Introduction

‘Public–Private Partnerships bring public and private sectors together in long-term partnership for mutual benefit’.\(^1\) So wrote the British Treasury about public–private partnerships (PPPs) in 2000. Since then, they have become an emblematic form of contractual relationship providing public infrastructures and services at both international and domestic levels. The question arises, therefore, of the role that the law plays in ensuring that PPPs deliver these infrastructures and services for the public good.

This monograph provides a narrative for the dynamics involved in coordinating competing public, private and individual interests in PPPs. Three problems of coordination have to be tackled. Firstly, the fragmented features of PPPs and their public and private partners; secondly, the multiple tensions between PPPs, their public and private partners and third parties, such as taxpayers or users; and thirdly, the constant changes in definitions and techniques used in these schemes. In addressing these issues, public authorities use their discretion. Institutions, law and communities shape this use of their discretion by public authorities. Pragmatism may explain the concrete implementation of these interplays between institutions, law and communities in PPPs. However, my narrative suggests a more principled, yet more demanding, analysis of how discretion coordinates public, private and individual interests in PPPs: the law does not account fully for discretion; it needs to be supplemented by an ethical framework, namely an ethic of care.

PPPs, PUBLIC SPENDING AND FINANCIAL CRISES

Tight pressures on public budgets inform the background against which PPPs have been developed. Officially born following the financial crisis triggered by the September 1992 ‘Black Wednesday’, English Private Finance Initiatives (PFIs) were rebranded as PPPs in 1997. They do not have a statutory definition. Since their launch, however, two main requirements have been ascribed to them; namely that:

\(^1\) Treasury, 2000, 10.
Public-private partnerships and the law

1. the private sector must genuinely assume risk;
2. value for money must be demonstrated for any expenditure by the public sector.²

In 2000, PPPs were broken down into three different kinds: firstly, private ownership in otherwise state-owned businesses; secondly, PFIs; and thirdly, government services sold to wider private markets.³ Since then, various definitions have appeared in Treasury documentation. For instance, in 2007, the notions of structured arrangement, value for money (VfM) and control were highlighted;⁴ while in 2008, PPPs were associated with joint working, collaboration and risk sharing.⁵ PFIs often link assets and services. However, the official definitions emphasise either the services purchased⁶ or the construction of assets and the provision of ‘associated services of a specified quality’.⁷ PPPs/PFIs are thus associated with features such as VfM, risk allocation, joint working, control, the long term, assets and specific outcomes. The weights attached to these elements vary. This monograph starts from the following working definition, underlining the main recurring features of PPPs/PFIs. PPPs/PFIs are understood as:

a long-term cooperation between public and private partners to deliver a public infrastructure or service, according to principles of risk allocation between the parties and value for money (VfM).

Under the multiple forms mentioned above, the Labour government (1997–2010) experimented with PPPs/PFIs and developed them into a policy to finance public projects in nearly all policy fields, ranging from defence to social housing, from prisons to highways and from schools to hospitals. By 2010, approximately 600 PPPs/PFIs had been set up. They financed school refurbishments, hospitals, the London Underground and a major waste treatment project in Manchester, to name just a few of the projects where PPPs/PFIs have been critical. By March 2010, the net book value of PFI assets was officially £30.9 bn and the associated liability for capital repayments was £28.1 bn. The 2010 value of future obligations was estimated at £131.5 bn, including service charges and

³ Treasury, 2000, 10.
⁵ Treasury, 2008, 18.
⁶ Ibid 18.
some life cycle replacement costs. By comparison, the overall assets of the British government were £1,207.5 bn in 2010 and its overall gross liabilities were £2,480 bn. PFI assets thus represent 2.55% of these overall assets and 1.12% of these overall liabilities.

When the coalition government came into power (2010), it announced spending cuts worth £30 bn, almost equal to the value of the PFI assets. A period of hesitation followed: PFI programmes such as Building Schools for the Future (BsF) were cancelled; few new PFIs were signed; and reviews were carried out. However, by December 2012, PFIs had been relaunched in the form of Private Finance 2 (PF2). Negotiations for new projects progressed, for instance for the building of a new state-of-the-art hospital in Birmingham and the delivery and maintenance of rolling stock for the Thameslink project. The Buckinghamshire Waste PFI reached financial close. The Treasury announced that PF2 would represent a market of £1 bn per year. PPPs were coming back. Under the new modalities of PF2, VfM remains the key objective that public authorities pursue; yet risks are allocated differently between public and private partners. Therefore, further developments in PPPs would gain from building on lessons learned from past mistakes in delivering public infrastructures and services.

Developing and implementing PPPs/PFIs requires the involvement of many actors, from financial institutions and insurance companies to facilities management firms, as well as from directors deciding on submitting a bid to the architects designing the project. Among all the relationships involved in PPPs/PFIs, this monograph focuses on three. The first is the relationship linking public and private partners together. The second is the relationship linking public entities with individuals, especially users. The third is the relationship linking PPPs/PFIs with individuals. This monograph suggests a narrative for mapping the interplays, potential weaknesses and available corrective devices between these three relationships.

PPPs, LAW AND PUBLIC CONTRACTS

English legal literature does not examine PPPs/PFIs comprehensively but often analyses the specific techniques used in them in a separate manner.

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Economic law scholarship investigates the contractual and financial mechanisms guiding the private finance\textsuperscript{11} or the building construction\textsuperscript{12} side of PPPs/PFIs. Public law scholarship analyses issues such as \textit{ultra vires},\textsuperscript{13} accountability,\textsuperscript{14} public procurement,\textsuperscript{15} local finance\textsuperscript{16} or human rights.\textsuperscript{17} A couple of handbooks systematise the technical issues arising from both contract and public law.\textsuperscript{18} However, different contributors write on specialised issues without articulating the different sides of PPPs/PFIs as a whole. This results in a patchwork of issues being treated for idiosyncratic purposes. However, PPPs/PFIs are forms of economic power that the government uses to implement its policies. As such, a more comprehensive framework is needed.

Recent scholarship on public contracts contributes to developing such an overarching framework for government action. Davies and Vincent-Jones both seek to channel the discretion that public authorities enjoy in

\begin{itemize}
\item M Edwards, ‘Case Comment’ (2002) JPEL 304.
\item S Cirell, J Bennett and R Hann, \textit{The PFI and Major Strategic Procurement in Local Government} (Thomson Sweet and Maxwell 1997–); S Arrowsmith (ed), \textit{Public Private Partnerships and PFI} (Sweet and Maxwell 1999–); J Fox and N Tott, \textit{The PFI Handbook} (Jordan 1999); G Lindrup and E Godfrey (eds), \textit{Butterworths PFI Manual} (Butterworths 1998–).
\end{itemize}
these public contracts. Davies focuses on the modalities for developing ‘a public law of government contracts to control, facilitate and render accountable the government’s activities’. She mostly argues in favour of formal, in the sense of statutory, solutions to address uncertainties arising from public contracts, such as the scope of powers granted to public authorities or their power to change the law during the contracts to reflect changes in the public interest. Formal legal solutions to these specific issues arising in public contracts would ensure a greater accountability of public authorities and help to strengthen the confidence of citizens and private contractors in public action and decisions. Vincent-Jones considers that public law has failed to develop such an appropriate framework for calling public authorities to account. Suggesting a renewed social contract, he is mostly concerned with the legitimacy and efficiency of public decisions and government contracts, which regulate the behaviour of individuals and social and economic actors. He advocates hybrid regulation to limit discretion, combining formal law and legal procedures with informal institutional processes. This should ensure that decisions related to the organisation of public services are rationally and democratically taken. Furthermore, this hybrid regulation should help citizens to enjoy the full benefits of contracts.

This monograph engages with this scholarship on public contracts. It focuses on PPPs/PFIs, however, and does not suggest a theory for government contracts based on a discussion of the accountability, efficiency or legitimacy of PPPs/PFIs. Davies’ and Vincent-Jones’ emphases on, respectively, formalisation and hybridity, are used as a starting point for an investigation into how the commitments and interests involved in PPPs/PFIs are structured. The narrative presented here accepts that both approaches may be traced in PPPs/PFIs, that PPPs/PFIs are hybrids and that there is an ongoing process of formalisation. However, my narrative nuances these two trends with a more systemic approach to these schemes. The methods used for developing such a narrative are detailed in the next section.

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20 E.g.: Ibid Chapter 6.
22 Ibid 308 and nearly in the same wording, 333.
23 Ibid 359–60.
RESEARCH APPROACH: A NARRATIVE FOR PPPs

Facing the dearth of case law and statutory provisions expressly related to PPPs/PFIs, this monograph seeks to develop a narrative for these PPPs/PFIs. One of the research’s central themes is that PPPs/PFIs are not fully encapsulated in legal norms or institutional mechanisms. In order to understand a PPP/PFI, we need to look at its ‘cultural side’, i.e. the informal way in which the public and private relationships are organised and operate in PPPs/PFIs. PPPs/PFIs such as the London Underground PPPs (LU PPPs) have consisted of different sets of contractual documents running to hundreds of pages with many appendices. In this case, these documents organised the relationships between London Underground Ltd, a public body, and Tube Lines, one of the two private contractors, on the one hand, and between London Underground Ltd and Metronet, the other private contractor, on the other hand. These relationships were the outcome of financial and political negotiations between the London authorities, the central government and market actors during the procurement process. The differences in the performance and termination of the contracts with Tube Lines and Metronet cannot be explained solely with the help of the contractual documents which were to a large extent similar. Other political, technical, social or managerial factors need to be considered. For this reason, understanding PPPs/PFIs needs to build on a narrative that encapsulates their cultural dimensions and these non-legal factors.

Against a backdrop of sparse and diverging legal techniques whose scope may be rather inappropriate, narratives focus on key issues underlying the diverging techniques and the overarching solution to be privileged. In cases of conflicts between techniques or loopholes, narratives direct attention to the general aim that the system promotes. Narratives then allow one to find techniques which best match this general aim. Narratives thus foster creativity within the constraints of relating the means to the end. They provide explanations fitting the whole story line. Narratives may also draw attention to who is telling them and how.

My narrative accounts for the specificity of PPPs/PFIs in the ways in which discretion articulates tensions between the competing public, private and individual interests involved in them. To construct this narrative, three strands of resources have been brought together in a framework detailed in Chapter 1. Here, the basic tenets are briefly presented.
Introduction

The starting point for this research lies in the statement that most of the research carried out on PPPs/PFIs belongs to public management literature. The emerging questions there relate to assessing PPP/PFI success, to their generalisation as a way of governing or to their hybrid nature between public and private sectors. Across these questions emerges the idea that PPPs/PFIs are a specific mix of government tools such as money, authority or information. My narrative builds on this concept in order to understand PPPs/PFIs as a bundle of various techniques, legal and non-legal, which need coordination in order for them to deliver the common good.

The second resource for developing my narrative is the officially available material, namely the wealth of guidelines, codes of practice, standardised documentation, recommendations etc., along with the scarce available legal solutions. As PPPs/PFIs can prove to be highly technical arrangements, a series of case studies have been especially chosen to illustrate the basic features of PPPs/PFIs in England. These cases bring to mind practical questions as they supervene in their context and reveal the factors influencing how solutions are developed. The following case studies inform my narrative: accommodation PFIs (PRIME and STEPS), the London Underground PPPs (LU PPPs), school refurbishment programmes (BsF and then PSBP), waste PFIs, the NHS LIFT programme and hospital PFIs. These case studies are spread over different policy areas where PFIs have been widely used (real estate operations, transportation, education, waste and healthcare). They have

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29 Private Sector Resource Initiative for the Management of the Estate.
30 Strategic Transfer of the Estate to the Private Sector.
31 Building Schools for the Future.
32 Priority School Building Programme.
33 Local Improvement Finance Trust.
been developed at different moments from the end of the 1990s to current fine tuning. This illustrates possible evolutions across PPPs/PFIs and a variety of issues in both their elaboration and implementation. All these cases have attracted sustained attention from the National Audit Office (NAO), which provides detailed analysis of these PPPs/PFIs.

The final contributing resource to my narrative is anchored in public law concerns and the functions that PPPs/PFIs perform: they constitute ways for the government to spend taxpayers’ money and to implement its policies on transportation, education, healthcare etc. Developing a narrative for PPPs/PFIs seeks to give an account of the connections between the techniques, means and aims involved in governmental action and public discretion. Therefore, my narrative adheres to the idea that law, politics and morality are connected and that the values involved in these connections and choices need to be acknowledged. It suggests that the defining values for the discretion used in PPPs/PFIs are concerns for autonomy, solidarity and trust. Chapter 1 returns to defining these values, which run across this monograph.

NARRATIVE IN A NUTSHELL

Building on the resources drawn from public management, case studies and values in public law, my narrative suggests that PPPs/PFIs are located within a ‘regulatory space’, i.e. a framework composed of the main elements structuring the context in which PPPs/PFIs are embedded. These elements include the legal and non-legal techniques that public and private sectors rely on to develop PPPs/PFIs. From this starting point, the hypothesis is that, within the regulatory space, commitments and interests related to PPPs/PFIs are structured by three features: institutions, law and community. As these structures are under tension, discretion is required to balance concerns for autonomy, solidarity and trust when public authorities decide on commitments and interests. My narrative then seeks to assess the specific role of the law in this process, its limits and its interplay with the community. In this sense, my narrative departs from Davies’ and Vincent-Jones’ approaches. Firstly, it departs from Davies’ focus on legal formalism as it does not assume that human behaviour has to be regulated through formal norms to reach a certain level of stability. Regular non-legal practices may also create stability. It also underlines

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that formalism may be seen as a spectrum and not only conceived of in its ultimate form of statutory enactment. Secondly, my narrative departs from Vincent-Jones’ hybridity in displacing hybridity from characterising the regulatory and legal system to depicting PPP/PFI arrangements themselves. It also suggests that the main contrast within hybridity lies in institutions versus community and not state versus market. My narrative underlines that the state is not necessarily a single entity and that the market is a form of community of interests.

Overall, this monograph accounts for one specific tool of state intervention in economic life: PPPs/PFIs. It suggests that formalisation and hybridity are both needed to explain PPPs/PFIs but are not sufficient: formal certainty and maximising calculation do not fully explain how discretion is used in terms of coordinating public, private and individual interests in PPPs/PFIs. It therefore highlights the structures which shape how discretion is used in PPPs/PFIs and how these different structures both narrow down and widen discretion in attempting to articulate concerns for autonomy, solidarity and trust in daily decisions. Explaining the tensions between these constraints on discretion leads me to suggest a narrative where the law is supplemented with an ethic of care; namely, an ethical framework seeking to chart the discretion that a person in a position of trust enjoys when meeting the needs of those individuals for whose well-being they are responsible.

ARGUMENT AND OUTLINE OF CHAPTERS

In order to articulate a narrative for PPPs/PFIs, this monograph is divided into five chapters, each contributing to highlighting how public and private commitments and interests are organised in these schemes.

Chapter 1 explains the frames of reference, providing a general overview of the recurring concepts used throughout this monograph, including regulatory space, techniques and narratives. As PPPs/PFIs are hybrids in how they structure public and private commitments and interests, they may develop according to different models, namely market-analogue, state-analogue and community-analogue. This monograph tests these models on English PPPs/PFIs to highlight their distinctiveness.

Relying on these concepts, Chapter 2 details English PPPs/PFIs in terms of both their legal context and in their practical development. It underlines how the regulatory space is shaped in England and then discusses how PPPs/PFIs have been linked to changes in public administration. Case studies are also brought in here to illustrate the key
features of PPPs/PFIs and their main practical issues. This chapter concludes by suggesting the hypothesis that discretion is shaped by institutions, law and community but that, in turn, discretion needs to balance concerns for autonomy, solidarity and trust.

This hypothesis is then tested in the following two chapters. Chapter 3 details how public and private commitments are structured between PPP/PFI partners and how market logics present in PPP/PFI contracts have evolved away from competition towards formalisation and cooperation. Chapter 4 explores how these commitments and interests are structured with regard to outsiders, mainly the PPP/PFI machinery and individual users. The lack of coordination between market-analogue and state-analogue models results in fragmentation of and intermediation in the protection of individual interests. The interplay between the techniques and narratives on which the public and private partners rely in the PPP regulatory space is highlighted in both chapters. While Chapter 3 underlines that narratives extend the reach of legal techniques, Chapter 4 suggests that narratives developed to address deficiencies in legal techniques fail to strengthen the coordination of public, private and individual interests in PPPs/PFIs. These market-analogue and state-analogue models do not provide for a direct coordination of public, private and individual interests. At most, VfM conveys an economic logic across the two models: it focuses on individuals in their capacity as abstract taxpayers but remains silent on individuals as concrete PPP/PFI users or third parties and on their needs for public infrastructures and services.

Building on the preceding statement, Chapter 5 returns to the hypothesis suggested in Chapter 2 and highlights the ways in which PPP/PFI users and third parties are understood in their collective dimension. A community-analogue model would indeed outline the mutual support and tensions between institutions, law and communities in coordinating collective interests, beyond the public, private and individual interests in PPPs/PFIs. It would highlight the limits of the law in this coordination and suggest a more encompassing way to articulate the tensions between PPP/PFI commitments and interests, which rest on ethical considerations of care emphasising the needs of PPP users and other third parties.

Analysing how institutions, law and communities coordinate the interests involved in PPPs/PFIs leads to the suggestion that market-analogue and state-analogue models overly focus on VfM, leaving out any other standard of assessing how public discretion is used. Therefore, the Conclusions highlight how an ethic of care may be developed to assess this use of public discretion in PPPs/PFIs in a more comprehensive way. Such development would have three main aspects: community, flexibility and trust. Communities are needed to provide a stable framework
supporting this integration of competing public, private, collective and individual interests. Flexibility is needed to give space for the balancing of public, private, collective and individual interests over time in the public decision-making process related to PPPs/PFIs. A balance between flexibility and stability needs to be developed. To that end, trust appears to play a constitutive part in how discretion is used to tackle these tensions between the various interests involved in PPPs/PFIs. Suggesting a narrative of care to account for PPP/PFI dynamics highlights this crucial role of trust and the need to foster its multiple forms within PPPs/PFIs or, more generally, within public–private relationships providing public infrastructures and services.