arrangement composed of (1) a set of state-societal relations affecting the style or process of sectoral policy-making; (2) a set of ideas related to governing these interactions and effecting policy contents and instrument choices; and (3) a set of institutions designed to regularise and routinise the content and style of policy-making in the sector concerned”, (Howlett, 2001: 7).
2. The micro-brewery, wine and organic farming markets are three examples of this connection (Carroll and Swaminathan, 2000; Swaminathan, 2001; Pozner and Sikavica, 2013).
3. According to many authors, the domination of these six companies is directly related to the privatisation of electricity networks: “*The UK’s energy market is highly centralised and dominated by large commercial players (Willis and Eyre 2011). This is as a result of the process of privatisation of electricity and gas infrastructure and supply, which until the 1980s was state owned and run. Energy, both heating and electricity, supply is largely dominated by the so-called ‘Big Six’ companies: British Gas, EDF Energy, E.ON, Npower, Scottish Power, and SSE. Between them, the Big Six supplied nearly 95 per cent of households in 2014*” (Willis and Simcock, 2018: 371).
4. Energy4All is a nation-wide network of cooperatives in the United Kingdom initiated in 2002.
5. Initiated in 2011 with the following overall purpose: to “*ignite an energy revolution which places communities at its heart and strives for a clean, affordable and secure energy system for all. We are achieving this by helping communities across the UK to own, generate and save energy together*” (Community energy coalition website). This coalition includes 43 organisations of different types: environmental NGOs (e.g Friends of the Earth), cooperative networks (e.g. Co-operatives UK) structures specifically dedicated to community energy (e.g. Energy4All) but also organisations beyond the environmental groups (Campaign to Protect Rural England, National Farmers Union, National Trust).
6. These constraints are shown by the low number of community energy organisations having employees and the small number of volunteers involved in these initiatives: “*70% of organisations were found to have no paid staff and entirely reliant on volunteers to deliver their projects. For groups reliant on volunteers, community energy organisations reported that a small central core of volunteers*

were often responsible for their energy projects. 56% reported fewer than 10 volunteers” (Community Energy England, State of the Sector report, 2019: 10)

7. It is a £140 one-off discount on electricity bill during the winter, under the Warm Home Discount Scheme and accessible for two categories of people: the ones receiving the Guarantee Credit element of Pension Credit, known as the “*core group*” and the ones with low incomes and meeting energy supplier’s criteria for the scheme - known as the “*broader group*” (Ofgem website).

ABSTRACTS

The British energy policy regime is commonly depicted as large-scale, centrally-planned and private-sector led sector with limited citizen involvement into energy planning and development. However, the number of electricity generation projects owned by community groups has risen dramatically over the last decade. The development of such initiatives raises a key question related to public services provision and market organisation: does community energy constitute an alternative beyond market and State arrangements? Based on semi-structured interviews and extensive policy analysis, this article provides a twofold answer to that question. First, it shows that community energy in the United Kingdom constitutes an alternative model to market and State arrangements with the opening of three possibilities: ownership of energy infrastructures by local community groups, participation with higher levels of citizen involvement and economic benefits with profits made from electricity generation distributed within local areas. Second, the article shows that the transformative power of this model is limited because community energy is embedded between the State and the market. This embeddedness is characterised by the fact that community energy organisations struggle to institutionalise advantages and to challenge decisions that affect them negatively, and by a corrective role with a provision of several services that were previously provided by State and market actors.

Le régime de la politique énergétique britannique est généralement décrit comme un secteur centralisé et contrôlé par de grands acteurs de marché avec une participation limitée des citoyens à l'aménagement et au développement énergétiques. Cependant, le nombre de projets de production d'électricité détenu par des collectifs de citoyens et de riverains a considérablement augmenté au cours de la dernière décennie. Le développement de telles initiatives soulève une question clé liée à la fourniture de services publics et à l'organisation des marchés : la *community energy* constitue-t-elle une alternative aux modes d'organisation socio-économiques étatiques et marchands ? Mobilisant des entretiens semi-directifs et une analyse approfondie des politiques publiques, cet article apporte une double réponse à cette question. Premièrement, il montre que la *community energy* au Royaume-Uni constitue un modèle alternatif aux modes d'organisation socio-économiques étatiques et marchands avec l'ouverture de trois possibilités : une propriété des infrastructures énergétiques par des groupes de citoyens et de riverains, une plus grande participation citoyenne et enfin une distribution locale des bénéfices de la production d'électricité. Deuxièmement, l'article montre que le pouvoir transformateur de ce modèle est limité car la *community energy* est encadrée entre l'État et le marché. Cet encastrement se caractérise par le fait que les organisations de soutien à la *community energy* peinent à institutionnaliser les avantages obtenus et à contester les décisions qui les affectent

négativement, et par leur rôle compensateur avec la prestation de plusieurs services, auparavant fournis par l'État et les acteurs du marché.

INDEX

Mots-clés: économie politique, politiques publiques, participation citoyenne, énergies renouvelables, énergie coopérative

Keywords: political economy, public policies, community energy, renewable energy

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La *Private Finance Initiative* et les infrastructures scolaires au Royaume-Uni : vingt ans après, quel héritage ?

Twenty Years on: the Legacy of the Private Finance Initiative on the School Estate in the UK

Françoise Granoulhac

Introduction

- ¹ En octobre 2018, à l'occasion du discours de présentation du budget, le Chancelier de l'Échiquier Philip Hammond annonçait l'abandon de la *Private Finance Initiative* (PFI)¹. En cela, le gouvernement de Theresa May ne faisait qu'entériner le déclin de fait d'un modèle de partenariat public-privé (PPP) adopté vingt-six ans auparavant, par lequel l'État délègue à un consortium privé le financement, la construction et la gestion de bâtiments ou infrastructures aussi diverses qu'hôpitaux, écoles, ou routes ainsi que des services associés². Pendant la durée du contrat, le plus souvent conclu pour une période de vingt-cinq à trente ans, les autorités locales versent une rétribution annuelle (*unitary charge*) à la société projet (*Special Purpose Vehicle* – SPV) créée à cet effet (fig.1). Cette rétribution couvre les emprunts et intérêts d'emprunts, les coûts d'exploitation et les dividendes versés aux actionnaires. À l'issue du contrat, la propriété des biens ainsi réalisés revient le plus souvent à l'autorité contractante. Autant qu'un mode de financement, la PFI est donc un mode d'acquisition et de gestion des infrastructures.
- ² À la date de mars 2018, c'est le ministère de l'éducation qui détient en Angleterre le nombre le plus élevé de contrats PFI en cours (173 sur un total de 704 contrats actifs³), devant le ministère de la santé, pour un montant de 8,6 milliards de livres. Chaque contrat PFI peut inclure de un à plus de dix projets de construction ou de rénovation, en une ou plusieurs phases. En Écosse également, trente-neuf contrats concernant des

infrastructures scolaires sont toujours en cours⁴, dont une partie relève d'un modèle légèrement différent, le *Non-Profit Distributing model* (NPD)⁵. L'Irlande du Nord et le pays de Galles comptent respectivement quinze et six projets, les quinze projets scolaires nord-irlandais représentant la majorité des investissements réalisés sous partenariats publics-privés.

- 3 Or la question de l'héritage de ces contrats se pose, car ceux conclus il y a vingt ou dix ans engagent encore à l'heure actuelle écoles et collectivités, avec de multiples conséquences. Le fonctionnement de ces partenariats dans le secteur éducatif a été étudié sous des aspects divers, le plus souvent à partir d'études de cas. Mais la plupart de ces travaux ont été menés avant le déclin des PPP⁶. Au-delà des scandales révélés au cours de ces dernières années, il s'agira ici, après avoir établi le bilan financier de la PFI, d'éclairer les diverses facettes de cet héritage, notamment son impact sur les acteurs du système éducatif et sur le patrimoine scolaire. Par ailleurs, la décision de Philippe Hammond ne signale pas nécessairement la fin des partenariats publics-privés. Qu'il s'agisse des besoins futurs en infrastructures, de contraintes économiques liées au Brexit ou de décisions politiques, la question du financement de la commande publique se posera. Cet article est principalement centré sur les dispositifs utilisés en Angleterre et en Écosse, PFI et NPD, majoritairement employés dans le domaine scolaire, et dont on peut à présent, à vingt ans de distance, tenter d'apprécier les effets.

1. La *Private Finance Initiative* et l'école : entre idéologie et opportunisme

- 4 Malgré des débuts hésitants sous le gouvernement de John Major, le recours aux financements privés pour des projets à visée sociale, incluant donc l'éducation et la santé, s'est rapidement imposé à partir de la fin des années quatre-vingt-dix au Royaume-Uni, avec cependant beaucoup moins de succès au pays de Galles. L'ouverture en 1999 de la première « école PFI », Victoria Dock Primary School à Hull, a lieu après une période de baisse continue des crédits d'investissement, alors que la nécessité de rénover et construire des infrastructures scolaires et hospitalières vieillissantes devient pressante. On attend de ce nouveau modèle trois avantages principaux : le respect des délais et des budgets, une baisse des coûts d'exploitation et la réalisation de bâtiments de qualité, maintenus dans un état optimal. Mais l'argument décisif en faveur de la PFI tient à l'avantage fiscal qu'elle présente par rapport aux financements publics. En vertu du principe « *buy now, pay later* », il devient possible de mettre en œuvre des chantiers importants sans attendre et sans différer d'autres investissements, tout en maîtrisant le niveau de la dette⁷ : le transfert des risques et bénéfices au secteur privé fait en effet passer les dépenses engagées, qui sont des dépenses publiques, « hors bilan », du moins jusqu'à l'adoption des normes IFRS (*International Financial Reporting Standards*) pour les comptes publics à partir de 2010, puis l'application, pour le traitement statistiques des projets, des nouvelles normes comptables européennes (ESA10) en 2014⁸.
- 5 Loin d'être une réponse uniquement financière à une situation d'urgence, le recours aux PPP relève aussi d'une vision politique plus globale, qui vise à introduire dans les services publics l'expertise, la capacité d'innovation et les méthodes de gestion du secteur privé. Ces principes, appliqués au système éducatif anglais, ouvrent d'abord la voie à la marchandisation et l'externalisation de services destinés à des établissements de plus en plus autonomes. Ils conduisent, avec l'expansion sous l'administration *New*

Labour d'un secteur public indépendant composé d'*academies*, à la suppression du monopole des autorités locales dans l'administration de l'éducation. La création d'un nouveau type d'*academies*, les *free schools*⁹, sous le gouvernement de Coalition, complète une diversification de l'offre favorable à l'entrée sur ce quasi-marché de nouveaux acteurs associatifs ou privés. Malgré la résistance que ces réformes rencontrent en Écosse, le recours aux PPP y est fortement encouragé par le gouvernement travailliste-Lib-Dem puis par le parti nationaliste au pouvoir à partir de 2007, tant par conviction politique que par pragmatisme financier. Les autorités locales, qui contrôlaient autrefois la chaîne des opérations de construction scolaire, de la programmation des équipements à leur réalisation, confiée aux services d'architecture internes ou à des cabinets privés, se trouvent désormais en position de client d'un consortium rassemblant investisseurs institutionnels, constructeur et financiers.

- 6 Outre les projets dont elles ont l'initiative, les collectivités sont les partenaires de programmes dont le gouvernement central fixe les objectifs et détermine les financements. C'est le cas de *Building Schools for the Future* (BSF), programme phare du *New Labour* lancé en 2003, et des programmes successifs écossais, PPP1, PPP2 et *Schools for the Future*, qui font largement appel aux financements privés¹⁰. En Irlande du Nord l'accent est mis particulièrement sur le rattrapage du retard pris dans l'entretien et la construction d'infrastructures¹¹. Compte tenu des limites de leurs budgets d'investissement, les collectivités ont tout intérêt – et sont fortement incitées – à s'engager dans les PPP. À l'exception du pays de Galles, où les autorités locales sont invitées à faire preuve de prudence sur le plan budgétaire, la plupart des collectivités des trois autres nations voient dans ce dispositif une aubaine, entretenue par l'attribution de subventions spécifiques. Les *PFI credits* et leur équivalent écossais, qui sont des dotations à taux fixe, couvrent en effet, en théorie, la rétribution annuelle due à la société projet. Ces paiements sont constitués de deux parties, l'une, concernant le bâtiment lui-même, étant acquittée par les collectivités sur leurs budgets de fonctionnement, l'autre, concernant les services, étant prise en charge par les établissements sur leur dotation budgétaire. En Écosse l'ensemble des paiements est effectué par les autorités locales.
- 7 Le choix de la PFI peut donc se lire à plusieurs niveaux : comme un choix politique et comme un choix opportuniste au niveau local, qui tend à devenir sous la pression des instances gouvernementales un choix quasi-contraint, « *the only game in town* », selon la formule utilisée par plusieurs dirigeants locaux. Ce choix a cependant de multiples conséquences en termes de redevabilité, et d'abord de redevabilité financière et managériale, du fait des dépenses engagées par les pouvoirs publics sur le long terme et de l'importance prise par le management de la relation contractuelle. Mais au-delà des aspects financiers et de l'exigence de transparence, la redevabilité des PPP s'exerce aussi par rapport aux attentes des usagers et à la qualité du service public ainsi assuré, ce que Frédéric Marty et Arnaud Voisin définissent comme une redevabilité d'impact¹². Or, cette dimension est particulièrement importante, comme on le verra plus loin, pour les projets à vocation sociale.
- 8 Après la crise de 2008 et ses répercussions sur les institutions financières, le déclin de la PFI dans le domaine scolaire est brutal mais n'est pas total. Alors que le gouvernement de Coalition tente d'imposer une version remaniée, la *Private Finance 2* (PF2) qui ne concernera que cinq projets (quarante-six écoles), les investissements se poursuivent en Écosse, notamment dans le cadre du NPD, mais se tarissent en Irlande du Nord. Bien

avant la crise cependant, les questionnements se multiplient – y compris au sein du *Treasury* – sur ce qui est censé justifier le recours aux financements privés, c'est-à-dire la *Value for Money*.

2. Le bilan financier : *Value for Money* et poids de la dette

- 9 Un des paramètres essentiels des partenariats publics-privés est leur durée et c'est bien à l'épreuve de celle-ci qu'il convient d'analyser leur bilan, sous deux aspects principaux : les coûts supportés par la collectivité et le rapport coût-bénéfice-risque (*Value for Money*). Selon certains calculs, les paiements cumulés sur la durée de vie des contrats actuellement en cours dans le secteur éducatif atteindront au final 32 milliards de livres pour un investissement initial d'une valeur de 8,6 milliards¹³. Ils représentent plus de quatre fois la mise de fonds initiale en Irlande du Nord et au pays de Galles¹⁴. En Écosse, 12,2 milliards de livres restent dus sur les vingt-cinq prochaines années au titre des contrats de plus de 300 « écoles PFI », soit pour la seule année 2018-2019, 434 millions de livres, près de 10% du budget courant de l'éducation¹⁵. Les infrastructures scolaires constituent une part particulièrement importante des PPP conclus par les autorités locales en Irlande du Nord et en Écosse, où les remboursements annuels atteindront leur niveau maximum au cours de la période 2022-2029, et ne commenceront à diminuer sensiblement, comme en Angleterre, qu'à partir de la fin des années 2030.
- 10 Si les remboursements atteignent de tels niveaux, c'est en grande partie en raison du coût du financement de la dette, supérieur avant la crise d'environ 2% à celui des marchés publics traditionnels pour les projets BSF et de 3 à 4% après la crise financière, ce qui portait les taux d'intérêts pour ces projets à plus de 7% en 2010¹⁶. Seulement un quart des contrats PFI conclus avant 2002 comportaient des clauses prévoyant un partage des gains entre autorité publique et consortium privé à la suite du refinancement de la dette en cas de baisse des taux d'intérêts. Il faut ajouter à cela le coût des fonds propres apportés par les investisseurs, la multiplicité des frais liés aux assurances, à l'emploi de conseillers juridiques ou financiers, et surtout l'indexation du prix des services sur l'inflation. Une étude du *National Audit Office* (NAO) sur un groupe d'établissements scolaires fait apparaître des coûts de financement totaux, sur une durée de vingt-cinq ans, supérieurs de 40% aux coûts d'un financement public pour les mêmes infrastructures¹⁷. Mais surtout, les rétributions annuelles, qui couvrent engagements financiers et services, constituent des charges qui ne peuvent être modulées, les paiements étant sanctuarisés (*ring-fenced*).
- 11 Ce coût plus élevé du financement et de la construction – les entreprises ont tendance à surévaluer financièrement les risques constructifs – n'a de sens que si les PPP réalisent des gains d'efficacité sur le cycle de vie du contrat. C'est en effet la *Value for Money*, c'est-à-dire le rapport entre le coût total de l'investissement, le bénéfice rendu et le transfert du risque au secteur privé, qui légitime en théorie le choix de la PFI par rapport à d'autres modes de financement et de construction des infrastructures. Or, pour les infrastructures scolaires comme pour d'autres secteurs, l'évaluation préalable de la VfM intègre des critères, en particulier une estimation financière du risque, qui jouent systématiquement en défaveur du financement public.
- 12 Qu'en est-il, à posteriori, du rapport coût-bénéfice-risque réel ? Selon les rapports du *National Audit Office* et du *Public Accounts Committee* de la Chambre des Communes

publiés en 2018, les avantages censés compenser un coût plus élevé n'ont de manière générale pas été démontrés pour l'ensemble des projets. Cet exercice d'évaluation est de toute façon extrêmement complexe, les différents ministères concernés s'avérant eux-mêmes incapables de quantifier les bénéfices de la PFI, une lacune soulignée en des termes particulièrement sévères dans un rapport de la Chambre des Communes¹⁸. Le ministère de l'éducation semble avoir été le seul à envisager de procéder à un tel bilan... qui n'a en tout cas pas été rendu public. En Écosse, les dernières investigations menées par *Audit Scotland*, qui portent en partie sur les infrastructures scolaires, soulignent également l'absence de clarté dans des choix de financement, considérés comme autant politiques qu'économiques¹⁹. La question de la qualité, qui sera abordée plus loin, est à cet égard fondamentale pour déterminer dans toutes ses dimensions le véritable rapport coût-bénéfice-risque, les aspects quantitatifs et qualitatifs étant d'ailleurs souvent liés. Le *Treasury* reconnaît en revanche assez rapidement la faible *Value for Money* du dispositif pour les contrats plus modestes, inférieurs à 20 millions de livres, et en particulier pour les équipements informatiques et les prestations de services qui sont à partir de 2012 « détachés » des contrats PF2²⁰. C'est la raison pour laquelle le choix de la PFI est considéré comme étant plus pertinent pour les constructions neuves que pour les opérations de rénovation.

- 13 Vingt ans après, la charge financière que représentent les paiements annuels au titre de la PFI pèse lourdement sur des établissements et des collectivités dont l'équilibre budgétaire est fragilisé par la baisse des dotations aux autorités locales consécutive à la crise financière de 2008 et à l'adoption de politiques d'austérité. Cette baisse est particulièrement sensible en Angleterre, où elle atteint 37,9% entre 2010-2011 et 2015-2016, contre 9,6% au pays de Galles et 8,5% en Écosse²¹. Mais les collectivités écossaises disposent de faibles marges de manœuvre, en raison des pressions financières liées aux priorités fixées par le gouvernement²². Dans les régions du Royaume-Uni où l'on a eu largement recours aux PPP, les crédits accordés par le ministère, qui diminuent au fil du temps, ne permettent plus aux autorités locales d'assumer le remboursement de la dette sur leur budget de fonctionnement. Cet écart entre ressources et paiements (*affordability gap*) les contraint à réaliser des économies sur d'autres postes budgétaires et parfois en dernier recours, comme à Bristol en 2017 et à Leeds deux ans plus tard, à négocier des crédits supplémentaires auprès du ministère²³. À Sheffield, où les paiements annuels à la société projet atteignent en 2018-2019 40 millions de livres, la différence se chiffre à 6,9 millions, soit 2% du budget individuel des établissements. Pour combler cet écart, des prélèvements additionnels ont été effectués sur le budget de toutes les écoles de la ville, y compris celles qui ne sont pas sous contrat PFI²⁴. Même lorsqu'un léger excédent est prévu en fin de contrat, comme cela a été calculé dans le quartier de Tower Hamlets à Londres, les incertitudes demeurent en raison de l'évolution, difficile à prévoir, de l'inflation²⁵.
- 14 Il est bien sûr légitime de s'interroger sur la fiabilité des projections faites initialement par les responsables locaux pour déterminer la soutenabilité budgétaire de leurs projets. Ces calculs semblent avoir été très optimistes et l'attribution des marchés peu transparente en Écosse²⁶. Dans les quatre nations, les collectivités ne disposaient pas toujours, dans les premiers partenariats, de l'expertise nécessaire à la gestion de ces contrats. Mais quelle que soit la situation locale, la longue durée de la relation qui lie la société projet et les autorités locales est intrinsèquement porteuse d'incertitude. Sur une aussi longue période, les paramètres évoluent en fonction de la conjoncture économique, des décisions politiques ou fiscales, de l'allocation des ressources aux

établissements. L'utilisation des bâtiments et des équipements change au fil du temps, créant de nouveaux « risques ». Comme le soulignent Frédéric Marty et Jacques Spindler, les contrats PFI sont par nature des contrats incomplets, les aléas sur une longue période ne pouvant être envisagés à l'origine du projet²⁷. Dans le secteur éducatif, c'est une réaction en chaîne qui affecte les ressources des collectivités locales et des établissements scolaires, y compris ceux qui ne sont pas concernés par les contrats PFI.

3. L'impact de la PFI sur le terrain

- 15 Il est difficile d'évaluer précisément le poids de la dette sur les budgets des établissements et ses conséquences sur les activités scolaires, car les charges liées aux contrats PFI, qui peuvent dépasser 10% du budget des établissements, se cumulent avec d'autres charges fixes, principalement cotisations sociales et salaires. Dans l'enseignement secondaire, la situation financière des établissements s'est fortement dégradée entre 2014 et 2018²⁸. Toute recherche d'économies tend à se traduire par des suppressions de personnel ou par une réduction de certains enseignements. La mise en place du *Curriculum for Excellence* en Écosse, qui prévoit une large offre d'enseignements, serait ainsi fragilisée par la PFI, selon le *Times Educational Supplement*²⁹. Dans le système éducatif anglais, très atomisé, où chaque école bénéficie d'une large autonomie, tout dépend en fait de la situation financière de chaque établissement, et de son « taux d'occupation », les budgets étant en très grande partie calculés en fonction du nombre d'élèves. Or une école en perte d'effectifs, quelle qu'en soit la raison, voit sa dotation budgétaire diminuer, alors qu'une partie de ses paiements à la société projet augmente avec l'inflation. La nécessité de maintenir un niveau d'effectifs élevé est donc une préoccupation constante des chefs d'établissement. Conséquence inattendue sur les réformes portées par les gouvernements Conservateurs en Angleterre, la situation financière d'un nombre croissant d'établissements va jusqu'à compromettre l'intégration d'« écoles PFI » précédemment sous tutelle des autorités locales dans des groupements d'*academies* (*academy chains*) peu enclines à absorber leurs déficits.
- 16 Au niveau des écoles elles-mêmes, ce n'est pas seulement la dette, mais la nature même de la relation contractuelle qui a un impact sur la vie des établissements. D'une part les coûts de révision des contrats, notamment des contrats secondaires concernant les prestations de service, représentent une charge supplémentaire sur les budgets. D'autre part la rigidité de ces mêmes contrats entrave l'adaptation à de nouveaux besoins et de nouveaux usages qui surviennent inévitablement sur une durée de plus de vingt ans. Le cas de Frederick Bremer School à Waltham Forest, Londres, en est une illustration : dans cette école secondaire construite en 2009, qui consacrait en 2017 une part importante de son budget (16,7%) au paiement du contrat PFI, des travaux d'entretien jugés peu utiles sont planifiés, au détriment du renouvellement plus urgent des équipements informatiques souhaité par l'équipe de direction³⁰. On a pu noter également, comme dans le secteur hospitalier, des dérives dans la facturation de travaux d'entretien courant, largement supérieure aux tarifs pratiqués sur le marché, et l'application de charges supplémentaires dans les nombreux cas d'utilisation des locaux hors temps scolaire.

- 17 La PFI crée donc sur le long terme une relation asymétrique, d'autant que les usagers sur le terrain n'ont pas de relation directe avec le consortium. La difficulté de rompre cette relation contractuelle, en raison des compensations à payer aux organismes prêteurs et aux actionnaires, peut conduire à des situations extrêmes : la municipalité de Liverpool doit ainsi s'acquitter de 4 millions de livres par an pour une école fermée en 2014 sur décision de l'inspectorat, après seulement douze ans d'utilisation et un investissement d'une valeur de 24 millions de livres, qui aura finalement coûté 47 millions de livres à la collectivité entre 2017 et 2047. Bien que rare, ce n'est pas là un cas isolé : des situations similaires ont été observées à Belfast, dans le Lancashire, le Wirral et à Brighton, souvent en raison d'une baisse des effectifs, donc de la « demande ». Or c'est là, dans le domaine scolaire, le risque le plus important.
- 18 La situation des autorités locales n'est cependant pas uniforme. Si certains cas ont été fortement médiatisés, le bilan n'est pas toujours négatif, en particulier dans les localités les plus importantes, qui bénéficient en général des ressources matérielles et humaines indispensables à la gestion de contrats complexes. Les informations obtenues pour cette étude auprès de plusieurs autorités locales indiquent que le niveau de prestations spécifié pour l'entretien et la maintenance des locaux a été respecté, les contrats incluant la possibilité de revoir les paiements à la baisse ou de les suspendre dans le cas contraire³¹. Certaines mesures, comme le *benchmarking* des prestations de services, ou la standardisation des contrats introduite en 2007 (SOPEC) ont permis également de corriger les excès cités plus haut, et de protéger davantage les intérêts des collectivités dans leurs relations avec le consortium. Mais l'efficacité de ces mesures dépend aussi de leur capacité à faire appliquer les mécanismes prévus, et à imposer des pénalités financières réellement dissuasives, ce qui implique un suivi précis, sur le terrain, de la qualité des prestations fournies. Les marges de manœuvre sont parfois étroites, comme l'ont montré les tentatives des élus de la municipalité de Slough, en 2016, pour réduire le coût de certains services³². La question centrale reste bien celle du contrôle de la collectivité – et des moyens d'exercer ce contrôle – sur la gestion et l'utilisation d'équipements publics dont elle supporte les coûts.
- 19 Enfin, malgré le transfert d'une partie du risque, en particulier constructif, il faut bien constater que la responsabilité ultime est en dernier ressort toujours détenue par les autorités locales. C'est à elles qu'il appartient d'assurer la continuité du service public, tant pour l'accueil des élèves que pour la fourniture de services. Dans les cas les plus sérieux, notamment la fermeture de dix-sept écoles à Édimbourg suite à des défauts de construction mettant en péril la sécurité des élèves, il leur incombe de scolariser les élèves dans d'autres établissements, le consortium privé devant quant à lui assumer les coûts de remise en état des bâtiments. Il en va de même en cas de défaillance de prestataires de services tels que Jarvis ou Carillion. Sur la durée de vie des contrats, l'éventualité de telles situations n'est pas négligeable. Une rupture s'opère donc entre, d'une part, la propriété et la gestion des actifs dévolue pendant toute la durée du contrat au consortium privé, et, d'autre part, la mission de service public dont les collectivités sont garantes et assument le coût ; autrement dit entre investisseurs et acteurs du système éducatif.

4. Vers une financiarisation du patrimoine scolaire ?

- 20 Cette rupture apparaît de manière encore plus évidente lorsque l'on examine la nature même du financement et ses conséquences. Le montage financier est constitué à 80 ou 90% de prêts bancaires et obligataires, et à 10% de fonds propres provenant d'institutions financières et des entreprises porteuses du projet. Or le coût du capital est plus élevé que celui de la dette. Pour les constructions scolaires, si l'on prend l'exemple du *Priority School Building Programme*³³, le retour sur investissement se situe entre 10 et 12,4%. Les dividendes versés aux actionnaires de 139 sociétés ayant investi dans des projets de construction scolaire entre 2010 et 2016 auraient atteint 180 millions de livres, pour des bénéficiaires avant impôts de 329 millions de livres, soit 5,6% des paiements à ces sociétés³⁴. Plusieurs travaux ont mis en évidence l'étendue du contrôle exercé par un petit nombre de groupes internationaux, souvent domiciliés offshore³⁵. Ainsi les secteurs de l'éducation et de la santé représentent à eux deux en 2016 deux tiers des projets PPP au Royaume-Uni dont le capital est détenu à 50 ou 100% par des fonds d'infrastructure domiciliés offshore. C'est notamment le cas en Écosse où la moitié des 320 « écoles PFI », sont à 100% contrôlées par des fonds d'infrastructures tels que 3i, Semperian ou Tetragon³⁶, le capital de la société projet faisant partie du portefeuille d'actifs de ces groupes internationaux. Innisfree, dont les investisseurs sont principalement des fonds de pension, est actuellement le principal détenteur de projets PFI dans le secteur éducatif, avec des participations dans dix-huit projets comptant 260 écoles.
- 21 Avec la vente de parts du capital de la société projet à des investisseurs secondaires³⁷, la propriété des actifs change de main, et l'on peut penser que l'objectif va être d'optimiser l'investissement et donc de limiter les coûts. Lorsque l'on sait que les parts du capital ainsi investi peuvent faire l'objet de multiples échanges sur les marchés financiers, on mesure la distance qui s'établit entre la fonction première des infrastructures – l'accueil des jeunes dans des bâtiments de qualité – et les objectifs de ceux qui en assurent le financement et la gestion. Il faut cependant garder ces chiffres en perspective, car tous les projets PPP ne sont pas concernés par ces opérations de revente aux investisseurs secondaires³⁸. Il est tout à fait significatif qu'en dépit des recommandations du *National Audit Office* et du *Public Accounts Committee* de la Chambre des Communes, le *Treasury* ait renoncé à introduire des mécanismes permettant au secteur public de participer aux bénéfices réalisés sur les ventes des parts de la société-projet sur les marchés secondaires³⁹. Ce que révèlent ces dérives, plus qu'une financiarisation du patrimoine scolaire, c'est l'incapacité des pouvoirs publics à réguler un dispositif qui ne peut fonctionner qu'en attirant de nouveaux investisseurs⁴⁰.
- 22 Les partisans de la PFI font valoir par ailleurs que la rentabilité doit être à la mesure du risque, et que tous les contrats n'atteignent pas le niveau de rentabilité prévu. Sans ce modèle d'acquisition et de financement d'infrastructures, affirment-ils, il aurait été impossible de renouveler et d'entretenir le patrimoine scolaire. Au pays de Galles, où les PPP ont été peu utilisés, les nouvelles infrastructures ont été financées sur les budgets d'investissement, ce qui a limité le nombre de projets de construction. Il est vrai également que la gestion des locaux, et en particulier les réparations et l'entretien courant, a longtemps été négligée à l'échelon local. Sur ce plan, selon les services des collectivités contactées pour cette étude, les bâtiments de ces « écoles PFI » seraient dans un état bien supérieur à celui d'autres établissements où réparations et entretien

sont retardés par mesure d'économies. Mais ces résultats positifs ont été acquis au prix d'une érosion des processus démocratiques de décision et de contrôle et d'une captation des bénéfices financiers par un petit nombre d'investisseurs privés, opération peu compatible avec le respect d'une éthique de service public telle qu'elle est définie dans le guide britannique à ce sujet, intitulé *Nolan principles of public life*⁴¹. Ce processus a produit, pour des générations à venir, un patrimoine dont la valeur éducative et architecturale, à la fois matérielle et immatérielle, est au cœur des débats concernant son héritage.

5. L'héritage architectural de la PFI : le défi de la qualité

- 23 Outre un cahier des charges spécifique, la conception des bâtiments et des équipements scolaires implique une compréhension précise du travail des enseignants et du développement de l'enfant. L'organisation de l'espace joue également un rôle social dans l'intégration d'enfants handicapés, dans la prévention de comportements violents, dans la création d'un climat scolaire favorable à l'étude et au bien-être des élèves. Dans ce domaine, le Royaume-Uni se distingue par une longue et riche histoire d'innovations – parfois controversées –, de recherches et de débats sur les relations entre l'espace scolaire et ses utilisateurs. Par ailleurs la qualité et la durabilité des infrastructures dépendent aussi, sur le long terme, de leur entretien, de la maintenance des installations et de la réactivité des prestataires. La définition et l'appréciation de la qualité sont donc complexes et, comme l'ont montré Cardellino et al, varient en fonction des éléments valorisés par les diverses parties prenantes : faisabilité du projet, valeur d'usage des infrastructures et services, esthétique, prise en compte des attentes des utilisateurs. En Angleterre comme en Écosse et en Irlande du Nord, sous l'influence d'organismes de conseil tels que la *Commission for Architecture and the Built Environment* (CABE) et *Architecture & Design Scotland*, ce sont principalement des critères architecturaux qui ont prévalu, au détriment d'interprétations plus larges et parfois plus pragmatiques de la qualité⁴². Trois grands critères, déclinés en une dizaine d'indicateurs (*Design Quality Indicators*) figurent régulièrement dans les publications officielles de la période : la fonctionnalité des infrastructures, la qualité des éléments constructifs et l'impact, notamment esthétique, et enfin l'identité du bâtiment.
- 24 Dans quelle mesure les écoles construites sous partenariats publics-privés répondent-elles, dans la durée, à cette définition de la qualité ? Et comment le processus qui régit le financement et la commande architecturale influe-t-il sur la qualité ? Les premières évaluations des bâtiments scolaires neufs construits après 1998 réalisées par le *British Research Establishment* (BRE) pour l'*Audit Commission* au début des années deux mille étaient très critiques, en particulier sur le plan de la conception architecturale et des éléments de confort. Seuls les services intégrés aux contrats PFI semblaient donner satisfaction. Selon un des responsables de BRE, « *We could spot PFI schools at 1,000 yards – they all had aluminium cladding and crinkly tin roofs* »⁴³. Les organisations professionnelles n'avaient pas manqué de dénoncer cette « esthétique d'entrepôt » visible dans les premiers bâtiments, qui se manifeste notamment par l'absence de lumière naturelle ou des espaces de circulation mal conçus ou trop étroits. Une critique formulée également dans une évaluation des *Pathfinder projects* nord-irlandais menée en 2004, qui ne notait guère de différences entre les écoles PFI de la province et celles de ses voisins⁴⁴.

- 25 Les efforts réalisés par la suite ont été notables, et sont à mettre en relation avec l'objectif de transformation sociale et de réussite éducative qui est au cœur du programme phare du *New Labour, Building Schools for the Future*, et de son équivalent écossais *Schools for the Future*. De nouvelles pratiques ont été intégrées au processus, comme l'évaluation systématique des projets à trois étapes différentes selon la méthodologie développée par les experts de CABA et la nomination d'un « *design champion* » pour assister le client. En Écosse la rénovation ou reconstruction des infrastructures, directement associée au projet éducatif porté par le *Curriculum for Excellence*, a été accompagnée d'une véritable réflexion sur la conception de l'espace scolaire pilotée par le *Scottish Futures Trust*, dans le but de capitaliser sur l'expérience acquise et de diffuser objectifs et bonnes pratiques. Mais la question de la qualité demeure, sur le terrain, un sujet particulièrement complexe qui se prête à des interprétations subjectives et fort différentes selon les professionnels concernés⁴⁵. Les améliorations constatées en Angleterre dans les dernières phases du programme BSF, avant sa suppression en 2010 par le gouvernement de Coalition, laissent penser que l'accompagnement du processus, de la définition des spécifications au suivi du chantier, joue un rôle primordial. C'est également la leçon que l'on peut tirer, a contrario, de la suppression de CABA et du recours à la PFI, au profit de la mise en œuvre de solutions à bas coûts à partir de plans standardisés, ce que certains ont appelé des « *flat-pack schools* ». Les PPP ne seraient-ils finalement ni pires ni meilleurs que d'autres formes de maîtrise d'ouvrage, l'essentiel étant la préparation, le suivi et le contrôle des projets ?
- 26 Répondre à cette question suppose que l'on puisse identifier des freins ou obstacles à la qualité qui seraient propres à la conduite des projets dans les partenariats publics-privés. Selon CABA, ce n'est pas le mode de financement lui-même qui constitue un obstacle, mais la complexité d'un processus décisionnel axé sur les éléments quantitatifs et financiers, souvent mal évalués, plutôt que sur des éléments plus qualitatifs, comme les caractéristiques du site, la conception des espaces, la capacité à innover. Les responsabilités sont multiples, et se situent à chaque étape de ce qui est présenté comme une chaîne intégrée. Ainsi si l'on se réfère à l'audit de CABA sur cinquante-deux écoles secondaires construites entre 2001 et 2006, la piètre qualité des infrastructures constatée dans plus de la moitié des cas était le résultat d'une évaluation imparfaite des coûts et d'une prise en compte très insuffisante du travail de conception, le « *design* », dans l'évaluation des propositions des entreprises. Les architectes soulignent également que ces phases préparatoires sont soumises à de très courts délais, peu propices à la réalisation d'études de faisabilité approfondies ou à la consultation des usagers. À cela s'ajoute le constat d'une exécution des travaux souvent défectueuse (mais sans doute cela peut-il se produire également dans des processus classiques), ce qui pose également la question du choix des sous-traitants et des conditions d'emploi. La pression sur les coûts, constante du début à la fin de la phase de construction, apparaît comme un facteur de risque d'autant plus important que l'architecte n'a guère la possibilité, le cas échéant, de s'opposer à l'entreprise de construction qui, dans ce système, est son employeur.
- 27 Il serait illusoire de croire que les contrats traditionnels donnent lieu à des réalisations exemplaires. Mais les conséquences des pratiques induites par ces partenariats sont apparues très clairement en janvier 2016 lors de la chute d'un mur dans une école d'Édimbourg faisant partie de la première phase de constructions scolaires engagée en 2001 (fig.2). Sans attribuer la responsabilité directe de la chute de neuf tonnes de

maçonnerie à l'utilisation de financements privés, les conclusions de l'enquête ont indiqué que la méthodologie adoptée pour la conduite des projets PFI a augmenté les risques de construction et de conception défectueuses. Est mise en cause en particulier, comme étant la principale faiblesse du dispositif, l'absence d'examen détaillé, par un expert indépendant, de la qualité des éléments structurels, et une confiance excessive dans les procédures d'auto-certification adoptées par les constructeurs pour ces opérations de contrôle. À la suite de cet évènement survenu alors que l'école était inoccupée, soixante-douze établissements ont été inspectés et dix-sept autres « écoles PFI » ont été fermées, perturbant la scolarité de plusieurs milliers d'élèves, et plusieurs organisations ont appelé à une inspection générale de tous les bâtiments construits sous partenariats publics-privés en Écosse⁴⁶. Même si le « risque » a été effectivement assumé par le consortium (*Edinburgh School Partnership*) il est clair que les conséquences ont dû être prises en charge par la municipalité, comme cela a pu être le cas ailleurs, lorsque les prestataires de services ont été défaillants. Il existe donc bien un défaut de redevabilité d'impact, au-delà de la responsabilité financière du consortium. La survenue d'autres incidents liés à des défauts de construction confirme les doutes que l'on peut avoir sur un système qui accentue la vulnérabilité aux défaillances mais n'en couvre pas toutes les conséquences⁴⁷.

- 28 C'est donc bien la nature de la commande publique et le déséquilibre de la relation contractuelle entre le client (les autorités locales) et le constructeur partenaire au sein de la société projet qui constituent « le maillon faible » du système, même si les mesures d'accompagnement des collectivités ont permis quelques améliorations – éphémères en Angleterre. À la rupture déjà constatée entre investisseurs et acteurs institutionnels, répond en miroir la fragmentation des responsabilités entre le client, l'équipe chargée de la conception (architectes et ingénieurs) et l'entreprise de construction, une double rupture qui fait obstacle à la transparence et à la redevabilité. La faillite de Carillion, l'accident d'Édimbourg semblent avoir définitivement discrédité les formes initiales de partenariats publics-privés largement utilisées en Angleterre et en Écosse. Si les leçons du passé ont été tirées, on peut s'interroger, en conclusion, sur les perspectives offertes par les nouvelles approches expérimentées au Royaume-Uni.

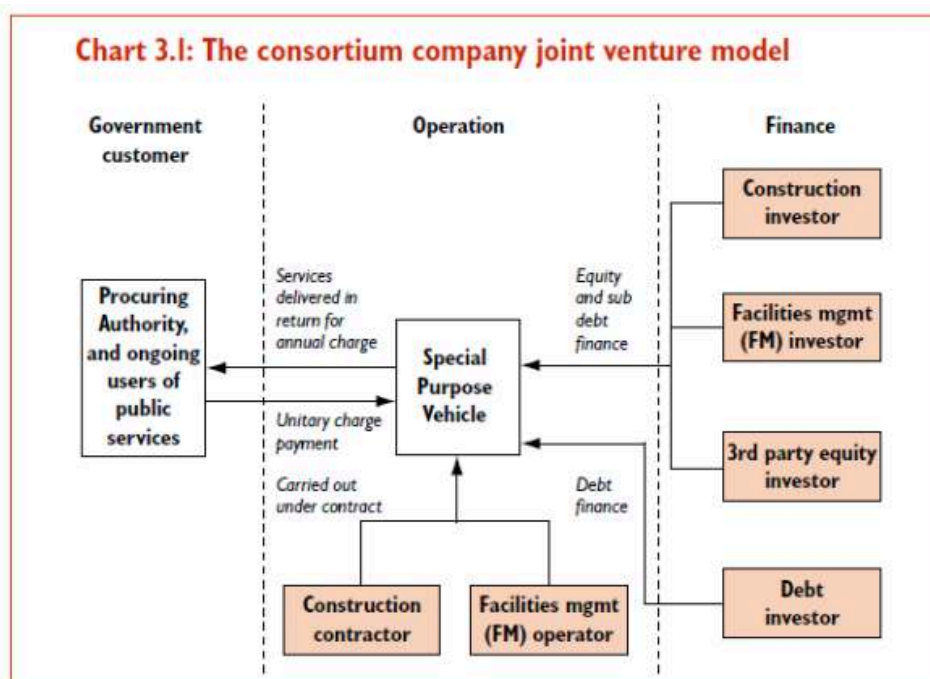
Conclusion

- 29 Peut-on remettre l'intérêt du service public au cœur des choix d'investissement et de la commande publique ? Il est peu probable qu'une nationalisation des contrats (donc leur rachat), mesure de toute façon écartée par le gouvernement Conservateur, puisse permettre aux autorités locales de reprendre à leur compte la gestion de leur patrimoine scolaire sans fortes pénalités financières. À ces solutions radicales sont préférées des mesures plus ciblées, comme la renégociation de certains éléments des contrats concernant les services lorsque cela est possible, mesures fortement encouragées par le gouvernement de Coalition dans le cadre du *Operational PFI Savings Programme*.
- 30 Il faut distinguer ici le cas de l'Angleterre et de l'Irlande du Nord d'une part, et de l'Écosse et du pays de Galles d'autre part. Alors que dans le premier cas aucune véritable alternative n'a été envisagée, des solutions innovantes ont été expérimentées dans les deux nations voisines. *Hub* en Écosse, *Mutual Investment Model* au pays de Galles : ces dispositifs apportent des améliorations mais ne modifient pas

fondamentalement les principes des PPP, malgré une participation accrue du secteur public au capital (à hauteur de 20%) dans le modèle gallois. En Écosse, la quasi-totalité des projets scolaires a été planifiée entre 2012 et 2019 dans le cadre de cinq groupements territoriaux (*hubs*) ayant recours soit à des contrats « classiques » soit à des partenariats avec le secteur privé sous forme de *joint ventures* (*hub companies* ou *hubcos*). Mais ce modèle partage de nombreuses caractéristiques avec le NPD, en particulier un endettement à long terme, et n'empêche pas la revente des parts du capital. Depuis 2019 l'Écosse semble s'éloigner des PPP en optant pour un financement public du *Learning Estate Investment Programme*, les autorités locales assumant les dépenses de construction par l'emprunt, avec le risque d'alourdir leur endettement, tandis que le pouvoir central prend en charge les coûts des services.

- 31 Il est clair désormais que toutes les tentatives de réforme des financements privés se heurtent à deux obstacles principaux : d'une part les projets doivent être attractifs pour les investisseurs en termes de volume et de rentabilité, et d'autre part le contrôle du capital et l'affectation du risque doivent rester effectivement au secteur privé, faute de quoi les projets sont reclassifiés comme étant publics. L'équation est donc impossible à résoudre : toute tentative de participation accrue des pouvoirs publics au capital de la société projet, de l'ordre de 40%, comme cela a été tenté en Écosse, va à l'encontre de l'objectif de maintenir ces opérations hors bilan⁴⁸. Or c'est cet objectif qui reste, de l'aveu même de John Manzoni, *Permanent Secretary* au *Cabinet Office*, la raison d'être des partenariats publics-privés⁴⁹.
- 32 À l'échelle locale, deux grandes tendances se dégagent actuellement dans le domaine scolaire : d'une part la recherche d'une diversité de modes de financement, avec un retour marqué depuis quelques années vers l'internalisation des services (*insourcing*). Cela concerne notamment les services de formation, de soutien pédagogique proposés aux établissements pour améliorer les résultats de leurs élèves et leur classement dans les *league tables*. D'autre part, et cela peut paraître paradoxal, le développement par les autorités locales d'une activité commerciale susceptible de générer des ressources propres⁵⁰ qui pourront être mobilisées sur des projets plus modestes de rénovation et d'entretien du patrimoine scolaire.
- 33 La réponse à l'abandon de la PFI et des PPP pourrait donc se trouver dans la juxtaposition de divers modes d'intervention et de financement, notamment dans le recours aux *Municipal bonds* déjà expérimenté en Angleterre et en Écosse. Si l'on peut attendre de cette évolution une transparence accrue et un meilleur contrôle des pouvoirs publics sur l'utilisation des ressources, encore faudra-t-il que les collectivités démontrent leur capacité à gérer efficacement leur patrimoine, en particulier à assurer l'entretien des locaux et la qualité des services mieux qu'elles ne l'ont fait dans le passé. Le recul de l'externalisation des services, de même que la vigilance accrue des pouvoirs publics, en Angleterre, envers les opérations des groupes privés impliqués dans la gestion des *academies* confirment bien, après deux décennies de croissance en Angleterre, les limites de la privatisation dans le secteur éducatif⁵¹. En fin de compte, qu'il s'agisse de l'efficacité du système scolaire ou de la gestion des infrastructures, c'est toujours l'État qui est redevable du bon fonctionnement du service public.

Fig.1. Structure d'un projet PFI



SOURCE : HM TREASURY, *PFI : Meeting the investment challenge*, July 2003, p. 37.

Fig.2. Oxbgangs Primary School, Édimbourg, une des écoles faisant partie de la première vague de PPP signés en 2001 avec le consortium *Edinburgh Schools Partnership*.



Source : Sky News, 2016.

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NOTES

1. Cette annonce ne concernait que l'Angleterre. Les décisions concernant les dépenses d'investissement, la responsabilité des infrastructures et des partenariats publics-privés, à l'exception de quelques secteurs comme la défense, sont transférées à l'Ecosse, au Pays de Galles et à l'Irlande du Nord depuis les lois de dévolution de 1998.
2. Ces derniers incluent la gestion des *hard facilities* dont la maintenance des bâtiments, espaces extérieurs et équipements techniques, et des *soft facilities*, par exemple l'entretien, le gardiennage et la sécurité, la restauration, le mobilier. Il existe de nombreux types de contrats. Dans le domaine scolaire il s'agit le plus souvent de contrats DBFO – *Design, Build, Finance and Operate*.
3. En valeur, le ministère de la santé occupe la première place, devant la défense et l'éducation.
4. AUDIT SCOTLAND, ACCOUNTS COMMISSION, *Privately financed infrastructure investment, The Non-Profit Distributing (NPD) and hub models*, Édimbourg, janvier 2020, p. 16.
5. Le dispositif NPD fonctionne de manière identique à la PFI. Il prévoit cependant une redistribution des bénéfices opérationnels au secteur public et limite les bénéfices financiers. Le coût du financement demeure cependant plus élevé qu'un financement public et la revente des parts du SPV reste possible (AUDIT SCOTLAND, ACCOUNTS COMMISSION, *Privately financed infrastructure investment, op. cit.*, p. 6 et 15). Le terme générique PPP sera utilisé pour faire référence à la fois à la PFI, PF2 et au NPD.
6. Sur les processus de décision, voir KHADAROO Iqbal, « The actual evaluation of school PFI bids for value for money in the UK public sector », *Critical perspectives in accounting* n°19/8, 2008, p. 1321-1345 ; KAKABADSE Nada K. et al, « Effectiveness of Private Finance Initiatives : study of private financing for the provision of capital assets for schools », *Public Administration and*

Development, n°27, 2007, p. 49-61. Sur la mise en œuvre des projets, PENDLEBURY Maurice et ISMAIL Suhaiza, « The Private Finance Initiative (PFI) in Schools : the Experience of Users », *Financial Accountability and Management*, n°22/4, 2006, p. 381-404 ; GIBSON Helen et DAVIES Brent, « The impact of Public-Private Partnerships on Education, A case study of Sewell Group Plc and Victoria Dock Primary School », *International Journal of Educational Management*, n°22/1, 2008, p. 74-89 ; également GRIGGS Clive, « Education and the Private Finance Initiative », *Forum*, n°52/2, 2010, p. 181-204, WOOD Adam, « Economies of School-Building : the Selling of Architectural and Educational Futures », *Ardeth*, n°3, 2018, p. 137-157.

7. La dette publique ne doit pas excéder 40% du PIB, objectif fixé par le gouvernement Conservateur en 1990 et intégré par le gouvernement travailliste aux règles budgétaires en 1998. Voir ESPOSITO Marie-Claude, « La politique des partenariats publics-privés : une approche bi-partisane en évolution », *Observatoire de la société britannique*, n°8, 2010, p. 51-68.

8. Voir MIZELL Lee, « Public-private partnerships at the subnational level of government : the case of PFI in the United Kingdom », in OECD, *Subnational Public-Private Partnerships: Meeting Infrastructure Challenges*, OECD Multi-level Governance Studies, OECD Publishing, 2018, p. 75-105, p. 89.

9. Les *academies* sont des écoles primaires et secondaires publiques et gratuites déjà existantes, qui bénéficient sous ce nouveau statut, comme les *free schools*, de « libertés » supplémentaires en ce qui concerne les programmes, le recrutement et la rémunération des enseignants. Elles font souvent partie de *Multi-Academy Trusts* gérés par des groupes associatifs ou privés à but non lucratif. Les *free schools* ont le même statut mais sont des créations nouvelles.

10. *Building Schools for the Future* (BSF) avait pour ambition la rénovation, le renouvellement et l'équipement informatique de toutes les écoles secondaires du pays à l'horizon 2018, dans un objectif de « transformation éducative ». Environ 50% des projets de ce programme estimé à 55 milliards de livres sont financés sur fonds privés. En Écosse, le programme *Schools for the Future*, toujours en cours, s'est déroulé en plusieurs phases à partir de 2009.

11. NORTHERN IRELAND AUDIT OFFICE, *Building for the Future, a Review of the PFI Education Pathfinder Projects*, Belfast, The Stationery Office, octobre 2004, p. 11.

12. MARTY Frédéric et VOISIN Arnaud, « La redevabilité des partenariats publics-privés », *Revue française d'administration publique*, n°160, 2016, p. 1123-1138, p. 1125.

13. CENTRE FOR HEALTH AND THE PUBLIC INTEREST DATABLOG, *Counting the Cost of School PFI schemes*, février 2018, <https://chpi.org.uk/blog/counting-cost-school-pfi-schemes>, consulté le 10 novembre 2019.

14. HM TREASURY/INFRASTRUCTURE AND PROJECTS AUTHORITY, *Private Finance Initiative and Private Finance 2 projects, 2018 summary data, May 2019/Current projects as at March 2018*, <https://www.gov.uk/government/publications/private-finance-initiative-and-private-finance-2-projects-2018-summary-data>, consulté le 22 octobre 2019.

15. HUDSON Nicola, « Scotland's schools : a new LEIP forward? », *Scottish Parliament Information Centre, SPiCe Spotlight*, 2 octobre 2019, <https://spice-spotlight.scot/2019/10/02/scotlands-schools-a-new-leip-forward>, consulté le 29 novembre 2019. FREEMAN Tom, « PFI schools bill to reach £434m – nearly 10% of schools budget », *Holyrood*, 4 juillet 2018, https://www.holyrood.com/news/view,pfi-schools-bill-to-reach-434m-nearly-10-of-schools-budget_8955.htm, consulté le 15 septembre 2019.

16. NATIONAL AUDIT OFFICE, *Financing PFI projects in the credit crisis and the Treasury's response*, Londres, The Stationery Office, 27 juillet 2010, p. 23.

17. NATIONAL AUDIT OFFICE, *PFI and PF2*, Londres, 2018, p. 15.

18. HOUSE OF COMMONS, PUBLIC ADMINISTRATION AND CONSTITUTIONAL AFFAIRS COMMITTEE, *After Carillion: Public sector outsourcing and contracting*, Londres, 3 juillet 2018, p. 18.

19. AUDIT SCOTLAND, ACCOUNTS COMMISSION, *Privately financed infrastructure investment*, op. cit., p. 18. Le manque de transparence concernant les informations disponibles sur les partenariats est également évoqué dans le rapport du *Public Accounts Committee* de l'assemblée nord-irlandaise de 2015 : NORTHERN IRELAND ASSEMBLY, PUBLIC ACCOUNTS COMMITTEE, *End of session report 2014-2015*, <http://www.niassembly.gov.uk/assembly-business/committees/2011-2016/public-accounts-committee/reports-2011-2016/end-of-session-report-2014-2015/>, consulté le 26 février 2020.
20. La *Private Finance 2* succède à la PFI en 2010. L'objectif principal du gouvernement est d'améliorer la transparence des partenariats en introduisant une participation minoritaire de l'État au capital du SPV, participation qui restera cependant limitée à 10%. Mais ce nouveau modèle, très proche de la PFI, n'a guère convaincu les investisseurs.
21. AMIN SMITH Neil et al, « A time of revolution ? British local government finance in the 2010s », *Institute for Fiscal Studies*, London, 2016, p. 10 et p. 14. La comparaison avec la situation budgétaire des autorités locales nord-irlandaises est difficile en raison de sources de revenu et de responsabilités différentes.
22. Il s'agit par exemple des coûts liés au maintien du nombre d'enseignants et à l'augmentation des cotisations sociales et des salaires.
23. DUNTON Jim, « Leeds strikes deal with government over rising PFI school costs », *Room 151*, 19 juin 2019, <https://www.room151.co.uk/resources/leeds-strikes-deal-with-government-over-rising-pfi-schools-costs>, consulté le 18 septembre 2019.
24. SHEFFIELD CITY COUNCIL, communication personnelle (FOI request), 10 décembre 2019.
25. TOWER HAMLETS BOROUGH COUNCIL, communication personnelle (FOI request), 21 février 2020.
26. Les informations sur la soutenabilité budgétaire étant rarement rendues publiques, il est impossible d'évaluer précisément le nombre de collectivités confrontées à ces difficultés, mais les économistes écossais Margaret et Jim Cuthbert estiment qu'un grand nombre d'entre elles sont concernées. CUTHBERT Margaret et CUTHBERT Jim, « The effect of PFI commitments on local authority finances », *Fraser of Allander Economic Commentary*, n°34/3, 2011, p. 53-62, p. 53.
27. MARTY Frédéric et SPINDLER Jacques, « Bilan et perspectives des contrats de PFI britanniques (1992-2012) », *Gestion et finances publiques*, 2013, p. 43-62.
28. 50% des *academies* étaient en déficit en 2016-2017 et 60% des écoles administrées par les autorités locales. BUSBY Eleanor, « Almost one in three council-run secondary schools in deficit, study finds », *Independent*, 11 janvier 2019, <https://www.independent.co.uk/news/education/education-news/school-funding-cuts-austerity-secondary-council-education-policy-institute-epi-a8721746.html>, consulté le 14 janvier 2020.
29. HEPBURN Henry, « Private finance legacy frustrates efforts to reform Scottish curriculum », *Times Educational Supplement*, 26 mai 2017, <https://www.tes.com/news/private-finance-legacy-frustrates-efforts-reform-scottish-curriculum>, consulté le 17 septembre 2019.
30. PLIMMER Gill et FORD Jonathan, « PFI: hard lessons on growing cost of public-private deals », *Financial Times*, 4 février 2018, <https://www.ft.com/content/83cdf442-0817-11e8-9650-9c0ad2d7c5b5>, consulté le 4 octobre 2019.
31. Douze autorités locales en Angleterre et neuf en Écosse, parmi celles qui détenaient le plus grand nombre de contrats PPP, ont été interrogées via les formulaires « *Freedom of Information* » au sujet de la soutenabilité budgétaire de leurs contrats, des cas éventuels de révision des contrats et du niveau d'entretien de leurs bâtiments.
32. « *Slough Borough Council could propose a change of services in the contract, but the provider could veto such suggestions in certain circumstances. As a result, interests had to be balanced and relationships with partners had to be maintained* ». SLOUGH BOROUGH COUNCIL, *Meeting of Education and Children's services scrutiny panel, Private Finance Initiative Contract for Schools*, janvier 2016, <http://www.slough.gov.uk/moderngov/ieListDocuments.aspx?Cid=133&MID=5444#AI3010>, consulté le 14 janvier 2020.

33. Le PSBP succède au programme *Building Schools for the Future* supprimé en 2010 par le gouvernement de Coalition. Il s'agit d'un programme d'envergure beaucoup plus modeste destiné à répondre aux besoins urgents de travaux dans 260 écoles en Angleterre.
34. CENTRE FOR HEALTH AND THE PUBLIC INTEREST DATABLOG, *Counting the Cost of School PFI scheme*, *op. cit.*, p. 2.
35. Voir notamment les investigations de la *European Services Strategy Unit* et des commissions parlementaires.
36. WHITFIELD Dexter, « The financial commodification of public infrastructure, The growth of offshore PFI/PPP secondary market infrastructure funds », *European Services Strategy Unit*, octobre 2016, p. 25, <https://www.european-services-strategy.org.uk/publications/essu-research-reports/the-financial-commodification-of-public-infras>, consulté le 20 novembre 2019.
37. Dans ce type de transactions, les investisseurs primaires vendent leurs parts de ces sociétés à des investisseurs secondaires (qui n'ont pas investi dans la société projet à l'origine), en général quatre à cinq ans après la mise en service des infrastructures, afin de disposer de liquidités pour d'autres projets. NATIONAL AUDIT OFFICE, *Equity investment in privately financed projects*, Londres, The Stationery Office, 9 février 2012, p. 14.
38. Ces pratiques concernent 34,9% des infrastructures scolaires sur la période 1998-2016. Sur ce sujet, voir WHITFIELD Dexter, « Profiteering and offshoring : new evidence », *European Services Strategy Unit*, p. 15, <https://www.european-services-strategy.org.uk/wp-content/uploads/2017/10/PPP-profiteering-Offshoring-New-Evidence.pdf>, consulté le 21 décembre 2019.
39. HOUSE OF COMMONS, COMMITTEE OF PUBLIC ACCOUNTS, *Private Finance Initiatives*, Londres, 20 juin 2018, p.11.
40. Voir AUDIT SCOTLAND, ACCOUNTS COMMISSION, *Privately financed infrastructure investment*, *op. cit.*, p. 18.
41. Au premier rang figure le principe suivant : « *Holders of public office should act solely in terms of the public interest.* » Ces principes ne s'appliquent pas seulement aux fonctionnaires, mais à tous ceux qui participent à l'offre de service public. COMMITTEE OF STANDARDS IN PUBLIC LIFE, *The 7 principles of public life*, 31 mai 1995, <https://www.gov.uk/government/publications/the-7-principles-of-public-life/the-7-principles-of-public-life-2>, consulté le 30 janvier 2018.
42. Sur ce sujet, voir l'analyse de CARDELLINO Paula, LEIRINGER Roine et CLEMENTS-CROOME Derek, « Exploring design quality in the BSF programme », *Architectural engineering and design management*, n°5, 2009, p. 249-262.
43. MARRS Colin, « Did PFI cause Edinburgh's school failures ? », *Architects Journal*, 4 mai 2016, <https://www.architectsjournal.co.uk/news/news-feature-did-pfi-cause-edinburghs-school-failures/10005984.article>, consulté le 24 septembre 2019.
44. NORTHERN IRELAND AUDIT OFFICE, *Building for the Future, a Review of the PFI Education Pathfinder Projects*, *op. cit.*, p. 44.
45. CARDELLINO Paula, LEIRINGER Roine et CLEMENTS-CROOME Derek, « Exploring design quality in the BSF programme », *op. cit.*, p. 251.
46. FREEMAN Tom, « Edinburgh PFI school crisis – private consortium will foot bill », *Holyrood Magazine*, 11 avril 2016, https://www.holyrood.com/news/view,edinburgh-pfi-schools-crisis-private-consortium-will-foot-bill_6782.htm, consulté le 24 septembre 2019.
47. Voir à ce sujet : COLE John, « Quality control demands architects return to site », *RIBA Journal*, 7 mai 2019, <https://www.ribaj.com/intelligence/safer-construction-architects-role-oxgangs-wall-collapse-john-cole>, consulté le 22 décembre 2019. C'est d'ailleurs à la suite de la fermeture des écoles d'Édimbourg, ainsi que de l'incendie de la tour Grenfell que des mesures d'identification préventive des risques ont été proposées par le RIBA et par le *Chartered Institute of Building*.

48. Le gouvernement écossais a pour cette raison été contraint en 2015 à diminuer la participation du secteur public dans les contrats NPD et *hub* afin d'éviter de les réintégrer dans les comptes publics.

49. « *The entire PF structure is to keep the debt off the public balance sheet. This is where we start* », in HOUSE OF COMMONS, PUBLIC ADMINISTRATION AND CONSTITUTIONAL AFFAIRS COMMITTEE, *After Carillion : Public sector outsourcing and contracting*, op. cit. , p. 16.

50. BAWDEN Anna, « Why councils are bringing millions of pounds worth of services back in-house », *The Guardian*, 29 mai 2019, <https://www.theguardian.com/society/2019/may/29/bringing-services-back-in-house-is-good-councils>, consulté le 14 janvier 2020. Voir WALKER David et TIZARD John, *Out of Contract : Time to move on from the « love in » with outsourcing and PFI*, London, Smith Institute, janvier 2018, p. 17.

51. GRANOU LHAC Françoise, « Excellence at what cost ? Austerity and the reform of the school system in England (2010-2016) », *The Political Quarterly*, n°88/3, juillet-septembre 2017, p. 434-442, p. 440.

RÉSUMÉS

Depuis la fin des années quatre-vingt-dix, les collectivités locales britanniques se sont engagées dans des partenariats publics-privés de longue durée afin de renouveler et rénover leur patrimoine scolaire. Il s'agira ici d'examiner l'héritage de la *Private Finance Initiative* sous une triple perspective, financière, éducative et architecturale. Cet article met en évidence la rigidité et les coûts élevés des contrats sur le long terme, ainsi que leurs conséquences sur les finances des collectivités et les budgets des établissements, dans un contexte économique marqué par les politiques d'austérité appliquées depuis 2010. Si les autorités locales ont amélioré la gestion de ces contrats, le déséquilibre de la relation entre secteur public et partenaires du secteur privé n'en demeure pas moins un problème fondamental et conduit à une érosion des capacités de décision et de contrôle des pouvoirs publics. Bien que les partenariats publics-privés aient permis de réaliser des programmes de construction scolaire de grande envergure et d'améliorer l'entretien des bâtiments, on peut s'interroger sur la qualité de ces réalisations. Les enseignements ont été tirés de ces contrats et les autorités locales s'orientent à présent vers des formes plus diversifiées de financement et de réalisation d'infrastructures scolaires, susceptibles de garantir un meilleur rapport coût-bénéfice-risque et de protéger les intérêts des utilisateurs du service public.

Since the end of the 1990s, local authorities in the UK have taken long-term commitments under public-private financing schemes in order to renew or refurbish their school estate. This article focuses on the legacy of the *Private Finance Initiative*, which is considered from three different but complementary perspectives: financial, educational and architectural. It highlights the lack of flexibility and the long-term costs of the contracts as well as their consequences on local council finances and school budgets, in a context dominated by austerity policies from 2010 onwards. While local councils have improved their expertise in dealing with such contracts, the imbalance of the relationship between public and private sector partners remains a central issue and has led to an erosion of public authorities' control and decision-making capacity. Although public-private partnerships have made it possible to complete large-scale school-building programmes and to improve the level of maintenance, the quality of those buildings can be

questioned. Lessons have been learnt and local authorities are now turning towards more diverse forms of procurement, in an attempt to ensure greater value for money and to protect the interests of public service users.

INDEX

Mots-clés : PFI, Non-Profit Distributing, infrastructures scolaires, autorités locales, soutenabilité budgétaire, qualité architecturale

Keywords : PFI, Non-Profit Distributing, school infrastructures, local authorities, affordability gap, architectural quality

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The Privatisation of Asylum Accommodation in the UK: Winners and Losers

La privatisation de l'hébergement pour les demandeurs d'asile : les gagnants et les perdants

David Fée

Introduction

- 1 Britain has a long tradition of hosting and welcoming migrants and refugees, being one of the first 13 signatories of the 1951 Geneva Convention on refugees. Housing, as underlined by many studies,¹ is key to their integration into British society. However, while the national housing crisis and the changes in house prices attract much media attention, the housing problems refugees face do not get much press coverage, apart from by the specialist media (*Inside Housing* for instance). When they do, it is mostly from the tabloid press which is quick to denounce the 'over indulgent' access to social housing migrants and refugees are said to enjoy.²
- 2 The housing conditions of asylum seekers are even more problematic. They are not only constrained by the national housing shortage but have also been redefined following a major structural overhaul of asylum accommodation in the past 10 years which amounts to a privatisation of the system, although its operation and regulation mark it apart from the traditional privatisation of utilities.
- 3 This article will review and analyse the transformations of the system designed by the UK authorities to accommodate asylum seekers, in order to assess the extent to which it has been privatised and the consequences of these transformations. First, I will review the concept of privatisation in order to try and understand the specificities of the privatisation policies applied to asylum accommodation. Then, I will locate housing within the controversial issue of asylum and migration to the UK, before exploring the legislative changes introduced by successive governments to the asylum

accommodation programme and their motivations. I will next assess the consequences of and the problems thrown up by this privatisation, before concluding on how privatisation has played out in a policy area largely regulated by international law.

- 4 This paper only focuses on asylum seekers, namely someone who has arrived independently in the UK, has applied for asylum and is awaiting a decision on whether they will be granted refugee status or not.³ I shall not look into the housing of other categories of migrants such as resettled people⁴ or even refugees. Besides, I shall not look at the devolved nations in detail but at the UK in general as immigration is not a devolved matter.

The Privatisation of Public Services in the UK

- 5 Along with the USA, the UK has been a driving force behind the privatisation of the world's economy for the past 40 years. In the UK, this privatisation momentum was unleashed by the Conservative government formed after Margaret Thatcher's electoral victory in 1979 and the coming to power of the so-called New Right.⁵ The determination of successive Conservative governments to privatise the economy can be accounted for by the neoliberal component of the New Right. Indeed, its philosophy is by and large averse to state intervention in the economy⁶ and has been summarised by Nicholas Bosanquet by a thesis and an antithesis: Bosanquet argues that for the New Right "*society has a natural tendency to order and the economy a natural tendency to growth*".⁷ Conversely, he argues, for the New Right the negative result of state intervention is that as "*politicisation*" grows, politics becomes concerned with vote-buying and public spending and taxation get out of control.⁸
- 6 It follows from this outlook that government intervention is seen as likely to create chaos and disrupt these natural tendencies and that the role of government should be kept to a minimum, namely upholding law and order, justice, national security and setting the right framework for the market to thrive. The New Right's determination to privatise derives from the belief that the market is the best mechanism to allocate resources as it is thought to match supply and demand and achieve a balance if left to its own devices. Privatisation also derives from the need to secure accumulation and profit by means of competition between individuals and companies in order to fuel the market economy. "*Because this acquisitive momentum produces material abundance, it is claimed that self-interest benefits society as a whole*".⁹
- 7 Because of these ideological premises, in the UK, the state has been the subject of "*a permanent revolution*"¹⁰ for four decades and privatisation has been one aspect of this revolution. This has taken many forms. Since 1980, reforms have been introduced in the UK to change and privatise what Le Grand and Robinson called one year into Thatcher's second term "*the three modes*" of state activity: provision, subsidy and regulation.¹¹ Successive governments, not only Conservative but also New Labour,¹² have upheld a 'small state' consensus and sought to curtail these three modes, reducing state provision, subsidies, and regulation.
- 8 The welfare state and public services have been a prime target for the New Right in the UK. Indeed, the foundations on which post-war public services were built were criticised by New Right proponents and said to be in need of reforms for a number of reasons: they were said to be too costly, to favour the middle classes more than the poor,¹³ to be controlled by vested interests and finally to limit choice.¹⁴ Their

privatisation has not always been visible as it does not always involve the replacement of the state by the market ('denationalisation') or contracting out, but can be limited to "the shift from one form of intervention to another one or the encouragement of the third sector".¹⁵ The contours of public services have become blurred as these shifts have sometimes morphed into "the privatisation of the production of a service that is still state financed".¹⁶ This is especially true in the field of housing where from 1988 until recently the state-subsidised the voluntary sector to build social housing. More specifically, the privatisation of housing in the UK has involved denationalisation (right to buy), liberalisation (increasing the role of the private and third sectors) and contracting out (of its management to new structures such as TMOs and ALMOs¹⁷ or the private sector). Besides, the direction of change, the nature and extent of privatisation can be constrained by the "previous pattern of state provision and intervention", as some scholars argue.¹⁸

- 9 Where the state has not been privatised, its operation has been profoundly reformed through a "managerialisation" process designed to remodel it on the lines of the private sector.¹⁹ This is said to have occurred in two stages: first, in the 1980s, the onus was on cost control, performance indicators and targets; then, from the late 1980s on, decentralisation and quasi-markets were introduced.²⁰ In order to reform public services, successive governments since 1980 have drawn on a number of mechanisms including fragmentation, competition, private management practices, economies (savings), the creation of a managers' tier, performance assessment and payment by result.²¹
- 10 The result of this revolution has been, as LeGrand and Robinson predicted as early as 1984, that: "the state will be involved through subsidisation and through helping entrepreneurship by others, rather than through direct public provision".²²
- 11 Housing in the UK has been significantly impacted by these reforms and has been in the vanguard of this privatisation programme for a number of reasons: first, because it breached a number of New Right principles (control of the money supply, reduction of the Public Sector Borrowing Requirement²³ and freedom of choice).²⁴ Second, the number of winners was large and visible (those former tenants who have become home owners under the Right to Buy²⁵) while losers were also numerous but invisible (taxpayers footing the bill).²⁶ Lastly, housing was privatised because it is mostly a private good and local authorities were thought to be inefficient and dominated by vested interests.²⁷ One outcome of this privatisation process in the housing sector in general has been its residualisation, namely the decline of the size of the council sector and the concentration of poorer households in it.²⁸ The commodification of the housing sector through the sale of the more attractive council homes has indeed reinforced social stratification: by 2016/17, only 43% of social rented households were in full or part-time work, 21% were inactive and three quarters were in the bottom 40% of the income distribution in England.²⁹ It has also reinforced the concentration of ethnic minorities with all ethnic groups bar Indians, Mixed, other Whites and Chinese being more likely to live in social housing than white British.³⁰ The other outcome has been that the Right to Buy has generated more than £58 billion in capital receipts for the government, more than any privatisation programme since 1980 in the UK.³¹
- 12 As we shall see in the next section, the privatisation of asylum accommodation derives in part from a desire not to compound the socio-economic characteristics of the social sector; as in the case of the privatisation of council housing, it stems from a desire on

the part of central government to make savings. We shall to turn to the question of the privatisation of asylum accommodation proper and examine it against the background of asylum migration first.

Asylum Seekers in the UK: a Controversial Issue

- 13 Paradoxically, although the number of asylum seekers in the UK is much lower than in the early 2000s, the salience of the question in public opinion has increased and it has been increasingly subject to political debate and instrumentalisation. As a result, governments have introduced a number of legislative changes in order to create a “hostile environment”³² which bears on the housing circumstances of asylum seekers.
- 14 In 2018, 5.7% of all international immigrants (namely “people who change their country of residence for at least one year”) were classified as asylum seekers. The number of asylum applications to the UK rose from 1989 onwards, peaked in 2002 at 84,132 and then fell sharply to reach a twenty-year low point of 17,916 in 2010, before rising again to reach 35,566 in 2019.³³ These figures do not include resettled people as explained above.³⁴ Asylum seekers migrate from all parts of the globe and there is no predominant geographical area of origin, although only 6% come from the Americas or Oceania: in 2019, 29% of asylum applicants were nationals of Asian countries, 27% were nationals of Middle Eastern countries, 24% were nationals of African countries, and 14% were from Europe.³⁵ Compared to other European countries of reception, the UK has a low ratio of asylum seekers: in 2019, there were around 5 asylum applications for every 10,000 people residing in the UK, while across the EU28, there were 14 asylum applications for every 10,000 people. The UK was therefore below the average among EU countries for asylum applications per head and ranked 17th among EU28 countries on this measure.³⁶
- 15 Two key figures matter regarding housing provision. First, the percentage of asylum applicants whose application was refused, since in theory their legal right to housing comes to an end on refusal (see next section): the rate of refusal reached its highest point at 88% in 2004. After that, the percentage of applicants refused asylum fell to 59% in 2014, then rose again, before dropping to 48% in 2019.³⁷ The second indicator is the percentage of appeals that are successfully lodged, since persons appealing who are successful have their right to housing reinstated: this stood at its lowest point in 2004 at 18%, increased to 42.2% in 2015, before falling back to 35.4% in 2018.³⁸
- 16 Although asylum seekers account for a lower proportion of international migrants in the UK than in many European countries, they have become caught up in the immigration debate and their social and housing rights have been affected as a result. Following Theresa May’s 2012 statement about creating “a hostile environment”, the political determination to create such an environment for migrants is often associated with the coalition government that was in power between 2010 and 2015. However, this policy agenda originated earlier, in the mid-1990s. Even before the Coalition was formed, legislative changes, ministers’ statements,³⁹ and increased European migration following the 2004 expansion of the EU, had led to a change in public opinion and the greater salience of the issue of migration. This contributed to the perception that migrants benefited unfairly from social housing and other services, despite studies by the Equality and Human Rights Commission and the Local Government Association

showing that the view that “migrants are jumping social housing queues” is unfounded.

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- 17 This agenda means that UK immigration policy has been “at the forefront of a growing European ‘restrictionism’ towards refugees and asylum seekers” which has been driven both by ideological and economic considerations.⁴¹ In the UK, “restrictionism” started rising to the top of the political agenda during the Major years and stayed there during the New Labour years when the party’s immigration policy was driven by two principles: limitation of public expenditure and keeping an image of political toughness.⁴² It has led to new entry requirements and restrictions to welfare for asylum seekers once in the UK.
- 18 This new approach to immigration and more particularly asylum manifested itself most prominently in 1998 when the New Labour government published a White Paper entitled *Fairer, Faster and Firmer, A Modern Approach to Immigration and Asylum*.⁴³ It heralded a reform of the existing system with a view to creating “a new covenant” based on “fulfilling the mutual obligations [...] that exist between the Government and those seeking asylum”.⁴⁴ The document illustrated a hardening of discourse and policy towards asylum seekers and continuities with previous Conservative governments. While underlining the contribution international migration made to the UK, it pledged “to deal quickly and firmly with those who have no right to enter or remain [in the UK]” and to tease out “genuine applicants” from “abusive claimants”, so as to “to plan and allocate resources more flexibly in order to minimise costs overall [...] to the taxpayer”.⁴⁵
- 19 As a result of this political consensus on an ‘exclusive citizenship’⁴⁶, asylum seekers no longer have similar rights in the field of housing to those granted to refugees and other persons in need. From the mid-1990s onwards, a series of measures have curtailed their housing rights as well as their choice. First, the 1993 *Asylum and Immigration Appeals Act* abolished local authorities’ duty to house asylum seekers permanently. Second, the 1996 *Asylum and Immigration Act* together with the 1996 *Housing Act* defined two categories of asylum seekers (port-of-entry and in-country) and removed single asylum seekers from the priority need categories of the population whom local authorities have had a duty to house since 1977 if at risk of homelessness.⁴⁷ More generally, successive legislative changes have reduced their welfare rights: in 2002, section 55 of the *Nationality, Immigration and Asylum Act* removed support from those who did not make a claim “as soon as reasonably practicable” and “recourse to public funds” was no longer possible for asylum relatives.⁴⁸ In 2011, support was further reduced, with the abolition of the Refugee Integration and Employment Service, the service designed to help asylum seekers move out of the asylum system into real life, once they had been granted refugee status.⁴⁹
- 20 However, the politicisation of the asylum issue and more generally of immigration in the UK over the last 30 years has not only impacted the housing rights of asylum seekers and led to the rise of what some term “cimmigration”⁵⁰: coupled with austerity measures, it has also brought about the privatisation of asylum accommodation after 2010.

The Privatisation of Asylum Accommodation

- 21 The housing rights of asylum seekers in 2020 are tightly defined and housing is part of the help asylum seekers are entitled to under three circumstances: while the Home Office is reviewing their application (section 95 of the Asylum and Immigration Act 1999) if they have no means of their own; while assessing whether they are eligible for support (section 98); and when an applicant has been refused asylum but has not yet left the country (section 4). Asylum seekers cannot choose where they will be accommodated and the current Home Office policy revolves around dispersing them around the country. On arrival in the UK they should be housed in Initial Accommodation (IA) centres (there were seven in 2017) for up to 19 days while the Home Office assesses whether they are eligible for accommodation and if so dispersed to settled accommodation. However, if no place is available in IA, applicants can be temporarily housed in emergency accommodation (hotels, hostels, or B and Bs). If an asylum application is accepted, “applicants have 28 days to secure housing and a means to support themselves before their entitlements under section 95 are stopped”.⁵¹ They become refugees and must leave the accommodation provided, and the local authority then has a duty to rehouse them. However, if their application is rejected and they are one of the statutory priority categories, the local authority must frequently also rehouse asylum seekers temporarily while they await deportation or appeal so that they do not become homeless.
- 22 At the end of December 2018, statistics showed that there were 43,549 asylum seekers benefiting from section 95 assistance, of whom 40,072 were living in dispersal accommodation, namely not in IA anymore. The North East of England had the highest proportion of dispersed asylum seekers relative to its population (6 for 10,000) and the South East the lowest. Glasgow and Liverpool had the highest numbers as far as councils were concerned. That 62% of local authorities had no asylum seekers in 2018 highlights their concentration in some areas of the country.⁵²
- 23 The privatisation of asylum accommodation is the outcome of a series of measures that have gradually shifted the system away from local authorities towards private contractors and sub-contractors. The formation of the Coalition in 2010 was a turning point, although key changes introduced during the New Labour years paved the way for this development.
- 24 Before 1999, it fell upon the local authority where asylum seekers made a claim for asylum to provide accommodation. The problem was that most were made in London and the South East. In order to relieve the pressure on these areas, the newly elected New Labour government announced changes to support arrangements in the 1998 White Paper previously mentioned (*Fairer, Faster and Firmer: A Modern Approach to Immigration and Asylum*) in order to move towards a more integrated approach,⁵³ and to a centralised system. Asylum seekers arriving in the UK would henceforth fall under the jurisdiction of a new body, the National Asylum Support Service (NASS), run by the Home Office through regional consortia whose remit was to secure accommodation from various providers through contracts.⁵⁴ These could be voluntary bodies, local associations or companies from the private sector, although in the initial funding round local authorities dominated before being replaced by private sector entities after 2006 when council housing for asylum seekers became controversial.⁵⁵ Accommodation was to be provided on a “no choice” basis and was construed as a “safety net”.⁵⁶ The

two key motivations behind the reform were greater efficiency through “rationalisation” and cost-cutting: the existing system was said to cost £400 million and likely to rise to double that amount by 2000/01.⁵⁷ The reform was implemented following the passing of the 1999 *Asylum and Immigration Act*. Further privatisation took place before 2010: in 2002 under the *Nationality, Immigration and Asylum Act*, a programme of reception centres for asylum seekers was initiated (IA) and contracted out to the private sector.⁵⁸ The new arrangements resulted in a system of 22 separate contracts with 13 different suppliers (a mixture of local authorities, private providers and voluntary organisations) by 2012.⁵⁹

- 25 The formation of the Coalition in 2010 ushered in a further and deeper round of privatisation. The privatisation of asylum accommodation was retained (IA centres and the increasing use of private landlords) and in addition to that the contracting process was privatised. Since 2012, the accommodation of asylum seekers has been provided through contracts managed by six regional Commercial and Operational Managers Procuring Asylum Support Services (COMPASS). By 2018, three private companies (Serco, G4S, and Clearsprings) each held two of these contracts and operated “a supply network of contractors, sub-contractors and private landlords”.⁶⁰ Under the new contract system, the Government aimed to make £140 million worth of savings in the first round.⁶¹ These companies were known to the Government as they already provided services to the Government, but only Clearsprings had some housing experience. Contracts were given for five years, but in 2016 the government announced that they would be extended until 2019 and that a new round of contracts would start as of 2019.⁶² An invitation to tender was put out in November 2017 for 10-year contracts worth £4 billion, in the seven regions covered by the UK Visas and Immigration Office (the three devolved governments plus four groupings of English regions). The new contracts, known as Asylum Accommodation and Support Service Contracts (AASC), were awarded in January 2019 to Serco, Mears Group and Clearsprings Ready Home.
- 26 Serco won the new AASC contracts for the Midlands, the East of England, and the North West, worth £1.9 billion over ten years. The company was originally founded in 1929 as the British division of the Radio Corporation of America (RCA), and became a provider of public services following a management buy-out in 1987 and stock exchange listing in 1988. Today Serco employs more than 50,000 people worldwide. It describes its mission as “the delivery of essential public services [...]in defence, transport, justice, immigration, healthcare and other citizen services”.⁶³ In 2019, it had an overall revenue of £ 3,248 million and profits of £102.5 million, across four continents. It aims to “improve the performance of public services [...]” and prides itself on that fact that “a strong public sector ethos runs through [their] organisation”.⁶⁴ Mears Group was awarded contracts for the North East, Yorkshire, Humberside, Northern Ireland, and Scotland. Similar to Serco, Mears was founded in 1988. It is smaller, with over 15,000 employees in 2016, and a turnover of £905.1 million in 2019. Mears only specialises in housing-related services (maintenance, management, development, care and support and planning) and manages 11,000 homes every day. Clearsprings/Ready Homes was awarded contracts for Wales and the South of England. It was established in 2000, is a subsidiary of Clearsprings and has been providing homes to central and local government for 14 years. It states that it has a portfolio of 15,000 homes and prides itself on “providing value for money, quality and transparency”.⁶⁵

- 27 Under the COMPASS terms as well as the AASC ones, contractors need to take a number of factors into consideration when suggesting accommodation to the Home Office, such as the concentration and availability of accommodation, the capacity of local public services, or the level of risk of social tension if the number of asylum seekers increases.⁶⁶ Their performance is measured against a number of Key Performance Indicators (KPIs) (9 for COMPASS including three for accommodation standards) designed to improve the quality of services. When problems are brought to the attention of the providers, they must address and solve them within a specific timescale or face financial penalties.⁶⁷ Yet despite this legal framework, a number of issues/problems have arisen.

The Consequences of Privatisation

- 28 Since 2012, successive parliamentary reports have highlighted recurring problems posed by the contracting out of asylum accommodation.
- 29 First, these reports underscore the poor communication between the various stakeholders. In its 2018 report, the House of Commons underlined what it called the “systemic mistrust” between some actors in the sector (the Home Office, NGOs, and the Independent Chief Inspector of Borders and Immigration, ICBI). This was said to be due to the NGOs and ICIB’s concern that the Home Office would turn down an asylum application and the contractor retaliate if complaints by asylum seekers about their homes were made public.⁶⁸
- 30 Second, there is a lack of accountability in the procurement process as private contractors are not answerable to local authorities although they operate within their boundaries. As Andy Burnham (Mayor of Greater Manchester) and other council leaders have complained, the new arrangements have created an unequal partnership between the Home Office, the local authorities and the contractors: this was due to the Home Office’s refusal to share “risk management information and contingency plans”⁶⁹ (in contracts), but above all to the lack of local authority oversight: although the asylum dispersal scheme can only operate with their agreement, on a voluntary basis, local authorities have no inspection or sanction power nor can they impose the same housing standards regulations within their boundaries.⁷⁰ Besides, although the housing provider must consult with the local authority regarding the accommodation envisaged, the latter only has 72 hours to consider the request and if turned down on the grounds of health and safety issues, the provider can “seek permission from the Home Office to override the local authority’s objections”.⁷¹ The lack of power on the part of local authorities is all the more paradoxical as they have to pay for extra services provided to asylum seekers (health, education) although they receive no extra funding from the central government unlike for Resettlement Programmes.⁷²
- 31 The discontent expressed by local authorities is also caused by a second problem created by the privatisation of asylum accommodation: the frequent use of substandard dwellings by contractors. The standards of settled accommodation provided by contractors are regulated by the Key Performance Indicators applying to accommodation (KPI 4/5/6/7, see above) and should conform to them: this means that contractors should provide accommodation that is safe, without any severe defects and be well-maintained. Furthermore, they should make it possible for asylum seekers to raise complaints and contractors should contractually address these within five days or

respond to any emergency within the specified response time.⁷³ Properties should be inspected by providers (who are one and the same) at least once a month and every time an asylum seeker moves out of a property. Besides, the Home Office is supposed to inspect one third of all properties in a contract area every year.

- 32 However, parliamentary reports have repeatedly underlined a number of failings: these include the presence of vermin, of asbestos, cleanliness issues, inadequate facilities or furnishings, and failing heating systems. The accommodation provided is inspected by the contractor (with potential conflicts of interest even if subject to key performance indicators), but the local authority has no power to conduct inspections. These problems were confirmed by an Independent report in 2018 highlighting that only 24% of the properties inspected complied with the Compass requirements according to the Home Office's own inspectors, while 43% were not fit for purpose.⁷⁴ As the ICIBI report underlined, the Home Office, with a team of nine Contract Compliance Officers for the whole country, was not able to meet its inspection targets.⁷⁵
- 33 Initial accommodation run by the private sector since 2020 poses even more problems. Parliamentary reports have underlined that bathrooms and showers facilities in such centres are sometimes dirty, pregnant women not always fed adequately and health checks are not carried out properly so diseases are not always picked up.⁷⁶ There is sometimes not enough food, children are not always schooled and providers do not always fulfil their obligations to provide transport to medical appointments.⁷⁷ When hotels are used in emergency situation, they can be substandard or unfit as the same criteria are not applied as for settled accommodation.
- 34 When standards are not up to the key performance indicators, the Home Office can impose fines or a service credit. Reports show that the records of the three contractors from 2012 to 2019 varied widely: while Clearsprings was never sanctioned for missing targets between 2012 and 2017, and G4S was not fined in 2015 and 2016, Serco was fined almost every year.⁷⁸ Worryingly, the subcontractors carrying out inspections on behalf of the contractors did not appear to have the same definition of "urgent defects" and "emergency defects" as the Home Office, which itself did not agree with local authorities.⁷⁹
- 35 One issue that privatisation was meant to solve but that still endures for different reasons is the concentration of asylum seekers. The system introduced in 1999 that was privatised in 2012 was meant to disperse asylum seekers away from London and the South East. While this geographical shift has been achieved, it has been at the expense of the Northern councils that have taken part in the programme. Indeed, the cost saving objectives of the initial programme have been compounded by the austerity measures introduced by the Coalition after 2010. This has resulted in asylum seekers being sent away from the existing communities⁸⁰ and cheaper accommodation being sought by contractors in order to keep within the financial constraints of the Home Office contracts or to minimize their losses. Two problems have surfaced: on the one hand, in these cheaper and often poorer areas where asylum seekers are concentrated, deprived communities can be unwelcoming and suspicious of newcomers and an influx of asylum seekers can push up local private rents or reduce accommodation supply, thus leading to local tensions.⁸¹ On the other hand, some voluntary local authorities are not able to provide accommodation as a consequence of local high housing prices.⁸² The concentration of asylum seekers may not be visible at first sight as although the cluster limit may not be reached (1 for 200 residents) at local authority level, there may be a

high concentration at ward level where the limit does not apply because of cheap housing being located in a few deprived wards. The problem is made worse by the fact that while the number of asylum seekers almost doubled between 2012 and 2019, the number of local authorities taking part in the scheme went down from 150 to only 121 (out of 453).⁸³

- 36 The eviction of some asylum seekers from dispersal accommodation has drawn media attention too: in a number of cases, where there are no health considerations and an application has been rejected by the Home Office and the applicant refuses to leave, locks on the property were changed by Serco while the applicant was out.⁸⁴ This can also happen when the applicant has received a positive reply but has not secured another accommodation within the 28 legal days and so has not left. However, it appears that Serco also ended up paying the rents of applicants when there were (child) welfare considerations and the Home Office stopped funding.⁸⁵
- 37 Most of the problems described above derive from the new and faulty governance of the asylum system. However, some, such as service fragmentation, were already underlined in 2002.⁸⁶ As the 2017 House of Commons report then noted, the main cause of the current problems is that “although the system of three providers looks straightforward on the surface, below it lies a complex network of contractors, sub-contractors and private providers”.⁸⁷ Indeed, the contractors themselves are required to source accommodation provision from various providers.⁸⁸ For instance, from September 2012 to 2016, Serco subcontracted asylum housing to Orchard and Shipman, a specialist lettings agency, in Scotland and Northern Ireland. However, following complaints about O&S’s treatment of asylum residents and housing conditions and Serco appearing before the Home Affairs committee, O&S’s operations were transferred to Serco.⁸⁹ During the proceedings, the committee’s chair underlined that Serco subcontracted its operations to 20 providers, who themselves, unbeknownst to Serco, sometimes subcontracted their operations too. As the CEO of Serco explained, part of the problem was that Serco only managed the estate but subcontractors were in charge of the maintenance of their properties.⁹⁰

Conclusion

- 38 Asylum accommodation is illustrative of the privatisation revolution that has swept the UK since the 1980s in many ways. As in other policy areas (education to a lesser degree), local authorities have been deprived of most of their power and are no longer service providers but only facilitators. They have all the risks but no tools to manage these.⁹¹ Privatisation has been motivated by a desire on the part of successive governments to cut costs, streamline the existing system and paradoxically recentralise it (i.e. the Home Office negotiates accommodation contracts directly with a handful of contractors and defines targets and indicators), as well as a determination to diffuse this political issue in this particular case. However, unlike for utilities, privatisation has worked its way through contracting, subcontracting; the system remains a hybrid one since state subsidies are used to provide private goods (private accommodation); looking at the reform through LeGrand’s grid of analysis, it is clear that provision has been privatised, but subsidy and regulation have not. The general result is a loss of accountability, as private contractors are not accountable to local authorities and, as a consequence, to local residents and voters. On the face of it, the governance of asylum

accommodation has become simpler, more top-down, but underneath it has developed into a complex network of national, local and sometimes international actors (Serco), whose primary motivation is thought to be to use housing provision as a stepping stone to obtaining bigger government contracts.⁹²

- 39 Despite repeated recommendations by the ICIB as well as the Home Affairs Committee, the Home Office has decided to retain the post-2012 system, insisting that any transfer of responsibility to local authorities would make the system less rigorous and “reduce the accountability of the Home Office and the ability to hold providers to account”.⁹³ It is hard not to read behind this decision the usual mistrust all UK governments have displayed towards local authorities since 1979. In a written statement in 2019, Caroline Nokes, the then Minister of State for immigration, announced that the new contracts would provide improvements on existing arrangements such as a requirement for accommodation providers to liaise closely with local authorities, to work with the local community and voluntary organisations, to have a clear management and inspection plan, to set clear requirements for standards and inform asylum seekers better about their rights.⁹⁴ However, although more central government funding was pledged by her predecessor to improve the system,⁹⁵ value for money seems to remain a top priority behind the new contracts.⁹⁶ One can only hope asylum seekers will benefit from better housing conditions. If not, only the Home Office and private contractors will gain from the renewal of a much-criticised system.

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NOTES

1. See for instance Deborah Phillips, "Moving Towards Integration: The Housing of Asylum Seekers and Refugees in Britain", *Housing Studies*, XXI: 4, 2006.
2. See for instance Steve Doughty, "Nine Asylum Seekers a week are found to be lying about being children in desperate bids to stay in Britain", *The Daily Mail*, 10 September 2018.
3. Refugee status is defined under Article 1 and 2 of the 1951 United Nations Convention and Protocol Relating to the Status of Refugees as "[...] any person who is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country [...]" see UNHCR, United Nations Convention and Protocol Relating to the Status of Refugees, Article 1 and 2. The UK signed the Refugee Convention in 1954 and the Protocol in 1967.
4. Resettled people are granted refugee status while still living abroad and before being brought to the UK. For instance, Syrians are a category of resettled people and a target to resettle 20,000 Syrians by 2020 has been set by the UK government. Resettled people are not included in asylum seekers statistics. By 2018, there were four different resettlement schemes.
5. Although 'the new right' is not a term that everyone agrees with. See Denis Kavanagh, *Thatcherism and British Politics: The End of Consensus?* (Oxford, OUP, 1987).
6. Even though in practice the 'free market' is largely a myth. See Bernard Harcourt, *The Illusion of Free Markets* (Cambridge MA, Harvard University Press, 2011).
7. Nicholas Bosanquet, *After the New Right* (London, Heinemann, 1983), p. 5.
8. *Ibid*, p. 22.
9. Mark Hayes, *The New Right in Britain, An Introduction to Theory and Practice* (London, Pluto Press, London, 1994), p. 29.
10. Janet Clarke and John Newman, *The Managerial State* (London, Sage, 1997)
11. Julien LeGrand, Ray Robinson (eds.), *Privatisation and the Welfare State* (London, George Allen and Unwin, 1984), p. 4.
12. Simon Jenkins, *Thatcher and Sons: A Revolution in Three Acts* (London, Penguin Books, 2007)
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14. Bosanquet, *op. cit.*, p. 22.
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16. Ray Forrest, 'The Privatisation of Collective Consumption', in M. Gottdiener, C. Pickvance (eds.), *Urban Life in Transition, Urban Affairs Annual Reviews* 39 (1991), p. 174.
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18. *Ibid*.
19. John Clarke, Sharon Gewirtz, Eugene McLaughlin, *New Managerialism, New Welfare* (London, Sage, 2000).
20. Christopher Pollitt, *Managerialism and Public Services* (Oxford, OUP, 1993).
21. Christopher Hood, 'The New Public Management in the 1980s, variations on a theme', *Accounting Organisation and Society*, XX: I, 1995.
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24. David Fée, « Le logement et l'Etat-Providence, 1979-1997 », in A. Kober Smith and T. Whitton, *L'Etat-Providence : Bilan de 18 années de pouvoir conservateur (1979-1997)*, *Revue Française de Civilisation Britannique*, IX : IV, pp. 133-149.
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26. Christopher Pierson, *Retrenchment and the Welfare State* (Cambridge, CUP, 1994), p. 79.
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28. Alan Murie, Ray Forrest, *Selling the Welfare State: The Privatisation of Public Housing* (London, Routledge, 1988), p. 74.
29. MHLG, *A New Deal for Social Housing Cm 9671* (London, HMSO, 2017), p. 17.
30. See <[https://www.ethnicity-facts-figures.service.gov.uk/housing/social-housing/renting-from-a-local-authority-or-housing-association-social-housing/latest#:~:text=households%20with%20higher%20rates%20of,Caribbean%20\(40%25\)%20ethnic%20groups](https://www.ethnicity-facts-figures.service.gov.uk/housing/social-housing/renting-from-a-local-authority-or-housing-association-social-housing/latest#:~:text=households%20with%20higher%20rates%20of,Caribbean%20(40%25)%20ethnic%20groups)> [1 September 2020].
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64. *Ibid.*
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94. <<https://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2019-01-08/HCWS1237/>> [1 September 2020].
95. <<https://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2016-12-08/HCWS335/>> [1 September 2020].
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ABSTRACTS

The United Kingdom has been a pioneer regarding privatisation policies since the 1980s. This derives from the coming to power in the UK in 1979 of the New Right with the election of the Conservatives led by Margaret Thatcher. Privatisation has taken many forms and has spared no area of society or the economy. Housing has been at the forefront of the public services that have undergone privatisation for economic, political and practical reasons. Within the field of housing, the rules governing access to asylum accommodation have been altered since the 1990s and the provision of accommodation has shifted to the private sector since the 2010s. These transformations have had consequences on asylum seekers' housing conditions. Going over successive parliamentary reports on the matter, one cannot fail to wonder who are the winners and the losers of these reforms.

Le Royaume-Uni est un pionnier en matière de politiques de privatisation depuis les années 1980. Ce choix découle de l'arrivée au pouvoir en 1979 de la Nouvelle Droite en la personne de Margaret Thatcher. Cette politique de privatisation a pris des formes multiples et n'a épargné presque aucun pan de la société et de l'économie. Le logement figure au premier rang des services publics touchés par ces mesures pour des raisons économiques, politiques et pratiques. Au sein de ce domaine, les règles qui gouvernent l'accès des demandeurs d'asile au logement ont été modifiées depuis les années 1990 et la fourniture de logements a basculé dans le domaine privé depuis les années 2010. Ces transformations n'ont pas été sans conséquences sur les conditions de logement des demandeurs d'asile et à la lecture des multiples rapports parlementaires sur le sujet il convient de s'interroger sur les gagnants et perdants de ces mesures.

INDEX

Keywords: asylum, privatisation, housing, immigration, local government, accountability

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A Brief Introduction to Complexity Theory in Managing Public Services

Une introduction succincte à la gestion de la complexité dans les services publics

Nicholas Sowels

Introduction

- 1 Work on this article began long before the Covid-19 pandemic, which exploded in early March 2020, and within a couple of weeks changed our lives fundamentally. It will affect us for a very long time. In some ways, what follows may seem trite, given the direct and indirect suffering the “coronacrisis” looks set to cause. Yet, this crisis is also a massive challenge for public policy as the coronavirus has swept the world: it has hugely reduced international travel and business; in spring 2020, it stretched health services so severely that countries across the globe went into lockdown to limit hospital patient numbers, at a staggering economic cost; governments have been scrambling to obtain simple and complex medical equipment and are once again talking about the importance of strategic industrial sectors; whole sectors of the economy have been on the brink of collapse, etc. Monetary and fiscal authorities are doing the unthinkable to fight the pandemic, to bail-out companies and support households. Confinement curtailed civil liberties and social distancing is set to disrupt our lives for a long time. In short, governments (along with households and companies) have been plunged into unprecedentedly complex crisis management. It is beyond my competencies to apply the ideas set out below to the coronacrisis. Yet some of them may contribute to readers’ own thinking about what we are living.
- 2 My own interest in complexity theory has followed several intuitions. For several years, I have done some translations about the energy sector, an activity in which investments in infrastructure and plant are vast.¹ Yet energy is also an area in which the global business environment changes very quickly. In the last 15 years, shale gas and oil have totally changed the energy balance of the USA; renewable energies have seen substantial price falls; nuclear power is much compromised since the Fukushima

disaster in 2011, while gas is declining in Europe and coal is back: with the coronacrisis, the spot oil price was *negative* (sic) on Monday 20 April 2020.² How are policy-makers investing billions (of euros, pounds or dollars) to react to such gyrations?

- 3 The second intuition came from thinking about how Britain's post-war Labour government did what it did. National debt after the war was around 250 percent of GDP and Britain desperately needed a loan from the United States (and Canada). Despite this, the Attlee government nationalised substantial parts of the UK economy, created the Welfare State (the NHS, social insurance and pensions), managed the British zone of occupied Germany, demobilised the armed forces... and departed ignominiously from India, leaving tragedy behind.³ How did they manage all this? And how did they do it without computers? Part of the answer is the far greater simplicity of goods and services at the time:⁴ welfare benefits were flat rate, consumer goods were rationed and limited in variety... and society was deferential to the "man in Whitehall who kn[ew] best", etc.⁵ Part of the answer is that business and government were simpler, precisely because there were no computers, as bigger and more flexible IT systems themselves generate complexity (and project failures).⁶
- 4 The last intuition follows from participating in conferences in recent years, in which new public management (NPM) still figures largely, even though NPM is now quite old: Osborne and Gaebler's landmark study on *Reinventing Government*, for example, was published in 1992.⁷ So, what has happened since? One answer to this question lies in the development of complexity theory and its application to public services over the last 30 years. Section 1 of this article attempts to summarise some of the key concepts in this field. The next section seeks to present how complexity analysis has evolved within public sector management. Finally, section 3 gives some examples of complexity theory applied to public services.

The varied origins of complexity theory

- 5 The examination of the complexity of economic and political processes is actually not new. In the *Wealth of Nations*, Adam Smith provided both a historical analysis of economic development, and a detailed analysis of how economies worked, including his study of the division of labour, and his allusion to the "invisible hand" coordinating market activity. He thus laid the foundations of political economy as a discipline, and as a driver of public policy. Marx too analysed political economy issues from a historical, political and philosophical – yet critical – perspective. But later, the study of economics narrowed its field of enquiry to examine more specifically how markets operate, how "agents" make choices in allocating scarce resources and how prices are formed. This began in the latter half of the 19th century and was accompanied by the increasing formalisation of economic behaviour and the elaboration of graphical and mathematical models to explain such behaviour. This use of maths brought clarity and consistency to arguments. As Rodrik has noted, "[w]e still have endless debates today about what Karl Marx, John Maynard Keynes, or Joseph Schumpeter really meant... By contrast, no ink has ever been spilled over what Paul Samuelson, Joe Stiglitz, or Ken Arrow had in mind".⁸ But the development of economic modelling based on mathematical formalisation and statistical testing has both strengths and weaknesses. As Paul Cilliers, an early contemporary thinker of complexity, stated "[w]e cannot deal with reality in all its complexity. Our models have to reduce this complexity in order to

generate some understanding. In the process something is obviously lost”.⁹ More specifically, the real problem is the way modelling seeks to be “positive” in its scientific approach, but invariably ends up being normative: reflecting the twofold meaning of the word “model” itself, as a simplification and as an ideal. This has become especially the case of mainstream economics, or what Colander and Kupers call the “standard frame”, and which provides the basis for neoliberal policy-making. While Rodrik shies away from complexity, suggesting that economics should be more willing to accept a plurality models, Colander and Kupers argue the answer lies in investigating the “complexity frame”.

- 6 Looking at complexity, put very simply, means going beyond a “Newtonian” view of science, which “might crudely be summarized as (1) relationships between individual components of any system can be understood by isolating the interacting parts, (2) there is a predictability to the relationship among the parts, and (3) the result of interactions and the working whole might eventually be understood by simply summing the parts”.¹⁰ By contrast, complexity theory, or perhaps more accurately complexity theories seek to explain how systems evolve in varied and unpredictable ways. This entails looking both at the interconnectedness of the parts making up the systems and the parts themselves: “[i]n technical jargon, that means that dynamics and statics become blended, and the math becomes wickedly difficult”.¹¹
- 7 The inherent instability following the multiple interactions of parts in complexity systems is sometimes seen as chaotic, as often portrayed in the *butterfly effect*: “the idea that a butterfly flapping its wings in Brazil might precipitate a tornado in Texas”. Yet chaos theory is only a special case of complex systems, in which the changing state of a system has no order whatsoever.¹² Instead, complexity theory seeks to identify more patterns of behaviour which, though complicated, also display elements of stability. For Cilliers, they have structures, which models seek to understand, although this is complicated as the boundaries of complex systems are hard to specify, while the “vitality” of a system “lies in its ability of transform [its] hierarchies”.¹³
- 8 A key contribution to defining complexity has been made by Edgar Morin, who has given a broad epistemological overview of complexity theory, drawing much on natural sciences. He notes that “classical science” rejected complexity given its three fundamental explanatory principles: i) the principle of universal determinism, connecting past and future events; ii) the principle of reduction, by which knowledge of a composite can be achieved from knowing its constituent parts; and iii) the principle of disjunction, by which cognitive difficulties are dealt with by separating them into different disciplines. For Morin, the first *de facto* breach of classical science came with the second law of thermodynamics. Set out in the middle of the 19th century, it states that heat (energy) can only move from a more concentrated state to a less concentrated state (say from hot water to cold water). This principle has been more widely formulated as the idea that (in a closed system) order descends into disorder, or chaos. This is an irreversible process, and so could not be explained by the previously-existing laws of physics that were based on reversibility.
- 9 Complexity did then enter certain areas of mathematics and engineering in the 1940s and 1950s (information theory, cybernetics and general systems theory). But, the specific study of complexity in an inter-disciplinary way to address complex phenomena in physics, biology, technology and social sciences only began fully with the creation of the Santa Fe Institute in 1984.¹⁴ According to Colander and Kupers, the

founders of the Institute were seeking specifically to understand complex phenomena by overcoming the separation of traditional academic disciplines, in order to address problems such as:

stock market booms and busts, financial crises, the reconfiguration of amino acids into the vastly more complicated molecules of living things, the sudden collapse of civilisations, the emergence of agriculture after nomadic hunter-gathering [which] all defied standard explanations, yet [...] shared the common characteristics that involved the sudden seemingly spontaneous emergence of a new order.

- 10 Significantly, one of the aims of the Institute was to use high-level mathematics along with ever-greater and ever-cheaper computer power to examine the non-linearities, abrupt transitions and interconnections between the parts making up systems. Significantly too, early funding for the Institute came from the Citicorp bank, to explore the relationship between complexity theory and economics, to understand macroeconomic phenomena in view of forecasting the future.¹⁵
- 11 The approach by the Santa Fe Institute of applying more complex mathematics and more computer power to understand complex systems, fits in with what Morin has called *restricted complexity*. This can be examined by “important advances in formalisation, in the possibilities of modelling”. But for Morin, this “still remains within the epistemology of classical science”, seeking to produce laws. He contrasts this with *generalised complexity*, which requires epistemological rethinking, “bearing on the organisation of knowledge itself”. What is notable here is that complexity requires understanding the relationship between the parts of a system and the whole, which affect each other, so that a knowledge loop is required to track such interaction. This may be complicated indeed, because new qualities or properties may emerge, just as a system – a whole – is more than the sum of its parts. Morin also states that the whole may also be *less* than the sum of its parts, when certain qualities and properties of the parts are inhibited by the organisation of the whole: what he calls *subtractivity*.¹⁶ Drawing on various disciplines, Morin further examines other key concepts of complexity such as the “self-organisation” of systems (which he actually terms “self-eco-organisation” because systems need energy and information from their environment), or even “metamorphosis” (like the sociological metamorphosis when prehistoric societies of a few hundred persons gave way to “enormous historical societies with cities, agriculture, army, civilisation, etc.”).¹⁷

Complexity theory and the management of public services

- 12 For Göktuğ Morçöl, it is fair to ask whether “the concepts and methods of thermodynamics, atmospheric science, and the like [are] transferable to public policy and administration”. He also notes there are problems in ignoring the mathematical logic of complexity theory in the fields in which it has originated, to “apply it only metaphorically in the social sciences”. Yet Morçöl goes on to argue that such legitimate concerns should not rule out exploring “exciting theoretical and empirical possibilities complexity and related theories offer”.¹⁸ For their part, Teisman and Gerrits state two approaches more explicitly: the first attempts to *replicate* the original scientific approach in public services; the second uses the general ideas and concepts emanating from natural sciences but *translates* them into the target domain (of public

management). The concepts of science can be powerful metaphors, but have to be applied carefully.¹⁹

- 13 Given the inherent and increasing complexity of producing and delivering public services, it seems to me that complexity theory in this area has in fact developed its own, creative dynamics. The nature of many public services has always been more difficult to determine and measure than marketable goods, as has their provision. For goods and services sold in the market, measuring financial flows (turnover and profits, etc.) provide relatively simple criteria for evaluating the efficiency of producers, while bankruptcy sanctions failure. Moreover, prices summarise the necessary information in the market for producers to make choices in organising their business, as Hayek famously stated.²⁰ For their part, consumers make choices between products according to their preferences and budgets. By contrast, policy-makers, public purchasers, public and/or private service providers and citizens as users/customers often make decisions with more opaque and complex information. What exactly is “a good education”? And how is it delivered? Or what exactly is “the right medical treatment”? And “can I trust this doctor’s advice”? are all questions nearly all households ask themselves at some point, and involve choices that are far more complex than the purchase of most goods and services. Yet complexity theory reveals even more how complicated such public services are. Byrne and Callaghan, for example, point out that health should be viewed as a set of intersecting systems involving: i) the individual human as a complex physiological system and eco-system with micro-organisms inhabiting the body; ii) the public health system of the population as a whole which has a massive intersection with the urban system; iii) the health care delivery system(s); and iv) the relationship of the human species with the global eco-system.²¹ (The myriad interactions of these complex health systems are painfully visible to us today with the coronavirus pandemic.)
- 14 Complexity in public services has also been much augmented by organisational change. The move away from the bureaucratic hierarchies which provided public services (and in fact many consumer goods) in the post-war world has made the organisation of producing, delivering and using/consuming public services ever more complex. As Haynes notes, it is important (today) “to understand better the major tensions in public service work, such as the contradictions between professional and managerial agendas and the differing strengths and weaknesses of public, private and non-governmental provision”.²²
- 15 Complexity theory, it seems to me, has been pushed forward precisely in public sector management as ever-more complex organisational structures and modes of governance have emerged. These have resulted substantially from the replacement of bureaucratic government (operating through command and control) by mechanisms of complex contracting and performance measurement linked to new public management (NPM), with all the associated reforms of de-regulation, managerialism, etc. The organisational complexity of public service systems has subsequently grown further with so-called post-NPM reforms which “introduced a combination of vertical integration via stronger control measures and greater capacity for the political executive, and more horizontal collaboration and coordination in the form of networks, teams and projects”.²³ This has led to highly complex hybrid structures with varied providers responsible for servicing users/customers, who in turn expect ever-more personalised services.

- 16 In Britain, for example, NPM emerged progressively during the 1980s, as successive Conservative governments sought to promote the economy, effectiveness and efficiency – the 3Es – of public services. This was done progressively through: increasing available information about the costs and outputs of public services; organisational reforms involving competitive tendering, outsourcing, deregulation and privatisation where possible; and the creation of quasi-markets in activities like education and health where services were (and still are) essentially free at the point of use. In the 1990s, the Major governments set up “citizen’s charters” for public services, with the aim of ensuring that citizens could expect more specifically-defined outputs, and have better recourse to complaint when necessary.
- 17 This NPM reform programme was subsequently largely taken over by New Labour, when it came to power in 1997. But it was also amended and extended as Public Service Agreements (PSAs) were introduced in 1998, initially setting out 600 performance targets for Whitehall departments. Over time, these became a means for the government – especially the Prime Minister’s Delivery Unit working with the Treasury – to track more closely the achievement of specific public policy goals.²⁴ At the same time, New Labour pursued a policy of “joined-up government” and the creation of networks within the NHS and local government, in order to strengthen cooperation alongside competition. For public policy specialists like Rhodes *et al.*, this meant that “networks” had become a new primary organisational structure alongside “markets” and “hierarchies” in the delivery of services, with their own sets of cultures and interconnections.²⁵
- 18 As a result of these on-going processes, the chains for designing, producing and delivering public services have become increasingly diverse and fragmented, involving multiple actors and agencies trying to meet the increasingly complex and diversified needs of the public, be they users or customers of public services. The bureaucratic organisations which created the Welfare State and managed the public sector in the decades after World War II have been superseded by dense networks of organisations, making up so-called complex adaptive systems (CASs). As a whole, these are more complex and often less-understood than their constituent parts. They have “soft boundaries” between organisations and other systems, leading to “entanglement”: i.e. “mutual dependence on each other and inability to maintain rigid separations and boundaries... increasingly witness[ed] when understanding the relationship between the private, public and non-governmental parts of society and the managerial and professional roles in these organisations”.²⁶
- 19 The evolution of such complex adaptive systems is marked by multiple features which are now well documented in the literature. These include *feedback* that may be “reinforcing” or “balancing”; and *emergence* of new behaviours, typically by independent local actors who affect systems from the “bottom up” (which was in fact how Osborne and Gaebler described the non-ideological, non-methodical emergence of NPM in the USA during the 1970s and 1980s, at state and municipal government level).²⁷ Significantly, unlike wholly chaotic processes, complex adaptive systems have elements of order “as defined by patterns of replicated behaviour for given periods”. These are known as *attractors*, and are often made up of values, beliefs and logics. They tend to be hierarchical, so that one attractor contributes more to social order than others, although such a hierarchy of *attractors* may vary over time (in the case of New Labour’s PSAs, for example, these became more cross-cutting during the 2000s, while output

targets were reduced, although the culture of attainment remained entrenched²⁸). Systems may also be subject to *path dependency* as they are shaped by national histories and institutions, which give change a certain momentum. But *bifurcation points* exist too, when organisations and systems are both on the brink of chaos, and subject to dramatic change. Finally, systems and organisations are also shaped by *self-organisation*, which involves the creation of new ideas and practices as local responses to system dysfunctions.²⁹

- 20 Given the array of factors and forces at play in delivering public services, Haynes warns explicitly about the temptation to reduce such complex situations and systems to simple assumptions of cause and effect, and indeed guards against searching for an “ultimate truth representation” of a particular activity set. Instead, by creating diagrams (or flow charts) seeking to represent complex public system, he proposes including the following set of considerations when analysing and reforming systems: i) what, for the purposes of representation, are considered to be the boundaries of any particular system? ii) who are the key actors involved, and where are they positioned in the system? iii) what are the core activities and where do they take place? iv) what secondary activities take place to assist the delivery of primary activities? v) where do outputs occur, and how do they relate to prior activities? vi) is there any logical order or connectivity of activities to be present diagrammatically? vii) what are the key points of connection, for communication and to link complex processes of interaction? viii) how do resources flow into inputs and activities?³⁰ We shall see in the next section that Haynes and his colleagues at Brighton University have developed a toolkit to apply this schematic reforming policy, although this is far from amounting to a general approach to using complexity theory to implement reform.

Complexity theory in practice in public policy

- 21 So far for the theory, what about the practice? Cairney, among others, makes a key point by noting that “[t]he first difficulty with complexity theory is that it is difficult to pin down when we move from the conceptual to empirical analysis”. Perhaps given the very nature of complexity, policy prescriptions can only be tentative and piecemeal, as they are highly dependent on specific (local) circumstances. This at least seems to be how complexity analysis operates in practice, with case studies examining primarily local government issues, and specific attempts to solve “wicked” problems (i.e. problems that cannot be solved by “partial or transactional solutions, but require concerted, adaptive and carefully stewarded approaches”, and for which no optimum solutions exist).³¹ This section starts by presenting the Toolkit developed by Haynes and colleagues at the University of Brighton to apply complexity theory to public service management in the United Kingdom. It then moves on to summarise a number of other case studies and applications of complexity.
- 22 The *Brighton Systems and Complex Systems Toolkit Framework* sets out a number of steps for applying complexity theory to public policy issues.³² Policy-makers are invited first to decide whether the situation or problem they are addressing is “simple”, “complicated”, “complex” or “chaotic”, with each category being broken down further (for example, the “complex” category has “unpredictable changes”, “changing interactions” and “identify and use patterns” as sub-categories). The next step in the toolkit involves “considering action and intervention”, and this is done by inverting

the sequence of steps in the traditional management approach indicated in the toolkit, which runs from: resources and their use > identify types of change > use of information > setting rules > empowering self-organisation > directions of purpose > radical change.³³ In the alternative *radical 'public value' approach* pioneered at Brighton, the first step for bringing about change in a complex system is the “radical change” step, which involves “building core and primary values that enable a critical sense of the priority issues that need action”, and going through the sequence to end with “resources and their use”. Hayes has noted, for example, that the reassertion of values of care has become important in hospital management, where services had become too “depersonalised and instrumental”.³⁴

- 23 In an article presenting the application of their methodology and published in 2018, members of the Brighton team related experiences from a wide range of case studies, including “macro policy issues like the economy and public finances, and national energy policy, but also local examples [...about how] regional and local government could be support changing local dynamics in tourism, how social workers best respond to risk in partially closed family communities, etc.”. The team stressed the importance of beginning with “cultural interventions from the ‘bottom up’ [and b]uilding team and organisational cultures and making them resilient through adaptability [which is] argued to be at the core of a management practice that uses the insights of complexity theory”. This requires constant interaction and communication between managers/leaders and organisation staff. Devising diagrams explaining the use of stocks and the flow of resources (including human resources), and supplementing them with the use of “Post-it” notes to map out interventions are often key visual aids in conceiving and designing change of complex systems. Similarly, they stressed the importance of encouraging “helpful and functional self-organisation” in parts of a complex system, by providing “reinforcing information about [them] in [other] parts of the system”, etc. At the same time, this summary article by the Brighton team once again stresses the difficulty of taking the theory of complexity and actually applying it practically to changing the operation of public services. It concludes, however, by suggesting that “an appreciation of complexity theory and its concepts” by practitioners “drives a change in perspective”, within an environment that is inevitably uncertain, given “our dynamic, interactive, and innovative society”.³⁵
- 24 The application of complexity theory to public policy has also been much researched at the Erasmus University of Rotterdam. An early case study by Klijn examined the construction of a railway tunnel through the city of Delft, which was first mooted in the late 1980s. However, given the involvement of many actors due to joint financing requirements – notably the municipality and local private investors, the national railway company and central government (with input from several ministries) and parliament – the decision-making process was long and complex. At one point changing national priorities led to the project’s outright cancellation, although the tunnel was finally opened in early 2015. Klijn acknowledges the apparently chaotic nature of the decision-making process, but also identifies “stabilising factors” (i.e. attractors) during the planning process, including: resource dependencies between actors, interaction patterns between them, rules and regulations in networks, and trust relations between actors. In the light of the uncertainties thrown up by the process, he notes that political and media commentary shifted towards favouring strong and decisive leadership capable of making clear decisions without being sucked into myriad negotiations

between complex networks of actors. But he concludes that such a strong leadership approach is unlikely to solve the increasing complexity of society.³⁶

- 25 Globalisation is also a contributing factor leading to additional complexity challenges which public services have to face, and has been accelerating since the end of the Cold War. Indeed, it can well be argued that the resulting global interdependence of political, economic and social systems has produced unprecedented complexity. However, according to Arpe, the way *individual* decisions are made in given situations has not kept up with such increased complexity as humans' brain structure only evolves very slowly, while institutional decisions are rooted in social systems such as organisations or cultures: traditional economics failed, for example, to predict and ultimately explain the global financial crisis, due to its cognitive biases. With prescience, Arpe notes that "it is virtually unimaginable what a global pandemic might mean".³⁷ These themes have also been developed by Ho (a civil servant from Singapore) in a McKinsey web article. Ho points out that the "most vexing wicked problems today – such as climate change, energy security, global pandemics, sustainable development, and cyberthreats – have causes and influencing factors that are not easily determined *ex ante*". Formulating policies to deal with such issues requires integrating diverse views and expertise, creating mechanisms to share information and strengthen collective action, and essentially adopting a "whole-of-government approach", as Singapore has done for economic policy, since the early 1990s, and subsequently extended to risk management (the so-called "whole-of-government integrated risk management" framework).³⁸ Yet the process of overcoming the silos of traditional bureaucratic government, Ho has later admitted, is not easy.³⁹
- 26 Lastly, it is more than fitting to recall the application of complexity thinking by Elinor Ostrom, the first woman to win a Nobel Prize in economics in 2009. Her work has challenged many of the basic tenets of mainstream economics. In her Nobel lecture, she testifies to the almost spontaneous tendency for "positive economics" to be normative, noting that "in the mid-twentieth century, the dominant scholarly effort was to try to fit the world into simple models and to criticise institutional arrangements that did not fit". Her work – deeply grounded in empirical observation of municipal and local institutions – challenges notably the dichotomy of mainstream economics that goods are either private and so excludable (a person is excluded from use if they do not pay) or public, and therefore non-excludable (say, like national defence from which no member of a society can be excluded). Ostrom observed that so-called "toll goods" also exist, which are provided by small-scale public and private associations, such as theatres, private clubs and day-care centres. Their "subtractability of use" (i.e. the ability to exclude users for non-payment) is low, as tolls are low. Conversely and in particular, Ostrom identified the existence of goods she called "common-pool resources" (like groundwater basins, lakes, fisheries, forests, etc.). In this case, there is a structural difficulty in excluding members of a community from accessing the resources, but subtractability is high, as non-members are excluded. Based on the study of such local organisations in many societies, the research she conducted (with colleagues) led to the formulation of general design principles for managing common-pool resources, including: boundaries between users and non-users; appropriation and provision rules that are congruent with local social and environmental conditions; collective decision-making arrangements for members of the pool; monitoring, sanctions and conflict resolution mechanisms; acceptance of the common-pool management by the local community and government. In short, Ostrom identified and

analysed a form of common resource management which lies totally outside the usual market-state dichotomy, and which reflects real, existing, complex, bottom-up institutions.⁴⁰

Conclusions and discussion

- 27 Given the diversity of ideas and approaches presented in this succinct summary of complexity theory, it should come as no surprise that, as Cilliers observed, there is “[n]o general model [that] can capture [the] singularities” of the multitude of contingent factors, specific conditions, contexts and times.⁴¹ For persons partial to analogies with natural sciences, this should not really be a surprise, as even physics – that hardest of all sciences – does not have a general theory which can explain both gravity and quantum mechanics.⁴² If I may make my own inter-disciplinary comparison with international political economy, I would venture to say that complexity theory in public sector management is “the study of a *problématique*, or set of related problems”,⁴³ using a set of ideas and concepts from different schools of thought. They can be used for analysis and understanding, but provide no over-arching theory to shape policy. Thus the numerous concepts we have seen provide broad insights into the working of public services, yet remain hard to use as operational tools in terms of clear, direct policy actions. Or as Kvilvang, Bjurström and Almqvist put it more simply, “complexity theory is no panacea for unlocking the difficulties of public sector challenges”. But it can be used as a sense-making framework in fostering problem-solving capacities in complex organisations, and so contribute to the legitimacy of governance.⁴⁴ Expressed in another way, complexity theory can be used to achieve the appropriate balance between autonomy and control in the increasingly hybrid and complex organisational structures through which public services are designed, produced and delivered.⁴⁵
- 28 Two of the main works cited here conclude with very different approaches to these issues. For Colander and Kupers, recourse to complexity theory should be channelled to fostering “laissez faire activism”. They draw on Hayek’s idea of knowledge coordination via the price mechanism to restate the need for governments to create the appropriate eco-system in which “people’s true social goals can emerge... In a bottom-up policy, the social goal emerges from the process. People are free to choose both their individual and collective goals, and are also free to choose *how* to achieve those goals”. But Colander and Kupers specifically claim that complexity theory helps move beyond the government-market dichotomy of the standard frame and *passive* laissez-faire (anti-government) policy. “Instead, complexity policy supports a policy that treats government and private enterprise as partners from which new blended institutional forms may evolve”.⁴⁶ They acknowledge however that “a complex system works only if individuals self-regulate,... that they do not push their freedom too far, and that they make reasonable compromises about benefiting themselves and benefitting society”.⁴⁷
- 29 In contrast, if Philip Haynes, and the team working on complexity at the University of Brighton have one clear lesson to put forward from their work on complexity, then it is the importance of values as an attractor in implementing policy change. As complexity theory raises “some serious questions about the ability of strategic managing and planning...because of high levels of uncertainty... [b]uilding a strong and resilient organisational culture that is founded on shared values becomes central to the strategy of a public service organisation”.⁴⁸

- 30 In their introductory and summary chapter of the handbook on complexity and public policy they edited, Cairney and Geyer are generally somewhat more circumspect. For them, lessons in one context may not be applicable to another, and as policy-making systems change quickly, making them difficult to predict, policy-makers need to adapt rapidly too. Given the limits to our knowledge of policy-making systems, and limits to our ability to control them, this often produces bottom-up or local approaches to policy advice, with arguments including: less reliance on central government to drive targets, in favour of adaptive local organisations; the use of trial-and-error projects to deal with uncertainty and change; treating “errors” as sources of learning not failure to be punished; and encouraging greater understanding in the public sector of emergence and feedback loops within complex systems.⁴⁹
- 31 Cairney and Geyer also briefly touch on the political implications of such a bottom-up, complexity approach which runs through much of what has been said here. They point out that policy which is shaped from a complexity perspective challenges the mechanical, “state in control” approach of much democratic politics. While central governments necessarily have to go through failure and learning processes when general simplistic policies fail, they are under a certain democratic constraints to do so, notably in states with a “Westminster model” of central government, based on national accountability and responsibility.
- 32 Indeed, simplicity – and optimism – in political campaigning work well. “Take back control” was essential to the Leave vote in the 2016 referendum, as was “Get Brexit Done” to the December 2019 election. But as the saying goes “for every complex problem there is an answer that is clear, simple and wrong”.⁵⁰ And few political decisions illustrate the clash between political simplicity and policy complexity more starkly than Brexit. However, maybe public sector policy change also requires the simplistic ideas to drive the political process. The ensuing simple solutions, in a complex environment, will necessarily and logically be wrong. But perhaps they may also trigger balancing forces, or be part of a sort of ongoing, dialectical process, as successive policy waves unfold over time?
- 33 What is sure, for Britain however, is that Brexit is a bifurcation point in history, which is already developing its own path dependency. Following the large election victory of Boris Johnson and the Conservatives in December 2019, the Brexit process is hardening, with Britain distancing itself more and more from the European Union, and moving more and more away from regulatory integration with its European partners. And it seems unlikely that the coronavirus pandemic will affect this much.
- 34 At the same time, the pandemic itself is a colossal moment of bifurcation in the global economy and world society. The direct impact of the health crisis is already leading to a withering of international links, and sharpening superpower antagonism between the United States and China especially. The indirect economic impact could lead to profound changes in the functioning of the global economy and in the economic and political system which has emerged since the end of the Cold War at the end of the 1980s. We will surely be living in interesting times, and the notions of complexity and systems interconnectedness should provide the reader with some feeling for how change is likely to be profound, planetary and problematic.

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NOTES

1. The cost of the Hinkley Point power plant, for example could be more than £22 billion; Jillian Ambrose, “Hinkley Point nuclear plant building costs rise by up to £2.9 bn”, *The Guardian*, 25 September 2019.
2. BBC News, “US oil prices turn negative as demand dries up”, business section, 21 April 2020, <<https://www.bbc.com/news/business-52350082>> [4 September 2020].
3. The partition of India accompanying British withdrawal in 1947 led to more than one million people dying and some 17 million people being displaced: Shashi Tharoor, *Inglorious Empire: What the British did to India*, London, Hurst & Company, pp. 142-8.
4. David Colander and Roland Kuper note that, “in the course of the 20th century two things made the world more complex: our wealth increased and there were more of us. Increased wealth also meant more sophisticated products and services, with greater interdependence”, *Complexity and the art of public policy: solving society’s problems from the bottom up*: Princeton University press, 2014, p. 47.
5. A widely-used paraphrase attributed to Douglas Jay, who in *The Socialist Case* (1937) wrote “in the case of nutrition and health, just as in the case of education, the gentleman in Whitehall really does know better what is good for people than the people know themselves”; see <https://en.wikipedia.org/wiki/Douglas_Jay> [28 April 2020]. This view actually gained currency during World War II, but was later much criticised by the “New Right” around Thatcher in response to the crisis of the 1970s.
6. Philip Haynes argues that “IT systems have increased the complexity of public service organisations rather than simplifying procedures and practices”, *Managing Complexity in the Public Services*, London, Routledge, 2015, p. 98. Other studies have shown that: greater technological complexity and IT flexibility go hand-in-hand, but that such IT flexibility itself produces more complexity (for example, Lawrence R. Ness, “Exploring Information Technology Flexibility and Increased Complexity: Is Management Prepared?”, *International Journal of Applied Management and Technology*, Vol 6, No 3, 2008); and that IT projects are less likely to succeed when they are complicated (large in scale) or complex (as objectives many not be clear, requirements may change, operating environments subject to outside influences, etc. (e.g. David J. Williamson, “Assessing the relationships among information technology project complexity, complication, and success”. Paper presented at PMI® Research and Education Conference, Limerick, Munster, Ireland. Newtown Square, PA: Project Management Institute, 2012).
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11. David Colander and Roland Kupers, *ibid*, p. 13.
12. *Ibid*, p. 115.
13. Cilliers, *ibid*.
14. Edgar Morin, “Restricted Complexity, General Complexity”, *Worldviews, Science and Us*, pp 5-29 (2007), doi.org/10.1142/9789812707420_0002. See also David Byrne & Gill Callaghan, *Complexity Theory and the Social Sciences: the State of the Art*, London, Routledge, 2014, Chapter 2 “Restricted complexity and general complexity: an outline of the arguments”, pp. 39-56.
15. David Colander and Roland Kupers, *ibid*, pp.132-3.

16. Edgar Morin gives the example of delinquent or criminal behaviour as excessive liberties inhibited by law.
17. *Ibid.*
18. Göktuğ Morçöl, "Complexity of public policy and administration: introduction to the special issue", *Public Administration Quarterly*, Vol 32, No 3 (Fall 2008), pp. 305-313.
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21. David Byrne and Gill Callaghan, *ibid*, p236.
22. Philip Haynes, *ibid*, p1.
23. Tom Christensen & Per Læg Reid, "Complexity and Hybrid Public Administration—Theoretical and Empirical Challenges", *Public Organization Review*, (2011) 11, pp. 407-423, DOI 10.1007/s11115-010-0141-4.
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26. Philip Haynes, *ibid*, p. 19.
27. David Osborne and Ted Gaebler, *ibid*, pp. 1-24.
28. Nehal Panchamia and Peter Thomas, *ibid*.
29. The list here is taken from Philip Haynes, *ibid*, pp 24-50. In terms of *attractors*, David Colander and Roland Kupers speak of "basins of attractions" that replace the concept of equilibrium, and which can be quite sticky, *ibid*, p. 54. These characteristics are mentioned almost ubiquitously in texts on complexity and public policy, including in, for example: Ani Matei and Cătălina Antonie, "The New Public Management within the Complexity Model", *Procedia – Social and Behavioural Sciences* 109 (2014), pp. 1125-1129; Paul Cairney and Robert Geyer, "Introduction" in Paul Cairney and Robert Geyer (eds), *Handbook on Complexity and Public Policy*, Edward Elgar, 2015, pp. 1-15; Yousif El-Ghalayini, "Complexity Theory: A New Way to Look at New Public Management", *Network and Complex Systems*, Vol 7, No 1, 2017.
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32. The framework was developed by members of the Brighton Systems and Complex Systems Knowledge Exchange, hosted by the School of Applied Social Science and the Community University Partnership Project (CUPP), <https://www.brighton.ac.uk/_pdf/research/ssparc/toolkitframework.pdf> [30 April 2020].
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41. Cilliers, *ibid*.
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45. Tom Christensen & Per Lægred, *ibid*.
46. David Colander and Roland Kupers, *ibid*, pp. 41-3.
47. *Ibid* p. 9.
48. Philip Haynes, *ibid*, p. 57.
49. Paul Cairney and Robert Geyer, *ibid*.
50. The expression was coined by H.L. Mencken, an American journalist and essayist. I first read it and specifically recall it from a text by Gerry Stoker, a specialist in British local government, “New Localism, Progressive Politics and Democracy, in Andrew Gamble and Tony Wright (eds), *Restating the State?*, a special edition of *The Political Quarterly*, 2004, pp. 117-129. Stoker uses the expression when talking about complexity.

ABSTRACTS

This article seeks to provide a brief overview of the development of complexity theory in public sector management. The article starts by reviewing the emergence of complexity theory, first in natural sciences and then in social sciences, as an attempt to analyse complex systems and phenomena which direct “Newtonian” causalities fail to explain fully. Next, it looks at how such complexity theory – which makes the distinction between complexity and chaos – has been used to examine public services. In particular, the article analyses how new public management (NPM) and post-NPM have led to far more complex public service networks and delivery systems than the bureaucratic government structures which existed previously. As a result, research into complex public service systems has itself contributed to the deepening of complexity theory. Finally, the article presents a series of cases in which complexity theory is applied to public sector management, and the management of common pool resources as analysed by Elinor

Ostrom. It concludes that complexity theory is a powerful tool for challenging the standard frame of mainstream economics and NPM, but that its applicability is not easy.

Cet article donne un bref aperçu du développement de la théorie de la complexité dans la gestion du secteur public. L'article commence par passer en revue succinctement l'émergence de la théorie de la complexité, d'abord dans les sciences naturelles puis dans les sciences sociales, comme une tentative d'analyser des systèmes et des phénomènes complexes que les causalités directes, « newtoniennes », ne parviennent pas à expliquer pleinement. Ensuite, l'article examine comment cette théorie – qui fait la distinction entre complexité et chaos – est utilisée pour analyser les services publics. En particulier, l'article examine comment la nouvelle gestion publique (NGP) et le « post-NGP » ont créé des réseaux et des systèmes de prestation de services publics beaucoup plus complexes que les structures administratives bureaucratiques qui existaient auparavant. En conséquence, la recherche sur les systèmes complexes de services publics a elle-même contribué à l'approfondissement de la théorie de la complexité. Enfin, l'article présente une série de cas dans lesquels la théorie de la complexité est appliquée à la gestion du secteur public et à la gestion des ressources communes tel qu'elle fut analysée par Elinor Ostrom. Il conclut que la théorie de la complexité est un outil puissant pour remettre en question le cadre standard de l'économie orthodoxe et de la NGP, mais que sa mise en œuvre n'est pas sans difficultés.

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