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## Abstract.

This work aims to be part of the developing body of public law which seeks to combine empirical research with a theoretical framework. It uses the example of the privatisation of the rail network and the deregulation of the bus industry to this end. Each phenomenon is examined through both library research and direct interview. Throughout this reference is made to the overall framework of public law and the essential concept of accountability. The work concludes by drawing the two processes together and putting forward the thesis that in the sphere of public transport for public lawyers the question of public accountability cannot be separated from ownership.

Chapter 1 is an examination of public law and the theoretical assumptions behind it. It explores how the subject has developed since Dicey and the competing frameworks which now exist amongst public law academics. Chapters 2 and 3 are general studies of nationalisation and privatisation in the twentieth century. They show how using different mechanisms the British State could claim to be enhancing accountability. Chapter 2 explores the public corporation in particular and how that phenomenon coincided with the general development of the state and a system of administrative law. Equally in the following chapter it is shown how privatisation coincided with a disenchantment as to the arrangements of the state especially on the right. The contradictory rationale behind each concept is also explored.

Chapters 4 and 5 study bus deregulation. This includes a study of how bus transport was regulated, how deregulation came about and what the consequences of this were. It explores both the experience of public ownership and privatisation and how both were unsatisfactory in delivering accountability. Chapter 5 concludes with a case study of the Glasgow bus market which is seen as a microcosm for broader developments in the bus industry.

Chapters 6 and 7 study rail privatisation. These study how British Rail operated as a nationalised industry and how privatisation came about and worked in practise. Further the intellectual underpinning of railway privatisation is critically examined. Again these chapters highlight the difficulty in achieving accountability in both of these arrangements.

Chapter 8 draws together the conclusions of these two studies and re-emphasises the public law framework in which the work was carried out. It concludes that public law should resist creating a system of accountability through privatisation particularly in transport and that the link between public accountability and ownership which was broken by the public corporation should be re-established.

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Given the integrity of the above list it almost goes without saying that any errors and viewpoints expressed in this work are entirely my own.

# CHAPTER ONE : INTRODUCTION.

**“Constitutional principles and forms do not operate in a vacuum of Abstract Reason”**

**Harold Laski, 1936.<sup>1</sup>**

When studying Britain's state institutions one is acutely aware of their peculiar traditions. These traditions may be seen in the pomp and circumstance of the state opening of Parliament; the continual existence of a feudal monarchy (albeit bourgeoisified) or the entire process of making law. These structural anachronisms produce their own effects in legal studies; particularly in law that relates to the British state: administrative law and practice. In an immediate way these unique problems are shown in the absence of a written constitution which itself is an international anomaly.<sup>2</sup> But in general these traditions' effects are more subtle and sophisticated as in the case of the state's intervention in the economy. Although nationalisation and, latterly, privatisation were by no means solely British concepts,<sup>3</sup> the form they took in Britain had a peculiar identity as I shall demonstrate below. They were haphazard in developing, their rationale was unclear and largely unspoken and the primary legislation that initially started the privatisation and nationalisation process was based solely on issues of transfers of ownership rather than accountability.

Any area of state power is of interest to public lawyers especially one as fluid as the state and economy. Yet such a statement (although plainly true) would have been severely frowned upon if made by a British academic lawyer thirty years ago. This again is representative of the British state, how it operates and the ideologies it uses for underpinning itself. It is the purpose of this work to study the processes of nationalisation, privatisation and deregulation whilst exploring the theoretical underpinning of modern academic public lawyers. This is not a purely intellectual exercise, it is necessary to clear the air before the implications of this are utilised to develop more empirical work.

## **A NEW APPROACH?**

It is my contention in this introduction that Dicey's legacy has divided all academic public lawyers. As a result of this, to quote Martin Loughlin, "Public law is a hopelessly fragmented subject with little in terms of an authoritative structure".<sup>4</sup> During the eighties and nineties many academics have sought to challenge the hegemony of Dicey's work and have tried to replace it. Within this body of work however there are major discrepancies. Nevertheless, it will be argued that there is a common trend: each seeks to construct a framework with reference to some type of external principles. That is, in the absence of one document or statement identifiable as "The Constitution", public lawyers have had to use different reference points to give their work coherence. This is not a new observation; one of the purposes of Dicey's work was to construct a coherent structure for public law. But recently academic public lawyers have spread their net further. Some have found their

structure from within Dicey's work and sought to reclaim it; others have brought concepts from other disciplines, while others have sought to study the subject believing the only principle is that there are no principles. This introduction will look at each of these trends and contend that none on its own is an adequate model for administrative law. In particular the idea now propounded by two senior public law academics that contract and the market - within certain limitations - provide a system of accountability which has evaded us in the traditional state<sup>5</sup> will be challenged.

This work will attempt to argue that *accountability* is central to any administrative law system: the state in its many guises must have some form of structure which is open accessible and answerable to ordinary members of society. This should involve citizens who live as consumers of utilities or workers in the relevant industries so as to encourage their *participation* within the modern state.<sup>6</sup> In the context of transport, participation and accountability will provide an effective way of *co-ordinating* activities within the state's operation. This seems straightforward and many "new" public lawyers would have no problem with the principles mentioned here. Many have suggested policy measures which would go a long way to achieve this for example: a Freedom of Information Act or openness in drafting regulations and rules. However, it will be this work's contention that without a notion of public ownership all of these worthy concepts will not fulfil their real potential.

The best way to illustrate this is through empirical research into the process of the privatisation and deregulation of transport, notably the bus and rail industries over the

last fifteen years. This area of state intervention has had many problems both before and after privatisation and deregulation: lack of accountability, alienation of ordinary people from its operation and a lack of co-ordination in its working all of which will be evidenced below. Through this work it will be shown how these problems have continued since privatisation and deregulation took place. It will be shown that both traditional nationalisation and modern deregulatory structures have not worked. Administrative law must learn from these historical examples and seek to construct new solutions. It will be this work's contention that any new authoritative structure of administrative law needs a concept of public ownership which could be capable of fulfilling the traditional tests of accountability so familiar to administrative lawyers. At the time of nationalisation this notion was relatively common amongst radical administrative lawyers<sup>7</sup> who rejected Dicey's traditional approach.<sup>8</sup> Yet now it barely features. This may be due to extraneous political factors such as the experience of Thatcherism or more widely the collapse of the command economies in Eastern Europe and Russia. An example of these external factors influencing public lawyers comes with Norman Lewis' questionable statement: "Market economies saw their greatest triumph of the century during the 1980s".<sup>9</sup> However the absence of any notion of public ownership as part of the concept of accountability, it will be argued, leaves a hole in the search for a coherent administrative legal structure.

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<sup>6</sup> For an earlier exposition of this idea see Prosser(1982).

<sup>7</sup> Robson (1951) who saw nationalisation as tied to the general growth in public administration and in turn saw this development as leading to a new type of modern society.

Other differences aside, a great debt is owed to the academic public lawyers of the last fifteen years. They have begun to make more acceptable the combination of empirical work with an explicitly theoretical framework that was once sneered at as “un-legal”. The traditional approach was accurately summarised in the early eighties by Terence Daintith, “[it] analyses constitutional principles and structures largely to the exclusion of any consideration of the activities in which the organs of government are engaged or the purposes with which they pursue them”.<sup>10</sup> This is much less the case now but still occurs in some writing and this will be dealt with later. However, important as these scholars have been in developing the discipline of public law this gap mentioned by Daintith is still prevalent when public ownership is concerned. The question of accountability in the theoretical context of constitutional and administrative law is often removed from a real consideration of what ‘accountability’ means to the public for example in the case of transport.

This introduction, then, will attempt to explore the roots of the traditional approach to administrative law and why it has proven to be an obstacle to analysing and understanding the modern state. This will then be contrasted with the approach of the ‘new’ public lawyers which has come to the fore recently. The work will then introduce its own concept of accountability through public ownership and explain how it differs from the other academic positions. This will also be combined with an explanation of why the privatisation and deregulation of transport is a useful example for administrative lawyers and is suitable for study in order to test their principles.

Thus the intersection of the modern state with the economy will be subjected to analysis worthy of its importance.

## THE LEGACY OF DICEY: THE TIME-LAG

As is so often the case, to understand the battles of today one must examine the recent past. The diffuse nature of public power in Britain is related to the state's historical development. Indeed one could argue that the absence of a coherent concept of the state<sup>11</sup> in British legal and political literature unifying all public activities and traditions has impeded the development of critical thought in all disciplines, not least in public law. It may also be true that membership of the European Union with its specific conceptions of states in relation to aid and economic convergence has begun to alter this.<sup>12</sup> But to understand Dicey's position it is necessary to examine this tradition of conceiving the state as diffuse rather than as a coherent entity. The English settlement of 1688 between feudalism and capitalism was based on an understanding - an "operational code"<sup>13</sup>- which allowed the birth of a modern capitalist society within the structures of the feudal system. This was clearly anomalous: "while the monarchical tradition remained there was a gradual shift to the idea that the executive power was an emanation of, or an agency of Parliament".<sup>14</sup> Thus, this shifting of the sands of constitutional power did not allow the executive to create a distinct image for itself as separate from the monarchy, at least in legal terms. With no clear concept of executive power other concepts were required to try and categorise the state such as the Crown or the Nation. It was within such a tradition that Dicey worked.

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<sup>11</sup> This theory is clearly expounded in Dyson(1980).

<sup>12</sup> For example in the area of State aid there are a number of cases which have dealt with the issue of what constitutes a State body e.g. *Kwakerij Gebroeders van der Kooy BV & Others v Commission*

The publication of Dicey's "Introduction to the Study of the Law of the Constitution"<sup>15</sup> in 1885 was an attempt to create an autonomous subject of constitutional law. Dicey saw the two enduring aspects of the Constitution to be the rule of law and the sovereignty of Parliament. The work was not designed to provide an examination of the new powers which the British state was starting to exercise. Indeed, one of the purposes of the work was to counter the development of a distinct corpus of law dealing with the administration: an equivalent to the French 'droit administratif'. Thus he argued that all institutions or individuals were and should be subject to the same common law.<sup>16</sup> This work was a clear attempt to check the development of executive power whilst at the same time classifying the state as equivalent to any other individual. But if it were only this then Dicey's work would hardly be as significant in the public law field as it remains.

Beyond this, it was the first attempt to grapple with the problems of constitutional law in a country with an unwritten constitution and to lay down a model for its study. To do this he labelled his work as expressly legal, to contrast it with the historical and political approaches. In the opening chapter he explicitly distances himself from the "antiquarianism" of historians and political theorists who concern themselves primarily with "constitutional conventions".<sup>17</sup> This process was not solely self justification<sup>18</sup> although Loughlin's jibe of the "need for academic lawyers to fashion distinctive market niches"<sup>19</sup> probably had a degree of truth even then. Its main object

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<sup>14</sup> *ibid.*, p40.

<sup>15</sup> 10th edition.

<sup>16</sup> See below p62

was to place judge-made law and the common law tradition in the centre of the British state and not to allow any exceptions. He “construed the subject in the image of the common law mind”.<sup>20</sup> In doing this he also sought to expel the vagaries of politics from the legal study of the British constitution by giving the political aspects the title of “constitutional conventions”. These could be chronicled, of course, but such work was not for the legal mind: “as a lawyer, I find these matters too high for me”.<sup>21</sup> He regarded the conventions of the constitution as ranking below the two main areas of his study - the sovereignty of Parliament and the rule of law. Dicey’s work aimed to be ‘positivist’ in the sense that it dealt only with the law and removed the uncertainties of political thought. This corresponds with his adherence to Austin’s philosophy. As his biographer wrote, “Dicey followed in the footsteps of Austin by subjecting Constitutional law to scientific study”.<sup>22</sup> Yet the claims for a neutral vision of the law are dubious for two main reasons. Firstly, his distaste for the growth of the state and executive power could not be removed from his legal work. One legal academic wrote at the time of the centenary of the publication of Dicey’s work that, “the abstraction of simple principles from complex problems was the work of a lawyer but under the influence of a politician”.<sup>23</sup> Secondly, as will be illustrated below when examining modern scholars who attempt to salvage some concepts from Dicey there were tensions even within the constraints of his own model of the rule of law aligned with the sovereignty of Parliament.

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<sup>20</sup> Loughlin (1992), p48

It is clear that, nearing the end of the nineteenth century, Dicey wanted to stamp his authority of the common law on the ever developing British state. At this time the state was beginning to expand its powers as a precursor to the rapid development in the fields of welfare and the economy which occurred in the early twentieth century and between the two world wars. Also as a corollary to this political expansion of the new state there was an increased level of labour disruption with newly formed trade unions. This also found a political manifestation in the birth of the Labour Party which at the time upset the established British state institutions.

This was a world far removed from the certainties of the common law and one which Dicey did not much care for. Above all else Dicey was a conservative thinker. This is true if use is made of Loughlin's ideal type division of conservative normativism<sup>24</sup> or even in the narrower political sense - although he was a life-long Whig. He was also a staunch opponent of Home Rule for Ireland<sup>25</sup> and the extension of the franchise to women. Significantly he believed both these policies should be put to referenda - setting aside the central concept of the Sovereignty of Parliament. In his defence he did believe latterly that Parliament had been debased by the growth of the party system. Loughlin quotes from Dicey's introduction to the tenth edition of his seminal work published in 1915 - a year prior to the Irish Easter uprising, two years before the Russian Revolution and four years before the tanks were sent in to put down an insurrection in Glasgow - "faith in parliamentary government has suffered to an extraordinary degree".<sup>26</sup>

For Dicey the twentieth century threatened a betrayal of his values. He undertook a letter writing campaign to the Times in opposition to the Trade Disputes Act 1906 which exempted trade unions from delictual actions in some circumstances. This could be viewed as in line with his legal belief that no institution was 'above' the law and should be subject to the same common law as anyone else. During the 1912 miners' strike he urged enforcement of the law even if it meant bloodshed. He argued that trade unionists "must be fought by the force of the state".<sup>27</sup> According to his biographer he believed Lloyd George's settlement with the miners in 1920 to have "inaugurated the rule of revolution by caving into the unions".<sup>28</sup> From these practical examples we can see an illustration of his ideological beliefs. Even his work, "The Law of the Constitution" begins with a quote from Burke, the conservative political philosopher.<sup>29</sup> Yet, this is only part of the story, for if there was nothing else to his work it would be unlikely that Dicey would be studied at all other than as an archetypal nineteenth century academic. Thus to describe Dicey's work as an "outbreak of Anglo-Saxon parochialism"<sup>30</sup> is only partially correct. It does not illuminate the whole picture.

To comprehend fully the significance of Dicey's work it is necessary to return to the peculiar legal and political tradition of Britain with its distinction between form and content. Although taking the form of a "dispassionate conclusion of academic legal

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<sup>25</sup> He wrote more about Ireland than about any other issue. See McEldowney *op.cit.*

<sup>26</sup> Dicey (1915), plviii.

<sup>27</sup> Cosgrove *op. cit.*, p210. For all these points see Cosgrove's biography.

<sup>28</sup> *ibid* p208

science”<sup>31</sup> its content was shaped by Dicey's own conservative viewpoint. It sought to be a modern approach yet it still supported the ‘pre-modern’ form. In doing this it was very much in line with the British constitutional tradition as outlined at the beginning of this work. That is to say, the dynamic of change within the British state has always taken place beneath the auspices of the ancient constitution. Dicey appreciated this and although he was trying to carry out a new project for constitutional law by creating a structured subject he was careful not to challenge any element of the ‘ancient’ tradition. Although he had created an autonomous discipline of constitutional law he had done so with conservative values entwined through it. In particular his concept of the rule of law was attractive to legal scholars and remains so as will be illustrated when examining the work of modern academics. Yet, this supposedly positivist work had a very developed political underpinning. In supporting the traditional approach to the State he was clearly condemning those who wished to reform the structures. This was an exceptionally important political issue at that time with the ferment in Ireland and the growth of trade unions and the suffrage movement. These were all issues Dicey felt strongly about and although they were not dealt with directly by his work on the British Constitution they certainly directed his support for tradition and the ‘rule of law’.

However, the legal establishment throughout England particularly in legal education at the universities accepted Dicey’s work. His shadow hung over legal thought for most of the twentieth century. Academic lawyers accepted Dicey's implicit values as part of the discipline of constitutional law, although there was opposition earlier this

century notably by William Robson and Ivor Jennings. These writers could be seen in some senses as the forerunners of the 'new' approach to public law. However their sympathies lay with the expansion of government much more than in the case of the modern academics. The expanded executive was according to Robson, "the most significant expression of democracy in our time".<sup>32</sup> This debate was not merely academic as legal students became practitioners and judges. The Lord Chief Justice of England and Wales Hewart wrote a Diceyan work "The New Despotism"<sup>33</sup> which attacked the new formations of the state as lawless. In Robson's words, "Lord Hewart's attitude represented 99% of the opinion then held by the bench, the bar and the solicitors' branch of the profession".<sup>34</sup>

Politically Dicey's work had a considerable effect. The two official reviews of the new formations of the state, the Donoughmore Committee on Ministers Powers (1929) and the Franks Committee on Administrative Tribunals (1955) were very influenced by his work. Again using Robson's words the 1929<sup>35</sup> report had "the dead hand of Dicey lying frozen on its neck".<sup>36</sup> Both reports were aptly described as a "typically medieval confusion of private and public responsibility".<sup>37</sup> Through his legal work Dicey placed conservative thought at the centre of constitutional law and its academic tradition.

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<sup>32</sup> Robson *op.cit.*, at p421.

<sup>33</sup> Hewart (1929).

<sup>34</sup> Robson *op.cit.* at p421

This is also reflected in the torpor in which a system of administrative law was developed in this country. Moreover, when it began to develop, its structure still felt Dicey's influence. One of Dicey's express desires was to counter the moves to a French model of 'droit administratif'. As explained above, to emphasise the difference from France he argued that all subjects were liable to the common law including public authorities. This precluded until relatively recently the development of a body of principles that could be applied specifically to administrative bodies. There was a tendency to look to pragmatic solutions and to apply existing remedies to administrative problems. In many ways then Dicey was one of the most influential British conservative thinkers because he tied his work in with the concept of the autonomy of law. By pushing the development of public law away from a principled structure it distanced it from other academic disciplines. In a sense it was shunted out of significance in the broader academic world.

Even more importantly, it meant that the growth of the modern state was not met with any exacting legal analysis as the growth developed rapidly in the early decades of this century. Obviously there were some exceptions, witness Robson's encyclopaedic examination of the new tribunals in "Justice and Administrative Law".<sup>38</sup> Nevertheless it could be said that this work and others like it at the time were not really analytical works and were more concerned with documenting the growth of an administrative system which the legal establishment was loath to admit existed. It will be argued that the absence of a legally analytical approach exacerbated two problems inherent within

the British Constitution, namely a lack of accountability and an abundance of secrecy. It prevented these concepts being fully explored by lawyers.

Perhaps the most damaging legacy was the effect on public law. It became viewed as a slightly archaic system because of this Diceyan 'time-lag', for much of the writing on public law was influenced by this anti-collectivist view of the modern state, even when this no longer coincided with the reality of the situation. A good example of this would be Wade's work on administrative law. Dicey's individualist view of the state was one which even some thinkers of the nineteenth century establishment were trying to distance themselves from. As will be shown, by the thirties the leadership of the Conservative and Liberal Parties accepted a collectivist structure of some form, which was an implicit recognition of a concept of public ownership. Yet the tentative moves away from Dicey's model of the state were not echoed in the legal establishment, although there were some dissenting voices such as Robson and Jennings. In many universities today his work *still* remains the starting block for studies of Constitutional and Administrative law, in some cases even dictating its structure.

## THE 'NEW' PUBLIC LAWYERS.

Clearly there has been an attempt to move away from Dicey's work and to adopt a more theoretical approach. This has been particularly intense in the last fifteen years, perhaps due to the pressure cooker of Thatcherism which has forced many to examine previously unthinkable concepts. Loughlin, however, dates the new public law to the birth of the new universities in the sixties when they were looking for new ways to study and examine public law. This was reflected in a more empirical style of work with certain areas of state activity being put under detailed scrutiny e.g. local government, planning law, the economy. Whatever the roots of this development a number of legal academics saw the limits of Dicey's framework and attempted to remedy it. However within that extremely broad grouping there was no unanimity as to the correct direction. This to some extent reflected the complexities and tensions of Dicey's work itself. But the principal reason was the lack of consensus over a theoretical framework into which to put public law. This has resulted in a degree of passionate debate between different schools of thought.<sup>39</sup> Perhaps this became inevitable when it became broadly accepted that public law required more than a simple empirical approach. As argued above Dicey's claim to create a value free fact based system were spurious and ignored the concepts which he sought to introduce to public law. From the time of the publication of Dicey's work the way in which empirical work and sources were interpreted became extremely significant.

That many different sources of administrative law stretch far beyond court cases and Parliamentary statutes is now broadly accepted. Furthermore, the way in which these sources are presented is integral to the theoretical approach of public lawyers. Which are the most important? Which should be highlighted? Which ignored? All of these nominally structural questions actually represent theoretical positions. The difference seems to be that this is now accepted and most public lawyers now understand that the framework adopted for their own study will be strongly influenced by a theoretical approach. To illustrate this we can examine the work of a number of different academic lawyers who adopt a different approach. Space prohibits a fuller exposition of their positions in the current academic debate but it is hoped the summaries below do not pass into the realm of caricature.

### A 'DIFFERENT DICEY': ALLAN

A new age will sometimes have to exploit the benefits of the old era. This epithet could be used as a description of the development of the British Constitution. So too in law. Although generally there is a consciousness in public law of Dicey's limitations his work still held attractions for some. As an example we can examine the writings of T.R.S. Allan. He subscribes to a rights-based view of public law; that is, reference must be had to a coherent structure of rights. To some extent he believes the roots of these rights can be found within Dicey. In another public law academic's words rights are central because "Their role is to articulate a number of principles which should guide the exercise of administrative action and to interpret legislation in the light of the principles".<sup>40</sup> Beyond Dicey, Allan is influenced by liberal thinkers,

notably Ronald Dworkin. He makes this link explicit in his book<sup>41</sup> “Law, Liberty and Justice” which expands on a previous article of his: “Dicey and Dworkin: the Rule of Law as Integrity”.<sup>42</sup> But why use the work of Dicey for this exercise? Allan believes that there has been a misconception of Dicey’s work as lawyers have taken it too “literally” and “confused the nature of public law”.<sup>43</sup> This in part is due to the confusion inherent in linking the sovereignty of Parliament with the Rule of Law. In fact Allan’s claim is that “it is impossible to reconcile his emphasis on the rule of law with the unlimited sovereignty of Parliament”.<sup>44</sup>

Allan believes the Rule of Law should be the starting point for public lawyers. In a sense it “serves as a form of constitution”.<sup>45</sup> In an English context the rule of law can be equated with the common law which itself embodies equality and fairness and traditional concepts of individual rights. Thus judges are the central defenders of the constitution, and, this ‘different Dicey’ is reinterpreted in the light of the benefits of the system of the common law. Reference is also made to Hayek who is quoted as seeing the state as a “superstructure erected over a pre-existing system of law”.<sup>46</sup> This is parallel to the rule of law as there are broadly accepted ‘rules of just conduct’ equivalent to the common law which must not be broken by anyone, particularly not Government. Allan accepts that Dicey and Hayek both prove inadequate to the task of examining the modern state, the former because of rapid developments in the twentieth century and the latter because his life was dedicated to limiting the state and

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<sup>41</sup> Allan (1993).

<sup>42</sup> Allan (1988).

<sup>43</sup> Allan (1993) *op cit* p18

the use of its powers. This is when the work of Dworkin is introduced as an aid to defining the nature and limits of public law. A particular aid to the judges<sup>47</sup> will be his distinction between principle and policy. That is matters of principle should be decided by the courts; policy by the political branches of the constitution. Wary that this sounds ominously like the merits/legality distinction used often in judicial review cases Allan argues that this will be much easier to apply where there is a clear set of rights to which judges can refer. The best place to develop such rights and apply them is within the courts. Thus, “the common law must be developed with imagination to meet the needs of modern constitutionalism”<sup>48</sup>.

So Allan attempts, as Harden points out in his review, to “rescue and defend a version of Dicey that is freed from positivist assumption”<sup>49</sup>. Indeed, Allan argues that his ‘different Dicey’ was struggling to escape from Austinian thought.<sup>50</sup> Again the difference in Allan’s work is that all is stated explicitly. It is because the common law - or rule of law - represents the best defence of a liberal<sup>51</sup> notion of rights that it should be the basis of a public law system. There are no unspoken assumptions as to the apparently innate and self-evident superiority of common law to all other systems. In Craig’s words, “Any attempt to discuss particular topics without considering these background ideas evidences a series of implicit assumptions about such ideas which are concealed and untested”<sup>52</sup>. The difficulty with this model is that it becomes court-centred and relies on an over-idealised view of the ‘common law’, although Allan is

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<sup>47</sup> Who are central to Allan’s project.

<sup>48</sup> Allan(1993) *op. cit.*, p12.

<sup>49</sup> Harden(1995) at p298.

critical of the role the courts are playing at the present time by not realising their sovereign position. His re-interpretation of Dicey as a rights based thinker depends on an acceptance of Dicey's nineteenth century individualism.

Furthermore, the reliance on the common law depends on the belief that it was built on consensus and accepted by all in the community. This is a matter of historical dispute which is rejected by some who could argue that the common law was a weapon used by the courts in order to destroy collective endeavour such as, in Dicey's time, the building of the trade unions. Another criticism highlighted by Harden is that if the common law can challenge statute because it represents the rules of just conduct broadly accepted by society, why has this never been attempted? Allan attempts to re-emphasise Dicey's importance by over-emphasising one area of his work- namely the superior nature of common law. But this argument could be seen as historically specific to the nineteenth century and not one which is broadly accepted now. By emphasising the court-made common law Allan inevitably downplays other sources and ignores the benefits of collective action. In other words, if the state can only ever be judged in court or in a way analogous to the treatment of private individuals this theory suggests it has no specifically collective role allocated to it as state. Thus the attempt to find a rights-based constitution in Dicey's work and use this as a model for modern public law (albeit added to by more modern liberal thinkers) is not wholly convincing.

A counter-point to the re-invention of Dicey in contemporary liberal clothes is the work of Martin Loughlin.<sup>53</sup> He is extremely critical of almost all other legal academics, none of whom he believes provide an adequate base for a new look at public law. With his book “Public Law and Political Theory” he attempted to create a new interpretative theory for public law. This would recognise public law as a form of political discourse which, to borrow Gadamer’s phrase,<sup>54</sup> produces a “fusion of horizons”. He is influenced strongly by post modernist thinkers and schools of thought like hermeneutics. He claims there is no consensus in British public law but creates two ideal type theories which dominate: the normativist and functionalist. The normativist school is further subdivided into conservative and liberal camps. His aim in undertaking this study was not to provide an exhaustive textbook on modern political theory but rather to highlight the difficulties in establishing a single rational structure for public law, difficulties, incidentally, which he seems to feel every other legal academic has failed to overcome.

The problem with Loughlin’s work, rich though it is in historical and political information, is revealed clearly in a recent essay (though perhaps only latently in his book). In the later work he rejects any reference to normative principles as a guide to the public law model; he claims there are “too many principles in the world”.<sup>55</sup> Such a conclusion is perhaps an inevitable consequence of allying yourself closely with post-modern political thought. Post-modernism, by its very nature, is diffuse; yet one of its lowest common denominators is that society is inherently fractious. Thus it is hard if not impossible to lay down truths that are accepted by general society: all that exists

are smaller sub-divisions in society. By accepting these strictures one implicitly rejects the notion of collectivism in any form: it is a post-collectivist individualism. This differs from Allan's work because Allan seeks to define a sense of normative principles from within Dicey explicitly, and one of these principles may be a rejection of collectivism. On the other hand Loughlin rejects reference to any set of principles regardless of content. All Loughlin would regard as valid in the study of public law is the interpretation of existing principles.

This post-modernist approach has been utilised in politics, arts and literature but in British public law it has further implications. For the rejection of normative principles by a public lawyer takes us back in a certain sense to Dicey - although not in the manner of Allan. Although Dicey's creation of an autonomous 'law' apart from the vagaries of politics and theory has been exposed as bogus and has been further rejected by his contemporary supporters in favour of an explicit defence of principles, Loughlin's rejection of principles to some degree corresponds to the 'positivist' reading of Dicey's public law as a collation of common law - the other side of the coin to Allan. Dicey can then be seen as espousing a pre-collectivist individualism as opposed to Loughlin's post-collectivist model.

## EXTERNAL INFLUENCES

The argument up to this point has been that in the new era of public law, new frameworks are being built in order to construct an acceptable model of administrative and constitutional law. This differs from the work of previous public law thinkers like Dicey and his followers because they tried to compose the subject in exclusively legal terms eschewing political theory even though the purpose of Dicey's work had a clear political content. Both of the modern examples examined so far can be seen to derive from the work of Dicey in contradictory ways. Allan explicitly states this and reinterprets the work within a liberal framework. Loughlin on the other hand denies any reference to normative principles and in so doing links the discipline of public law back to the dubious positivism of Dicey.

Having said that, both of these examples draw heavily on outside thinkers in coming to their own conclusions. This points the way to other possible frameworks for public law which draw on external influences. This definition of 'external' would mean from outside the traditional ambit of British public law. Significantly, Loughlin is extremely critical of those who attempt to import principles from different traditions in order to remedy the British deficiencies. His particular ire has been aimed at Harden and Lewis and to a lesser extent Prosser. Loughlin gave an extremely critical review of the former's book<sup>56</sup>, "The Noble Lie"<sup>57</sup> which was replied to by the authors.<sup>58</sup> All three of these academics believe that administrative law is a vital instrument in transforming the British state. Indeed, their whole framework of administrative law depends on a large amount of institutional reform. Their early work also shares an influence of the Frankfurt School of critical theory. Clearly these

thinkers use elements of this school to provide their framework for public law. This, however is not static. From similar bases these academics have moved in different directions. Harden and Lewis in particular have moved to a position of citing the benefits of the market and contract for use in a system of public law; this will be explored below. More recently there also seems to be a division between Harden and Lewis with the latter taking an even more enthusiastic position on the benefits of the 'market' for public law.<sup>59</sup> Again this divergence shows the difficulty of constructing a broadly accepted framework for public law even within similar traditions. However it will be clearer if they are studied separately.

### CRITICAL' PUBLIC LAW: PROSSER.

In Prosser's studies of privatisation and nationalisation there is much reference to institutional design. The importance of this in the field of the state's intervention in the economy will be dealt with when examining the justification for the ambit of this work. The design of the British state has often been the concern of public lawyers, even though in many cases it was with describing what existed rather than prescribing what would be preferable. What makes this work more original is its explicit use of the Frankfurt School's method. It shall be shown how Harden and Lewis use the test of "immanent critique" in their work<sup>60</sup> whereas Prosser seeks to use the twin tests of participation and accountability in his own model of public law.<sup>61</sup>

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<sup>57</sup> Harden/Lewis (1986).

<sup>58</sup> Harden/Lewis (1988).

The relevance of this school of thought and the peculiar British experience of state relations is worthy of note. The Frankfurt School stood in a tradition of Marxist analysis but rejected determinism. For them the state itself was a source of power not simply one determined by the economic structures of society. Other thinkers linked to the school, like Habermas, also rejected revolutionary change “[he] saw the motive force of social development in technology rather than class relations”.<sup>62</sup> These thinkers seek to create a more sophisticated analysis of the advanced capitalist state through the employment of concepts like ‘legitimation’ and ‘immanent critique’.

It can be seen how such an analysis can be used by left leaning academics to discredit the individualist view of the state implicit in Dicey’s work. As has been argued, this model had strong political overtones and did not conform to the real situation in the British state. But it can also be used to attack “crude” Marxists who refuse to recognise the multifarious ways in which the new state operates and subscribe to an “over-simplified monolithic view of the state”.<sup>63</sup>

In Britain the absence of any developed theory of the state<sup>64</sup> has allowed the form of the British constitution not to distinguish state from society. This means that the state has no clear identity, its limits are undefined and its legal position ambiguous. The interpenetration with the European Union may be beginning to alter this but the vagueness still exists. The dominant legal tradition, as seen above, has aided this state of affairs; for example, Dicey's refusal to recognise the state other than as a legal person - the same as any other individual. Throughout his work he uses examples of

individuals when examining the state: “With us every official, from the Prime Minister down to a constable or a collector of taxes is under the same responsibility for every act done without legal justification as any other citizen”.<sup>65</sup> But this form contradicts the reality which is even admitted by scholars like Allan who seek to re-interpret Dicey’s work. In this context the critical method could be useful in exposing the reality of autonomous state power in Britain. Prosser argues that if the study of public law is to be “intellectually coherent” it needs to “take the form of a fundamental reassessment of the theoretical basis for its study”.<sup>66</sup> This can be aided by a critical analysis which subjects the form of the British state to tests from a coherent framework. Hence the tests of “participation” and “accountability”.

However criticism of this method has come from another legal academic who claims it is a misapplication of Habermas’ work.<sup>67</sup> Murphy states that Habermas’ work depends upon a distinction between the system and the lifeworld, both of which have their own logic and communication. He believes that British public lawyers are putting forward lifeworld solutions to problems of the system. For example, Prosser’s emphasis on participation and accountability as mentioned above. Murphy takes these as being derived from the “communicative rationality” of Habermas which is the logic of the lifeworld whereas the system only understands power and money. This misapplication creates some anomalies such as “the bizarre proposal that the English Courts can or should become the site of some rejuvenated public sphere”.<sup>68</sup> Indeed, by

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<sup>63</sup> Prosser *op. cit.*, p13.

<sup>64</sup> As argued in Dyson *op. cit.*

<sup>65</sup> Dicey (1959) p193

proposing inappropriate reforms one is not simply making a categorical mistake but “such neglect of system imperatives will almost certainly lead to a diminution in the efficiency and the effectiveness of systems”.<sup>69</sup> This aside, the use of the critical method is beneficial when examining British public law. It takes this external method and applies it to the contradictory system which exists within the British state. Thus a new framework can begin to be constructed by critically examining that which exists already. Prosser has been arguing this since the early eighties, a relatively long time to hold to one approach in the new public law as the next example illustrates.

### ‘REINVENTING’ PUBLIC LAW: HARDEN AND LEWIS

From a similar tradition come Ian Harden and Norman Lewis who wrote in the introduction to their work “The Noble Lie”<sup>70</sup> that their concept of ‘immanent critique’ owes a great deal to the critical thinkers Adorno and Horkheimer.<sup>71</sup> In this work they use Dicey’s concept of the ‘rule of law’, yet in a different way to Allan. Rather than praising the common law tradition of England they argue that the concept is unrealisable under the current constitutional arrangements in Britain. The “rule of law’s” strength lies in its appeal to the British people who have expectations of openness, democracy and public accountability. In Britain this has led to a “remarkably stable social order”.<sup>72</sup> This expectation clearly contradicts the reality and will ultimately reflect itself in disaffection with the current system. Thus “immanent critique” becomes relevant as it is used as a tool to contrast the actual situation with people’s expectations.

Drawing from this they draw up a list of institutional reforms which draw heavily on the American Constitutional model. That is, a Freedom of Information Act and an Administrative Procedure Act with openness and statutory consultation procedures before drawing up regulations. This model was criticised by Loughlin in his review. However the writers claim: “the proposals here canvassed are for the most part not alien to the British traditions, but simply contemporary accompaniments to them”.<sup>73</sup> Loughlin rejects this approach because they draw on principles alien to British tradition. Following his argument their proposals for institutional reform will not be able to establish themselves within the British state. However it could be argued that this framework represents a combination of external factors with the traditional approach. They combine their use of critical method with a use of a concept of the rule of law. For them, the “rule of law, when closely scrutinised, requires that we oppose arbitrary and untrammelled behaviour whatever its provenance and whatever conceptual shape it assumes”.<sup>74</sup> They argue that this is different from Dicey’s approach because his fundamental flaw was to ignore the way in which the modern state was developing. This had an effect in terms of his definition of the rule of law: “not only was his analysis defective and short sighted but it was accompanied by the stated belief that individuals would be well protected by the English Constitution”.<sup>75</sup> So, their use of the traditional concept is different from Dicey but it is still traditional

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<sup>73</sup> *ibid.* p11

in the literal sense, for them “constitutional constancy is represented by the ‘rule of law’”<sup>76</sup> ; it has a transcendental quality over the actual constitutional institutions.

The effectiveness of this method is questionable. It relies on the idea that there is a concept of the ‘rule of law’ shared throughout society. Although it is not as parochial as Dicey’s view even their definition of the concept as a limiting of arbitrary state power is not one which could gain a societal consensus. Their historical argument explores how the courts built up an “autonomy of the legal order” which could “play a role in legitimating capitalist society”.<sup>77</sup> This could also be seen to derive from the historian E.P.Thompson’s argument over the rule of law which he saw as “the imposing of effective inhibitions upon power and the defence of the citizen from power’s all intrusive claim” and as an “unqualified human good”.<sup>78</sup> This definition became a point of much dispute amongst the Left in the seventies.<sup>79</sup> Harden and Lewis use Thompson as an authority. But in the polarised society of nineteen nineties Britain can such a concept of the ‘rule of law’ be regarded as universally shared? Surely different people have different definitions of what the ‘rule of law’ is? During the miner’s strike of 1984-85 the use of the police to attack picket-lines was seen by some as a breach of the ‘rule of law’ - an arbitrary use of state power - to others they were upholding the state against an organisation determined to flout the ‘rule of law’. To sections of society benefit fraud is an open flouting of the ‘rule of law’ in society to others it is vital for survival. Amongst young people the use of illegal drugs is very

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<sup>76</sup> *ibid.* p8.

widespread and perhaps even the norm. Many examples could be given they merely show the divisions in society which cannot be breached by such a vague concept.

Perhaps historically it was possible to identify shared transcendental values. It is questionable to what extent there has been a “stable social order”<sup>80</sup> in British History. There have been times when the British people have been involved in great struggles and acts of militancy, not least at the time of Dicey in industrial struggles which created trade unions and over the right to vote involving the Chartists and the Suffragettes which is mentioned above. Indeed it could be argued that part of the driving force behind Dicey’s work was an attempt to stifle strong social movements. But now the disaffection with the state and its workings which Harden and Lewis presciently described is a reality and it also includes the courts and the ‘law’. For these reasons it is not clear whether the ‘rule of law’ is the best form in the nineties from which to construct a framework of public law. Indeed even in Harden and Lewis’ own more recent writing they use the concept less readily.

In the nineteen-nineties as shall be explored when looking at the development of the privatisation process in all academic circles examining the state there has been a turn to the question of the quality of public services. Harden and Lewis in a sense try and adapt this thinking for public law in Britain. Harden labels this era “the decade of public services”<sup>81</sup> and Lewis published a lecture which shares much, including a title,

with an influential American text “Reinventing Government”.<sup>82</sup> Again this should be put in the context of developing a framework from which to study public law.

Post-Thatcher, they take the idea of the state as having a minimal role in ownership as a constant. That accepted it is argued that the state must develop in new ways to make its role relevant. In many instances this means introducing the market - which can best match the citizens demand for quality with a “stable budget”.<sup>83</sup> Allied with this is the notion of contract. Nominally this is a legal document but again, like the ‘rule of law’, it has a transcendental quality: a “moral promise”<sup>84</sup> which is accepted by the community. Clearly the introduction of these concepts to public law is in response to the rapidly changing way in which the state has developed in the last twenty years, changes which (albeit in a guarded way) to a greater or lesser extent are welcomed by the writers. In Harden’s study of Compulsory Competitive Tendering, the NHS reforms and the Next Steps Agencies the introduction of the concept of contract is presented as a positive step; in particular the purchaser/provider split inherent in many of these contracts, “enhances both individual rights and the accountability of government”.<sup>85</sup>

Yet this is not enough; there is a need to develop a clear concept of a public law contract which combines “the values which underlie the symbolic appeal of contract”<sup>86</sup> with a commitment to quality public services. He argues that the NHS

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<sup>82</sup> Gaebler/Osborne(1992). Lewis’s lecture provided one of the basis for his longer work *op. cit.* (1996).

<sup>83</sup> Lewis (1993) n1

contract could perhaps become a model for this.<sup>87</sup> He claims that this does not imply an acceptance of the policies of the Thatcher/Major Governments. “It is a mistake to identify the framework with the particular purposes that happen to be pursued through it,”<sup>88</sup> thus, in effect, use must be made of the beneficial aspects of Thatcherism. The word ‘contract’ should not “become the exclusive property of opponents of public services”.<sup>89</sup> So it could be argued that contract now becomes an external influence which forms part of this framework of public law.

Lewis in his 1993 lecture<sup>90</sup> and his 1996 book welcomes Harden’s work but probably goes further in embracing the new state as a progressive step to developing a framework of public law. “Privatisation, contracting out, the Citizen’s Charter, the purchaser-provider split are all important ingredients of reinvented government”.<sup>91</sup> Again this is not an endorsement of the Conservative administration as, “some of the emerging pattern of new government is above party and resides in the grain of the constitution itself”.<sup>92</sup> However the institutional reform which Lewis argues for here as he did in the 1986 work takes the concept of free-markets and puts them centre stage. The claims he makes for these are very high, “The justification for markets is choice and freedom; it is a human rights justification”.<sup>93</sup> This rhetoric is familiar to students of privatisation as a justification for that process in the eighties when it was just beginning.<sup>94</sup>

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<sup>87</sup> *ibid.*, p74.

<sup>88</sup> *ibid.*, p71.

<sup>89</sup> *ibid.*, p78.

<sup>90</sup> See above.

<sup>91</sup> Lewis (1996) *op. cit.* p10

For public lawyers this is a relatively new approach for a novel framework is now being stated explicitly. Thus for these writers the public's expectation of the 'rule of law' has begun to be realised by the marketisation of the modern state although it needs to be combined with further institutional reform. However in recent writing Harden has been a little more critical of the formations of the modern state and possibly of Lewis's work, "To win ... public confidence in government as a positive instrument for serving the interest of the community requires more than fashionable slogans about 'reinventing' government".<sup>95</sup> He has recently argued that more government is not necessarily wrong but it needs to be regulated better. In his 1996 work Lewis also seems to have a similar side-swipe at Harden's work, "The currently *fashionable* preference for 'the contract state'" (my italics).<sup>96</sup> This phrase occurs in the passage of his work which defends Osborne/Gaebler's work as part of a literature which in the late twentieth century seeks to determine what (minimal) role the state should play. These mutual criticisms illustrate the difficulty of gaining a consensus over public law even amongst writers which work in the same tradition.

If, then, these academics are given as examples of the diverging trends present in modern public law there is a difficulty in reconciling them. All are influenced to some extent by Dicey albeit some only in a minimal way and all are trying to construct a new framework. Drawing on these works it will be argued that a work of administrative law does indeed need to make reference to external principles. This is almost inevitable given the peculiar British constitutional tradition. However it will

be argued that the use of the terms ‘markets’ and ‘contracts’ will **not** provide a useful basis for this framework. In other words the “marketisation” of the modern British state should not be accepted by academic public lawyers as providing answers to the questions of accountability which have troubled administrative lawyers for most of this century.

So, to summarise, one link between public law and the study of privatisation and deregulation is the common concept of accountability. Within the disciplines of constitutional and administrative law the question of how to hold the state to account has been fundamental. However as illustrated above the model of Dicey, which relied on the traditional ‘common law’ approach, has been heavily criticised, particularly in the last thirty years. Moving away from Dicey has not meant that there is less emphasis on accountability. On the contrary it is argued by the “new” public lawyers that within the modern state that accountability cannot be delivered without moving away from Dicey’s “pure” model. It is also clear that a group of public law academics believe that accountability can be delivered using the devices which have arisen due to the processes of privatisation and deregulation. That is illustrated above by the work of Ian Harden and especially Norman Lewis. It is one of the arguments of this work that it is wrong for public law to associate the trend towards privatisation in the modern state with the delivering of more accountability. In the field of public transport – which this work examines - it is further argued that accountability can only be delivered by a form of public ownership.

## **ACCOUNTABILITY - THE CENTRAL CONCEPT.**

In the study of the British state there are many phrases which are deliberately ambiguous. For example labelling any arm of central Government the 'Crown' has proved particularly troublesome in the development of a system of administrative law. It would seem that the concept of accountability may also fall into this category. Indeed, it could be argued that accountability is only really defined by its absence. So, in the nationalised industries, it was broadly accepted they were unaccountable both to the public and to Parliament because of the particular structure of the public corporation, although as shall be shown this structure was adopted because it was thought to combine "the best of both worlds" between the public and private sector.<sup>97</sup> Moreover the establishment of independent boards was bound to create tensions with the archaic Parliamentary structures of Westminster. Generally, then, the public had no sense of owning these industries and saw them as unaccountable.<sup>98</sup> As explained in Chapter 3 this alienation was exploited in the early days of Thatcherism and privatisation. Thus accountability was defined by its absence.

This negative approach has difficulties for public lawyers, for there is no positive structure against which to measure a model of public law. In a sense this is part of a more general problem for public lawyers:<sup>99</sup> the absence of an authoritative framework

for their study. But it also means that any definition of accountability may not be authoritative but simply the approach of a particular academic. As explained above Dicey began this trend but thought his own approach to be universal. This was broadly accepted in the realm of public law<sup>100</sup> until the nineteen-sixties. Moving away from Dicey led to a number of competing frameworks. Part of this debate revolved around the concept of accountability. Thus there is the creation of new constitutional structures proposed by Harden and Lewis, the 'return' to the common law of Allan or the post-modernist approach of Loughlin. No one academic, then, can produce a clear picture of what accountability would be. The concept can vary from person to person but it also depends on the context.

A relatively new development in public law theory although perhaps not in other social science disciplines has been the support for the "reinvented"<sup>101</sup> state. It is mentioned above that the changes made to the British state under the influence of Thatcherism have been seen by Harden and Lewis especially as a means of delivering their concept of accountability. It is the argument of this work that this faith in the market is misplaced and that in the context of transport services which have been privatised and deregulated where once they were publicly owned a model of accountability can only truly be delivered with public ownership. For such an argument to be justified it will be necessary to clarify exactly what is meant by accountability.

In attempting any definition one must be aware of the multifarious ways in which the word accountability can be used. This work is an attempt to explore the interface between the state and its intervention in the economy through nationalisation and privatisation. As a result it means examining the work of both public lawyers and to some extent economists and within this broad field there will be several differing and perhaps contradictory concepts of accountability. This leaves aside the disputes within public law itself. Further, as shall be argued below, both nationalisation and privatisation were seen as means of increasing accountability even though they were diametrically opposed in other respects. This is again due to the different definitions of this concept.

A useful academic comparison is with the nineteen-eighties work of Day and Klein who undertook a study of various British public services and measured them against their standards of accountability. Although they were more concerned with political science and social policy their definitions are intriguing. They point out that “accountability ... presupposes agreement both about what constitutes an acceptable performance and about the language of justification to be used”.<sup>102</sup> This is significant for this work because it identifies the problem of a public law that relies so heavily on the concept of accountability but as explained above has no consensus behind it. Furthermore in a broader sense proponents of privatisation and nationalisation will clearly not share a consensus on what amounts to accountability. Thus subjective factors become critical as each analyst will have their own definition. This tension is outlined below with the different definitions summarised.

As an aside it is worthwhile to note that Klein and Day see a tension in public services between the political accountability of the British state and the managerial accountability of delivering a public service.<sup>103</sup> In a sense this summarises the essential tensions which will be examined in this work. That is both privatisation and nationalisation emphasised their “new-ness” removing the traditional structures of political accountability and replacing it with either the “market” or the public corporation. However as discussed above both failed in this approach and neither provided a substitute concept of accountability that is generally satisfactory.

At this stage of the Introduction it may be appropriate to consider the various definitions of accountability that will be used in this work. This will then conclude with a statement as to which model the writer feels is most appropriate.

### Traditional Constitutional Accountability

It is unsurprising that the traditional constitutional view of accountability is centred around Parliament given the unitary nature of the British State. As the House of Commons was elected it alone could hold the executive to account which it did through its elaborate procedures of debates, questioning and committees. If the House did not do its job correctly the members could be removed by election. Harden and Lewis labelled this “ex post accountability”.<sup>104</sup> However this view of Parliamentary accountability has been largely discredited in the twentieth century. The dominance

of political parties, the system of government whips and the electoral system have meant that the Government necessarily dominates Parliament. In the context of this work this was clear even at the time of the Morrisonian nationalisations and one of the purposes of the particular structure of the public corporation was to remove the need for Parliamentary accountability. As shall be shown any attempt for Parliament to intervene was resisted but there was compromise eventually with the creation of a Select Committee on Nationalised Industries in 1956. So in this work the traditional model of Parliament delivering accountability is not as important for, in the era of nationalisation there was a desire to move away from traditional structures whereas privatisation was intended to limit political arrangements for accountability.

Another traditional tenet of accountability in the British state is through Government ministers. In a sense this is part of Parliamentary accountability as ministers will be responsible to Parliament. This model of accountability was also important for nationalisation as Government ministers had a close relationship with the relevant nationalised industries. Again this model of accountability was inappropriate given the structure of the public corporation which in formal terms relied on independence. Moreover, Ministers were prevented from answering questions on the daily operation of the industries which prevented the industries being called to account.<sup>105</sup> In the process of nationalisation the model whereby the industry became part of a Government department and hence solely answerable to the minister was rejected except in the case of the Post Office until the late 1960s.

Another traditional concept of constitutional accountability which was utilised to some degree was the use of audit. Again this was only used to a limited extent for the new nationalised industries as it was also seen as inappropriate to the new form of the public corporation which relied on financial independence. Thus the traditional models for holding a public body to account were not utilised in the process of nationalisation. However as shall be shown in Chapter 2 they were not completely removed so there was a lack of clarity about exactly where accountability did lie. As an aside it was the main argument of Harden & Lewis's work "The Noble Lie" that the above models of accountability were inappropriate for all areas of the state - not solely the nationalised industries - and they argued for a greater degree of openness and "sunshine" regulation instead. Few now demand public accountability from the traditional structures of Parliament.

### The Accountability of the Public Corporation

If the traditional approach of accountability was rejected in Morrisonian nationalisation what then was the appropriate model? The form of the public corporation will be examined in detail in Chapter 2 but its new structure was meant to be accountable to the public as a whole. Although the board of a nationalised industry was meant to be independent it was to have a close relationship with Government ministers over policy matters. However the Board needed to be aware that it was running the industry for the whole "nation". In a sense it was an attempt to mimic the growth of the joint stock company whose boards were accountable to their shareholders although in this context the nationalised industries' shareholders were

the whole population. Alongside this rather vague definition of public accountability there was to be created a complaints machinery which would provide a direct link from the general public to the nationalised undertaking, although the strength of these bodies was questionable.

It will be argued that the public corporation as providing a new form of accountability as an alternative to the traditional approach failed. Its ostensible independence and duty to society only allowed for a vague concept of accountability. When this is mixed with an amalgam of traditional constitutional structures which were introduced as a compromise<sup>106</sup> the result was obfuscation. Furthermore, the lack of any statutory duty to reveal information tended to make the industries secretive. Perhaps more than anything this lack of an information flow gave the impression that these industries were not being properly held to account.

### The Public's Perception of Accountability

This experience of public ownership would seem blatantly to contradict the argument of this work that accountability can only be delivered through a form of public ownership. It would seem to be inevitable that state ownership would result in an unaccountable structure. Indeed that was one of the main arguments of Thatcherism. This work will argue that the failure of Morrisonian nationalisation to deliver accountable structures was due to the vague way in which the board of the public corporation was meant to be held to account. In fact one could argue that the

politicians at that time thought that simply taking these industries into the public sector was sufficient, as argued above.

What these models ignored was the public's perception of a structure as accountable. This is linked in some way to the support which the public gave to the nationalised undertakings however it goes a little deeper. For the concept of an industry being "independent" from the public results in a distance between the public and the delivery of the services. This is reflected to some extent in the Annual Survey of Social attitudes examined in Chapter 3.<sup>107</sup> It will be argued in this work that this aspect of accountability is fundamental to the delivery of public transport services. One of the factors which Thatcherism could exploit in its pursuit of privatisation in the eighties was the lack of affinity ordinary people felt with those industries. This contradicted the feelings of the public in the forties when nationalisation was very popular largely due to the widespread failure of the private sector in the utilities. This turnaround was due in part to the institutional structures of the nationalised industries which it was felt were not accountable to the public. This was compounded by the weak machinery for dealing with complaints which as shall be shown were seen as having a lack of independence from the industry itself and also shrouded in secrecy.

Thus in dealing with nationalisation alone we can see a considerable range of definitions of accountability. It has been shown that in the British Constitution accountability traditionally revolves around Parliament. Moreover the public corporation itself had its own concept of accountability resting primarily with its

board. An additional dimension to the question is also added when one looks at the public's perception of the nationalised industries and whether they were held to account.

### Shareholder Accountability.

The privatisation process of the eighties and nineties allowed yet more definitions of accountability. In general these veered more towards the economic model of accountability that is that accountability would be determined by consumers making their choices in a free market. But as shall be shown the creation of regulators for the utilities allowed the output of more information which corresponded more with the definition of accountability proffered by some public law academics.

In the early era of Thatcherism when privatisation of the utilities began accountability was defined by the absence of state involvement. Thus the market was seen as the midwife of accountability. This was the era of "popular capitalism". In the mid-eighties the idea of widespread share ownership gained currency. Moreover it was argued, as shall be shown, that this would induce a new accountability in relation to the industries. They would be answerable to a specific group of shareholders who would expect the company to be held to account in public. It was even said at the time that the existence of this "shareholding" democracy would induce a greater sense of ownership amongst the share holding public than was possible under the monolithic Morrisonian structures of the public corporation.<sup>108</sup> It will be argued that this measure of accountability is necessarily directed towards a minority - that is those who own

shares. Moreover as the privatised utilities developed it became clear that the dividends were largely the shareholders' first interest rather than an open accountable structure. In fact examples will be given that show if a group of shareholders were interested in holding the industry to account they saw their aspirations thwarted by larger institutional shareholders. It will be argued that this model of accountability although popular in the eighties became discredited as further privatisations developed.

### Regulatory Accountability.

Another more promising model for accountability under the privatisation process was the creation of powerful new regulators to oversee the running of the utilities. This will be looked at in detail as it also occurred in the rail industry. These external agencies could be seen as a new innovative measure to hold the industries to account. In a sense this model of accountability coincides with the argument of public lawyers like Harden, Lewis and Prosser in support of the creation of new structures to scrutinise the British state.<sup>109</sup> Indeed these writers have been broadly supportive of the new regulators. However there have been a number of difficulties with these regulators delivering accountable structures.

Firstly, the regulatory structures were created in a piecemeal manner. This was done as each industry was transferred into the private sector. There was no clear regulatory rationale expounded, indeed this was also true for privatisation itself. Thus, as will be

argued, there was no clear philosophy underpinning the new regulatory structures that these would provide accountability. Indeed, one could argue that the reverse was true and that these structures were seen as a stop-gap measure until there was competition in the field thus no long term thought went into their design.<sup>110</sup> This could be confirmed by looking at the different ways in which the regulators operated. Chapter 3 will show the variety of tasks performed by the regulators of different industries ranging from attempting to introduce competition, to monitoring the privatised industry to providing a voice for the consumer. It will also be shown that at different times the Conservative Government relied on different rationales. It could be argued that a full official analysis of the role of the regulators did not occur until the New Labour Government ordered a review in the summer of 1997.

However if the confusion in creating the structures is left aside the regulators did allow for one aspect of an accountable structure to develop - the flow of information. Through using their powers under statute and other external pressures it is unquestionable that the regulators have managed to get more information from the privatised industries than was possible under the earlier form of public ownership. Again this change, it will be argued, is due in large part to the end of the secrecy inherent in the public corporation form with its own vague definition of accountability and the partial involvement of traditional constitutional arrangements. So one part of accountability has improved in the sense of the flow of information. It will be argued below that this is not sufficient in itself however to provide a fully accountable structure. In another context Harden and Lewis argued that Parliamentary

accountability only provided an ex post accountability,<sup>111</sup> that is it was reactive. The object of accountability was to “ensure openness at all stages of the policy process and to provide explanation for action taken and conduct reserved”<sup>112</sup>, thus an ex ante accountability was needed. The same point could be made in relation to regulation - it essentially responds to the industry rather than the regulator having an early input into the framework in which it will operate.

In the context of privatisation, then, there were further definitions of accountability. It was with the creation of new regulatory structures that a link was made with some public lawyers’ model of accountability in the sense of open external agencies. However it is the argument that these concepts of accountability are incomplete. What then is the paradigm of accountability for this work?

### Which Accountability?

It has been argued that no single model of accountability examined above can be removed from its particular context. To understand the definition of accountability one also has to understand the views of the individuals who claim their models deliver accountability or the political context in which it is raised. As stated above, in the context of both nationalisation and privatisation one aspect of accountability which was neglected was how the public perceived the new structures. Thus was the general public aware of the structures designed to hold the industries to account and if so did it participate in them? This aspect of accountability was particularly important for

public ownership as it was meant to be an improvement from the previous arrangement in the private sector. The Morrisonian model failed under this particular model of accountability. The resulting alienation that ordinary people had from the nationalised industries was exploited by Thatcherism as a reason for privatisation, as will be demonstrated below.

However for all the lip-service paid to the new era of “popular capitalism” the privatisation process also neglected this aspect of accountability. Although the regulators provided a new forum for the production of information they were not initially highly participatory in style. Their original rationale was not to provide a new forum for public accountability as shall be shown in Chapter 3 when examining the Littlechild reports. Thus it will be argued that, whereas the privatisation process did increase one aspect of accountability it did not provide a complete solution. Fundamentally privatisation meant the introduction of the profit motive to the provision of utilities. Thus regardless of the regulatory framework the main priority of the industries became the growth of dividends and creation of shareholder value and this was particularly true where the effect of actual competition was limited.

So for this work a truly accountable structure should involve the public. This should be coupled with an increased flow of information which was one of the advantages of the privatisation process. This accountability should not be reactive. That is to say any structures which promote accountability must also involve themselves closely with the industry in question rather than simply respond to their initiatives and should

permit a degree of formal planning not available to regulators. It will be argued that this particular model of accountability - for public transport - would require public ownership.

In the field of transport, it will be argued, accountability is directly linked to the public's perception of service provision. Both bus and rail services depend heavily on public use. This is true even though the rail network is heavily subsidised. It is shown in Chapter 7 that each of the privatised franchises have made optimistic claims for the cutting of subsidy based on a growth of passenger numbers. However it will be shown that during both the deregulation of the bus network and the privatisation of the rail industry that there was no increase in use of public transport. Particularly in the bus market people were bewildered as to the infrequency and ever changing nature of bus services. People's perceptions were of a service in which they were merely passive spectators.

However such processes coexisted alongside a form of direct control in the shape of the Passenger Transport Authorities. These will be examined later in this work. In summary these are made up of elected councillors who are appointed to oversee the running of local transport services. Although during the eighties and nineties their powers became more limited as they had to divest themselves of running their own bus services and the awarding of local rail franchises to the private sector they still remain important actors. For example, in Scotland the awarding of the Scotrail franchise was severely delayed largely due to the role of the Strathclyde Passenger

in their area. This use of elected members provides a direct link between the public and the delivery of services. Although it could also be argued that the public is not fully aware of what the Transport Authority does the direct electoral link plus greater publicity could counter this. This solves part of the problem of the public perception of accountable structures and permits forward planning.

It may be argued that such a model, if it delivered accountability, would not require any extension of public ownership, but would simply amount to a series of elected regulators of the transport network. However it is the argument of this work that transport services need to be returned to public ownership for reasons outlined in the following section. Another reason for this specific to public transport is that the process of privatisation and deregulation in the transport network has not led to a competitive market but rather a series of dominant operators who now run both rail and bus services. Thus the only ostensible change has been the introduction of the profit motive which essentially drives the entire private sector. This changes priority from providing a public service. It is the argument of this work that the model of accountability preferred in this thesis cannot be delivered by the privatised and deregulated structure. Harlow and Rawlings have challenged, “the efficacy and appropriateness of market discipline as a form of accountability, particularly where ... the extent of choice which citizens exercise is limited”.<sup>113</sup> This work would also seek to carry this out. This argument is changed slightly for the rail network where profits are delivered by way of subsidy. However, the targets of cutting subsidy and the

dominance of large operators in gaining the franchises confirm the dominance of the 'market' model of accountability here as well.

It may be argued that the experience of the Morrisonian nationalisation shows that the profit motive cannot be removed simply by the intervention of the state. But it will be argued that the problem was the particular institutional structure adopted. In a sense although the public corporation was seen as a new structure difficulties arose because the 'ancient' structures of constitutional accountability or lack of it still intervened. This was added to problems inherent in the public corporation form itself, particularly the vagueness over how it would deliver accountability.<sup>114</sup>

## **WHY LINK ACCOUNTABILITY WITH OWNERSHIP?**

The assertion that an accountable structure can only be delivered by expanding public ownership above cannot and should not go unchallenged. Although in the past there may have been shared belief that public ownership was necessary in modern society even amongst academics that has now vanished. Public law is not alone in academic disciplines in emphasising the success of the market and the failure of public ownership. In political terms this is the accepted wisdom with all the established parties supporting to some extent reliance on the market to deliver public services. In public law the acceptance of this notion inevitably skews notions of accountability towards contract and market testing.

This work will also show that neither the process of controlled privatisation nor outright deregulation within the delivery of public transport services has delivered accountability. The precise definition of accountability and the competing models of this concept are dealt with above. But, having considered these definitions, how is the leap to be made from establishing a lack of accountability to the necessity for public ownership? Such a conclusion is reached due to the experience of both Morrisonian nationalisation and Thatcherite privatisation. Neither process created accountability,<sup>115</sup> however both utilised elements which would be of great use in a truly accountable structure. It would be useful to summarise each experience here as it fits in to the overall argument.

### Failure of the Public Corporation.

It will be argued in the next chapter that one of the driving forces behind nationalisation in the forties was the desire to have accountable public services. Popular experience during the Second World War and the thirties led the Labour Party to adopt a programme of broad nationalisation. However it will be further proposed that the structure adopted by the Labour Government was one which could not deliver the form of accountability which was popularly expected. This is explored above where the public's perception of accountability is examined but it is clear that the form of the public corporation did not allow for a clear concept of accountability to be developed. This in turn led to the intervention of more traditional methods of delivering accountability, namely Parliamentary structures and ministerial responsibility. Thus responsibility for accountability was dispersed between various

institutions but not delivered by any of them. Again this led to further disillusionment with public ownership which was later exploited in the early days of Thatcherism.

In summary these are the processes that will be explored in the next chapter. It is such experiences with public ownership that give weight to the argument that accountability and public ownership do not mix. It will be argued that such a conclusion is misleading. Although the institutional form of nationalisation did not allow for a structure of public accountability it did remove one of the obstacles which also prevented the private sector from creating an accountable structure. That is it replaced the maximisation of shareholder value and replaced it with the goals of delivering decent public services. Robson, a public lawyer strongly in favour of the public corporation, argued in the context of the coal industry that “The elimination of private ownership was a surgical operation which had become necessary to save the life of the patient”.<sup>116</sup> Further the railways needed to “modernise and re-equip themselves more adequately than they were able to do under the conditions of private enterprise”.<sup>117</sup> In summary he stated that there was a general belief that the nationalised industries needed to be taken over “because it is too dangerous to leave them to be exploited by private enterprise for profit”.<sup>118</sup> It is worth noting these arguments from the forties particularly as they come from a public lawyer interested in the concept of accountability.

Fifty years on the current debate would argue strongly against the assumptions put forward by Robson and others at the time.<sup>119</sup> It is the very private sector which was rejected after the Second World War that can deliver the elusive accountability in the delivery of public services it is claimed. As will be argued below the experience of rail privatisation and in particular the deregulation of the bus industry contradict this assertion. This provides an illustration of what happens when the profit incentive is reintroduced to the delivery of public services. Ultimately there is a consolidation of operators who use their strength in the market to dominate and then branch out into other areas. During the process of bus deregulation six companies gained listings on the stock exchange. Thus the priorities of a company change from delivering services to earning profits and the arguments of Robson from the forties become relevant again.

So nationalisation allowed for partial accountability in the sense that the industry was focussed on delivering the public service. However the flaw in this model was that it was not matched with innovative new structures to open the industries out to the public. This ultimately was to play a part in their downfall.

## Failure of Privatisation.

It is argued by some public lawyers that privatisation has created a more open and to that extent accountable structure. Measured by one aspect of nationalisation that is true. As is explored in Chapter Three the creation of regulators and intervention by Government allowed an open flow of information, which did not exist under Morrisonian nationalisation. Does increased information flow equal an accountable structure? Bearing in mind the complex ways in which accountability can be interpreted<sup>120</sup> that will surely depend on your definition. But it is the argument of this work that a definition which is based solely on this is only partially complete.

As will be explained in Chapter Three the regulators of the utilities when created had no real rationale. This was also clear in the first years of their operation. In their struggle to find a role they did create a climate which allowed them access to information which was previously extremely difficult to get from the nationalised sector. However this model of regulation will always be reacting to information given to it rather than being involved in the industry itself. Using Harlow and Rawlings' metaphor it is a fire-fighting device rather than a fire-watching one.<sup>121</sup> Thus any element of accountability will be following an event rather than prior to the event occurring. A good example of this happened during the process of rail privatisation and is mentioned in Chapter Seven. South West Trains could not operate its services due to a lack of staff for several weeks in open breach of their franchise. The Rail Regulator could do nothing but fine the train operating company several months after the event. As the railway still operates as a subsidised network all the fine amounted

to was a partial withholding of subsidy. An accountable railway system would not have let the event occur in the first place.

Another element of public accountability was lost in the move towards privatisation: the re-introduction of profit as a driving factor in the industries. At the height of the privatisation of the utilities as explored in Chapter 3 it was argued that this was a step forward and in different ways would provide an accountable structure.<sup>122</sup> However this feeling changed over the course of several years with feeling turning against the “fat-cats” and the large profits which they garnered for providing public services. Thus the feeling grew that industries were not being run simply to provide basic services but rather to increase shareholder value. This is further exacerbated by the model of British utility regulation which does not control profits but prices. So the element of accountability which existed under nationalisation disappeared because of privatisation and the justification for it.

To summarise, the process of privatisation - because of the creation of new regulatory agencies – allowed for more openness and access to information. This has strengthened the argument that de-nationalisation created a more accountable structure. However alongside this the element of services being run simply for the public rather than profit which was very much to the fore at the time of nationalisation in the forties disappeared due to privatisation. Thus an important aspect of public accountability was lost. Moreover even the existing regulatory structures are a reactive form of regulation rather than being proactive.

### Is there a solution?

The limits to the type of accountability of the Morrisonian model of nationalisation and privatisation may be accepted. But why does it follow that full accountability can be delivered through public ownership? The answer lies in studying the experience of both processes and looking at the example of the privatisation and deregulation of public transport.

Nationalisation was a step forward for accountability because it removed the drive for private profits from the provision of public services. However the form of the public corporation did not allow for a full model of accountability. This was due to the vagueness of the architects of nationalisation and the intervention of the traditional institutions of constitutional accountability: that is Parliament and Ministers. Privatisation removed these problems of accountability by removing most Parliamentary or Ministerial control. Moreover, through the creation of the regulators it provided a forum for the increased flow of information. However by its very nature it demanded that profit again became the driving force removing one important aspect of public accountability.

From this it could be argued that the ideal model of an accountable structure is one which combines the openness of privatisation with the public accountability aspect of nationalisation which guaranteed that providing a public service was the sole aim of the industry. The latter half of this formulation would seem to demand that the

service in question was removed from the private sector given that its *raison d'être* is to produce profits. This is where the element of public ownership comes in. But how would public ownership in this context avoid the problems of Morrisonian nationalisation?

It is clear that any model of public ownership would have to equal the openness of the privatised utilities. The experience of nationalisation showed this was not possible through Parliamentary structures. However in the field of transport there is a different model which will be examined below: the Passenger Transport Authority. This is a useful model for public ownership as it is made up of elected representatives, councillors, not appointed members of a board. Further it is in direct control of funds given to the train and bus operators. As well as providing an overview of the whole transport service it runs its own operation. In this sense it combined a regulatory structure with the delivery of services.

This would seem to combine openness and the advantage of running its own transport service that is focused on delivering a public need rather than pursuing private profits. Thus the advantages of both models examined above could be utilised. However the advantages of a publicly owned transport service are limited if there is no clear institutional requirement of accountability.

So throughout this work there will be a discussion of various models of accountability. In fact one of the most important arguments between privatisation and

debate intersects with the discussion amongst public lawyers as to the way accountability and openness can be delivered within the British State. As discussed above a number of academic public lawyers have constructed (or re-constructed) their models of accountability around the privatisation process and the drive to utilise the private sector in the delivery of public services. Ultimately it is the argument of this work that faith in such a model is misplaced and that solutions to the problem of the unaccountable nature of the British state will not be found there but rather in a re-discovered model of public ownership.

## **WHY PUBLIC LAW?**

The above passage perhaps illustrates why the field of privatisation and deregulation require to be studied by public lawyers. But this needs to be emphasised further. A study of rail privatisation by a lawyer should be no great surprise. After all, rail privatisation may have been the largest job for the legal profession that has been created under Conservative administrations. A mountain of contracts has been created which in its turn could potentially create much litigation. Finding a route through the tortuous route of this particular privatisation may need a lawyer's eye for detail. Yet it is not the task of this work to give a definitive exposition of the minutiae of the privatisation process. Rather as a work of public law this text will use an empirical study of the privatisation of the railways **and** the deregulation of the bus network to explore the key issues for public lawyers.

Centrally, this will explore the need for a framework which places participation and

for these concepts to be fully realised public ownership needs to be re-established as a central component of an accountable state. As was previously stated this was accepted by those who argued against Dicey earlier this century. In particular Robson argued that the development of administrative justice was tied to the creation of a fairer society.<sup>123</sup> Emphasising “the age which we live in is pregnant with social unrest,”<sup>124</sup> he clearly saw administrative law as a tool to make a better society. This is linked to his position at the London School of Economics which was one of the birthplaces of Fabian Socialism. This area of thought which will be examined in detail in the next chapter believed in major reform of the institutions of the British state including the introduction of the public corporation. In a sense Robson was arguing the legal corner of this case against Dicey and his disciples.

In a sense, then, academic lawyers studying nationalisation and privatisation are not new phenomena. Indeed this area has represented one of the most fluid in terms of organisation of the state in the last twenty years. Recently it could be argued that public lawyers have utilised the privatisation process to explore their own framework for public law, especially with the creation of regulators and the beginning of a British school of work on this topic. Yet their acceptance of new modes of regulation has ignored or played down the idea of a revitalised model of public ownership. This, it will be argued, should be central for administrative lawyers.

Undoubtedly the British experience of nationalisation was viewed by many unhappily. Alienation in relation to these industries did not decrease when they were taken under

public ownership. In fact one could argue that the alienation could be more clearly defined than in private industry. Furthermore, although there was 'ownership' there was little if any participation in the industry by the workforce and consumers.<sup>125</sup> This encouraged secrecy which in turn prevented accountability which was further obfuscated by Parliamentary structures. Thus the basic notion of "controlling what you own" disappeared. Any future model of public ownership, then, would have to encourage participation as a means of ensuring support for the industry but also as a means of increasing accountability. It is argued that participation could be encouraged with the model outlined above.

In this similarities can be seen with Macpherson's model of participatory democracy.<sup>126</sup> He argues that it is in industry that such first steps must be taken as it is here that ordinary people will stop acting as consumers and producers and start acting as exerters. This notion is linked to the argument developed above that the public's perception of accountability has been ignored in previous experiments of public ownership. They are largely viewed as passive and this is reflected in the institutional design of the structures. It is argued that this is the wrong approach to utilise. If a structure of public transport was developed which combined openness, democracy and the absence of a drive for profits the public would respond to this.

The interface between industry and the state is central for lawyers interested in promoting the notion of accountability. Thus institutional change would inevitably involve changes in public consciousness which are equally important. Some would

argue that such experiments would fail because of low participation or apathy. But one must not view the future with the eyes of the past: “low participation and social inequity are so bound up with each other that a more equitable and humane society requires a more participatory political system”.<sup>127</sup> In legal terms participation as a concept must accept these problems or it will be lifeless. In arguing these points examples will be drawn from the experience of the state’s handling of transport.

## **CONCLUSION**

A study of the British state and its institutions cannot be made neutrally. Dicey's attempt to use the common law method in constitutional legal studies has been exposed as having internal weaknesses. The resulting vacuum has meant a number of conflicting ideas have been used in attempts to create a new model. As has been argued such a model needs some reference to normative principles. This differs from Robson’s approach who saw his role as a documentor of the new era of administrative justice, paraphrasing Spinoza: “to understand the causes rather than either to condemn or praise”.<sup>128</sup>

In the specific field of state intervention in the economy, similarly neutrality cannot exist. Even more specifically in transport the concepts of participation and accountability are not academic points but necessities as we face a transport crisis in the late twentieth century. A new model of public ownership fulfilling all these

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<sup>125</sup> See Prosser(1986).

objectives may lead to the “downgrading or abandonment of market assumptions about the nature of man and society”,<sup>129</sup> assumptions which have become all too prevalent even in the field of public law as argued above. Yet to enter the next millennium with coherent concepts of participation and accountability placed in a system of public law such assumptions must be challenged.

To this end in the next chapter the experience of nationalisation will be explored with a study of why there was alienation and disaffection from these originally popular measures taken in the forties, and what effect the problems of developing a system of administrative law had on the structures of the newly nationalised industries.

## CHAPTER TWO.

**“The private business form which has built Western Capitalism has become the Public Form which is making Socialist Britain”**

ELDON L JOHNSON, 1954.<sup>1</sup>

Placing the concept of ownership in the centre of a new system of public law will invite certain criticisms. Perhaps one of the strongest will rely on historical evidence. The history of nationalisation in Britain hardly suggest that that ownership is central to a concept of accountability. Rather secrecy and lack of participation seemed to be the norm in the nationalised industries. This chapter will attempt to examine how that came about. In order to understand the problem it will be necessary to examine how the general notion of public ownership became implemented through the particular structure of the public corporation in Britain.

There are two sides to this argument. Firstly the development of the British state in the twentieth century - which is so central to administrative law - and how it came to be associated with both public ownership and the corporation structure. The process of nationalisation corresponded to the expansion of the British state and the subsequent development of administrative law. The second is, as most of the nationalised industries were created by the Labour Government of 1945-51, how the labour movement came to accept the public corporation. For public lawyers the former is clearly central however the second part is important as through these debates the

clash of differing notions of accountability is evident. It has been shown how Robson and others almost pioneered a sympathetic approach to new institutional formations amongst academic lawyers. The same is true of nationalised industries which Robson clearly saw as part of the 'new' state. "The public corporation is in my judgement by far the best organ so far devised in this or any other country for administering nationalised industries or undertakings"<sup>2</sup> was part of the conclusion of Robson's work on nationalised industries. Yet it will be argued that the notion of 'accountability' which was argued for at the time could not be realised by the particular form of the public corporation. As mentioned in the Introduction the precise advantage of the public corporation in delivering accountability was always left very vague and indeed there were competing definitions.<sup>3</sup> Further this "new" structure could not eliminate the traditional structures of constitutional accountability through both Parliament and Government ministers. It will be argued that the structure of the public corporation encouraged alienation and that any accountability was obfuscated.

This is important for modern public lawyers who try to create a new framework for the topic. At the time of the nationalisation measures of the forties most public lawyers were still working within the constraints of Dicey's model. Thus, the design of nationalised industries were not central to them. Further those academic lawyers who dissented from the approach were ardent supporters of the public corporation. Robson clearly stated "The scale of this movement is vast; its diversity bewildering, its political, economic and social significance unquestionable"<sup>4</sup> in his sympathetic

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<sup>1</sup> Johnson (1954) p366

work on nationalisation. The ‘new’ public lawyers have attempted to break from both approaches.<sup>5</sup> Yet the peculiar historical experience of nationalisation does not necessarily mean that accountability cannot be realised by changes in ownership. For public lawyers it is important to re-state the concept of accountability and make clear what model of accountability they believe to be most important - learning the lessons of history but not rejecting all its experiments. To this end the chapter will explore how the particular form of public ownership was adopted, how it was hoped accountability was to be realised and how the corporation operated in practice.

## **THE STATE AND PUBLIC OWNERSHIP.**

It is clear when examining the early works on Thatcherism and statements made by politicians of that period that the nationalisation measures brought in by the 1945-51 Labour government were later seen as the benchmarks of socialism within the British state. Sir Keith Joseph was one of the key figures in establishing the mythology of Thatcher’s “revolution”. In her own biography Thatcher quotes approvingly her mentor on the “socialist ratchet”<sup>6</sup> which had gripped Britain since the Second World War. In her own words this amounted to a dominance of an ideology which was “socialist, social democrat, statist or merely Butskellite”.<sup>7</sup> These directly echo the works of Joseph notably, his speeches in the seventies: “We are now more socialist in many ways than any other developed country outside the communist bloc”.<sup>8</sup> The notion of public ownership was seen as inimical to free enterprise and the logic of the

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<sup>5</sup> See previous chapter.

market. The mechanics of the privatisation programme will be examined more closely in the next chapter. But, beneath the rhetoric, to what extent was nationalisation a creation of socialism in the middle of the century?

Even before the post-war Labour administration significant parts of the economy were under a form of public ownership. All of these were created by Conservative or Conservative-dominated coalition governments. The Central Electricity Board in 1926 and the BBC in 1927 were both established as public corporations. One executive of the BBC labelled it “the first ‘nationalised industry’”.<sup>9</sup> However he claimed that Lord Reith, the first Director General, wished to develop a “concept of public service which goes deeper than questions of accountability or control”.<sup>10</sup> Arguably this vision could be seen as appropriate for all publicly owned corporations prior to the Second World War. Another example often given of a pre-war public corporation was the Port of London Authority. This is not entirely accurate, as the official historian of the nationalised industries points out,<sup>11</sup> for two of the members of this authority were directly appointed by the trade unions unlike the independent board normally seen as part of the public corporation. Alongside these creations there were large amounts of electricity and gas supply under municipal control. The creation of the London Passenger Transport Board in 1933 was influenced by these previously created models as was the senior Labour figure Herbert Morrison who piloted the bill through Parliament. The inter-war corporation was not the first experiment in public ownership undertaken by the state; previously Conservative administrations had not been slow to take over companies in the ‘national’ interest.

For example Churchill in 1914 had acquired a majority share holding in the Anglo-Persian Oil Company later to become B.P. So there were established models working in Britain of 'nationalised' industries which had no links at all with socialism. Thus, the acceptance and co-option of a form of public ownership had a pre-history to the post-war Labour Government. It was stretching the truth to say the least to argue that any scheme of denationalisation was simply dismantling a bastion of 'socialism'. Denationalisation was clearly going to be a fundamental restructuring of the British state as indeed was the case in the original nationalisation programme.

Why was the structure of the public corporation accepted as the norm for nationalisation within the British Constitution? Below the socialist case for the corporation will be explored but what of these non-socialist measures? Clearly the choice of the public corporation was predominantly a pragmatic response, "designed to meet a particular situation".<sup>12</sup> Yet it also had a significance beyond this. Reith labelled it "a new fashion of government".<sup>13</sup> Another development it closely corresponded to was the development of the limited liability company in capitalism. This allowed for the management of an industry to have a degree of independence from the owners. In Chester's words: "The separation of ownership from management opened the way for State ownership without State management".<sup>14</sup> This societal development was coupled with a general antipathy to direct ministerial control of an industrial undertaking as in the case of the Post Office. Opponents of this formation from all the main political parties believed the industry would be too

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<sup>10</sup> *ibid.*, p33.

susceptible to direct political intervention, even though it was accepted that departments would be directly accountable to Parliament<sup>15</sup> which was not true of the public corporations as shall be explored below. Arguments were used which were very similar to those of outright opponents of nationalisation, namely that “the minister had no right to interfere with the running of the board”.<sup>16</sup> This consensus against the traditional model of constitutional accountability was not replaced however with a clear picture of how accountability was to be delivered. Yet it is clear that during the inter war period the public corporation was increasingly acceptable to government as a suitable structure for the nationalised industries.

Politically this occurred in a number of ways. In the 1920s the New Liberalism of Lloyd George and others leaned towards nationalisation. “The Liberals tolerated public ownership in certain limited spheres pointing reassuringly to the many examples of public concerns already in existence”.<sup>17</sup> This acceptance of a limited form of state intervention was equated with a “tidying up of capitalism”.<sup>18</sup> Their 1928 Yellow Book endorsed these values and saw boards running public enterprises as a more efficient structure. The “Public Board points to the right line of evolution”.<sup>19</sup> This endorsement by Liberalism was integral to Morrison’s own thinking. In the Second reading of the London Passenger Transport Bill Morrison “said he had been influenced in his choice of the public corporation form by the Yellow Book and the

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<sup>14</sup> Chester *op. cit.*, p42.

<sup>15</sup> Morrison (1950), p176.

<sup>16</sup> Chester *op. cit.* p39

Central Electricity Board".<sup>20</sup> Amongst Conservatives, a section also supported the form of the public corporation albeit with reservations. One right-wing critic of the post war consensus over nationalisation wrote that the climate for nationalisation was established by the protectionist turn of the National Government in the 1930s.<sup>21</sup> Further young conservative thinkers at the time like Harold Macmillan argued that in certain instances "the socialist remedy should be accepted".<sup>22</sup> Talk like this, argues Abel, "prepared a mental and psychological climate kindly to socialists and socialism".<sup>23</sup>

This political climate of the inter-war period affected the functioning of the state beyond the experimentation with the public corporation as examined above. For example, the industries which came under public ownership in 1945-51: gas, electricity, coal, rail transport, civil aviation and the Bank of England had to some extent already been earmarked for public ownership by Royal Commissions. The McGowan Committee on Electricity, the Heyworth Committee on Gas and the Swinton plan for a public airways corporation had all favoured a form of nationalisation.<sup>24</sup> The Straker Commission in the twenties had recommended a form of public ownership for the coal mines. Christopher Foster argues that as far as the railways (which had always been subject to a <sup>high?</sup> large degree of regulation) were concerned Geddes the first Minister of Transport wanted to nationalise them in 1919 - following the state intervention of World War One. Indeed the process goes back further to Gladstone who took a strong interest in the railways and at one stage

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<sup>20</sup> Chester (1975), p386.

proposed a form of nationalisation. Such interventions tend to support public lawyer E.C.S Wade's comment that the railways represented an early interface between the public and private sector,<sup>25</sup> a point which emphasises the importance for public lawyers in examining the privatisation of the rail network. Foster has noted more recently that more books appeared from the 1880s advocating public ownership.<sup>26</sup> However, Bonar Law - the Conservative Prime minister of the twenties - gave assurances that new governmental powers to take possession of railway tracks were specifically not nationalisation measures.<sup>27</sup> These pressures were exacerbated with the growth of road transport and the notion of 'wasteful' competition between different modes of transport<sup>28</sup> which was a "constant source of public and political complaint".<sup>29</sup> Thus prior to the Labour government's extensive use of the public corporation, it is clear that there had been many precedents for this within Britain. This was reflected in actual experiments, the suggestions of various official commissions and in an indirect sense in the political debate.

Apart from this, the World Wars also increased the use of methods of public ownership. This was especially true of the Second World War and to some extent the First. Miliband, a left-wing critic of the Labour administration, argues that the 1945-51 government can only be understood by the war experience and the "elaborate system of State intervention and control"<sup>30</sup> which had developed. This experience extended the consensus surrounding the nature of public ownership which as noted

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<sup>24</sup> See generally Morgan (1984), Chapter 3.

<sup>25</sup> Quoted in Harden/Lewis, p58.

<sup>26</sup> Foster(1994), p491.

<sup>27</sup> Chester (1975), p12.

above was quite extensive. The most significant effect of this would be the Conservative Party's ambivalent attitude to the nationalisation legislation in Parliament. The exception to this was the iron and steel industry which provoked heated controversy. Even in the case of the 1948 Gas Bill where 800 amendments had been submitted: "the champions of private enterprise had only limited zest for the fight".<sup>31</sup>

Added to this consensus over some forms of public ownership the model adopted did not inspire much resistance especially alongside generous compensation packages which were painstakingly negotiated between government and private industry. The problems of the value of any compensation were multiple especially as any debt incurred in the private sector fell on the newly nationalised industry. In the example of transport: "the interest on the [Transport] Commission's Compensation stock would have to be paid however bad its results".<sup>32</sup> The figures were calculated in such a way that there was a large tendency to over-valuation. For example because the companies would be liable for the debt the basis for valuation of the companies should be "closely related to earnings capacity"<sup>33</sup>: the so-called net maintainable revenue. Yet this became almost impossible when examining many small companies which were being amalgamated into one large concern; e.g. in rail and electricity. How could one predict the future prospects of a small part of a larger operation which was being dissolved? Thus out of a total compensation package spread over all the industries of

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<sup>30</sup> Miliband (1962) p273

£2639 million, £1150 million went on transport<sup>34</sup> which was overwhelmingly composed of smaller operations. The industries adopted for ownership were such that they offered no real threat to private capital: "Government intervention in economic affairs, though in some aspects irksome to private industry...presented no serious challenge to the power of the men who continued to control the country's economic resources".<sup>35</sup>

This almost completes the examination of how the state came to accept the public corporation in a large scale after the Second World War. By public lawyers at the time, though, this process was hardly recognised. As explored, above the nineteenth century Whig individualist ideology, epitomised by Dicey, was becoming isolated. However, at this point in history the legal dissenters from Dicey's view were very few. Significantly those that did dissent had close links with the new formations of the state<sup>36</sup> and the Fabian tradition as seen below. This time-lag between different elements of the state offers a partial explanation for the difficulty that legal academics have had in exploring and understanding areas like these. Further the virtual absence of public lawyers from the important debate over public ownership prevented their input into the central question of accountability within the British state as shall be explored when looking at different definitions of accountability below. Moreover it allowed the structure of the public corporation to be deliberately vague on the question of how accountability was to be delivered.

However even though legally there was no clear expression of it, the new consensus being built up around the government intervening in the economy was a reality. Indeed the argument utilised by Foster: <sup>that</sup> “the forms chosen then[1945] and earlier were adopted in large part to appease those who feared socialism”<sup>37</sup> has weight considering the precedents of how public ownership came to be accepted by the British state and how closely the Labour Government chose to follow them. For a clearer examination of how this came about the other side of the argument must be explored.

## **THE LABOUR MOVEMENT AND**

### **PUBLIC OWNERSHIP.**

Simply to examine the process of public ownership from the perspective of the state establishment is a little one-sided. Almost of equal importance is the Labour Party's internal grass-roots struggle over the nature of public ownership. It is simply not the case that "there was not much debate about nationalisation within the Labour Party".<sup>38</sup> The two attempts to reform Clause Four<sup>39</sup> by 'modernising' Labour leaders and the internal discussion provoked almost proves this in itself. It was perhaps true to argue in 1995 on the eve of the conference which rewrote Clause Four that it represented nothing more than a "generalised totem of faith".<sup>40</sup> Yet in the early decades of this century when the British state was slowly coming to terms with a model of public ownership an important battle raged within the Labour movement. In a sense the debate exposed Labour's relation with the state; indeed, in a sense, even highlighted the nature of the British state.

From 1918 when Labour's first policy statement was issued the "socialisation of industry"<sup>41</sup> was centre stage. Arguably, it was "Labour's defining policy,"<sup>42</sup> yet its ambiguity was clear even at this early stage. No explicit structure was adopted as the model in the early part of the century but it was clear that the Webbs' Fabian scheme

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<sup>38</sup> *ibid.*, p75.

<sup>39</sup> The original Clause 4 Part iv of the Constitution read: "To secure for the producers by hand or by brain the full fruits of their industry, and the most equitable distribution thereof that may be possible, upon the basis of the common ownership of the means of production, distribution and exchange and

was extremely influential.<sup>43</sup> This clearly stood for a “more advanced, more regulated form of capitalism”<sup>44</sup> which would ‘evolve’ into a socialist society as the efficiencies of such a system ~~was~~ realised by the broad populace.<sup>45</sup> The minimalism and inherent denigration of revolutionary change on a large scale was seemingly contradicted by Sidney Webb’s own drafting of Clause Four (which he wrote with Arthur Henderson) which seemed to voice the demands of many in the Labour movement for a transformation of society. Yet the Fabian’s belief was that in a new society industry would be run much more efficiently if administration was separated from policy.

Policy matters would be decided by the ‘Social Parliament’ which would set up a standing committee monitoring each industry. Corresponding to this each industry would have a board drawn from the administration, the ‘vocations’- a phrase which encompassed the workers and management - of the industry and the consumers. This board would be in charge of the general administration of the industry and not seek to represent any particular sectional interest. They also envisaged a network of advisory committees peopled by the “disinterested professional expert”.<sup>46</sup> This programme effectively excluded any direct control by the working class although they did have the vision of works committees that dealt exclusively with conditions of employment. Any worker on the board of the public corporation would not represent any particular interest. Indeed, the Webbs asserted that the argument “whether government of

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<sup>42</sup> Coates (1975), p2.

<sup>43</sup> See Webb(1920).

<sup>44</sup> Miliband *op. cit.*, p62.

industry should be from above or below<sup>747</sup> had no meaning. What this referred cryptically to was the debate raging in the labour movement over workers control. This cut to the symbiotic nature of nationalisation for the Labour movement: was it a chance to create a more advanced form of capitalism as also envisaged by the Liberals and sections of the Conservative party<sup>48</sup> or the first creation of a British Socialist state? Significantly, in both scenarios the notion of a clear definition of accountability was not discussed.

Essentially this remained the form of the debate from 1918 to the post war Labour Government although the form slightly changed. The battle was clearly expressed in the early thirties where the Labour Party swung sharply to the left. This followed the defeat of the 1929-31 Labour Government and the subsequent defection of leaders like Macdonald and Snowden to the National Government. It was during this period that Herbert Morrison<sup>49</sup>, Minister of Transport from 1929-31, piloted his scheme for the London Passenger Transport Board through Parliament. As noted above, this followed the structure of the public corporation which had begun to be utilised in other areas. As Transport Minister he had been in charge of the Central Electricity Board which he saw as extremely efficient. The creation of the LPTB was cited by Morrison as a major victory in the field of transport and in the general 'socialisation' of industry.

This was further emphasised in his book *Socialisation and Transport*<sup>50</sup> a work which his biographers claim established him as a “major socialist theorist”.<sup>51</sup> In it he put the socialist case for a public corporation run not by the workers but by an independent board in consultation with the minister.<sup>52</sup> The Minister “may exercise an influence where it is proper and legitimate that he should, without in any way interfering with the management of the undertaking”.<sup>53</sup> The public corporation was the perfect amalgamation of public ownership, accountability with operation being put on a “sound business level”.<sup>54</sup> In the words of one American admirer it was a “combination of the governmental adjective and the business noun”.<sup>55</sup> It was superior to both ministerial or workers' control as it favoured the technical experts. This elitism through favouring experts and the notion of an independent board revealed the extent of Fabian influence here. But it did not allow for a tripartite model for choosing the representatives of the board nor did it put the same emphasis on the flow of information although the board would have the fullest autonomy and pay decent wages so as to attract the right personnel.

Not a sentence

A useful comparison to this vision of the independent corporation as being the ideal model for ‘socialised industry’ is the structure adopted in France.<sup>56</sup> Although large scale nationalisation was brought in after the Second World War -as in Britain- rather than depend on independent experts drawn from business the French adopted a tripartite structure. This consisted of representatives of the state, the workforce and

<sup>50</sup> Morrison (1933).

<sup>51</sup> Donoghue/Jones (1973), p184.

<sup>52</sup> Following the administration/policy distinction of the Webbs.

<sup>53</sup> Morrison op cit p288

the consumers of the industry. This plan originally came from the main federation of trade unions in France - the CGT- and was designed to avoid the concepts of 'etatisation'. Significantly this different structure experienced many of the same problems that the British industries did<sup>57</sup> as shall be shown below. However, it illustrates that this group of socialists tended to view with disfavour the idea that business could provide sound independent managers. There may be significant national factors at work here. As one academic of the time put it, "Nationalisation [in France] represented the punishment of a guilty capitalism".<sup>58</sup> Leading French businessmen were guilty of collaborating with the Nazis during the Occupation. One further explanation for the structure adopted was the historically strong syndicalist movement in France. The tripartite structure was criticised openly by supporters of the public corporation. Robson argued that the particular structure was "seriously threatening the success of the French Experiment" and it was "wrong".<sup>59</sup>

A completely different model was also utilised in Italy in that one large holding company (IRI) - which was later followed by others - acquired shares in other companies. Rather than a creation of a left government the actual form came about as a by-product of the Fascist Government's action in saving the banking system during 1933. In contrast to Britain and France, the IRI held only a small proportion of its shares in the public utilities. Further its management was solely determined by the government and there were no workers' representatives. These different experiments in Western Europe underline the point that the British model advocated by Morrison

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<sup>56</sup> This comparison was made in an early study: Sturmthal (1953)

and others within the Labour movement was firmly rooted within Britain's peculiar traditions.

The public corporation model was fully debated at the 1932 and 1933 Labour Conferences. The central dispute concerned Morrison's plans for autonomous boards and the extent of trade union representation. The Transport and General Workers Union wanted the right to nominate members to the boards - influenced by the French model which the French trade unions had played a full part in designing - whereas Morrison wanted the nominees to be based on proven ability and not to represent any particular interest group. Morrison's plan was defeated at both conferences but as his biographers points out, "he lost the skirmish in 1932 and 33 but won the battle in the long term".<sup>60</sup> For when it came to the actual process of nationalising industry nominal power was given to Morrison.

Labour's acceptance of the public corporation form occurred around the same time as the British state's co-option of the scheme as examined above. This is not mere coincidence. The debates during the early thirties represented more than an argument about how many workers' representatives should be on the board of a nationalised industry. In truth it reflected those leaders of the Labour movement who wished to accommodate themselves to the British state rather than transform it. As can be seen, the rhetoric of senior politicians from all parties took a very similar approach to public ownership. The rift in the labour movement centred on the Fabian admiration for the expert and belief in the independence of a board structure which drew on the best

examples of capitalism versus a system of workers' control which was unclear in its structure. It should be noted here that both models were largely silent on how accountability was to be delivered.

The writings of senior figures on the right wing of the labour movement underline this point. Snowden<sup>61</sup> had explained his preference as early as 1913 for the “best experts and businessmen”<sup>62</sup> to man industry. Morrison continued the process with his dismissing of worker's control with: “This buses for the busmen and dust for the dustmen stuff is not socialism at all ... it isn't a busman's idea; it's middle class syndicalist romanticism”.<sup>63</sup> The Labour Left was opposed to the elitism inherent in the public corporation and wanted an extension of industrial democracy. In 1944 Ian Mikardo<sup>64</sup> moved a composite motion at Labour Party Conference which demanded an extension of public ownership into named industries which were “democratically controlled and operated ... with representation of workers and consumers”.<sup>65</sup> Such forcefulness in resolutions was not however enough to prevent the Morrisonian model becoming the norm.

Why was this the case? One academic notes the birth of a “corporate socialism” through the Thirties<sup>66</sup> which allied the Neo-Keynesians on the right of the Labour party with the Left who favoured worker's control. The end creation was a model of bureaucratic planning epitomised by Morrison's scheme. Even though major Left

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<sup>61</sup> One of the leading defectors to the National Government from the Labour Party.

<sup>62</sup> See Snowden (1913).

<sup>63</sup> Eldon Barry *op. cit.*, p31.

leaders like Bevan could argue on the eve of the Labour Government in 1944 against “the pernicious pretence that State Control, nationalisation of some key industries and Socialism are the same thing”<sup>67</sup>, there was no clear structured alternative to counter Morrison’s spurious association of socialism with the public corporation.

Nationalisation, then, was not only a compromise between Labour and the British state; it was also an internal compromise in the Labour movement. Furthermore, the actual structure of the public corporation was accepted by both sides from different perspectives. The left accepted it as a step on the road to socialism whereas the British establishment accepted its minimal encroachment into the country’s industry and as a bold experimentation in public administration. Central to both these perspectives is the importance of accountability. Now the different definitions of this term in this context must be explored.

## THE PUBLIC CORPORATION: ACCOUNTABLE?

As was often pointed out at the time of the nationalisation the question of accountability was not a completely new one for industry; even when it was owned by private interests. However, as a member of the National Coal Board wrote, this accountability is “primarily the means by which the directors seek and the shareholders decide to accord or refuse their confidence in their directors”.<sup>68</sup> Now however the whole notion of accountability was being reconstituted: the individual enterprise was being replaced by the public corporation and the body of shareholders was now represented by Parliament. Further, this operated alongside a more “traditional” constitutional accountability to the Minister who had important new powers over the Boards. Hence ownership was not seen as an end in itself to promote accountability; further safeguards would be needed to ensure accountability. Thus, we can see the roots of the notion in public law that questions of public versus private ownership need not affect accountability, which again can be traced back to the growth of the limited liability company.<sup>69</sup> As previously mentioned Morrison sought to build on the legacy of the best practices of modern capitalism. A good summary of his view was expressed in a trade union document of the thirties: “the tendency is to secure public control and the elimination of the profit motive while keeping the actual management in the hands of a body not susceptible to party political pressure and interference”.<sup>70</sup> However there are a number of contradictions built into this model of accountability. Primarily how could ordinary people feel they have a stake in these

new industries? Moreover on what was the Board's concept of accountability based? These questions were those on which the new form of the public corporation was silent. Although the public corporation was defined as being at arm's length from Parliamentary structures one of the ways nationalisation could be portrayed as being more receptive to the public was through some form of accountability from their elected representatives. In the eyes of Vickers, a member of the National Coal Board, Parliament "represented the whole community".<sup>71</sup> This traditional notion of accountability needs to be looked at in this context.

### Parliamentary accountability

As previously mentioned the public corporations were to be autonomous from Parliament in an 'arm's length' arrangement. Thus there was no direct Parliamentary accountability in the sense that existed for Government Departments. Morrison himself explicitly recognised this and argued that direct Parliamentary control "would tend to lead to excessive caution, slowness and red tape",<sup>72</sup> although he also argued he could see the case for electricity being under direct departmental control. This underlines the view that the public corporation provided an opportunity to deliver new models of accountability moving away from those traditional elements of the British Constitution.

Yet Parliament's role was not completely eliminated and the initial way in which elected MPs could hold industries accountable was through the age-old method of a

Parliamentary Question. However strict guidelines were laid down by the Speaker to allow questions only on policy matters and not on the day-to-day administration which was solely a matter for the boards. Alongside this was the possibility of debates, which according to one backbencher at the time were “rambling” and “unfocussed”.<sup>73</sup> This lack of influence led to the pressure of some MPs to create a Select Committee, a measure that was rejected by the 1945-51 Government. Indeed Morrison argued that all the parliamentary measures as they stood “amounted to something substantial”.<sup>74</sup> The fact that these grew up alongside a supposedly new model for delivering accountability shows the absence of any clear alternative models.

However the return of the Conservatives into government in 1951 began the process of establishing a Select Committee by allowing an investigation into this possibility. Evidence in favour of establishing the Committee was given by MPs of both major parties and senior civil servants. Morrison was again opposed to this citing the possibility as “terrifying”.<sup>75</sup> He had argued consistently that such a committee would introduce “meticulous Parliamentary supervision by another route”.<sup>76</sup> Yet the Select Committee was finally established as a permanent force in 1956. This followed a false start the previous year when the Committee had refused to operate under its limited terms of reference. Again this measure was justified in terms of delivering accountability. One member of the Committee, a Labour M.P., wrote it was a “new vehicle for public accountability”. This is quite ironic given that this was precisely what the public corporation was supposed to deliver itself. He added “through the

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<sup>73</sup> Hugh Molson MP quoted in Robson (1966) at p183

committee a better relationship between the boards and Parliament has been established".<sup>77</sup> Again this committee did not intend to infringe on the autonomous nature of the board. The committee that established the Select Committee stated it had no wish to interfere with the "independence of enterprises which are and must remain fundamentally commercial in character".<sup>78</sup> This corresponded to the qualification of the administration that the committee "would not be prejudicial to the commercial efficiency of the Boards".<sup>79</sup> The very need for the establishment of this committee further illustrates the additional measures that were required to establish these industries as accountable in the constitutional sense. Certainly the initial investigations of the Committee seemed to allow direct questioning of the members of the board and produced more information, although the first reports of the Committee studied one particular nationalised undertaking rather than producing a general overview of the whole area of industries owned by the state. Thus there was no clear relationship created between industry and Parliament. What existed was a mixture of limited questioning, largely uninformed debate and scrutiny by an overworked Parliamentary committee.

A further illustration of the limits of Parliamentary accountability was that of the limits of the jurisdiction of the Public Accounts Committee. This Parliamentary body undertook a number of limited investigations into some of the nationalised undertakings. However these would only be practicable if the body was wholly dependent on finance approved by Parliament. The PAC had neither the resources nor it would seem the inclination to undertake a full audit of the industries, which in

Robson's words would have placed an "intolerable burden"<sup>80</sup> on its limited resources. Hence "the PAC's enquiries are of peripheral interest to any broad conception of the work of the nationalised industries".<sup>81</sup> All this hardly translated into a completely accountable industry at least to Parliament. However, what of the Government? Did the ministers have more coherent powers thus making the industries accountable?

### Ministerial accountability.

Chester argues that one of the things which set the post-war nationalisations apart from the earlier examples was the increased power of the minister. Nominally this was true, although the introduction of the traditional concept of ministerial accountability again contradicted the argument that the new structure of the public corporation could deliver accountability itself. Every nationalisation measure contained the power for a minister to issue general directions. However, Morrison argued that there "need not be many cases"<sup>82</sup> when they would in normal circumstances be utilised. They were thought of as powers held in reserve to strengthen co-operation and negotiation. Indeed, not one direction was issued by the Labour Government of 1945-51. The first direction was issued by the Conservative administration on the subject of transport charges. The minister had other powers including the power to appoint and remove the board. Again the power to remove the entire board was seen as a 'nuclear' option and would not be utilised in normal circumstances. Indeed the general effectiveness of these measures is questionable.

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<sup>78</sup> *ibid.*, p378.

<sup>79</sup> Chester *op. cit.* p999 examining the position of the Home Secretary in May 1951.

One member of the Select Committee likened it to “Damocles’ sword”<sup>83</sup> suspended over the industry. Generally the power of the minister was hoped to be a balance between “compulsion and persuasion”.<sup>84</sup> These powers were limited in practice when dealing with a nationalised board with a well experienced management and its own bureaucracy. As Tony Benn, a minister with considerable experience of working with nationalised industries, put it the “whole basis of the relationship has been left too vague to be effective”.<sup>85</sup> Perhaps the clearest power ministers had was that of controlling the purse strings in that their approval was needed for any reorganisation or large capital outlay. But formal powers were seldom used. Hence an informal network of contact grew up around the minister and the board. This would tend to support the view of Tony Prosser in his examination of nationalisation that in the constitutional tradition of the British state any informal agreements will lead to a reduction of accountability.<sup>86</sup>

### Other means.

If the patchwork quilt of parliamentary measures and the ‘big stick’ approach of the minister were not enough to hold the industries accountable, what other measures could have been adopted? Although the board was an independent entity it was statutorily bound to operate in the ‘public interest’. This may be vague but at the very least it should include an increased awareness of how the public perceives the new structures and if it sees them as accountable.<sup>87</sup> Again it could be argued that this would prove difficult as in the words of one board member the duties they had were

<sup>83</sup> Davies M.P. quoted in Johnson *op cit* p370

ones for “which nobody has ever before been accountable to anyone”.<sup>88</sup> But the board utilised its power to publish annual reports with increased information which was widely heralded as a change from the private sector. It is notable that more information flow was gained here than by the cumbersome procedure of parliamentary questioning or by ministerial intervention. Yet obviously the content of that information was determined by the board and not some outside body.<sup>89</sup> Morrison saw these reports as very important together with other “public relations”<sup>90</sup> measures such as market research exercises. Robson felt that such information flows would be improved if they were subject to an external efficiency audit, not ‘efficiency’ in being held financially accountable but efficient as regards the use of its resources to carry out its tasks.<sup>91</sup> Thus the industries felt that releasing information within their annual reports provided an opportunity to show they were prepared to be held accountable to the public. But it should be remembered that there were no means of auditing the corporations as this was outside the powers of the Comptroller and Auditor General.

Another measure which could be used to judge the public’s perception of accountability was the effect of the complaints machinery put in place by nationalisation; how did the consumers raise their grievances with the industry. For the most part the industries were public utilities hence the consumers’ view was seen as vital as they had no choice of supplier. Perhaps for this reason Consumers’ Councils were also created in the nationalised undertakings. Their success was to be

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<sup>86</sup> Prosser (1986). Chap 2.

<sup>87</sup> See discussion in Chapter 1.

<sup>88</sup> Vickers *op. cit.*, p73.

<sup>89</sup> With the clear exception of the Auditors

judged in Morrison's view -and in quite archaic language- that "every housewife...should know how she can make her complaints".<sup>92</sup> The form of the consumer council varied between industries: in iron and steel there was one national council whereas the electricity industry had fifteen local areas. Yet the criticisms of them were of a similar nature. They were not seen as independent of the industries but as "stooges"<sup>93</sup> as one commentator put it. Furthermore they were not widely known about by the general public thus failing Morrison's dated "housewife" test.<sup>94</sup>

It can be seen that there was a general agreement at the time of nationalisation on the need to increase public accountability. The independent public corporation was not seen as enough in itself; further safeguards were needed. However, the opportunity to use this new experiment to promote new institutional models for delivering accountability was lost. Instead accountability was to be delivered by parliamentary measures, ministerial powers, information flow and consumer complaints machinery. It could be argued that these different sources of accountability together amounted to a great deal, and more than was present in the private sector and in other countries which had adopted public ownership. This was Robson's position.<sup>95</sup> However the problem of each of these exercises in accountability has been demonstrated and one could argue that this spreading of accountability makes it more diffuse, as there was no clear statement on what accountability was to mean. This could have explained the relationship of the board to the rest of the community or indeed the minister. The notion of the independent board allowed the workforce to feel a distance from it - it

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was not 'their' industry and this was not compensated by any additional structures to provide a link with the workforce and the industry. The existence of the consumer councils which so clearly failed the consumer increased the consumer's scepticism of the 'accountable' nationalised industry. Thus the overwhelming contradiction of the public corporation plan was that accountability was everywhere in words but nowhere in action. This can be further emphasised by examining how the industries operated in practice until the advent of the first Thatcher administration.

### **IN PRACTICE : THE NATIONALISED INDUSTRY.**

Clearly Labour's landslide post-war victory raised expectations amongst many people, not least of its plans for nationalisation. The structures created Morrison's visions of boards that would operate in the 'public interest'. As has been explored above the Fabian distinction between the administration of an industry and the policy of a Government when translated directly into the British constitutional structure resulted in a collection of disparate relationships. There was no clear settlement as to the relationship of the state with industry. In the absence of such a settlement the space was largely filled with informal contacts.

A further failure of the Government was not to allow the industries to become part of a broader economic plan. The intention may have been there but the autonomy of the boards seemed to contradict any use of the industries in macro-economic policy. In 1949 the Attorney-General gave an opinion that government could not direct the

board of a nationalised industry in possible breach of its statutory obligation to break even.<sup>96</sup> This was further supported by the legal opinion in Tamlin v Hannaford<sup>97</sup> that stated “in the eyes of the law the corporation is its own master”. This concerned the particular case of Crown liability yet in a sense reflects the arcane way that members of the legal establishment viewed new developments in the state. They preferred to classify it in terms of an older era that was more clearly understood by lawyers.

The contradictions of the rhetoric of Labour's nationalisation programme as opposed to the reality were clear. This can be explained by using the definition of accountability and its vagueness as regards the public corporation,<sup>98</sup> or examining the constitutional forms adopted and why they proved difficult to apply in practice. This meant that the nationalisation measures adopted in the 45-51 administration were not likely to be expanded to include new industries. This was an about-turn from the high point of 1945 when public ownership was immensely popular. In 1951 Labour leaders were almost scared to utter the word ‘nationalisation’. This is confirmed by politicians’ own recollection of the 1951 campaign<sup>99</sup> and statistical information. For example in a psephologists guide to that election<sup>100</sup> the number of Labour candidates who mentioned nationalisation was 20% down from 56% in the 1950 election. This can be explained in part by the processes outlined above of the strengthening of the board's autonomy and the absence of open access to information or other means of accountability.

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<sup>96</sup> Foster (1992), p79.

Other factors include the lack of change in personnel in the management of the industries. The National Coal Board was chaired by Lord Hyndley - a private pit owner. As far as board members drawn from the trade unions went, in 1951 9 out of 47 full time and 7 out of 48 part time members came from the unions. Five boards had no union representation at all.<sup>101</sup> This came on top of large compensation payments which crippled the finances of a section of the industries as they were liable to repay the debts regardless of their own performance. In Miliband's words the effect was to "saddle the nationalised industries with a burden of debt which materially contributed to difficulties that were later ascribed to the immanent character of public ownership".<sup>102</sup>

Moreover the industries chosen for public ownership were in the parlance of the time "Great Foundation Industries". More cynically as one socialist commentator put it, "capitalism's derelict industries".<sup>103</sup> As *The Economist* said, the scope of nationalisation was "almost the least it could do without violating its election pledges".<sup>104</sup> This was significant as it allowed the Conservative Party to make 'socialism' synonymous with inefficiency; a claim later repeated by Thatcher. Any attempt to nationalise profitable sectors of manufacturing industry were fiercely resisted. The proposed plan to nationalise the sugar industry was met by a huge advertising campaign of opposition funded by Aims of Industry. These problems at the birth of post-war public ownership are significant because, alongside the important questions of accountability, they laid the basis for alienation from nationalised

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<sup>100</sup> Butler/Pinto-Duschinsky(1971).

industry. This allowed politicians of the left and right to claim nationalisation was unpopular hence preventing any serious extension of public ownership and allowing privatisation to take hold.

This is not to say that nationalised industries remained static from the mid-forties until their transfer to the private sector. Indeed, according to Foster, during the sixties it appeared that ministerial power rather than being minimal was reaching new levels. Yet this was set in the context of the industries themselves setting the agenda. This followed the publication of two white papers dealing with the nationalised industries in 1961 and 1967 both of which sought to put the industries on a sound commercial basis. However such attempts foundered partly because of the state's 'stop-go' attitude towards investment during this period, but also because of deeper structural faults; as Prosser points out: "by giving an appearance of economic rationality ... they drew attention away from the means of government intervention which they did not cover".<sup>105</sup> Thus, although there were attempts to redefine economic criteria for the industries<sup>106</sup> there was still no attempt to examine the structures as they related to the state or indeed its workforce, although there was an attempt by the Select Committee of Nationalised Industry under Mikardo to carry out an across-the-board study of the relationship between the Minister and the Industries.<sup>107</sup> This wanted to create a Ministry for Nationalised Industries with less emphasis on the 'arm's length' relationship. The Minister should have the power to issue specific directions that would allow him to have a greater input into the running of the board. However the

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<sup>104</sup> *ibid.* p55.

Committee did also want to prevent overt 'politicisation' of the relationship and wanted to utilise new econometric techniques to improve the economic efficiency of the industries. In a study of the Report one academic saw it as a return to the "Webbsian specifics of 'measurement and publicity'".<sup>108</sup> Once again questions of accountability arose because the structures adopted by the public corporation were deficient in creating accountability.

Another partial remedy to the structural malaise of the industries was raised in the NEDO document of 1976 which argued for a more participatory approach to management. Each board would be supervised by a policy council; similar again to the Webbs' early design, which would represent all 'interested' parties in the industry. These would set clearer objectives than existed under the 'arms length' relationship with the ministers. This met a response in a Government White Paper<sup>109</sup> which rejected any institutional reform. It relied more on the increased use of corporate plans and more financial controls to be used with the introduction of External Finance Limits(EFL). Thus once again there was no re-examination of the flawed institutional relationship which prevented a satisfactory definition of accountability being realised.

Further, this relatively radical plan by the NEDO coincided with the IMF crisis in Britain which heralded the limiting of public expenditure and the birth of a tight monetary policy. The re-alignment of the right in the Conservative Party with the Chicago School of economists from America created a new school of thought toward

the structures of public ownership.<sup>110</sup> The Morrisonian model of 'socialised industry' was soon to receive a severe shock.

## CONCLUSION.

Before examining privatisation and deregulation, what can public lawyers ~~have~~ learned ~~from~~ the experiment with public ownership carried out in Britain in the forties? Holding the state to account is a central premise of most systems of public law. In the experience of the growth of public corporations, no radical new approach to accountability was offered in contradiction to the radical philosophy of some of their architects. Instead there seemed to be a reliance on old types of accountability - parliamentary structures, ministerial discretion etc. For what amounted to quite a radical restructuring of the British state there seemed to be quite a conservatism over such questions. This can be partially explained as the result of the absence of public lawyers from the design of the new industries. As explained the Diceyan notion of the constitution precluded a close involvement with new institutional design. Those public lawyers who did involve themselves were strong supporters of the public corporation form. For modern public lawyers there is a tendency to distance themselves from the Robson approach of support for the new forms of government whilst equally rejecting the thought of Dicey. Yet it is important not to throw the baby out with the bathwater. The notion of public accountability is central to public ownership, but what is critical is the type of accountability seen as important. In the Introduction it was pointed out that one aspect of accountability that was neglected by the Morrisonian model was how the public would perceive the new institutions. This

absence broke the link with the public and as a consequence broke the link between accountability and public ownership. So one consequence of the nationalisation experiments of the forties was to squander the chance to build a new model of accountability with a structure to achieve this. That ownership and accountability were not closely linked can be explained by the particular institutional structures adopted. The reliance on the 'independence' of the board of the public corporation proved a barrier to effective accountability with the general public. Moreover the constitutional tradition in Britain of accountability through Parliament and Government ministers proved incapable of coping with these new structures without utilising its own traditional methods. These points will be fully explored and justified when the particular case of transport is studied. Before that is done there must be a general overview of the privatisation and deregulation process to see if it was more effective in dealing with questions of accountability.

## CHAPTER THREE.

**“The golden rule about privatising is always to give people greater advantage than they previously enjoyed”.**

Madsen Pirie, 1988.<sup>1</sup>

The experience of public ownership in Britain clearly leaves a lot to be desired. The structure of the public corporations did not allow for openness. Moreover although the new structure was believed by its creators to be more accountable to the public following the example of the joint stock company this did not prove to be the case. Some possible reasons for this were outlined in the introduction and the previous chapter; one of the problems was the vagueness over how accountability was to be delivered. This allowed a large degree of alienation to develop between nationalised industries and the public, a trend which was skilfully exploited by Thatcherism, as shall be shown. In this chapter the success of the privatisation programme in addressing these issues of accountability will be judged. Firstly the roots of privatisation will be examined: how it began and developed. Then how far the quest for achieving more accountability was realised will be assessed. Clearly, if accountability is simply measured in comparison with the nationalised sector then this

standard will be quite low. Also as shall be shown the type of accountability which was seen as important differed sharply from the competing models used in the forties.

The role of public lawyers in this process will then be assessed, as it was largely in the eighties that public lawyers turned their attention to the question of privatisation and nationalisation as subjects vital for administrative law. In general these questions of accountability have merged into examinations of the regulatory structures set up in the wake of the privatisation of the utilities which will also be examined. The chapter will then conclude with an examination of how these questions will lead into the empirical study of bus deregulation and rail privatisation.

It will be argued here that questions of accountability within the British state which were distorted by the peculiar experience of the public corporation were not solved by the privatisation process. Moreover, although the general lack of openness experienced under nationalisation could be exploited by the prophets of privatisation, the ensuing regulatory confusion did not initially provide an overall improvement on the previous situation. It will be argued that this is due again to the questions of ownership which were turned on their heads by Thatcherism. Thus the peculiar experience of accountability under the Morrisonian institutions was portrayed as inevitable if the state was involved through public ownership. Also it will be suggested that some public law academics have been affected by this general process to down play notions of ownership as central and place more faith in new regulatory structures. These new structures will be judged by their changing role in the nineties

## **THE ORIGINS OF PRIVATISATION.**

For many privatisation remains one of the greatest achievements of the eighties. In the many political obituaries written for Lady Thatcher after her political demise in 1990 her role in changing the way the state intervened in the economy was seen as her most lasting memorial. One writer claimed the process was “likely ... to make the Thatcher years historic rather than historical”.<sup>2</sup> A further academic study stated “The privatisation programme was, in its scale, a revolution”.<sup>3</sup> Supporters of privatisation like Michael Beesley and Madsen Pirie were invited all around the world to promote their ideas. This international wave increased after the 1989 revolts in Eastern Europe and Russia where governments were returned committed to diminishing the role of the state in the economy. In the developing world the international financial institutions made privatisation a central part of the Structural Adjustment Programmes in certain countries. For example between 1988-92 25 developing countries undertook privatisations worth \$61bn.<sup>4</sup> However the use of privatisation as a generic term creates more problems than is first realised. Certainly the British experience has unique features and is probably more advanced than any other Western European country. In a Parliamentary Answer in 1992 it was revealed that the government had disposed of £41.5 bn of state assets since 1979. But as shall be shown below the notion of privatisation having a uniform character within Britain is untrue.

However, the origins of the privatisation programme could be said to follow the British constitutional tradition in that it was developed on a largely ad hoc basis. That is, in the early days of Thatcherism there was no grand detailed plan unveiled that pointed the way over the next decade. The manifestos of the first two Thatcher administrations made scant mention of their 'Jewel in the Crown'.<sup>5</sup> Indeed the large-scale debates on the nature of nationalisation in the labour movement had no such equivalent in the Conservative Party. This was apparent when a list of proposed privatisations was published in 1983 yet there was "nothing to indicate the role which privatisation would come to play in the second phase of Thatcherism".<sup>6</sup>

In a forthright three chapters of his political biography Nigel Lawson<sup>7</sup> rejects the notion that the policy was improvised or to use an academic's words "stumbled upon".<sup>8</sup> Rather he claims that the proponents of this programme were silenced to prevent alienating 'floating voters'. However Lawson's biography illustrates the chaotic way in which each sell-off proceeded. This seems to suggest that the programme was inchoate at this time and amounted only to the general idea of transferring ownership of the nationalised industries into the private sector.

Certainly the intellectual basis for this can be easily established in the Conservative Party of the seventies. During this period the right wing was strengthened. Keith Joseph, Thatcher's self-confessed "mentor"<sup>9</sup> presented a series of published lectures

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<sup>4</sup> See Financial Times, 20th June 1994.

<sup>5</sup> A term first used in Riddell (1991) but utilised by Lawson (1992) in his biography.

<sup>6</sup> Jenkins (1987) p173

defining the “humanity of capitalism”.<sup>10</sup> His phrase “too much socialism”<sup>11</sup> could be seen as a summation of his arguments. His work at this time, although short of specifics, had a central theme. He had served as a minister in the Heath Administration and he felt his hands had been tied by the public sector that completely dominated the British economy. Further, this sector was the reason for the national decline of Britain. Thus a ‘new consensus’ was needed. In line with this radical reversal he linked his own conversion: “I have only recently become a Conservative”.<sup>12</sup>

These ideas were not solely Joseph’s. They were heavily influenced by Alfred Sherman, an economist and director of the Centre for Policy Studies, who helped draft some of the series of speeches. Forceful arguments were put against public ownership and in defence of the ‘free’ market which, to be truly liberated, needed to remove the burden of public enterprise. This was new thinking for the Conservatives who had generally supported the nationalised industries during their period of government since the Second World War.<sup>13</sup> As argued in the previous chapter even during the legislative passage of the nationalisation bills the Conservatives’ opposition was largely rhetorical, with the general exception of the attempt to take the profitable iron and steel industry into public ownership in 1949. Facing Joseph’s general derision the ‘old’ Conservative Party had found it impractical to “reverse the vast bulk of the accumulating detritus of socialism”.<sup>14</sup> Thus one of the roots of the privatisation

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<sup>10</sup> See Joseph (1975) and (1976).

<sup>11</sup> Joseph (1975) *op. cit.*, at p6.

<sup>12</sup> Quoted in his obituary. Financial Times 12th December 1994.

programme can be found in this intellectual dismantling of the post-war structure of the British state.

This is where there is a significant interface with some trends in public law at that time. For Joseph's expression of this ideology reflected a malaise within the ruling elite in the seventies that found another outlet in constitutional writings. For example during the seventies a number of works from the conservative tradition were published which questioned the constitutional make-up of the British state.<sup>15</sup> In many ways these works revisited the period of Dicey with his works' criticism of the modern state. Hailsham warned of "elective dictatorship"<sup>16</sup> similar to Hewart's "New Despotism".<sup>17</sup> Nevil Johnson, another who published a critique of the British Constitution in the seventies, was also a close follower of Dicey as shall be explored later.<sup>18</sup>

This use of public law will be examined more closely when the question of public law academics assessing privatisation is looked at. Yet its significance here can be seen as placing the intellectual roots of privatisation within a general discourse of the restructuring of the state at least amongst a small section of public law academics. However there were other rationales resting on economic grounds. In Lawson's glib phrase there needed to be a "restoration of the market"<sup>19</sup> within the British state. That is to say privatisation would bring back the more natural arrangement of economic behaviour which had been distorted by the intervention of the public sector. This led

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<sup>15</sup> For Example, Johnson (1977) and Hailsham (1978).

to imbalances and inefficiencies that the 'market' would not tolerate. Yet both this desire for 'efficiency' and the wish to restructure the state could not envisage the rapid changes of the Thatcher administration and the momentum which would gather behind the process of privatisation.

## **IN PRACTICE: PRIVATISATION.**

After the 1979 election the state's relationship with industry was clearly going to be different. However the vague nature of the plans and the secrecy which surrounded their development<sup>20</sup> prevented any full discussion of the proposals. An example of this was the leaked Ridley report in the seventies, which along with analysing a future confrontation with the miners<sup>21</sup> considered the possibility of privatisation in the vaguest possible terms though removing the state's role in a limited number of economic areas.<sup>22</sup> Instead the programme began in a haphazard manner; dealing mainly with industries operating in a competitive environment. In the words of one expert commentator on privatisation the sales of this first period were "essentially peripheral to the public sector".<sup>23</sup>

Arguably this is where lessons were learned for the larger scale utility sell-offs. There was experimentation between fixed price share offers and tendering. The success rate of these privatisations was by no means uniform. For example, the Amersham

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<sup>19</sup> Lawson(1988), p9.

<sup>20</sup> In the period 1979-81 Lawson mentions three distinct committees which considered the question of nationalisation versus privatisation, p205.

International offer was 24 times oversubscribed because of a major underpricing of the share whereas Britoil was massively undersubscribed. Other sales of this period included the management buy-out of the National Freight Corporation, a trade sale of shares in ICL and a disposal of 5% of the assets in B.P. Yet, this was small beer. The revenue raised by privatisation from 1979-83 was 4% of the total raised from 1983-92.

This situation changed, however, when attention turned to the public utilities. This began with the disposal of British Telecom in 1984. Ostensibly this was to allow the industry funds to invest in developments in telecommunications, which were speeding up at this time. The sale was carried out by an offer to the public to invest. 2.3 million applications were received and it raised £3.9 bn. This total was 7 times greater than any other sale up until that point.<sup>24</sup> Although not a utility, the T.S.B, during 1986, was sold even though it was held in court that the question of ownership was extremely complex and the benefits of privatisation should not all pass to the Government.<sup>25</sup> This was followed by the disposal of British Gas which again was a “people’s share issue”<sup>26</sup> this time receiving 4.6 million applications.

The process continued through 1987 the year of the Conservatives’ third consecutive electoral victory. British Airways, Rolls Royce and the British Airports Authority were all sold. One of BP’s sell-offs coincided with the October crash of the world’s stock markets resulting in a massive underwriting of the sale. The immediate

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<sup>23</sup> Kay (1987), p12.

afterglow of the 1987 victory seemed to represent the zenith of the Thatcher era and almost all public sector industry was earmarked for privatisation. This period was when the privatisation of the rail network was seriously considered for the first time.<sup>27</sup> Further the sale of previously untouchable public services were carried out with the water industry in 1989 and the electricity companies during 1990. Thus in the period 1983-92 nearly all the utilities were disposed of by Government. Alongside these particular privatisations there was also a strong deregulatory ethic which resulted in the partial deregulation of the financial services industry and the almost complete deregulation of bus services.<sup>28</sup> But what was the impetus behind it?

There is no officially sanctioned reason available as there has never been a government statement on privatisation.<sup>29</sup> One explanation is that of increasing the accountability of the industries to the public in general.<sup>30</sup> This is the test adopted in this work to examine the structures both of privatisation and nationalisation. As has been shown the experiment in the form of the public corporation did not increase accountability or the public perception of it. But other explanations have been offered as an alternative or an addition to this. These, too, should also be briefly examined. One of the most common accounts of the programme is that it was done to improve faltering Government finances by reducing the PSBR. Indeed during 1986-87 the PSBR halved as a result of privatisation.

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<sup>27</sup> See Chapter 6

There is support for this argument in the problems that arose after the sales over questions of accountability and regulation. Here it seems that these issues were not studied fully before the sales were carried out. Thus this would seem to support the idea that the “desire to maximise returns to the Exchequer from disposals of public enterprises has consistently outweighed issues of competition and efficiency in the design of specific privatisation projects”.<sup>31</sup> Indeed Nigel Lawson argues “[it was] important to privatise as much as possible as quickly as possible”.<sup>32</sup> He quotes Pliatsky approvingly who claimed: “The prime motives for privatisation were not Exchequer gain but an ideological belief in free markets”.<sup>33</sup> However in practice the lack of thought over regulatory structures and the introduction of competition after privatisation suggests that the hastiness was due to a desire to gain financial advantage. As an argument the inherent superiority of the free market has much in common with Norman Lewis’ linking of the arrangement of the state, freedom and the market as shall be illustrated later. Here another parallel can be drawn with the nationalisation programme, that is an absence of coherent institutional design for the post-privatisation environment. This has implications for the questions of public accountability, as shall be examined, below. Furthermore, the question of reducing the PSBR appears again during the process of rail privatisation and specifically the privatisation of Railtrack.

Even if this rationale is put to one side what of the ‘efficiency’ argument? That is that the privatisation process was linked with the revival of industry: making it more efficient. Indeed an early defence of the process of privatisation by a Government

minister concluded "If competition cannot be achieved, an historic opportunity will be lost".<sup>34</sup> However the haste with which the sell-offs were completed, as suggested by Lawson did not allow for these new competitive markets to be completed or at least not initially.

If the field of telecommunications is taken as an example a chance for immediate complete liberalisation was lost with the controlled entry of Mercury into the market: creating a 'cosy' duopoly. However, the process has speeded up considerably in the nineties. Following the Government's 'duopoly' review of 1991 British Telecom was prevented from delivering entertainment services until 2001. This has allowed cable services to make a substantial inroad into the delivery of phone services as part of an overall entertainment package. These companies have attempted to buy into local markets<sup>35</sup> and even the American telecoms giant AT&T has taken a stake in smaller telecommunications companies.<sup>36</sup> Significantly cable operators now have more subscribers for their phone services rather than their television channels. Britain has now become the general model for the rest of the European Union's liberalisation programme: almost the whole of the European network was liberalised in 1998.

This process is again seen if we examine the gas industry. In the eyes of the advocates of increased competition the 1986 disposal of British Gas was seen as the

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<sup>32</sup> Lawson(1992), p239.

<sup>33</sup> Pliatsky (1991), p .

<sup>34</sup> Moore (1983), n13.

nadir of the whole privatisation programme.<sup>37</sup> In Christopher Foster's words it was the "least satisfactory"<sup>38</sup> privatisation. For it was transferred to the private sector wholesale - keeping its monopoly of supply and transmission. None of the problems of nationalisation were solved and the consumer remained at the mercy of a large vertically integrated corporation. Thus, the lack of competition negated the positive effects of introducing gas to the rigours of the private sector. But this situation did not remain static indeed British Gas's size and monopoly position caused tensions between the industry and its statutory regulator, Ofgas. In the words of the Financial Times this led to a "decade of bitter conflict".<sup>39</sup> Competition was introduced in a protracted fashion. This illustrates how difficult it is for Central Government simply to end political intervention in previously nationalised industries, although this is often cited as another rationale for privatisation.

There were two monopoly inquiries in 1988 looking at the industrial market and 1992 that examined the domestic monopoly. Competition was first seen among industrial users using more than 25,000 therms a year.<sup>40</sup> In 1996 in this area British Gas's share of this market has fallen to 35%. The process of competition in the much larger domestic market was hastened by the Gas Act in 1995. This forced the corporation to separate its transmission arm from its supply. Its intention was for full competition to exist for domestic users by 1998. This complete liberalisation was to be preceded by competition being adopted in trial areas. Thus, in April 1996, competition was introduced in SouthWest England among 500,000 consumers. As there is only one

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<sup>37</sup> At least prior to 1992.

network for the transmission of Gas - operated by the new arm of British Gas Transco - suppliers have to have access, which they are charged for. In this area a number of different companies tried to establish themselves with 'hard' selling techniques in the area. The local Electricity Company, SWEB, claimed up to 60,000 consumers would register with them for gas supply. This raised the vision of a 'super-utility' developing, a process also illustrated by the spate of mergers and take-overs in the utility sector in the mid-nineties.

The travails of the gas industry are significant because they seem to explore all the tensions that exist within the whole privatisation programme. Indeed, following a hefty pay increase for the Chairman of British Gas which ignited significant public anger and caused an inquiry into executive pay the corporation came to symbolise the excesses of privatisation. During the eighties the transfer of monopolies from the public to the private sector was criticised by ardent advocates of competition. Yet, at the time, Government seemed to support it: "we firmly believe that where competition is impractical privatisation policies have now been developed to such an extent that regulation of private natural monopolies is preferable to nationalisation".<sup>41</sup>

The 'efficiency' justification for privatisation, then, is not simply a question of introducing competition. In the case of gas and telecommunications this has been a long and laboured process involving the industry, its regulator and central government. Efficiency improvements come about through new regulatory structures

that are more effective in policing these industries than the structure of the public corporation. This brings the debate back to the *leit-motif* of accountability. Before the effectiveness of new structures of regulation is examined it is worthwhile to note a tension here between different rationales of privatisation.

One commentator has claimed that the tension between complete liberalisation and a policed privatisation with new regulators is not a conflict but a “rout”.<sup>42</sup> That is the idea of ex-nationalised industries competing in a completely free market place with minimal government involvement is completely unrealised. In an extension of the argument: “Denationalisation now appears to take precedence over or even to be carried out at the expense of, the promotion of competition”.<sup>43</sup> Thus the significance of transferring ownership is according to these commentators much greater than that of introducing competition.<sup>44</sup> Government, to them, is more interested in gaining a quick fix of funds to pacify the Exchequer and solve the problem of the PSBR,<sup>45</sup> albeit temporarily. As a result the new regulatory structures were not clearly thought out and the benefits of privatisation were lost. As has been shown, this has been disputed sharply by the leading protagonists. This debate may have moved on a little particularly in the mid-nineties with the further liberalisation in the electricity and gas industries. But the length of time it took to develop these processes and now the growth of ‘mega- utilities’ which compete in many different sectors illustrate the point on the lack of a clear rationale for the regulators. That is they tend to react to events and have pursued contradictory objectives at different paces.

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<sup>42</sup> Introduction in Kay, Mayer and Thompson *op. cit.*, p29.

A useful counter point to the contradiction of privatising sections of the state whilst maintaining regulatory structures<sup>46</sup> is the deregulation project carried out in the United States under Carter and Reagan. America, having no significant history of state ownership, decided instead to cut back its powerful regulatory agencies. Yet the Thatcher administration with its privatisation of the utilities and the **creation** of new regulators seemed to adopt a different emphasis. This seems puzzling given the ideological links between the two administrations. However Sir Christopher Foster claims that this apparent paradox does not exist in reality. Thus although “because of the vagueness and incoherence of nationalisation”<sup>47</sup> the British privatisation programme looked less like deregulation, deregulation in fact occurred. This argument is expanded by two of the architects of privatisation: “U.S. regulation embodies a philosophy similar to nationalisation with similar effects”.<sup>48</sup> This may be true but the creation of new regulatory agencies remained a fact, with the partial exception of the ‘deregulated’ bus industry as shall be fully explored in later chapters. Even the financial services industry that was so central to the programme of Thatcherism has a number of boards which regulate their members alongside the statutory role of the Securities and Investment Board.<sup>49</sup> Thus the existence of the regulators alters the nature of privatisation in Britain. They can be used as a vehicle of intervention in the ‘privatised’ industry whether to protect the consumer or to introduce competition. So, the privatisation programme although sharing an

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<sup>45</sup> With a degree of prescience given the increase of the PSBR in the nineties Heald and Steel, *ibid.*, claimed the gains could be negated by “the possible loss of future income”, p7.

<sup>46</sup> Albeit unsatisfactory.

intellectual credo with deregulation created a complex hybrid of liberalisation and denationalisation. How accountable are the new arrangements?

## **PRIVATISATION: ACCOUNTABLE?**

As was suggested in the preceding chapters accountability can be disparate in nature; it is often spread between different institutions which weakens its overall effectiveness. Moreover, each institution can have its own sometimes contradictory model of accountability. This was clearly the case in the public corporation but similar trends can be discerned in privatisation. It is critically important that the definition one gives to accountability and the model one sees as most important is made clear. During the first privatisations of the utilities much was made of a new 'people's capitalism' - this involved a new concept of accountability in this context: to the shareholder. But as mentioned above one of the new roles of the regulator was to hold the industries to account in certain areas. Thus initially we find two distinct types of accountability. Both of these should be examined to see whether they complement or contradict each other and whether they are an improvement on the public ownership experience.

### **The accountability of "people's capitalism".**

The notion of 'popular capitalism' came to the fore during the disposal of the utilities by public sales. Nigel Lawson, with characteristic modesty, claims to have invented the phrase following the privatisation of British Telecom: "We are seeing the birth of

people's capitalism".<sup>50</sup> Furthermore, he stood this in the Conservative tradition traced back to Anthony Eden of creating a 'property owning democracy' only this time expanded to industry. It created "a society with an in-built resistance to revolutionary change".<sup>51</sup> Such high-faulting claims are matched with a perceived demographic change. In 1979 there were 2.5 million individual shareholders (4.5% of the population) by 1992 this had increased to 11 million (25%).<sup>52</sup> The creation of a share-owning democracy with the Conservative Party permanently in power was seen as a realisable notion. The 1987 Conservative Manifesto said a widening of share ownership let people "feel part of the system by which wealth is created".<sup>53</sup> This can be seen as a Schumpeterian notion: that is giving the working class a material interest in capitalism. Moore labelled the process an 'extraordinary' success<sup>54</sup> whilst many in right wing think tanks thought its political impact to be irreversible.<sup>55</sup>

These exaggerated claims have been strongly tested by recent studies of share-ownership. The Saunders/Harris study shows that share ownership is "wide but shallow",<sup>56</sup> and 10 million <sup>individuals</sup> only own shares in one or two companies. Many relinquish their shares only after a few years. Further the trend in share ownership is to the increased dominance of institutions. In Britain this is primarily true because of the growth of the pension funds. This has led to a diminution of individual shareholders; <sup>in the numbers</sup>

<sup>50</sup> Lawson (1992) *op. cit.*, p224.

<sup>51</sup> Lawson *ibid.*, p206.

<sup>52</sup> Saunders/Harris *op. cit.*, p4.

<sup>53</sup> Quoted at *ibid.*, p26.

<sup>54</sup> Moore *op. cit.* p95

in 1957 66% of shares on the Stock Exchange were owned by individuals whereas now it stands at 20.2%.<sup>57</sup>

This lack of actual influence within the structures of the privatised industries is also accompanied by only a limited change in societal attitudes. The conclusion of Saunders/Harris state “the sociological effects of this programme has been muted”.<sup>58</sup> In contrast to the claims made during the eighties they say the belief that privatisation had fundamentally altered society was “much ado about nothing”.<sup>59</sup> In support for this they cite the annual survey of British Attitudes which appear to have actually moved to the left during the period of mass privatisations. It will be shown below when rail privatisation is studied that these attitudes were important in the perception of that particular privatisation and the model that was adopted. This more sober assessment of privatisation’s success in altering society is generally supported by Sir Christopher Foster. “It altered the political structure to the point where that alteration contributed to Conservative victories in several general elections”.<sup>60</sup> This is the sole extent to which he believes privatisation altered the British polity. The Economist in its usually frank language perhaps best summarises the changed attitude towards ‘popular capitalism’: “A share-owning democracy is a neat political phrase- but the market tells against it”.<sup>61</sup>

These examples are significant when the question of accountability is examined. A central tenet of privatisation was that being accountable to an identifiable group of

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<sup>57</sup> *ibid.*, p3.

shareholders was preferable to a more amorphous accountability to an unidentifiable 'public'. Again the vague way in which accountability was initially characterised for the public corporation is shown here. Although the public corporation attempted to mimic the accountability of the joint stock company it was never made clear how the board was to be directly accountable to the public.<sup>62</sup> Lawson talked of a sense of "real ownership" following privatisation where shareholders followed the price of their shares in the newspaper, received regular information from the company and attended the AGM.<sup>63</sup> Thus the ability of the shareholders to hold their board to account would be an improvement on the indirect control a member of the public could exert through their MP. The zeitgeist of the times was that of the 'Sid' generation<sup>64</sup> controlling these industries.

If we set aside the statistical evidence of the limited weight of the individual shareholder this view of accountability still raises problems. These are due to the conflict between the shareholder and the consumer. A parallel can again be drawn with public ownership where there was a claim that a conflict existed between the workforce and the consumers in the nationalised industries. But is it inevitable that the consumer is penalised at the expense of the shareholder or vice versa? Clearly one of the regulator's roles is to prevent this happening as shall be shown below. Yet the notion of 'popular capitalism' cannot be easily squared with accountability to the consumer. Is it fair in a utility to have accountability to be defined by reference to the

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<sup>61</sup> The Economist 6th Nov 1993

‘minority’ –the shareholders – rather than the general population which uses the service?

An example to illustrate this can again be drawn from the gas industry. In a recent ruling the gas regulator outlined tough new price controls on the transmission arm of British Gas Transco. This would involve the prices charged to gas suppliers being cut by 20-28%. The charges make up 43% of an average gas bill thus any limit would clearly benefit the average gas user. However, this affects the profitability of the industry, which directly affects the shareholder. In the words of the Financial Times it was a “very black day for 1.7 million Sids”.<sup>65</sup> Yet even this view is a little dated as the Chief Executive of British Gas, Richard Giordano, recently stated his desire to “ease Aunt Maud out ...without any pain”.<sup>66</sup> This means, to remove any remaining small shareholders.

So, even if the notion of shareholders having power to hold privatised companies to account is accepted this is an accountability of the few. Yet even within this limited vision of accountability what power do disparate shareholders have against the organised force of institutions? Any potential shareholder revolt<sup>67</sup> can be easily thwarted by the sheer size of the institutions. There is a current argument that the dominance of pension and insurance funds in the ownership of shares<sup>68</sup> means that indirectly the British people do own these industries.<sup>69</sup> This again is spurious given both the limited control that ordinary people have over their pension and insurance

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<sup>65</sup> Financial Times, 14th May 1996.

funds, and thus the control which these bodies do exercise is normally to support the boards of the industry. In total, this is an *extremely* indirect form of control.

If then accountability by owning shares is seen as bogus can enhanced accountability through privatisation be provided by the new regulatory structures? Will this be an improvement on the structures of the nationalised industries?

### Accountability and the new Regulators.

If it is accepted that the privatisation programme took an idiosyncratic route in its creation then the same can be said for the regulatory agencies that came into being to monitor each utility. Once more there was no one definitive statement as to the rationale for the regulators. In its absence, different rationales were used to define the regulators. Arguably the administration leant on different meanings at different times. The nearest thing to a written account in the early eighties came with two relatively short documents written by Stephen Littlechild<sup>70</sup> proposing regulatory structures for the telecom and water industry.

The essence of Littlechild's thought in his study of the proposals for British Telecom at this time was that regulation should act in a non-competitive environment. "Regulation is essentially a means of preventing the worst excesses of monopoly; it is not a substitute for competition. It is a means of 'holding the fort' until competition arrives".<sup>71</sup> There are difficulties with this 'second-best' approach utilised at this time

for it did not allow a full exploration of the regulatory agencies' role. In the context of telecommunications one of the regulator's major roles was to prepare the ground for competition. This approach altered when Littlechild examined the water industry. As the potential for competition here was extremely limited the regulator was to take on more of a permanent nature. "That makes it all the more important to 'get the regulation right'".<sup>72</sup> Littlechild's approach rests on the idea that regulators must act in an area where there is only limited competition. This role may be temporary or permanent depending on the environment of the industry. Yet over a decade later the regulator of telecommunications (OFTEL) looks no less permanent than the water regulator (OFWAT) nor the other regulators in the electricity and gas industry, not to mention the extremely detailed structure of regulation which has been created for the rail network. It is little wonder that a leading economist said that the "unfinished business" of designing regulatory agencies "will be a major part of the political agenda of the nineties".<sup>73</sup>

Where does this leave the question of accountability? What linked Littlechild's two concepts of regulation was the notion that the "primary purpose of regulation is to protect the consumer".<sup>74</sup> Indeed Littlechild writing with another early proponent of privatisation proposed that the basic criterion<sup>75</sup> should be a net aggregate gain to the consumer.<sup>76</sup> The model of regulation would not mimic U.S regulators and attack profits but would rather put controls on prices. They would be allowed to rise by an

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<sup>72</sup> Littlechild (1987) at p5.

<sup>73</sup> Kay in IEA (1995) at p58.

<sup>74</sup> Littlechild (1983) *op. cit.* at p6

amount relative to the rate of inflation set by the regulator; the so-called RPI-X formula. Littlechild argued that this approach was simpler, cheaper and less interventionist than 'rate of return' regulation. It would also introduce stability into an industry's plans. Inherent in this approach to regulation was the fear of 'regulatory capture'<sup>77</sup> again similar to the American situation. The theory is that when a regulator is closely involved in monitoring a company's profits it will tend to 'second-guess' the company and become more defensive of its interests. In short the regulator will end up in its pocket. This can also happen when the regulator is completely dependent on the industry for information. It was felt that by adopting the RPI-X formula - as was done for all the major privatisations of utilities - the consumer would feel a direct benefit in lower prices and the government could argue that the regulation was "light-rein"<sup>78</sup> enough to satisfy ardent proponents of liberalisation. Yet the many contradictions within the policing of the utilities which we have often referred to were not eliminated. Ironically the attempt to benefit consumers with the price regulation had a *quid pro quo*. By adopting this approach the relationship between regulator and industry became more adversarial and caused major difficulties over questions of accountability.

This relationship is epitomised by the regulators and ministers' ability to issue licences to operate in the competitive environment. Further regulators can amend the license if the licensee agrees; if not referrals can be made to the Monopolies and Mergers Commission. This approach was adopted in the Telecommunications Act and followed in most of the other privatisations of the utilities. On paper it seems

quite straight-forward but in practice the regulator will be negotiating with one large enterprise which completely dominates all potential competitors. To threaten an MMC referral is similar to the ‘nuclear’ option of the nationalised industry where the minister could threaten to sack the whole board. In practice it is used very rarely, although recently it has been threatened and used more often, and most changes are negotiated between the two parties - again similar to nationalisation. In two public lawyers’ words “negotiation and bargaining are institutionalised in Britain”.<sup>79</sup> Again it could be argued that even these elements have been developed in a clearer way since the late eighties. For example as will be shown in the case of rail privatisation the regulator’s role has a little more bite and he has statutory duties of consultation. Even here however the limits of British-style regulation have been seen in the attempts to ensure Railtrack makes the required amount of investment in the rail network.<sup>80</sup> As noted in the chapter on public ownership secrecy does not easily allow for accountability. However these processes are now much more open. The problem is with the range of interests represented by the regulator and by their reactive nature of regulatory intervention.

However perhaps the regulators can hold the industry to account when they do utilise the mechanism of the MMC. Littlechild argued in his 1983 document that from his own experience “the MMC is not a particularly swift or effective mechanism for combating the market power of a dominant supplier”.<sup>81</sup> A decade later the economist

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<sup>78</sup> This was one of the instructions given to Littlechild by the Secretary of State, Littlechild (1983) *op. cit.* p39

John Kay argued that the MMC was the “dog that has not barked”<sup>82</sup> and that many deals were made behind closed doors. In contrast to this the then head of the MMC writing in the same collection of essays argued that his organisation would have a “long-term relationship”<sup>83</sup> with the utilities. Further he adds that the MMC should be involved more frequently. Significantly he states that “regulation was not necessarily designed to be a long-term replacement for the competitive market”<sup>84</sup> echoing Littlechild’s earlier statement. One industry where the MMC has intervened quite significantly<sup>85</sup> is the bus market. This role will be examined in more detail in the relevant chapter but from the experience of other privatisations is it an effective means of accountability? The MMC is only utilised in exceptional situations and its mechanisms are not always transparent and often erratic. This fits in with the use of the MMC as a distant threat to achieve deals rather than it playing a central role. All in all it does not augur well for a system of accountability to the consumer, if accountability is viewed from the perspective of the public and it perceives the services it uses. For if privatisation is to be viewed as a success in increasing accountability then a measure of this must be related to how the public view these industries as suggested in Chapter One.

One of the major drawbacks of the system of Morrisonian nationalisation was the inherent secrecy within the British state. A radical attempt to break with this in the creation of the public corporation failed and more traditional concepts and institutions came to the fore in the definition of accountability, yet these did not provide greater

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<sup>82</sup> Kay *op. cit.*, at p60.

openness in this new area of state intervention. Clearly any system of regulation needs as much access to as much information as possible. In the privatisation statutes there is a duty to publish the licenses of the operators in the privatised environment. Further there are specific statutory duties for the Director Generals of the regulators to demand information from their industry and publish it<sup>86</sup> where they deem it expedient. This is indeed a step forward yet with no British Freedom of Information Act<sup>87</sup> there is not complete 'sunshine regulation'. Indeed Graham and Prosser argued in the late eighties that "in practice licenses have been drafted and privatisation has taken place in such a way as to limit the amount of information actually available".<sup>88</sup> This is done by the industries limiting the definition of what they need to reveal although in some cases there are harsh penalties for withholding information.<sup>89</sup> Again some regulators have tried to developing a system for recording information on their respective industries rather than relying on information given to them by the industry.

So if accountability is defined as having more access to information then these new structures are a partial success but this is to be weighed against the informal methods of bargaining between regulator and regulated. Again this contradiction can be seen to be due to the confusing rationale used when the regulators were initially designed. However, as noted, developments in both privatisation and deregulation have improved the situation in part. Information flow has been placed on a firmer footing and the powers of the regulators made clearer. Yet this cannot remove the confused rationale for their birth which still allows for overlap and the potential for

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<sup>86</sup> See Telecommunications Act 1984 s48; Gas Act 1986 s38; Water Act 1989 ss32-33; Electricity Act

misdirection. It is also the contention of this work that the nature of an independent regulator will by nature be on the outside looking in, and any accountability will always be after the fact to some degree - it is a reactive regulation. As noted in the Introduction of this work, this echoes Harden and Lewis' phrase: "ex post accountability". This problem could only be solved with the development of a system of public ownership with regulation an integral part of it. This stems from the argument outlined in the Introduction that with privatisation profit necessarily becomes the driving force, indeed that was a leading reason for the process supported by Lawson and Thatcher. The laudable aims of providing a public service – so important in the forties - were demoted. Although part of the new regulator's role would be to promote these aims it does not have a nature which could be involved in the direction of the service; rather it reacts to how the service is delivered. Admittedly this is something the Morrisonian model never achieved. Moreover the era of Thatcher's premiership tended to emphasise the regulators' role in introducing the 'market' in areas previously dominated by the public sector rather than promoting the social responsibilities of the industries. However the regulator's ambiguous role can be seen by the different emphasis in tone - perhaps not in substance as shall be seen later - adopted by Major's new government in the early nineties.

The Citizens Charter<sup>90</sup> claimed to be a defining moment in the pursuit of 'Majorism' - following John Major's elevation to Prime Minister in 1990. This emphasised the citizen as consumer and challenged large companies to respect their rights. How did it affect the regulation of the utilities? Certainly it seemed to change the emphasis from

the shareholder to the individual consumer. This trend was confirmed by the introduction of the Competition and Service (Utilities) Act 1992<sup>91</sup> which legislated to give the regulators more powers to protect consumers. In the words of Peter Lilley, then Minister at the Department of Trade and Industry it “puts the consumer first”<sup>92</sup> and largely brought all the regulators into line by giving them all similar powers. It required procedures for handling complaints, and gave more power to collect information for performance indicators and to publish information for the consumers. In short it emphasised and underlined the role of regulators as protectors of the consumer backed with their powers to limit prices not profits.

The National Consumer Council, however, remains sceptical as to the beneficial aspects of privatisation programme **and** the role of the regulators. In a report published in 1993<sup>93</sup> it agrees that competition seems to be the best solution; although it compares it to a Pandora’s Box,<sup>94</sup> as the problems created in the regulation of utilities and the creation of competition are more complex than first imagined. Further the NCC claimed that debates carried out by the regulator have more to do with “esoteric economic argument than with the legitimate concern of consumers”.<sup>95</sup> This has resulted in a wedge being driven between the consumer and competition. A clear manifestation of this idea lies in the relatively higher bills the consumer has to pay to meet the cost of any changes designed to bring about greater competition; for example, in telecommunications, where bills have fallen but arguably not as quickly

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<sup>90</sup> Cmnd. 1599.

<sup>91</sup> 1992 c43.

<sup>92</sup> HC Deb November 18th 1991, col 37.

as they should have. This cost is alienated from the actual benefits of restructuring - the consumer is expected to wait for “jam tomorrow”.<sup>96</sup> Thus, the notion that regulators are always perceived as serving the consumers by enhancing accountability is not completely correct. Indeed their role in attempting to introduce competition is full of difficulties when it is carried out in specific instances.

Even the trend of the Major administration to treat the regulators as consumers' champions has not been constant. The picture becomes more complex when we examine the new ethics of 'Majorism' -post 1992- which emphasise the 'jungle' of red tape and the need to slash regulations. The whole process seems to have been turned on its head: “Deregulation is the name of the game in public and private life”.<sup>97</sup> Witness the executive power given to the President of the Board of Trade in the Deregulation and Contracting Out Act 1994.<sup>98</sup> As Will Hutton, the popular economist, put it: “the Government is voting itself the competence in effect to remove regulation by decree”.<sup>99</sup> The practical effects of this trend on the existing regulators may be limited given the legislation of recent years. Indeed, the idea of deregulating or removing the powers of the utility regulators was specifically rejected by the National Consumer Council.<sup>100</sup> But the fact that superficial changes in political trends can alter the way in which regulators operate shows the ad hoc method in which the regulators were initially created in the eighties. It seems like they were created almost as an afterthought.

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<sup>96</sup> *ibid.*, p121.

The accountability offered by the new regulators, then, seems to be incomplete. Information flow has increased but only to a limited extent, the structures of decision-making are still not transparent and the regulators are tied to the RPI - X formula rather than regulating the profits of this industry. Moreover the regulation is inherently reactive because they are regulating private industries which exist to make profit. Thus the step forward of the public corporation promoting public service rather than profit has been lost. The regulators are only partially more accountable in that they promote more information flow but have less say in the overall direction of the industries. It is argued here that this definition of accountability continues to ignore the “public” and their perception of the new industry just as nationalisation did in the forties. This conclusion will be measured against the actual structures of regulation in the ‘new’ railways in a later chapter.

However before the evidence of deregulation and privatisation in transport is examined, how have public lawyers adapted to the new ‘accountability’ of privatisation?

## **THE ‘NEW’ PUBLIC LAWYERS RESPONSE.**

In the introduction the trend towards creating a ‘new’ public law by leading academics was noted. Although no consensus could be reached the conclusion was reached that each sought reference to some type of external framework. Of particular relevance to the area of privatisation was Harden and Lewis’ use of contract and the market as new methods of achieving accountability. Moreover, nearly all of the academics undertook

empirical work which to some extent was influenced by the new models of regulation and contract. Harden and Lewis undertook an early study of privatisation<sup>101</sup> and moved on to studies of contracting out and market testing as noted. Loughlin studied the changing nature of local government in the eighties and nineties which involved the increased use of contract and new modes of regulation. Finally most of Prosser's work has concerned privatisation, public ownership and regulatory structures.<sup>102</sup> So the work of these academics is of importance not simply for their new theoretical structures but for their judgement on new administrative structures.

This situation lends itself to some ironic contradictions. All these academics are to some extent post-Diceyan in their outlook.<sup>103</sup> Yet the era of Thatcherism really gave their work a chance to flourish. In other words the new arrangements of the state brought into being in the last fifteen years have proved ample scope for introducing questions of accountability; not that all these academics necessarily agree with the changes. But the advent of Thatcherism was meant to herald the dawn of a 'new' individualism echoing the sentiments of Dicey and his followers earlier this century. In this sense surely the trend of academic public law should have confirmed this by following its traditional routes in line with Dicey.

It has been observed that the doctrine of privatisation can be traced to a time in the seventies when a number of constitutional thinkers on the right were arguing the case

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<sup>101</sup> Harden/Lewis (1983).

for substantial constitutional reform.<sup>104</sup> One of these writers was also involved in an appreciation of Dicey at the time of the centenary of the publication of his work on the constitution. Johnson argued that Dicey's work was "penetrating" had "elegant simplicity" and "in respect of British Constitutional Law there was a gap to fill and triumphantly he filled it".<sup>105</sup> His words here are unsurprising given that his work was written in a legal tradition and drew heavily on Dicey, although significantly his support for limited government was coupled with external constraints such as a written constitution. However Harden and Lewis also show their admiration of Johnson's work. In the *Noble Lie*<sup>106</sup> they call his work a "sentient constitutional essay"<sup>107</sup> and quote approvingly his words that constitutional principles are a "necessary condition for having any discourse at all about how purposes are to be fulfilled in that society".<sup>108</sup> Perhaps it would be a caricature to label Johnson a neo-Diceyan but his influence on 'new' public lawyers like Harden and Lewis is significant.

A further confirmation of this overlap can be seen from other contributions to the symposium on Dicey where Johnson made his comments. Patrick McAuslan - a public law academic who has studied planning law in quite a lot of detail - criticised "politicians only too willing to preach Diceyan principles the better to disguise distinctly un-Diceyan practices".<sup>109</sup> McAuslan was of the opinion that public law tended to be dominated with too much "Low" constitutional law - primarily empirical

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<sup>104</sup> See above.

<sup>105</sup> Johnson (1985), p720.

<sup>106</sup> Harden/Lewis (1986) *op. cit.*

in focus, whereas Dicey's skill was to embody the High law with his grand vision. Perhaps we can relate this back to Harden and Lewis' model of "immanent critique" which criticised Dicey not for the substance of the 'rule of law' but because it was unrealisable within the British state. So, again there is shared ground with Dicey. This is important when their attitudes to privatisation and the regulatory structures are examined.

As was previously seen Harden and Lewis were broadly supportive of the utilising of contract and market mechanisms within the state. It will be remembered in Lewis' essay on Reinventing British Government for the IEA he envisaged that privatisation is normally the best solution in the public sector. The roots of this thought in their work can be seen again in *The Noble Lie*. "Indeed both contract and property rights may be seen as the embodiment of a relatively decentralised economic order which clearly offers some resistance to concentrations of arbitrary power".<sup>110</sup> Thus their description of contract fits neatly in with their definition of the rule of law seen in the previous chapter. As previously mentioned in the introduction the idea of the 'eternal' notion of contract and the communal notion of the 'rule of law' owe a great deal to Hayek. Among the 'new' public lawyers this link was explicitly made by Allen. It is through these ideas perhaps that a link can be made between a section of modern public law academics and the ideology of the Thatcher/Major era.

However generalisations are of little use: Harden as noted in the introduction is a slightly less enthusiastic proponent of privatisation but he does support the idea that

contract in itself is a counterweight to arbitrariness in public authorities. This is because it clearly delineates duties and responsibilities of parties to the contract. In a certain sense one can draw a parallel with the licenses awarded by the utilities. Again this approach links in to Prosser's work; he again is not an enthusiastic supporter of the process of 'marketisation' but realises the benefits of having distinct regulatory bodies. By their existence they raise the whole issue of regulatory control, which was masked in the public corporation model. In addition he supports increased information flow or rather the potential of this information being readily available even though it falls far short of 'sunshine' regulation as there is no Freedom of Information Act.<sup>111</sup>

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Clearly there are some uncontroversial points among these remarks on the regulatory bodies and the use of contract. The increase in information available and the existence of contractual documents are a boon to the whole community. Yet as argued in this work that this amounts to only partial accountability. The sense of creating a structure which promotes public service rather than profit is lost, and this then maintains the distance between the public and the industry. This will be illustrated later by the examination of bus deregulation and rail privatisation. With other privatisations the work of the utilities' regulators has been erratic. There has been no uniformity. The continual existence of informal bargaining methods and distant threats of the MMC tells against a coherent system of accountability. Further the refusal to implement a regulatory structure which monitors profits rather than prices has also increased alienation from these industries by the public. This has materialised in the row over 'fat cats', high profits and executive pay.

It is the thesis of this work as mentioned both in the introduction and in the brief study of the British experience of nationalisation that the inability to achieve this type of accountability is because the question of ownership has been overlooked. Privatisation has solved some of the problems of nationalisation and the public corporation structure but cannot solve them all precisely because of the re-introduction of the profit motive. This has been because ownership has been transferred from the whole community - no matter how imperfect an arrangement the actual experience was- to a private sector that exists mainly to create shareholder value. The secrecy and inefficiency of the Morrisonian model gave the proponents of privatisation much ammunition in their struggle to sell the utilities. This was particularly the case in the area of enhanced accountability, and is even reflected among a section of public lawyers who believe that accountability can only be achieved by the private sector and the methods it uses. It will be the task of the following chapters to refute these arguments and to show that public ownership is central to a system of genuine accountability.

To start this exposition the process within the bus industry will be examined, as an example of an industry where an almost complete model of deregulation was used.

## CHAPTER FOUR

**“The present system of regulation which has been with us for 50 years, has stifled the flexible and innovative approach necessary if the bus industry is to meet the travel needs of the 1980s”.**

Nicholas Ridley, 1985.<sup>1</sup>

### INTRODUCTION

The bus industry as it stood in the seventies seemed to be the epitome of everything the Thatcher administration wanted to reform. Not only did it involve a highly regulated structure which had been in place more or less unaltered for half a century but the public sector completely dominated the provision of services. Prior to the election of 1979 there were 101 public operators who provided 92% of stage carriage mileage.<sup>2</sup>

This public domination was at both national and local level. The creation of seven Passenger Transport Authorities<sup>3</sup> following local government reorganisation in the seventies was intended to facilitate a local integrated transport network. Other bus travel was provided by the National Bus Company and the Scottish Bus Group, both of which were publicly owned.

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<sup>1</sup> DoT Press Release 31.1.85

Following the May 1979 General Election, the government was not long in bringing its first plan for the buses. This paved the way for the Transport Act 1980 which deregulated express coach services. In the second term there was a wholesale deregulation of local bus services under the Transport Act 1985. Thus the dismantling of the regulatory framework for bus services was done over the eighties, largely in two parts. The immediate effect of each piece of legislation was very chaotic and took effect suddenly. In brief, during the early eighties there was a mushrooming of new coach companies whilst in the mid eighties there was a series of 'bus wars'.

If the test outlined in the first three chapters is used then the bus industry would seem to be a good example of the unaccountable structure implicit in the nationalised model. Further, the Conservative administration's use of a completely new deregulatory structure would seem to underline its suitability as a test for the model of accountability. How accountable was the old system and did it improve when the old regulatory structures were removed?

This study will place the development of the regulation of the bus industry in historical context. Then the development of the deregulation proposals will be examined. The process of deregulation itself will be analysed in two distinct parts; to some degree this follows previous academic studies of bus deregulation. Most of these empirical examinations took place one or two years after the initial deregulation of the industry, and thus showed the initial trends and effects. However deregulation took place a decade ago and recently there have been some rapid developments in the

will conclude with a survey of the initial effects of deregulation. The following chapter will have a detailed exploration of the latest trends in the deregulated arena. It will then conclude with a detailed case study of the Glasgow bus industry which in many ways can be seen as a microcosm of the wider trends in urban Britain. This will be justified below. Reference throughout will be made to interviews which were carried out with participants in the bus industry.

## **ENDING “UNFAIR COMPETITION” :**

### **THE ROAD TRAFFIC ACT 1930.**

It is worthwhile pointing out that the public control of the bus industry predated the 1945-51 Labour Government when most of the other nationalisation measures were carried out; it was introduced by the second Ramsey MacDonald-led Labour Government of 1929-31 following a Royal Commission on Transport. The Road Traffic Act 1930 divided the country into seven areas in which the licensing of bus routes would be administered by a Traffic Commissioner. Thus at this stage the system of *control* was administered by government rather than the *delivery* of services which was more varied. One observer claimed that many “bus companies owned by the railways followed them almost accidentally into public ownership”<sup>4</sup> in the 1940s. Furthermore, this method of acquisition meant that the “structure of ownership is more complex than in other industries dominated by publicly owned companies”<sup>5</sup>.

For this work it is important to place legislation in context. This legislation is a good example of the public intervention during the historical period examined in the introduction. In the inter-war period government intervened extensively. Road Traffic was now to be regulated by centrally appointed administrators. Moreover, there were the beginnings of a welfare state, an increased use of delegated legislation and the formation of new tribunals acting as a substitute for the courts in some areas. As was shown in the legal field this process was met with open hostility by the followers of Dicey. The Traffic Commissioners with their power to run tribunals and issue licences are probably a good example of what Hewart would have labelled the “New Despotism”.<sup>6</sup> It is important to view the intervention of the state in traffic licensing as part of ‘new’ state activity in the twentieth century which precipitated the development of a system of public law and the debates over Dicey.<sup>7</sup> Moreover the criticism brought against the Act by the deregulators of the eighties has echoes of the Diceyan school of public law albeit from a more overtly economic perspective. They share a very limited view of what the state should be involved in. Significantly this view is now shared by some modern public law thinkers who struggled against the Diceyan norm in the discipline of public law, as detailed in Chapter 1.

However the trend of an ever increasing administrative structure in the thirties intersected with another historical phenomenon of that time which provided more specific reasons for public intervention. This was the rapid growth in use of the motor vehicle and its resulting impact on the environment and the health of the nation. In

the twenties there had been a rapid increase in road accidents which many believed was due to the haphazard and dangerous way buses were run.

The legislation was preceded by a Royal Commission on Transport whose second report<sup>8</sup> more or less provided the basis for the bulk of the Act. This process was not unique, indeed as discussed in Chapter 2 most nationalisations were preceded by an official report favouring some form of state control. However it must be restated that the primary aim of the Act was to license the industry rather than to take over complete ownership. Legislation had been passed in the nineteenth century, the Town Police Acts of 1847 and 1889 for England and Wales and the Burgh Police (Scotland) Act 1889, to regulate the growth in use of passenger carrying vehicles. However, this was entirely discretionary and did not apply in large areas of Britain. Also the scope of these controls was relatively limited and did not cover changes in the routes or services. In the words of the Commission these laws were “drawn at a time when nobody could reasonably foresee the changes which the future was to bring forth”.<sup>9</sup>

The legislation was so ambiguously drafted as to allow a large body of case law to develop around such phrases as ‘plying for hire’. In Scotland it was decided in **Craik v Wood**<sup>10</sup> that a bus could not be defined as a ‘hackney carriage’ thus the legislation was not applicable to them and no licences were required. Thus the law as it stood was in a very unsatisfactory position. Local authorities tried to regulate the services by other means. With the power to implement the existing legislation in the hands of local authorities bye-laws had to be passed which mostly covered very small

geographical areas. This encouraged the Royal Commission to look at the idea of larger Traffic Areas which were more appropriate to bus services. Of the witnesses to the Royal Commission only the local authorities opposed this idea. Significantly, this model had been adopted in Northern Ireland where the Home Affairs Minister was in overall charge of the scheme under the Motor Vehicles (Traffic and Regulation) Act (Northern Ireland) 1926. In summary the Commission believed “the present chaotic system of licensing which is based upon obsolete laws passed long before mechanical traction existed, must disappear and be replaced by an entirely different system more suited to present needs”.<sup>11</sup>

Some modern transport economists and proponents of deregulation in the eighties disputed the concepts underlying the regulatory structures created by the 1930 Act and the findings of the Royal Commission. Glaister and Mulley argue that the legislation was a crystallisation of the inter-war distrust of competition. It was based on the “predominant fallacy of the era - unfair competition was synonymous with free competition”.<sup>12</sup> These economists’ views can again be linked back to the right wing thinkers of the seventies described in Chapter 3 who also labelled the inter-war period the time when the Conservative party lost its bearings and prepared the ground for the post-war consensus.

A major part of the Royal Commission’s area of examination was indeed the wasteful competition inherent in the unregulated bus services. These are complaints which will

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<sup>9</sup> *ibid.* p5

be revisited when the deregulated market of the eighties and nineties is examined.<sup>13</sup> This was epitomised by the 'fly-by-night' operator who could send buses on the peak route at peak times simply to make profits. They had no need to run a network or a consistent timetable and could cancel services at will as long as they gained customers on the busy routes. For example one Traffic Commissioner reported on the situation in Stoke on Trent where ninety buses operated. These were run by twenty-five different companies who competed fiercely leap-frogging each other along busy routes; this had resulted in many charges being brought for dangerous driving and obstruction.<sup>14</sup>

Opponents of introducing a regulatory structure at that time believed that, however unpleasant scenarios like those described above were, there was no real acceptable alternative. They argued that what was likely to develop in the case of regulation was a monopoly structure which many viewed as an even worse alternative. In fact, Glaister and Mulley hint that the hidden agenda of the Royal Commission was to introduce such a monopoly. For example, the Sub-Committee which considered quantity-licensing was dominated by those who would benefit from such an arrangement. Further, only organised pressure groups, they argue, were heard which effectively excluded small bus operators.

The view also gained currency in the Commission that if bus companies had to run unremunerative but socially necessary services they should be given the benefit of

monopolies on certain routes: obligations should be met with rights.<sup>15</sup> This led Glaister/Mulley to conclude the “development of the quantity licensing was motivated more by political rationale than by reference to any economic rationale”.<sup>16</sup> This view is supported by fellow transport economist and worker in the bus industry John Hibbs who in his IEA pamphlet on transport is critical of the Chair of the Royal Commission’s remarks that the Commission should “promote rationalisation as a prelude to nationalisation”.<sup>17</sup> These academics were in the forefront of bus deregulation in the eighties; clearly their view of the historical development of bus services is coloured by their support *for* deregulation. In a caricature of Edmund Burke’s words they were attempting to “plan the future by the past”.<sup>18</sup>

Underlying this viewpoint of transport regulation is the assumption that politics ‘interfered’ with economics. Thus, by implication their own work is clear of such distractions and operates on purely economic rationale. This corresponded at the time to one of the Thatcher Government’s rationales for privatisation, namely that government should not be in the business of providing these services as political considerations will outweigh economic ones. It echoes Sir Christopher Foster’s belief that nationalised industries become insulated from the economic realities present with the “entrenched habits of the past”.<sup>19</sup> However as has already been discussed this remains a false and in some cases impossible distinction to make, particularly in the field of transport. For example there is a direct link between Glaister and Mulley’s attack on the regulatory structures designed in the thirties to control the bus industry

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<sup>15</sup> *ibid.*, p24.

and the constitutional malaise felt by right wing commentators in the seventies. Both were attempting to reform elements of the British state which had been taken for granted for generations. One group concentrated on the constitutional structure of Britain whilst the other wanted to challenge fundamentally the way in which elements of the British economy operated. The language of the transport economists may not have been that of greater constitutional accountability of new structures -at least not directly - but the effect was the same, though accountability would be provided through the market rather than a new institutional structure. In the context of the general programme of privatisation the absence of any regulatory structure in the bus industry meant that no claims could be made that a new more political accountable system had been created. To some extent this has occurred with the regulation of the utilities as the regulators have developed. A recent example of a public lawyer who believes these developments have created a more accountable state is Norman Lewis particularly in his most recent work.<sup>20</sup> However the only claims that could be made for the bus industry were that it could be saved with the removal of the regulatory structures. There were no broader political or even philosophical justification. Perhaps this was because it was a **de** - regulation with theoretically no continuing influence from the state. This was unlike the utilities where as has been shown quite complex regulatory structures were put in place. The contradiction between these two models reached a point of conflict within the bus industry about a decade after deregulation as shall be shown below.

Thus economic arguments were used to support a political programme. Further, as a corollary to this the economists could put across their opinions precisely because the political debate swung in their favour. So, it is a little spurious to argue that pure economics are utilised by the deregulatory economists. This was also true at the time of the Royal Commission. Sidney Straker<sup>21</sup> was the only dissenter to the Royal Commission's findings and his words are used by Glaister in support of his 'economic' argument. Straker defended the "pirate operators" claiming "the commercial struggle always present or prospective leads to efficiency, economy and progress in the best sense of the word".<sup>22</sup> It would be false to ascribe to this dissent some higher status as if it alone recognised the "economic" reasons for resisting regulation in the way Glaister argues. Straker himself was head of an association of motor manufacturers involved in building buses - who would clearly suffer in the short term if there was a clamping down on small private operators. Ironically though a regulated bus market would have provided a steady and secure source of income eventually. However his own position as a central player within the bus industry hardly qualifies him as a disinterested observer in the regulatory process.

Another concept which was welcomed at the time of the Royal Commission but much denigrated - by the deregulatory economists - in the eighties, as shall be shown, was that of cross-subsidisation. This occurs where a company takes as much money from the profitable routes as possible to fund the less remunerative or loss-making routes. This concept in a sense cuts to the core of all public transport services. As will be

illustrated in the next chapter all rail services in this country run at a loss<sup>23</sup> and need some form of subsidy which continues even after the routes are awarded to private franchisees. Moreover cross subsidy itself will still continue to exist within the franchises. On the other hand some bus services can take in a large amount of money but only on particular routes and at particular times, and then they become 'cash boxes on wheels'. Yet this changes very rapidly at off-peak times and on unremunerative routes.

However it is these very services which provide a *social* service for those who have no other means of transportation. The Royal Commission at the time understood the benefits of a large bus network which ran both profitable and 'socially necessary' services, yet in the eighties this became anathema and caricatured as the argument of the monopolists who wanted to keep out the small entrepreneurial operator. But as Gwilliam<sup>24</sup> pointed out the bus industry has a number of significant externalities which need to be taken into account. Thus there are knock-on effects of not regulating the bus industry in the area of the environment, road congestion and safety. Some of these are even more important now than they were sixty years ago. However road safety was also a consideration in the thirties. Glaister claims this was overplayed and that the number of fatal accidents, for example, was levelling out before the legislation was introduced.

This explicit support which the Commission gave to the running of social services through the use of cross-subsidy and the granting of exclusive licences was underlined

by the role of the Traffic Commissioners. The procedures followed in deciding to award routes were quite complex and far-reaching and to some extent allowed for participation from the communities affected by the bus routes. An application to establish a new service or vary an existing one had to be submitted to the Traffic Area office. The application was published and time was granted for any objections to be voiced. If there were objections then the applications would be heard in a Traffic Court: a public forum. Under the 1930 Act<sup>25</sup> the Commissioner had to take into account:

- the suitability of the route.
- the extent to which the needs of the route are already served.
- the needs of the area as a whole as regards traffic and the co-ordination of all forms of passenger transport including transport by rail.

Glaister gives an extremely detailed breakdown of how a Traffic Court functions;<sup>26</sup> perhaps as a means of highlighting what a burdensome and bureaucratic process it was. But the Traffic Commissioner was given such powers precisely because the procedure prior to the 1930 Act was chaotic and discretionary. Some form of rationalisation was needed: as noted above the legislation which existed at that time dated from the nineteenth century and not designed for motor vehicles. Further the law was administered erratically by local authorities. Some even claimed that there were cases of corruption regarding local transport services. Compared to this the

Commissioners could give some consistency and certainty to the decisions on bus services.

Here again it can be shown how this process fits into general administrative developments in the twentieth century. Many tribunals were created with the premise of determining decisions in certain areas without the recourse to courts. This is the very thing that Hewart objected to. In a sense by highlighting the legalistic nature of the Commissioner's decision making Glaister is arguing that this is not a place where any form of detailed rule-making or adjudication is relevant. Rather than usurping the role of the courts the Commissioners are going into areas where the only determinant should be the market. This shows again the link between the deregulatory impetus and the Diceyan school of the early part of this century and their shared view of a limited state.

This approach to regulatory structures aside the trend in the early years of this structure was not one of uniformity. As empirical work on the Commissioner's decisions had shown it took a few years for a common approach to develop. A commentator from the thirties took the three main principles behind a Commissioner's decision to be "priority, protection and public need". One Commissioner even saw himself as a protector of a public utility, in his words "convenient transport at reasonable fares, is a public service as essential as an efficient water supply".<sup>27</sup> For the deregulation advocates the existence of the Commissioners working with this kind of ethos was the personification of the interventionist state, as the state was skewing

the market by bringing in irrelevant considerations which had no place there. This was the thirties viewed with Thatcherite hindsight. It is a little ironic that the Traffic Commissioner should be characterised as a stooge of a centralising state. One of the very reasons they were established was to have a licenser at 'arms length' from the dominant local authorities. Thus rather than representing 'state interference' the Commissioner was seen as an independent arbiter. This irony was continued into the debate on privatisation<sup>28</sup> as much was made of ending the 'political' interference of nationalisation even though the public corporation was in theory an 'arms length' authority. Thus a link between privatisation and nationalisation using the public corporation form can be seen here - both were at pains to claim that 'political' or 'state interference' would end. Neither would prove to be correct.

In severely limiting the powers of the Traffic Commissioners during the eighties the Government claimed to remove an obstacle in the way of encouraging private sector initiative. Yet again this was rhetoric rather than reality in that a significant amount of private bus operators existed prior to deregulation. Further the Traffic Commissioner rarely intervened to prevent a new route being established unless there was no proven need for it.

Thus public ownership in the bus industry took on a qualitatively different form to all other experiments. Firstly it predated the public corporation structure and concentrated on control through licensing rather than ownership. As was shown public ownership of the bus industry grew in a piecemeal way and tended to be split

between local authority provision and the national operators (the National Bus Company and the Scottish Bus Group). Alongside this there always existed a sizeable independent sector of private operators. In fact prior to the 1980 Act out of 5639 bus companies 5536 were privately owned,<sup>29</sup> although most of these were quite small and only really involved in excursion and trip work. This contrasts with other forms of nationalisation in the transport industry notably the rail network. If a test of accountability is used then the licensing scheme has much to recommend it. The role of the Commissioners, their use of open fora like Traffic Courts and the involvement of local communities did allow for some participation. The process was more transparent than many other experiments in public control.

It is significant to note that the arguments against regulation of the bus industry did not involve the lack of openness and accountability, as was the case in many of the utility privatisations. Rather the major argument was that regulation was not required in this field and that bus companies could be more responsive to a free market. The proponents of deregulation could argue that ultimately there would be accountability to the consumer as the bus companies would ultimately deliver better services. Yet as noted this is a different emphasis from that of the other privatisations which established new regulatory structures.

The nature of the licensing procedure allowed for a degree of accountability. However the system was not ideal particularly when coupled with the diffuse nature of the bus industry. Subsidiaries of the national operator ran services almost

alongside local operators. This form of ownership resulted in the ‘bus wars’ immediately after deregulation, as shall be shown. Further there had been a terminal decline in the use of the bus since the growth of car ownership. Patronage of the bus industry halved between the sixties and the eighties.<sup>30</sup> Little was done to promote the use of the bus as part of an integrated transport network outside the Passenger Transport Authority areas.

It would be worthwhile to say a little more on these authorities before the deregulation process is examined. The Passenger Transport Authorities operated through executives in Strathclyde, Greater Manchester, Newcastle, Merseyside, South Yorkshire and the West Midlands. As well as promoting co-ordinated public transport to meet the needs of their population as it was their statutory duty to develop a “properly integrated and efficient system of public passenger transport”<sup>31</sup> they also showed the use of the local authority in financially sustaining local transport. The County Councils in England and Wales and the Regional Councils in Scotland also supplied subsidy to bus services. What the PTEs allowed local areas to do was to attempt some type of integrated network. This could involve buses, trains and in some cases an underground system. With the innovative use of travel passes which applied across the network a dent could be made into car use. This made the PTEs a central player in urban transport as shall be seen in the study on rail privatisation, particularly in Scotland. That study will also show that there was also tension in the Passenger Transport Executives between rail and bus. Yet the Passenger Transport

Executives gave a glimpse of how an integrated transport system could be owned and controlled.

Beyond these examples there was little attempt to integrate bus with rail. Thus the rail network worked largely independently of the bus industry where there could have been combination to promote public transport. This again relates to the nature of the model of public ownership that was adopted following the Second World War. The public corporation form encouraged independence from other industries and did not allow easily for co-operation to take place. This theme will be explored more in the chapters on the rail industry. However it is ironic that following the awarding of several rail franchises to bus companies they are beginning to introduce in a distorted way a form of 'integrated' transport system, as we shall see.

In the following examination of deregulation it will be shown that the background to each initiative was the falling use of the bus network. Each Transport Act was preceded by speeches proclaiming that the legislation would save the bus industry. Whether this was achieved shall be examined when the full scale effects of deregulation are examined.

## ON THE RIGHT TRACK?

### THE DEREGULATORY EIGHTIES

Norman Fowler, the first Secretary of State for Transport in the Thatcher administration, while in opposition had written a policy document on the future of public transport: "The Right Track".<sup>32</sup> This hardly equalled other radical tomes of the right written at this time which called for a new constitutional settlement and the redirection of the Conservative Party. One forceful proponent of public transport described it as full of "unexceptional generalisations".<sup>33</sup> Yet it spoke of introducing competition and relaxing regulations for bus services albeit in a vague way. This illustrates well the early era of Thatcherism - a combination of high rhetoric with relatively minor reforms. It was not until a few years later when the momentum was established that major radical reforms were attempted. The legislation on the bus industry followed this pattern almost identically.

#### The Transport Act 1980.<sup>34</sup>

The first Transport Bill of the Thatcher administration was trumpeted by Norman Fowler as likely to "increase freedom of choice"<sup>35</sup> and encourage "Freddie Lakers of

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<sup>32</sup> Fowler(1977)

the Coachways”.<sup>36</sup> The Act itself redefined bus services and categorised them into two different types: express and stage journeys. This was done by distance.<sup>37</sup> Previously any distinction had been made on the basis of fares. For the new express services all quantity restrictions would be removed.<sup>38</sup> Hence the Traffic Commissioners who had previously controlled applications to enter the bus network had their brief limited to stage services. In these stage services the onus of proof changed with the Commissioner having to prove that any new service was not in the public interest,<sup>39</sup> rather than the operator having to establish that the service was required.

As express services were deregulated the Government claimed to be tightening up on the regulation of quality. Applicants had to be of good repute, professionally competent, have adequate maintenance facilities and an annual inspection of their vehicles.<sup>40</sup> The Government also removed the right to impose any fare controls.<sup>41</sup> Thus the regulatory regime of the buses was to remain in a kind of limbo. This was further emphasised by the creation of trial areas which could, with the permission of the Secretary of State, suspend all regulation of bus services. In the event only three areas applied for this status: Hereford, North Norfolk and South Devon although Fowler claimed many more areas had been in discussion with him.

This legislation corresponded with the first era of privatisation process where industries were sold into potentially competitive markets as outlined in Chapter 3. In

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<sup>36</sup> *ibid.* at 1122. This being a reference to the entrepreneur who attempted to establish a cheap air service.

<sup>37</sup> s3.

<sup>38</sup> s2(2)(b).

fact one of the first sell-offs was carried out under part II of the 1980 Act with the privatisation of the National Freight Corporation. Indeed this was viewed as the most significant part of the legislation by the Financial Times.<sup>42</sup>

This “partial”<sup>43</sup> deregulation was seen as an attempt to revive the entrepreneurial spirit. After the initial deregulation there seemed to be a frenetic clamour to enter the express market. A consortium, British Coachways, was launched to combat the dominance of the National Bus Company’s subsidiary<sup>44</sup>, National Express. Six months after deregulation it announced a major increase in services.<sup>45</sup> However two years later the entire consortium collapsed.<sup>46</sup> This process was repeated in a smaller scale all around the country. CK coaches became the first private company to close only one year after deregulation began.<sup>47</sup> Other private companies which came to the fore in later stages of deregulation, notably Stagecoach which got its first attempt to establish itself at this time. The lucrative commuter belt around London attracted the initial interest of twenty-nine companies; twenty eventually ran services but only six were still functioning one year later.<sup>48</sup>

The initial flush of apparent success allowed Fowler to claim “the public interest is best served by a minimum of interference by the state and a maximum amount of free competition”.<sup>49</sup> The reality again proved to be somewhat different. This was

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<sup>41</sup> s6.

<sup>42</sup> Financial Times August 8th, 1979.

<sup>43</sup> Savage *op. cit.*, Chap 2.

<sup>44</sup> Times September 18th, 1980.

<sup>45</sup> Times May 14th, 1981.

<sup>46</sup> Financial Times Survey of the Bus and Coach Industry February 17th, 1983.

established by an empirical study of East Midlands transport.<sup>50</sup> In this study the main beneficiary of deregulation was found to be National Express. It used its existing market share to dominate the scene. Through “reorientation and responsiveness”<sup>51</sup> National Express could increase frequencies, alter fare structures and take forceful action against any competitors.<sup>52</sup> Thus in conclusion “free competition has actually been reinforcing specialisation in service provision and the existing structure of the industry”.<sup>53</sup> This trend was to be repeated as shall be shown below. Although some independent operators remained in business (mostly those engaged in running services from the major cities to London), many of these, however, also made joint agreements with National Express.

The main beneficiary, then, of this particular deregulation was a nationalised monopoly. Its passenger numbers soared with a 45% increase from 1980-81.<sup>54</sup> In the same period National Express’s profits rocketed from £6 million to £25 million, and by 1983 this had risen to £47 million.<sup>55</sup> To achieve this, and to meet the Government’s strict financial targets, routes had to be cut by 8%.<sup>56</sup> This happened in predominantly rural areas; Bagwell - a transport analyst - gives the example of West Cumbria.<sup>57</sup> In the first year National Express expanded its service by 50% effectively killing off any coach competition. Within the National Bus Company, express coaches accounted for only 7% of the business yet provided the bulk of the profits.

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<sup>50</sup> Kilvington and Cross (1986).

<sup>51</sup> *ibid.*, p128.

<sup>52</sup> A strategy which is repeated when we examine the effects of full scale deregulation.

<sup>53</sup> Kilvington/Cross, p133.

<sup>54</sup> There was an increase in passenger numbers from 9.2 million to 14 million in 1980-81.

The dominance of the express market was achieved at a cost of taking passengers away from the rail network. British Rail made heavy losses in its Inter-City network. 30-50% of the coach's new customers came from trains.<sup>58</sup> Schemes such as the Super-Saver ticket, pensioner and young people's railcards were established to stop the exodus of passengers. Thus the main competition instigated by the 1980 Act was not between rival bus companies but between road and *rail* transport, thus illustrating at a national level in a concrete way the absence of the co-ordinated approach to transport which was mentioned above.

The result was called "surprising"<sup>59</sup> by one commentator but given National Express's dominance this was not entirely unexpected. It also aggrieved many on the right who had wanted to witness a rebirth of on-the-road competition as a result of the 1980 Act. John Hibbs, one of the most ardent advocates of transport deregulation, wrote for the IEA that the change in the early eighties "was more in principle than in practice".<sup>60</sup> It was a "cautious" deregulation.<sup>61</sup> His solution was to expand deregulation to all sectors of the bus industry<sup>62</sup> whilst maintaining strict quality controls. Thus, the 1980 legislation was a curious halfway house. It angered the pro-regulation lobby as it resulted in a net loss of services although fares did fall. It also put the Traffic Commissioners in a difficult position with their limited brief and terms of reference altered. For others it did not go far enough; they saw the regulatory authorities as having a stranglehold on local services. These grievances led to the 1985 Act.

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<sup>58</sup> Kilvington/Cross *op. cit.*, p128.

Further lessons can be drawn from the 1980 Act experience in the sense that when deregulation was introduced it did not necessarily mean there would be more competition. This was particularly true where a large publicly owned operator functioned as in the express service sector. It was also hinted at by the experience of the Trial Areas where in Hereford there again was a lot of on-the-road competition but the publicly owned company managed to establish itself because of its size and its greater resources. Thus when full-scale deregulation was introduced measures of privatisation would be needed to introduce full competition. But as shall be shown privatisation in itself could not prevent large operators using their resources to dominate the market.

The question of accountability was also not completely resolved here, mainly because the central board of the National Bus Company had more in common with other nationalised industries and was more remote. However one unique element of the bus services was that the Traffic Commissioners' open procedures applied. Furthermore, it was also more decentralised with different localised operators. This may have been due to the manner in which the NBC grew; by acquisition rather than in one fell swoop. Indeed the Transport and General Workers' Union (TGWU) argued in its evidence to the Transport Select Committee looking at the Buses White Paper<sup>63</sup> that the NBC combined the "best of both worlds"<sup>64</sup> with a national identity and local operators. Aside from the amalgam of a centralised board with localised bus services which did not allow for complete accountability the partial nature of the deregulation also told against a more accountable structure. With the remit of the Commissioner

changed and the speedy changes in the express sector the overall question of control was in a general state of flux. Yet even this position was preferable in terms of accountability to what was to develop in the late eighties and nineties, as shall be established. Accountability in this context would mean a form of supervisory specialised body which could issue sanctions against parts of the industry. This is not a wholly satisfactory definition of accountability but in the case of the bus industry it was definitely missed when removed in the mid eighties.

### The Transport Act 1985.<sup>65</sup>

This legislation was preceded by a white paper **Buses**<sup>66</sup> which put forward the arguments for further deregulation. It was published a year after the Conservatives' second electoral victory. This fits in with the general thesis that it was in this period that the more radical reforms were attempted, with the privatisation of the utilities also introduced in this time. The paper proposed to remove all quantity restrictions from all stage services and to privatise the National Bus Company by breaking it into smaller subsidiaries. These measures, as explained above, were an attempt to prevent a repetition of both the consequences of the 1980 Act and problems in the trial areas. This view as noted above had a number of academic supporters notably in Glaister and Hibbs. Beyond this it is not clear who was supportive of them.

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<sup>63</sup> See below

Following its publication there were eight thousand responses to the proposals.<sup>67</sup> The vast majority were opposed. The Transport Select Committee, with a Conservative majority, had taken considerable evidence and produced a report condemning a complete liberalisation of bus transport. It favoured instead a system of route franchising awarded by tender.<sup>68</sup> Other opponents were as varied as the Brewing Industry and the National Federation of Women's Organisations, as one Labour MP pointed out.<sup>69</sup> The overwhelmingly hostile response provoked the Department of Transport to publish a justification for its policies which also answered the main criticisms of the Select Committee.<sup>70</sup>

As the 1985 Act was preceded by a White Paper and an investigation by the Transport Committee there was now a better chance to examine the justifications for deregulation. Before this is done in detail it is worthwhile noting the Select Committee's conclusion to put the debate in context of this broader work. The committee opposed a complete deregulatory model; instead it proposed a system of franchising for routes. Significantly this model was revisited with rail privatisation - this time with Government support.

This 'tendering within regulation' model had some academic support<sup>71</sup> as did the deregulation system as mentioned above. In many ways the former was close to the London system where outright deregulation had been postponed. This was, claimed

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<sup>66</sup> Cmnd 9300, 1983-4.

<sup>67</sup> Savage *op. cit.*, p12.

<sup>68</sup> HC 38-I, 1984-5.

Ridley, to allow London Transport the chance to introduce more efficiency to its operation.<sup>72</sup> Significantly the Government opposed the general introduction of this 'managed competition' outright. Franchising, they claimed would inhibit innovation. Further, in some ways it would be more restrictive than the present regulatory model as there would be a lengthy time limit on operating the franchise. Most importantly it would perpetuate cross-subsidy which in its turn would accelerate the decline of the industry. In summary the whole notion "fails to deal with the depressing effects on patronage which any system of cross-subsidy generates".<sup>73</sup>

Yet this whole attitude contrasts strongly with the attitude during rail privatisation which as shall be shown favoured a system of franchising. To some degree all these arguments were turned on their head when examining the rail industry. It highlights that during the height of Thatcherism in the mid-eighties the emphasis was not on the fulfilment of accountability in structural form - whether public or private. Instead, accountability had to be gained through the open market. This assertion may seem to contradict the creation of the first regulatory agencies for the privatised utilities at this time and seem only relevant for the bus industry. In the deregulatory model the absence of any regulatory structures would allow the free market to establish itself and ultimately give the consumer the best deal, showing that the companies were *accountable* to their consumers in an indirect sense, as illustrated by their experiment in bus deregulation. This notion is not as clear in the privatisation of the utilities. Primarily because in most cases they were monopoly providers their accountability lay with the relevant regulator rather than the utility adapting under pressure of the

market. Yet the absence of any clear rationale for regulation at the time of their creation and the speed with which the utilities were put forward for privatisation illustrates that the primary reason for creating the regulators was not to promote any form of direct accountability. Although the regulators were created after each privatisation the emphasis was not on creating a coherent model of regulation but on disposing of each utility. This came later when there seemed to be a greater degree of clarity as to what a regulator's role should be and their relationship with their industry.

The ambivalent attitude to regulation changed when the rail industry is examined, it could be argued. This was a privatisation unlike any other. There are peculiarities in the rail industry as following chapters will show that mean a franchising system makes more sense than in the bus industry where it was rejected outright. But it will be argued that this reflects a broader discrepancy between these two periods which bus deregulation and rail privatisation reflect. Less emphasis was put at the time of bus deregulation on questions of accountability because the emphasis was on removing the state's involvement whether through privatisation or dismantling regulatory structures. In the later period there was a renewed emphasis on public service and enhanced constitutional accountability. As previously noted this trend was noted by leading public lawyers, notably Ian Harden.<sup>74</sup> What this reflected was not merely a change of emphasis on the Government's part but a larger societal change. This change showed itself in opposition to further privatisation and indeed

supported the extension of public ownership.<sup>75</sup> Thus the government had to alter its emphasis completely although it was limited to the degree it could carry this out as will be illustrated in the examination of rail privatisation. The idea prevalent in the forties of regaining a form of accountability by bringing an industry into public ownership gained an element of support following the excesses of the privatisations of the eighties. This again emphasises the close relationship between the public's perception of accountability and the need for a form of public ownership. This coloured the model adopted for the privatisation of the rail industry.

Having put this deregulatory legislation in context both within the eighties and as it compared to later deregulations it will now be worthwhile to examine the arguments used at the time to justify deregulation. The main justification clearly was that absence of regulation would mean more innovation and more competition hence a better service. This is seen in the language with which the Government introduced this legislation. Nicholas Ridley MP, a close confidant of Thatcher and author of the Ridley Report in the seventies,<sup>76</sup> the Secretary of State that piloted the Bill through Parliament, made this point during the Second Reading Debate. "There is far more to this Bill than deregulation. Far more than privatisation. It is a *full scale rescue plan* for the bus industry" [My emphasis].<sup>77</sup> Again we see the context into which bus deregulation was always put: an industry in decline. Since the high point of 1950 where 16.7 billion bus journeys were made there had been a steady fall in numbers. So in 1979, the year before partial deregulation was introduced, the annual tally was 7

billion.<sup>78</sup> Later it will be seen whether deregulation in the short or long term arrested this fall in bus use.

This policy of increased consumer use through increased competition and absence of regulation was also explained during the evidence Ridley and the DoT gave to the Select committee.<sup>79</sup> The officials at the Department stated: “I think the central policy of the Government’s White Paper is a policy of competition”.<sup>80</sup> Or as Ridley put it, a little more bluntly, competition needed to be introduced because “there is no other way”.<sup>81</sup>

As noted above this desire to free the private entrepreneur from the chains of existing regulatory structures was more of a rhetorical device than reality. Indeed, this was even confirmed by evidence given by the Bus and Coach Council who claimed to represent 98-99% of bus operators and 66% of coach operators in the United Kingdom. “There is ample opportunity under the present licensing system for services to be provided by any operator provided the Traffic Commissioners do not consider that to be against the public interest”.<sup>82</sup> Although the BCC would have had an interest in promoting the form of regulatory structure it does illustrate that the threat of competition to some extent always existed even under the regulatory model of the 1930s.

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<sup>78</sup> Transport Statistics, Great Britain 1993 p105.

<sup>79</sup> Evidence given to Transport Committee (1984-5), HC 38-II.

Moreover with a degree of prescience some in response to the White Paper even argued that the proposed solution would not succeed in its mission, and in fact have the opposite effect. “Deregulation is likely to lead ...to less competition because it is likely to lead to the re-establishment of territorial monopolies, of the kind we were familiar with fifty or sixty years ago”.<sup>83</sup> Thus the predominant notion at that time of deregulation being synonymous with competition was a central philosophy behind the restructuring of the bus industry, even if this did not fit in with the practical result.

Leading on from this theoretical justification was the more practical rationale of saving money with a more “effective targeting” of subsidy. It has already been noted that the reorganisation of local government in the seventies also allowed it to support financially local bus services. According to a senior civil servant the rising cost of subsidy to the bus industry had been a “major concern to Ministers for a number of years”.<sup>84</sup> The proposed legislation would not only end licensing for profitable routes; it would also open up to tender routes requiring direct subsidy. Also the legislation required local authorities to establish their bus company at arm’s length which in the long term coupled with privatisation would cut subsidy.

There was also an overwhelming desire to end cross-subsidy which Professor Michael Beesley<sup>85</sup> described as “a tax system without representation”<sup>86</sup> in his evidence to the Select Committee. It has been mentioned before that this was a central tenet of the Government’s thoughts; it criticised the Select Committee for not dealing with this

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<sup>83</sup> *ibid.*, p222. This is from the evidence of Dr D.A. Ouarmby, a retired director of London Transport.

issue. The Bus and Coach Council which did not support deregulation also supported the demand for an end to this practice. It has been mentioned that there is a big gap in profitability in the bus industry between services and routes. Two academics put it thus; “the industry lurches in a very short space of time between periods of extreme strain and surplus capacity”.<sup>87</sup> Obviously the larger bus companies could afford only to run unremunerative services if they made enough on the busier routes. It was never made clear how cross-subsidy was to be ended. For example, it was often stated that bus users in urban areas were paying more for their services than they needed to so universality of price could be protected. Yet there was not only discrepancy between routes but *within* routes at peak and off-peak times. Thus if cross-subsidy was completely removed how could the consumer have certainty when one of the results of that would be different fares being charged at different times for the same route?

Moreover the principle of cross-subsidy was not unique to the bus industry. One witness to the Select Committee stated that “cross-subsidy was an economic fact for most business life”.<sup>88</sup> The example was given to Michael Beesley during the hearing of the Select Committee of the cost of postage and how a universal price was paid for a stamp even though the cost of sending to different destinations varied greatly. He expressed his distaste for all cross-subsidy regardless of the context: “there are many, many instances ... it does not make it more desirable”.<sup>89</sup> He also accepted that bus deregulation was not only unique historically in Britain but internationally.

Cost cutting, then, was also a rationale to the whole project of deregulation. The White Paper suggested 30% of costs could be reduced.<sup>90</sup> Indeed an argument could be made that this was the only area in which the deregulation succeeded. After the first two years of deregulation subsidies fell by 23.4% by the PTAs and by 6.3% by other local authorities.<sup>91</sup> However it should be noted that this was almost completely due to the introduction of tendering not because of deregulation.

The 1980 Act also gave an opportunity for the Government to use its successes- in its eyes- as justification for the White Paper and the Bill. One of these justifications was the much lower unit costs of private sector bus companies as compared to publicly owned companies. This included both the National Bus Group and the services controlled by local authorities and the PTAs. Yet it was felt by the unions that like was not being compared to like. As far as the different in costs went one union official put it thus “The nature of the work in the private sector, the wages and conditions of employment are far different ... because it is accepted it is a different type of work”.<sup>92</sup> This refers to the point made above that private companies were smaller and engaged in excursion work rather than stage carriage services. This meant that staff could be employed on a part-time basis rather than in the case of the public operators whose drivers had a national agreement which allowed drivers to operate extended shifts to cover both peak services. As the majority of the costs of a bus company is in labour (around 70%)<sup>93</sup> this would clearly affect costs. The Government

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<sup>90</sup> Cmnd 9300 *op. cit.*, p .

<sup>91</sup> Gomez-Ibanez/Meyer (1990), p15. These American observers calculated these figures by collating

used this discrepancy to press further their case for privatisation and decentralisation of the National operator.

Other comparisons which the Government attempted to make with the 1980 operation were also criticised by bus operators. Both the Bus and Coach Council and the National Bus Company conceded that the main competition had not been between bus companies but with other modes of transport, predominantly rail as explained above. Also express service deregulation had involved the increased use of motorways and trunk routes not town centre roads nor quiet rural routes. Thus the impact of a complete deregulation of stage services was clearly going to be much greater and more evident to the public.

The final piece of evidence was that of the trial areas established by the 1980 Act. However Ridley was reluctant to cite them as an example; in particular he stated Hereford was “not an entirely successful experiment”.<sup>94</sup> This followed a report by the Transport Road Research Laboratory which stated that “At this stage the situation appears to be unstable and the final outcome is uncertain”.<sup>95</sup> Although there was a 38% fall in subsidy from the County Council to the local bus operator there were problems with road congestion and concessionary fares. The Traffic Commissioners had to intervene over the question of the safety of one of the smaller independent operators. From the transcript of the hearing “This is quite the worst case the Commissioners have had to consider during the 10 years I have been Chairman of the Traffic Commissioners for the Western Area. It is just as well that those who travel in

some of your vehicles did not know how much their health and safety were at risk".<sup>96</sup>

On the 2nd February 1982 the Commissioners also issued seven prohibitory notices against independent operators in the Hereford Area. Here, then, deregulation had meant an increase in service but at the expense of safety, so the Government was reluctant to use this part of the 1980 Act as justification. It is also unclear how good an example of bus-using communities the trial areas were. They were all predominantly rural with small towns. Thus their ability to act as a microcosm for future developments was limited.

Combined with the deregulation of bus services was the privatisation and break up of the National Bus Company. As already stated this was clearly a response to the effects of the 1980 act and was seen as a means of preventing a large operator dominating a deregulated market. The Scottish equivalent, the Scottish Transport Group, was excluded until 1989.<sup>97</sup> The trade union which represented the majority of transport workers greeted these proposals with "horror".<sup>98</sup> It feared the sell off was for "political considerations rather than structural".<sup>99</sup> It was evidence there had been preparation for privatisation. The Transport Act 1982<sup>100</sup> had introduced private capital into the NBC by allowing it to dispose of its shares and ordered separate accounts to be prepared for National Express. In the earlier years of Thatcherism these devices were often used as a prelude to privatisation.

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<sup>95</sup> TRRL Report LR 1131.

<sup>96</sup> Transcripts of hearing, quoted at *ibid.*, p149.

<sup>97</sup> Transport (Scotland) Act 1989, c23.

Priority was to be given to management and employee buy-outs of the subsidiaries. This was reflected in the Act which stated that persons employed by the bus companies must be afforded “reasonable opportunity of acquiring a controlling interest in the equity share capital”.<sup>101</sup> The NBC was split into seventy-two companies and sold off many to management-employee lead buy-outs. No single buyer was allowed to acquire more than three subsidiaries or two operating in contiguous areas. Clearly, the Department of Transport did not want a similar result to the 1980 Act when a large publicly owned company could use its position to dominate the market.

The Bill became law on the 30th October 1985, a year before deregulation was to be introduced. One Conservative MP, Peter Fry, voted against the Bill at its third reading. This was significant for as well as being a senior member of the Transport Committee he co-wrote Norman Fowler’s pamphlet in the seventies mentioned above. Perhaps highlighting how fast policy had moved on the bus industry he stated “I believe this bill is based too much on theory and insufficiently on practice”.<sup>102</sup> This confirms the limited way in which evidence from the 1980 Act had been used by the administration.

The Transport Act 1985, then, carried out in full the initial deregulation of the 1980 law. It more or less followed completely the preceding White Paper. Road Service Licensing was abolished;<sup>103</sup> the role of the Traffic Commissioners redefined<sup>104</sup> and

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<sup>101</sup> Part III, s48(4).

quality standards tightened.<sup>105</sup> A new system of registration was established.<sup>106</sup> Operators had to give 6 weeks notice to the Traffic Area office if they intended to establish, remove or change a bus service. The NBC was to be sold off<sup>107</sup> and eventually dissolved when this was complete.<sup>108</sup> Local authorities were to form companies to run local bus undertakings<sup>109</sup> and tenders were to be invited for any subsidised service.<sup>110</sup> Within seven years of office, then, the Thatcher administration had completely restructured the bus industry.

The one area excepted from this as mentioned above was the Greater London Area. This was originally viewed as a temporary measure to allow the abolition of the GLC and other measures to settle. Yet continual attempts by Conservative administrations to deregulate London's buses have failed. This process culminated in the absence of this measure from the Deregulation and Contracting Out Act 1994;<sup>111</sup> despite a 1992 manifesto commitment. During 1994 London Buses was broken into ten companies and sold off, in effect selling franchises. Ironically this was very similar to the proposals of the Transport Select Committee in response to the White Paper, which the Government had roundly rejected.

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<sup>105</sup> s8.

<sup>106</sup> s6.

<sup>107</sup> Part III.

<sup>108</sup> This was finally completed in 1991. See S.I. 1991/510.

## THE INITIAL EFFECTS OF DEREGULATION.

If the test of deregulation is that of a “rescue plan” for the industry in Ridley’s own words then it failed. The decline in bus journeys continued in the years following deregulation. In 1991-2 the number of bus users had fallen to 4669 million from a pre-deregulation figure of 5641 million: the fall was more dramatic in percentage terms in the larger cities.<sup>112</sup> The DoT was dismissive of these figures claiming they merely confirmed the trend of falling bus usage since the 1950s. This is a little different to the emphasis made at the time of the White Paper which suggested that with an end to regulatory structures the industry would be free to adopt new innovative measures and hence increase patronage.

If these figures are not regarded as conclusive then what of the increased competition heralded by the deregulatory process; did this not mark a measure of success? Again similarly to the effects of the 1980 Act, after the ‘big bang’ deregulation date in October 1986 there was an appearance of more on-the-road competition. The picture of congested high streets was ensconced in the public’s mind. However much of this was similar to the process after the 1980 Act came into being. That is, there was no significant new entry from small independent entrepreneurs.

One study commissioned by the Scottish Office<sup>113</sup> confirms this. It looked at the effects of deregulation six months and one year after October 1986. It found that in areas where two publicly owned corporations existed - that is a Scottish Bus Group company alongside a municipally owned company - there was extensive competition.<sup>114</sup> This intra-public competition was perhaps inevitable with their domination of the market with 90% of bus journeys in Britain and 89% of Scottish services so supplied.<sup>115</sup> Indeed, this competition was “aggressive and widespread”.<sup>116</sup> When the privatisation of these industries occurred slightly different trends emerged as shall be shown in the next chapter. However where only one SBG operator existed there was more scope for smaller operators to enter the market. Thus in Scotland there were “more providers of local bus services in the study areas than there were prior to deregulation”.<sup>117</sup> But “with very few exceptions ...all operators previously held operator licences”.<sup>118</sup> The experience of Stagecoach confirms this as shall be shown in the case study of the Glasgow bus market. Thus there were no entrepreneurs champing at the bit to enter the market after the restrictions were lifted.

Thus, as in 1980 without privatisation, deregulation resulted in the dominant monopoly surviving or entering into ‘turf wars’ with rival companies, for the most part also publicly owned. These initial ‘bus wars’ may also account for the increase in vehicle mileage after deregulation. In 1991/2 this stood at 2487 million km compared to a pre-deregulation figure of 2077 million. However it must be

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<sup>113</sup> Transport Operations Research Group (TORG)(1988).

<sup>114</sup> This was the case in Glasgow for example.

<sup>115</sup> *ibid.*, p10. 1980 figures.

remembered that these figures took place in the context of falling bus use. These figures were often cited as a sign of deregulation's success yet the figures do not take into account times when one bus shadows another. This clearly does not benefit passengers and indeed was one of the practices that the regulatory structures were established to avoid. The figures also reflect the growth of different buses used on routes, particularly the use of minibuses.

In terms of increasing passenger numbers or the numbers of new competitors the deregulation process seemed to have no initial effects. But there were two areas where the absence of regulatory structures had quite a dramatic effect: the amount of subsidy given to local authorities and the working conditions of bus workers. The figures on the subsidy dropped have already been cited<sup>119</sup> and it was also noted that the Buses White Paper saw the cutting in subsidy as an important part of the project. The same American observers who were taking lessons from this unique international project also stated: "The clearest winners from the combined package of deregulation, privatisation and subsidy cuts are British taxpayers".<sup>120</sup> This change caused by deregulation only indirectly affects the bus customer.

What of the changes to working practices brought in following deregulation? At 1992 prices an average bus worker prior to deregulation earned £251.40 per week in 1991/2 they earned £234.70<sup>121</sup> in real terms. These falling wages confirm the centrality of labour costs to the bus industry. The actual cuts were brought out in a number of ways for example with the consolidation of overtime payments into basic

wages.<sup>122</sup> These cuts in pay were coupled to changes in working practices like reduction in the amount of paid non-driving time<sup>123</sup> such as lunches and breaks and forcing drivers to sign off during quiet periods. One academic studying industrial relations concluded on his work within the bus industry was the “collapse of a centralised bargaining system” and the general cut in jobs had severely “altered the confidence of the trade union side”.<sup>124</sup>

Thus the drastic initial impact of the first few years of deregulation was not in the field of a dramatic increase in new bus companies nor a turnaround in the decline of bus usage. Rather it was in the fields of the treatment of the workforce and the subsidy paid to local authorities<sup>125</sup> where there was a dramatic change. So to that extent it succeeded. But as these were always secondary rationales and never the main justification for the Government the whole deregulation process was never trumpeted as a complete success. However the whole deregulation process was not at an end after these first years.

The next chapter will show that it is only ten years after the initial deregulation that we can see the full effects of deregulation. This is also affected by the privatisation of sections of the bus industry. Taken together these trends illustrate a growing consolidation of the market which contradicts many of the earlier rationale for

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<sup>120</sup> Gomez-Ibanez/Meyer *op. cit.*, p18.

<sup>121</sup> HC 1992-3 *op. cit.*, pxvii.

<sup>122</sup> Forrester *op. cit.*, p225 and also see case study on Glasgow.

<sup>123</sup> An important issue in the bus industry because of the peaks in use.

deregulation. This is also confirmed by a changing attitude of the state to the bus market.

This period can also be used to examine how the deregulated market was held to account as compared to the Traffic Commissioner's procedures which, it has been argued, had much to recommend them. It will be argued that the changing emphasis towards accountability and public service described above is noticeable *within* the bus deregulation project. Thus the state has found it necessary to readdress questions of accountability which it ignored or underplayed at the time of the Buses White Paper. This will be examined in the following chapter.

## CHAPTER FIVE.

**“In our rapidly consolidating industry it is in the best interests of our employees and shareholders to become part of a larger bus group”.**

Andrew Gall, September 1994.<sup>1</sup>

### DEREGULATION : ONE DECADE ON.

In the previous chapter the rationale for bus deregulation and privatisation was explored. When the ‘big bang’ date of deregulation came on 26th October 1986 the whole process had been signalled as the ultimate salvation for the bus industry. The decline in bus usage would be reversed as the private commercial sector could utilise innovative measures which were beyond the ken of the bureaucratic publicly owned enterprises. Hand in hand with this was to go the privatisation and break up of the nationally owned bus network. This was to bring an end to the practice of cross-subsidy.

Yet for all the detailed rationale given for the Buses White Paper and later the Transport Bill and its big-bang philosophy, the immediate effects of deregulation were apparently limited. Early empirical studies as mentioned in the previous chapter gave ambiguous messages as to the initial effects of deregulation. As argued the main changes were in employment relations and direct subsidy **not** in bus usage. Even

ardent supporters of the project who had played a key role in the creation of the plan recognised the limited scope of the change. For example, John Hibbs addressing a marketing conference on buses stated on viewing transport statistics: "I would not conclude from them that deregulation had been a 'success', neither can they be used to support the idea that it has been a 'failure'".<sup>2</sup> This ambivalence was also reflected in an official Parliamentary research paper published in 1995. "The impact of deregulation seems to have been neither as disastrous as the opponents to the legislation feared or as successful as its proponents predicted".<sup>3</sup>

However ten years after deregulation was introduced it is clear that deregulation coupled with privatisation did have an effect on the structure of the bus industry and indeed the nature of local bus services. These effects will be examined in this chapter in two ways - the general trends will be studied and there will be a specific case study of how these trends operated in the Glasgow area. It will be argued that the rationale for the changes of the mid-eighties has been negated rather than confirmed by the ultimate effects of deregulation. This has precipitated a change in attitude from the state towards the bus industry. Questions of institutional accountability and public service have taken on importance where once they were downplayed, as observed in the previous chapter. This is due to the creation of several large operators in the bus market who seek to dominate the supply of bus services. This change in attitude will also be detectable in the privatisation of the rail network. Thus the long-term effects of deregulation and the responses it provoked are central to a study of how the British

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<sup>1</sup> Gall was the Chief Executive of Scottish Motor Transport acquired by GRT in 1994. Financial

state has intervened in transport. Further and more specifically, the process of rail privatisation was directly influenced by these trends in the bus industry.

## **THE GOVERNMENT'S ATTITUDE :**

### **SECOND THOUGHTS?**

In April 1993 the Department of Transport issued a consultation paper<sup>4</sup> on the bus industry and the effects of deregulation. In it there seemed to be acknowledgement of some damaging consequences of the experiment. It said that deregulation had cut bus operating costs, reduced local subsidy and led to increases in innovation. Yet it also conceded that timetable changes were too frequent, the short period of notice for alteration of service caused instability and the bunching of buses in urban centres can cause congestion.<sup>5</sup> The publication of this document could be seen to reflect the change in emphasis in the justification for deregulation noted above; that is a shift from the primacy of the market to the creation of more 'accountable' structures. One of the results of this consultation can be seen almost two years after it began with the issuing of new regulations to permit the Traffic Commissioners to deal with road congestion.<sup>6</sup> The Confederation of Passenger Transport claimed the Government was trying to "re-regulate the industry by the back door".<sup>7</sup> How did this situation arise?

It is not enough to explain it merely as a purely environmental action to prevent bus congestion. It will be shown that this exercise was the Government's attempt to

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<sup>4</sup> DoT, 24th March 1994.

establish its opposition to the effects of deregulation in the bus industry. To justify this the processes at work within the industry will be examined and alongside this the changing attitude of the state in its different forms. Following this the Glasgow bus market will be used as a micro-study for the bus industry since deregulation.

## **THE STRUGGLE FOR MARKETS**

To refer back to the previous examination of the immediate effects of deregulation from 1985, a parallel was drawn with the 1980 Act and its initial results. However the processes in the later deregulation were constantly developing and could not be said to have one final result as had largely happened in the express coach industry with the continual dominance of National Express. The most significant difference in the case of the 1985 legislation was the coexistence of privatisation with the deregulation of local services. This affected the privatisation of the National Bus Company (NBC)<sup>8</sup> then latterly the Scottish Bus Group (SBG). Moreover, local authorities' bus services in some areas controlled by Passenger Transport Authorities were established as "arm's length" companies in order to prepare for privatisation.<sup>9</sup>

The NBC was broken up into 72 companies and sold from 1986-88; many to management buy-outs. The selling of the SBG took place later following the Transport (Scotland) Act 1989<sup>10</sup>; it was broken into ten companies and sold from 1990-91. Both privatisations were subject to restrictions. No one buyer could purchase more than three companies or two operating in contiguous areas under the

NBC sale.<sup>11</sup> As noted there was little new independent interest in the bus market which may explain the dominance of management buy-outs.

One exception to this was Stagecoach, a Perth based operator, established in 1976 as a caravan and minibus rental service. It moved into the bus market through express coach services in the early eighties after the initial deregulation of 1980. From interviewing a leading executive in Stagecoach it seems its operations at this stage were a little chaotic and were viewed disparagingly by others involved in the bus industry.<sup>12</sup> However its limited success at this stage allowed it to be in place to exploit the next wave of deregulation in 1986, this time concentrating its fire on stage services.

In 1987 in the first wave of privatisation Stagecoach acquired three subsidiaries of the NBC (the maximum), the first independent operator to do so. At this time the services it ran were predominantly rural or inter-urban built around small towns. As was shown in empirical work done by the Scottish Office<sup>13</sup> these were the main areas where the independent operators flourished, as urban areas tended to be dominated by either local authority operators or subsidiaries of the nationally based operations.

However these publicly owned concerns were in the process of being sold. Their separation into a group of smaller companies was clearly done to prevent market domination in the manner that National Express dominated express coach services

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<sup>11</sup> This was proportionally different under the SBG sale where no buyer was allowed to acquire two

following the 1980 Act, and so prevent a rerun of the 1980 Act and the rapid growth of National Express. Yet it is arguable whether this succeeded and indeed if it was possible to prevent a large operator emerging; for, as shall be shown, the large bus companies which did emerge came from that very milieu of the public sector.

As deregulation and privatisation developed over the decade, then, there was a clear struggle for survival amongst operators. The first outbursts of this were the 'bus wars' largely between established operators. Derek Scott, the Finance Director of Stagecoach, admits that if deregulation had developed only in this way it would have been harder for the company to establish itself. It needed the additional element of privatisation.<sup>14</sup> Thus Stagecoach and other independent operators were largely spectators in the first round of 'bus wars'.

However these bus wars developed largely due to the threat of privatisation. The bus companies were trying to garner the largest possible market. This was difficult; as was noted earlier bus usage had been declining over the last thirty years. Thus a way to increase the bus company's intake was to move into other geographical areas. When this was combined with privatisation, on-the-road competition was transformed into take-overs and mergers. Thus it became a struggle for expansion and control of local markets - a kind of 'bus imperialism'.

On 1994 figures nine companies control 56% of the bus market.<sup>15</sup> This expansion and consolidation was relatively easy to achieve in the post-1985 bus industry. The active encouragement of MBOs<sup>16</sup> allowed the dominance of managers with relatively little capital who later became easy pickings for the larger operators who offered large cash inducements to sell.<sup>17</sup> The manner of the sale also allowed for bargains to be gained. A useful example of this is the sale of the Scottish Bus Group which took place several years after the NBC sell-off. This privatisation was explicitly criticised by the National Audit Office<sup>18</sup> for the amount of money raised was significantly less than originally envisaged. The delay in the announcement of the intention to sell and the actual disposal allowed for excessive turbulence in the bus market. For example, in that period profits of the SBG fell from £9 million to £0.5 million. Significantly, of the ten subsidiaries in the Group only five were sold to management employee buy-outs. The remainder was sold to independent companies, three of which had a national profile, and two smaller ones. The reasons for this were clear as the time-lag between this and the NBC sale had allowed for the beginnings of a consolidation of the bus market. During this period the beginnings of privatisation laid the seeds for the growth of the new larger bus operators which could establish themselves in the later sale of the SBG. The momentum of these developments was continuous as again the Scottish industry shows: all five MBOs in the SBG were eventually sold to national operators.

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<sup>15</sup> TAS figures given in MMC(1995).

As mentioned above Stagecoach was the only significant independent operator to make initial headway in the 1985 deregulation of stage services. The company built on these early acquisitions by establishing operating extensive overseas services<sup>19</sup> and acquiring more bus companies. As Chief Executive, Brian Souter concentrated on developing these acquisitions.<sup>20</sup> In this way Stagecoach expanded its market share and turnover. From its initial three purchases until its stock market flotation it acquired nineteen companies. In July 1993 it became the first bus company to gain a stock market listing by becoming a public limited company. The aim of this sale was to raise £20.6 million to fund further acquisitions. In fact Stagecoach was one of four bus companies to date which have entered the Stock Exchange, apart from the coach operator National Express which was floated in December 1992.

Stagecoach, in a sense, led the way by gaining a stock exchange listing. It was then followed by Badgerline in September 1993 and GRT and Go-Ahead in May 1994. These bus operators all differed from Stagecoach in that they had all been previously publicly owned companies. Badgerline was a former NBC subsidiary which was subject to a management buy out in 1987. Through acquisition of seven other NBC subsidiaries it grew until it dominated local markets in the Midlands and Southern England. Go-Ahead was the main NBC operator in the North-East of England which it used as a basis for expansion in Brighton and Oxford. GRT came from a slightly different tradition in that it was a former municipal operator in Grampian Region. Their method was identical to that of the other operators expanding its market from

North-East Scotland to Leicester and Northampton. Outside these quoted companies<sup>21</sup> there stood British Bus which was also formed by the merger of two former NBC companies.

This process of deregulation then in the bus industry coupled with privatisation has led to a few large operators which grow by acquiring smaller operators. Significantly this was how the National Bus Company grew: through acquisition. It is clear from this that the intention to prevent a monopoly developing after deregulation failed. This was why NBC was sold by breaking it down into subsidiaries, yet is clear that where NBC subsidiaries had a strong position they have used this to build a local “empire”. However the nature of the privatisation and acquisition process means most operate a “patchwork” service around Britain. That however is also in a state of flux, for the bus industry’s consolidation alluded to above continues apace.

The entry of operators into the stockmarket gave them a new flow of capital which in turn speeded up the acquisition process. For example since its flotation in 1993 to November 1995 Stagecoach plc had acquired a further 14 companies and 20% stakes in another two.<sup>22</sup> That is only slightly less than it had acquired in the previous six years. But Stagecoach is not the only player in this growing ‘cartel’-isation of the bus market in the mid-nineties. National Express plc, which is firmly established following the deregulation of the coach market, has also entered the stage bus industry. It acquired a dominant operator, West Midlands Travel, for £243.7 million in March 1995, the single largest acquisition in the entire bus industry since 1986.

The deputy Chief Executive of National Express called it a “third and complementary leg”<sup>23</sup> to their business. This was almost immediately followed by the announced merger of Badgerline with GRT to form FirstBus plc. This company would control 13.5% of the domestic market and becomes the second largest bus operator in Britain with a view to become “the strongest group in the sector”.<sup>24</sup> The increase in acceleration of the consolidating process has led to increased speculation that weaker groups will be subject to take-over, notably Go-Ahead in the North-East of England.

Thus we have the situation where several giants dominate the provision of bus services. As was previously mentioned this scenario does not fit any of the rationales given at the time for bus deregulation. The rapid consolidation witnessed in the nineties was hardly the rebirth of competing independent operators. Rather as has been commented upon<sup>25</sup> the former NBC subsidiaries as ex-public sector operators all still have links between each other. Many of the managers of the large bus groups all know each other as former state employees. In one sense the consolidation process could be seen as a partial regrouping of the NBC albeit in the private sector. Certainly, the formation of FirstBus confirms this trend although GRT was a different type of public sector body being a municipal operator. Yet the support for deregulation rested on the idea that the monolithic public sector could not possibly increase bus usage.

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van hire company which moved into the bus industry.

<sup>22</sup> SB Holdings and Mainline Partnership. See below.

The theoretical implications of the recent developments in the bus industry for privatisation and a model of public ownership will be examined below. Yet again the importance of accountability is central to this question. By removing the state's regulatory role in the bus industry by limiting the power of the Traffic Commissioners the notion of accountable bus services was left to the 'market'. However the absence of the state's controls did not stop a process of consolidation and squeezing of smaller operators into niche markets. Arguably the same process occurred under public ownership and state regulation. The NBC grew by acquisition and a fairly large independent sector existed in this period. Yet what was lacking in the deregulatory era was any sense of external control. The bunching together of buses on peak routes and at peak times was given; little could be done to alter it, much as it annoyed the public and caused problems to the environment and to traffic congestion. In many ways the situation was analogous to the situation prior to the 1930 legislation albeit on a more serious level as regards environmental problems and road congestion.

However before the full implications of these observations are measured for this work it is necessary to examine the state's contradictory approach to the question of the bus industry. It shall be shown that although the role of the Traffic Commissioner was limited by the deregulation legislation other forms of control have been attempted to make the industry more 'accountable'.

## **THE STATE'S REACTION: HOW TO REGULATE**

### **DEREGULATION?**

The bus industry was perhaps in a unique situation<sup>26</sup> during the Thatcher/Major years in that it was an attempt at complete liberalisation. Thus in one 'big bang' the dead hand of the paternalistic regulator was set aside in order for the market to thrive. In the previous chapter on privatisation it was established that with the establishment of the regulators of the utilities the Government caused difficulties for itself. Originally only seen as 'holding the fort' until the arrival of competition their existence took on a rationale of its own.

There was never a clear detailed rationale for the regulators. This led to a period where the regulators almost attempted to define their own role. Also the introduction of competition occurred in a haphazard way, and in the case of gas and telecoms the full impact of this was not felt until nearly a decade after their privatisation. Combined with their introduction of competition in the era of the Citizen's Charter the regulator's powers were expressly expanded to protect consumers by the Competition and Service (Utilities) Act 1992.<sup>27</sup> Yet these dialectical contradictions between a deregulatory ethos and the creation of complex regulatory structures for the utilities seemed to be avoided in the bus industry, at least initially.

However, it will be shown that particularly during the recent era of consolidation in the bus industry the state has sought to bring it under a form of control. These

attempts have also been perceived as inadequate and faced demands for the introduction of a bus industry regulator, notably from the Transport Select Committee in late 1995. It would be a misnomer to suggest there were no controls on the bus industry post-deregulation. The Traffic Commissioners remained with increased emphasis on quality regulation. The Passenger Transport Authorities although required to divest their bus companies still had important supervisory and co-ordinating powers. Furthermore, as the private sector now dominated bus services where there was a tendency towards monopoly the existing competition authorities were also required to police the buses. In fact, as the decade proceeded the number of cases referred to the Office of Fair Trading (OFT) grew to an extraordinary number. The OFT received 541 representations about the bus industry between 1987 and 1994. Further, the Monopolies and Mergers Commission has had to rule in a large number of cases.

This process has caused frustration amongst the competition authorities. The consolidation process has been so rapid that there have been ever increasing numbers of references of unfair practices and potential abuses. This process has meant the OFT and its former Director-General Sir Bryan Carsberg led the attack on deregulation. Giving evidence to the Transport Committee's investigation on bus deregulation Carsberg stated, "The regulatory system is not strong enough".<sup>28</sup> This reflects the competition authorities' frustration at having to deal with the worst excesses of the bus industry and the emerging operators.

Comments similar to this are peppered through various MMC reports on the bus industry. Between 1989 and 1995 the MMC published 16 reports on the bus industry. Some operators featured more than others. For example, Stagecoach was directly involved in seven of those reports.<sup>29</sup> Remarkably during the course of 1995 there were five reports which all involved Stagecoach in some way either directly or in the case of one indirectly.<sup>30</sup> All found the company guilty of some form of unfair trade practice although they varied as to the recommended remedies. Stagecoach claims it has been “singled out for examination of its acquisitions in a way in which other companies in the U.K bus and coach industry were not”.<sup>31</sup>

Derek Scott when interviewed raised his scepticism about the competition authorities' independence from governmental structures. He believed that the OFT and MMC could be used as ciphers for a message from the Government. In other words Stagecoach was to be made an example of to warn the rest of the industry. Apparently private conversations between leading figures in the authorities and Stagecoach supports this. Stagecoach is a good candidate for this position as, once an outsider in the industry, it became the largest operator. The competition authorities could use Stagecoach's position to call for a general review of the bus industry following the publication of their reports. These authorities were thus in the forefront of calling for a new regulator for the bus industry.

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<sup>29</sup> In total the OFT and MMC have investigated Stagecoach twenty times.

This process reached its culmination with the publication of the MMC report into the bus industry in the North-East of England.<sup>32</sup> This was a suitable microcosm of the entire bus industry as 90% of bus services in that area were run by subsidiaries of four larger groups. The report studied five complaints of malpractice by various bus companies including Stagecoach's subsidiary Busways. The background to the involvement of the MMC was the collapse of the Darlington Transport Bus Group in November 1994 after particularly aggressive competition from Busways.<sup>33</sup> The lasting significance of this report, however, is in its concluding chapter on the whole deregulation project and its characterisation of the tactics of Stagecoach as "deplorable". Scott recognised this was extremely harsh language to be used by the MMC and conceded that its subsidiary made some mistakes, particularly in the running of free services which they did not have to register, although he argued that the local branch of the Transport and General Workers Union supported the company in its action, and it argued that Stagecoach provided better protection for the workforce.

Looking at the general picture of deregulation the MMC cited the problems of creating "congestion, pollution and instability of service".<sup>34</sup> Furthermore, the competition created was *potential* rather than actual and that there was a tendency towards "comfortable oligopoly"<sup>35</sup> between the main operators. It then listed solutions to the excesses of deregulation including expanding the powers of the Transport Commissioners to regulate the number of buses on the routes and to

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<sup>32</sup> Cmnd 2933 : *The Supply of Bus Services in the North East of England*. 1994-5.

monitor services. The Commissioners would also seek to curtail the ability to alter services speedily and would be required to make more information available to the public. Thus, the MMC did not find cause for a full re-regulation of the industry but nevertheless it certainly pointed in the opposite direction to that of the deregulatory road.

The British competition authorities, then, have been very dissatisfied with the effects deregulation has had. Arguably this represented a trend within the state which wished to counter some of the effects of consolidation within the industry whilst stopping short of establishing a new regulator, although as will be shown the Transport Committee supported the latter approach. As outlined at the beginning of the chapter the new regulations in February 1995 altering the ambit of the Traffic Commissioners seem to confirm this.

Further evidence could be seen with the abandoning of bus deregulation in London;<sup>36</sup> the re-establishment of the bus working group within the Department of Transport<sup>37</sup> and if we follow Stagecoach's scepticism the tacit support given to the competition authorities' more aggressive approach. Certainly during 1995 following the publication of the reports into Stagecoach's purchase of 20% of Mainline Transport and SB Holdings<sup>38</sup> the Government ordered Stagecoach to sell its share in both instances even though this was not the solution offered in the report.

The ultimate rebuttal of the deregulatory structure from an influential voice within the state was the Transport Committee's investigation and subsequent report into the bus industry. Two years previously it had carried out an investigation into the London bus industry which had included a cursory study of the effects of deregulation.<sup>39</sup> After hearing evidence from key people involved in the industry the report came out in favour of a specialist regulator. It would not be responsible for the monitoring of quality or pricing matters. Rather it "would acquire a specialist expertise in bus industry matters and act as a referee, quickly on the spot, able to settle disputes in a firm and fair manner".<sup>40</sup> It would have the power to stop 'predatory' behaviour and impose fines. These proposed changes would operate alongside an increase in the resources of the Traffic Commissioners and an increase in vehicle inspection. The report drew specific attention to the "very poor quality"<sup>41</sup> of some of the buses on the road. In contrast to the Select Committee's response to the Buses White Paper in the eighties it rejected the system of franchising of bus routes - which had in part been adopted for London bus services. This would give powers to the local authority or PTA to award a franchise for a period of time. The Committee was not convinced that it would be effective although it accepted it was motivated by the desire to "bring some order to the chaos".<sup>42</sup> It also heard evidence from the trade unions which argued that "tendering drove down wages and lengthened working hours".<sup>43</sup> This approach was confirmed by an interview carried out with a leading T&G official in Glasgow.<sup>44</sup>

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<sup>39</sup> HC 623, 1992-3.

<sup>40</sup> HC 54, 1995-6, *pliv.*

<sup>41</sup> *ibid*

Surprisingly given the movement on the part of the Government on the bus industry its response to the Committee's report reverted to a knee-jerk rejection of regulation. It was opposed to an "increase in the regulatory burden" and argued that present disputes could be handled within the framework of the existing competition authorities. It went further with the statement that on promoting bus use: "The present regime of deregulated bus services run almost entirely by private sector operators provides the best means of delivering effectively the services that people want".<sup>45</sup> This almost reverts to the position adopted by the Buses White Paper and hardly takes into account the dramatic changes within the bus industry and its failure to increase bus usage. It is even a qualification of the Government's tentative approach towards changing elements of the structure of the industry. Again Derek Scott argued that this change in approach of the Government witnessed in this response<sup>46</sup> and in some MMC reports which were less critical of the bus industry could be linked to rail privatisation. That is, at the same time as these reports were being published the first rail franchises were being awarded. In many cases as shall be shown it involved bus companies including Stagecoach.

In many ways the retreat of the Government into the mantra of the 'market' is significant. It could mark the end of the tentative steps to introduce a more 'accountable' structure for the bus industry. This is evidenced by the moves outlined above to open discussion on the effects of deregulation and to give the Commissioners some powers to intervene. These clearly fall far short of calling for a new regulatory agency yet seemed to show an awareness of the lack of any control within the bus

industry. However the overall effect of retreating to the position given in the response to the Select Committee document remains that a series of consolidating operators dominate an industry which is still in decline. Their steady growth and prominence in the industry has led to a feeling of complete helplessness on the part of bus users.<sup>47</sup> The dominance of a few operators means they are not really susceptible to commercial accountability and the absence of any structural control gives the impression of a vacuum of accountability, almost analogous to the position which existed prior to the regulation imposed by the 1930 Act. The absence of a rigorous investigation into necessary bus services which was once provided by the Traffic Commissioners is a void which needs to be filled. The transfer of ownership has not compensated for this and Government balked at re-introducing controls, although a Conservative Party dominated Select Committee supported this.

By dismantling a national network the Government was going against the trend to greater co-ordination of transport. As will be explained below the private sector has begun co-ordinating services again not for a highly utilised transport network but to create a higher level of profit. In fact the private companies have used arguments and methods previously deployed by publicly owned bodies. This stresses the importance in having a publicly owned transport network which is accountable and encourages participation.

Before some conclusions from the experience of bus deregulation are drawn the example of the bus market in Glasgow will be used to show wider trends in the bus industry.

## **CASE STUDY**

### **THE BATTLE FOR GLASGOW'S BUS MARKET**

To illustrate the processes at work in the deregulated bus industry it will be useful to use a study of an area which can be used as a microcosm for the larger picture in the urban environment. Glasgow is a good example because a whole number of themes can be explored with its experience of the decade of deregulation. Firstly, immediately following the “Big Bang” date of deregulation<sup>48</sup> Glasgow was one of the urban centres which seemed to feel the full effects of this policy. Pictures of Glasgow’s main thoroughfares<sup>49</sup> jammed with buses were portrayed throughout the Scottish media and entered the public consciousness. Secondly as the consolidation and struggle between major operators became the dominant trend in the nineties Glasgow became one of the key battle grounds. Thus within the space of ten years the processes outlined above all came to fruition: a bus war “won” by a dominant operator then as consolidation continued apace the market became a battlefield for the main bus operators. What sets Glasgow slightly apart from some parts of Britain is the existence of the Passenger Transport Authority and the relative high level of bus

usage in the city, but these factors allowed the developments which were occurring in the British bus industry to take place at a greater speed. Glasgow also illustrated practically what the effects of these policy developments were on actual bus users.

In 1994 two competition disputes were referred to the Monopolies and Mergers Commission (MMC) concerning the Glasgow market. These were Strathclyde Buses' take-over of Kelvin Central Buses,<sup>50</sup> a rival operator; and Stagecoach's acquisition of 20% of the shares in Strathclyde Buses.<sup>51</sup> Both of these reports came at a critical point of deregulation. Furthermore, the Government's response to them represented the new approach which was mentioned in the previous chapter. Thus it could be argued that all the major themes of deregulation are at work here and that this study will be a useful accessory to my main argument on the questions of participation and accountability in the deregulatory model.

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## **STRATHCLYDE BUSES**

The main operator in Glasgow by a considerable margin is the former municipal operation Strathclyde Buses.

**TABLE 1 From MMC (1995) Cmnd 2829.**

MARKET SHARE. 1994 (%)	SBH	KELVIN	C'SIDE 2000	MIDLAND B'BIRD	WESTERN SCOTTISH	OTHERS
<b>STRATH -CLYDE</b>	<b>33.0</b>	<b>18.1</b>	<b>9.4</b>	<b>NIL</b>	<b>7.4</b>	<b>32.1</b>
<b>G'GOW</b>	<b>76.2</b>	<b>11.6</b>	<b>2.8</b>	<b>0.6</b>	<b>0.3</b>	<b>8.6</b>

The Transport Act 1985 required Passenger Transport Authorities to divest their bus companies and allow them to operate as independent companies. Thus Strathclyde Buses Ltd (SBL) took over operations in 1986. In the nineties there was increasing pressure on municipal operators to sell their bus companies. This was completed on 19 February 1993 when SBL was acquired by Strathclyde Bus (Holdings) Ltd: a management employee led buy-out. This later changed its name to SB Holdings Ltd (SBH).

Before its take-over of Kelvin SBH operated largely as a local operator not going down the path of entering new markets, unlike, for example, one of the other Scottish municipal operators<sup>52</sup> GRT which in forming FirstBus<sup>53</sup> with Badger Line has become one of the largest bus companies in Britain. In discussion with the T&G rep for Strathclyde Buses he said the management of SBH regretted not being involved in acquiring subsidiary services. However it did incorporate a subsidiary Comlaw No 313 Ltd<sup>54</sup> in August 1993. This works as a separate unit from a Glasgow Depot and supplies mainly niche services e.g. night buses and tendering work. It also has an older fleet and pays lower wages to its drivers.

The structures of SBH are important because it prided itself on being an employee-owned company. 80% of the share capital was held by SBH employees who also nominated two Directors to the Board. This Board consisted of five directors, the remainder being Executive directors who own a minority of the share capital (18%) but had enhanced voting rights over certain issues. This was a seeming contradiction: a company owned by the workforce but with a powerful management at Board level which caused industrial tension. In July 1994 the SBH board proposed a 3% wage cut along with a package of reduced benefits. This resulted in support for industrial action – it could have introduced scenes of workers striking against a company they

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<sup>52</sup> There are four former municipal operators in Scotland; one remains in public control while the other three were sold off to MEBOs from 1989-93.

<sup>53</sup> Who ultimately took over ownership of SBH.

supposedly own.<sup>55</sup> However a settlement was reached by ACAS which guaranteed a consolidated pay rise.<sup>56</sup>

This dispute, perhaps not coincidentally, immediately preceded the take-over of Kelvin Central. Having solved the problem of industrial relations the management looked for an acquisition. This was announced as creating the “biggest employee-owned bus company in Britain”.<sup>57</sup> It again preceded by a matter of weeks the announcement of Stagecoach purchasing a 20% stake in SBH in November 1994. Before both these incidents and the competition authorities’ response to them are examined it will be necessary to give a brief profile of the other companies involved.

### **KELVIN CENTRAL BUSES LTD**

Another former public sector operator Kelvin was part of the Scottish Bus Group (SBG). As noted in the previous chapter the SBG was privatised between 1989-91. Based in Motherwell, Kelvin ran a number of services into Glasgow from towns North and East of the city. It ran 500 vehicles and employed a staff of 1300. One could argue that this company was one of the casualties of the deregulation/privatisation ethos. Following the first flush of deregulation post-October 1986, as noted previously, the SBG was involved in quite intense competition with the municipal operators in Scotland. Although this caused much congestion at the time the long-term effects were not significant. That is to say, many of the

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<sup>55</sup> A point often made about the nationalised industries were that ordinary people felt they had no stake

subsidiaries of the SBG found it hard to maintain competition with municipal operators many of whom were part of an integrated network.

In Glasgow through the work of the Strathclyde Passenger Transport Executive (SPTEx) the buses remained linked with rail services and the Underground. Moreover there are travelcards which can be used on all modes of transport. Thus although SBG could mount an initial challenge to the dominant position of these operators it could not maintain a prolonged battle. This was further emphasised as these subsidiaries prepared for privatisation. The initial "bus wars" largely ended because the SBG retreated. Kelvin Central was actually formed in 1988 by the merger of two companies<sup>58</sup> which were both smarting at the effects of the "bus wars". This was also reflected in damaging industrial action which culminated in a fourteen week strike in 1989 in response to a restructuring of the company. Such turmoil affected the saleability of the company, and uniquely in the privatisation of the SBG it only attracted one bidder: an MEBO. It acquired the company for the princely sum of £1 on 13 February 1991.

The structure in a sense was similar to SBH; the board consisted of 4 Executive Directors, 3 employee appointed directors and one non-executive director. The employees, though, only owned 47% of the shares with 46% being controlled by trusts. In a profits sense the company did badly making losses every year with the exception of 1992. It further curtailed its services in 1993 by withdrawing services from the East End of Glasgow. Its precarious position was perhaps best exemplified

by the Traffic Commissioner's refusal to renew Kelvin's licence for more than one year in 1994. Yet in September of that year SBH bought this seemingly desperate company for £11.1 million. This was less to do with recognising a bargain and more to do with consolidating its strength. Stagecoach was also involved in negotiations with Kelvin Central in the summer of 1994 and was expected to launch a bid of £10 million pounds. The reasons for this will be explained below.

### **STAGECOACH plc.**

The history of Stagecoach has been dealt with in the previous chapter. In the context of Glasgow it is necessary to make a few additional remarks. Brian Souter, the Chairman of Stagecoach, said when addressing shareholders in September 1994, that there was still "great potential for profit improvement".<sup>59</sup> He explained that the company was in a new phase; after concentrating on predictable low risk bus companies which would enhance the share value, it was now moving into potentially more risky urban areas. It would now look predominantly at employee-owned, ex-municipal and the London bus companies. Indeed along with its acquisitions of two London bus companies and its venture into Glasgow it also entered markets in Newcastle<sup>60</sup> and Sheffield;<sup>61</sup> both the subjects of references to the MMC.

Glasgow is an important market for Stagecoach. It is the major urban centre in Scotland and has a high level of bus usage.<sup>62</sup> Stagecoach has attempted to consolidate its strength in the South-West of Scotland which began with its take-over of Western

Scottish Buses in July 1994. Following this it bought out a small company, Arran Transport, which ran some important routes in the West of Scotland. In December 1994 Stagecoach also made a pre-Christmas announcement of its purchase of A1 Buses based in Ayr.<sup>63</sup> This was a small co-operative which had operated since 1926 although it had problems with maintenance. Investigations by the MMC did not result in Stagecoach's divestment of this purchase even though it was one of the main competitors to Western. Stagecoach's consolidation in this area is significant as it forms an almost contiguous area to Cumbria and the North-West of England where it is the dominant operator.

With this flurry of acquisitions Glasgow remains the "jewel in the crown" for Stagecoach. This can be illustrated by its negotiations in the summer of 1994 for the purchase of Kelvin Central which would have given it a route into the Glasgow market. Early on in the deregulation process Stagecoach attempted to create a niche in the Glasgow market by establishing the Magicbus service in 1986. This was not a success and was sold in the early nineties. Scott explained that Strathclyde Buses easily dealt with this competition although the T&G argued that Strathclyde sustained some losses from running extra services to combat this threat.

Following its failure to take over Kelvin and before its 20% stake in SBH was announced Stagecoach acquired a garage in Thornliebank, in the south side of the city. This was bought from Clydeside 2000, a small operator which had been

recently acquired by British Bus plc,<sup>64</sup> another emerging large operator. Stagecoach then registered 19 services with the Traffic Commissioner which would cover the main areas of Glasgow. These were withdrawn, however, after the stake in SBH was announced. Apparently Stagecoach was approached by the Chair of SBH as he saw the necessity of getting a large operator on board.<sup>65</sup> This struggle to establish a market in Glasgow is enormously significant both from the point of view of Stagecoach's strategy and the deregulated approach to transport. This can be partly illustrated by examining the official response to this process.

## THE STATE'S RESPONSE.

Why was Glasgow one of the main battlegrounds in the war of consolidating bus markets fought mainly in 1994? One significant reason is the large amount of bus usage.

TABLE 2 : TRANSPORT USED TO GET TO WORK (my emphasis). (MMC 1995).

MODE OF TRANSPORT (%)	TRAIN/ UNDER- GROUND	<b>BUS</b>	<b>CAR</b>	CYCLE	FOOT
<b>STRATH- CLYDE</b>	5.1	<b>19.2</b>	<b>55.9</b>	0.9	12.7
<b>G'GOW</b>	7.9	<b>30.9</b>	<b>42.4</b>	0.9	12.9
<b>EAST- WOOD</b>	7.0	<b>8.9</b>	<b>72.9</b>	0.7	4.7

The table illustrates this point when comparing Glasgow with Eastwood, an affluent suburb of the city. Another useful comparison is that the British average of bus usage in this context is **10%**. Glasgow also has one of the lowest rates of car ownership in Britain. In this market the municipal operator had an obvious advantage which it maintained through the decade of deregulation. Yet it clearly felt threatened by the

emerging operators and had problems of its own as its restructuring programme of 1994 showed.

The take-over of Kelvin Central was referred to the MMC. The Chair of SBH commented "Though technically a take-over, in essence it is a merger between the two companies as there will be an equal three man split on the new board of directors".<sup>66</sup> The report<sup>67</sup> concluded the merger was not against the public interest - with one dissent. The actual competition between the two in the period prior to the acquisition was very muted. As was noted above the ferocious period of the first tranche of "bus wars" was largely over. It further stated that the real competition was *potential*; that is it would have been likely that Kelvin would have been taken over by another larger bus company. It concluded that the best controls on SBH abusing its position came from the smaller operators; the subsidised rail and underground services of Strathclyde Transport and the presence - albeit limited - of three national operators in contiguous areas.

On this last point it was noted that not only Stagecoach but British Bus and GRT operated in Strathclyde. However, it is worthwhile noting the comments of the dissenting member: Professor S Eilon. He pointed out that the current bus industry was resulting in the creation of a number of local monopolies that could comfortably co-exist. Thus the present role of the MMC was to prevent damaging "bus wars" taking place. However he felt these were transitory with only temporary effects and

“a small price to pay if competition is not to be killed off altogether”.<sup>68</sup> He argued that the best solution in this market was a *duopoly*. His dissatisfaction with the entire state of affairs is best illustrated by these words: “I agree that completely free competition in this industry may not be possible ... the contrasting scenario of a benevolent monopolist operating entirely in the public interest may well be a mirage”.<sup>69</sup>

What was perhaps more significant given the changed emphasis of the Government on deregulation was the Department of Transport’s response.<sup>70</sup> It said that the merger had to be placed in the wider context of what was going on in the Scottish bus market. Thus the merger was acceptable as a counterweight to other large operators. Even the Scottish Office, although viewing the merger as undesirable, believed that if Kelvin was divested it would be very vulnerable.

This investigation was carried out almost simultaneously with the examination of Stagecoach’s 20% stake in SBH.<sup>71</sup> It occurred in November 1994 with Stagecoach acquiring an £8.3 million stake. Peter Shaw, SBH’s chair commented that Stagecoach was an “ideal associate”<sup>72</sup> in the present bus industry, yet literally weeks before the two companies had been involved in rival bidding for Kelvin. The MMC’s report<sup>73</sup> concluded that Stagecoach would exert a material influence on SBH and hence would deter competition from other large operators. That was despite Stagecoach’s

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<sup>68</sup> *ibid.*, p23.

<sup>69</sup> *ibid.*, p24.

<sup>70</sup> *ibid.*, p 58.

argument that the arrangement was merely financial and that it would maintain the ethos of SBH as an employee owned company.

The authorities concluded that there were benefits to the arrangement, given Stagecoach's greater business knowledge, its wide experience of the bus industry outside Glasgow and its particular expertise in engineering.<sup>74</sup> However these benefits on paper have to compete with the actual realities of what the relationship would mean. Stagecoach *would* exert pressure beyond its 20% stake because of its experienced, commercially orientated management. This would be especially important given the perception of other bus companies and Stagecoach's reputation. The Government's response to this again was very significant. Without hesitation it called for Stagecoach to divest its holding in SBH<sup>75</sup>; this followed a similar pronouncement over the stake in Mainline Partnership in Sheffield.<sup>76</sup> In that case the MMC had only concluded that Stagecoach should not be allowed to increase its stake with no requirement to divest. All the other processes outlined in the preceding chapter were coming to the fore at this time. It is clear that the Government wanted to make an example of Stagecoach to illustrate its *new* approach to the bus industry.

However this proposal was dropped in relation to the Glasgow market<sup>77</sup> as in June 1996 FirstBus bought SBH including Stagecoach's share. This brought a large profit to Stagecoach and to the employees who owned shares in the company. It illustrates the attitude of the large operators towards each other of mutual existence by drawing

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<sup>74</sup> These arguments further confirm the benefits of an integrated bus network.

up 'spheres of influence'.<sup>78</sup> Yet even this did not cause stability, as the merger was again referred to the MMC which then proposed that Firstbus divest itself of some of the services in Strathclyde.<sup>79</sup>

It is clear that the examination of the battle for Glasgow's bus market provides an opportunity to examine a whole number of different processes: the initial glut of the first "bus wars"; the threat of the emerging operators; the privatisation of the publicly and municipally owned bus companies; the emergence of "employee-owned" companies; the methods of acquisition and merger. In recent years only the North-East of England's bus industry could have had more interest from the competition authorities.<sup>80</sup>

Overall it can be shown that after a decade of deregulation the 'competition' that exists in Glasgow is largely potential rather than actual, a point which can be expanded across the whole country. There remains an uneasy truce between the large nation-wide operators and the dominant ex-municipal bus company. Yet this constant threat has not resulted in major innovations but rather behind the doors deals to coopt existing operators as in the case of the SBH, and even in the case of Kelvin Central a very weak company. For Stagecoach it illustrates the problem it will have in breaking into many more domestic markets, particularly given the Government's new stance. Its target of acquiring employee-owned bus companies will prove difficult even if the board is initially enthusiastic as seemed the case in SBH, for even the MMC

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<sup>78</sup> But Stagecoach launched yet another incursion into the Glasgow market in May 1997.

concluded that the aims of Stagecoach were contradictory to the ethos of an employee owned company. Stagecoach may realise (given the admission in the report on Kelvin Central) that the MMC was concerned “that the process of privatisation, in Scotland and elsewhere, was creating groups of bus companies with an unfair competition advantage because of the favourable terms of the employee buy-outs”.<sup>81</sup> What the Glasgow situation shows above all else is how removed from the deregulatory paradigm put forward in the eighties the modern bus industry is.

## **CONCLUSION.**

Ten years of deregulation in the bus industry has turned processes originally outlined by its authors into the opposite. Monopolies have emerged from the bus wars with little regulation aside from the competition authorities and increasingly the Traffic Commissioners; this is quite ironic given their vilification at the time of the 1985 Act. Perhaps this seems to be stating an obvious point: **de** - regulation apparently means the absence of any regulatory structure. But as mentioned previously it is not as straight forward as this. Privatisation of the utilities resulted in the creation of regulators with quite substantial powers. In the nineties the notion of liberalisation and the benefits of privatisation was sullied. In the bus industry this seemed to be

reflected in the re-discovery of the concept of accountability<sup>82</sup> which as noted in the previous chapter had little currency in the debate on deregulation.

Then the Government seemed to move in the direction of “beefing up the regulators” in order to protect the consumer. A useful point of examination to support this view is the rail privatisation programme.<sup>83</sup> If anything this privatisation has an over-abundance of regulators - something which many potential private sector franchisees have attempted to point out. So although the bus industry was the only complete liberalisation undertaken by either the Thatcher or Major administration it was not immune from these developments. The calls for an element of re-regulation of the bus industry support this, although as has been shown the Conservative Government backed away from this.

The picture in the nineties is loosely analogous to that which existed in the twenties immediately prior to regulation. Then controls were sought to prevent the dominance of “fly-by-night” operators who gained dominance in their markets by using methods of “cream-skimming” or flooding the market. Now, although the events take place in a different era where the car is the dominant form of transport, similar methods have been utilised.

Now there is an added factor, for the experience of an integrated bus network has not passed the “new” operators in the bus industry by. Again this is hardly a controversial point to make as most of the dominant operators are ex-publicly owned companies.

The whole notion of a network operating with cross-subsidy was held in the eighties to be the reason for the bus industry's decline. Yet now when studying the justification given by large operators to the competition authorities and the reasons given by management of smaller companies as to why they support their merger in a larger company the arguments seem familiar. Evidence given by Stagecoach in the recent flurry of reports by the MMC stated: "It was incorrect to assume that there were not sizeable economies of scale to be made within the bus industry".<sup>84</sup> On the general issue of a deregulated market, "It is recognised that *wasteful* competition between the operators had been shown to be against the public's long term interest (emphasis added)".<sup>85</sup>

These views speak volumes as to the gap between the rationale of deregulation and the actual practice. Derek Scott, when interviewed, stated that Stagecoach could make sizeable economics of scale notably because of the supply of buses, engineering services and parts. He argued that the Ridley model of the mid-eighties was unrealistic and drawn up as a response to the dominance of the NBC. On deregulation generally Stagecoach believe the effects of deregulation were relatively minor, "The deregulation of the bus industry was intended to replace public capital with private capital".<sup>86</sup>

The other side of the equation is equally illuminating; that is the reaction of the smaller companies. In an earlier investigation of an acquisition of a company by

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<sup>83</sup> See relevant chapters.

Stagecoach the MMC concluded, “[as]... part of a larger group it would benefit from economies in purchasing and finance charges and capital investment could be brought forward”.<sup>87</sup> These words were echoed during the take-over fever of the mid-nineties. Moir Lockheed, the Chief Executive of GRT in its own merger with Badgerline stated the overwhelming reason was “the substantial economies of scale”<sup>88</sup> which could be made. It has become generally accepted that a larger group can make savings in the purchase of buses, insurance and diesel fuel; further it has the benefits of a network. This implicitly accepts the notion of cross-subsidy so much attacked in the nineteen eighties. When this point is accepted it undermines the whole basis of deregulation and indeed advances the argument for a co-ordinated transport service.

What, then, does this show? The attempt to break up the NBC and promote small operators has failed. Rather, although there remain a large number of small operators,<sup>89</sup> the market is dominated by large firms which utilise the methods of a publicly owned network with none of the safeguards. That is they use cross-subsidy - although the phrase itself is never used - and use their size to gain economies. But their overriding objective is to make profit. So although bus use has declined every year since deregulation this has not prevented these companies establishing themselves as financial players on the Stock Exchange. In many instances, to use the words of one commentator, they are “eking out growth from static revenues”.<sup>90</sup> This shows the difficulties of separating the concepts of accountability and of ownership because public ownership would not be concerned with producing dividends but only

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<sup>87</sup> MMC(1991). Cmnd 1382 at p47.

in providing a public transport system - thus fulfilling a particular model of accountability. Although there have been attempts to re-assert accountability as outlined in this chapter it has not been possible as the bus industry is now largely privately operated, even though the methods used by these companies mimic the pattern in which the publicly owned bus companies operated.

This illustrates the argument put forward in the Introduction which was sceptical about the delivery of accountability through a purely private service. One of the justifications for privatising was to let the market decide. In this way a form of accountability would be delivered as the services would be more receptive to the consumer. But even this extremely indirect form of accountability did not come into existence in the bus industry. Deregulation did not prevent consolidation nor integration, indeed the industries actively promoted this policy. The reintroduction of the untrammelled private sector led to the pursuit of increasing shareholder value. This result did not solve any of the problems of delivering an accountable bus industry.

These developments occurred because the Thatcher/Major administration could not prevent the general tendency of public transport to move to an integrated position even when privatised. Yet this tendency can be damaging to the bus users and employees if not coupled with an industry held accountable as was provided in part by the Traffic Commissioners. Integration has occurred but in a distorted, fragmented way where shareholders' dividends become the driving force. It may be argued that

make no profits. Yet it has been shown that the dominant operators have monopolistic or oligopolistic positions which can eliminate quite effectively any emerging challengers. Through privatisation the Government could not prevent the broader processes which were at work in the bus industry and had been since the early decades of this century. A publicly owned bus industry could have had all the economies of scale which the new operators now had and could have involved the workers in the industry and bus users to great effect. This theme will be fully explored in my concluding chapters.

Yet the experience of the deregulation of a large part of public transport was meant to be an example not just of the benefits of the market but of future transport privatisation: particularly the rail industry. In the next two chapters the model of public ownership and privatisation adopted for rail will be examined as will how the processes were affected by the experience of bus deregulation, and how the concepts of accountability and regulatory control came to play such a large part in the model of rail privatisation.

## CHAPTER SIX.

### BRITISH RAIL.

#### A MODEL OF PUBLIC OWNERSHIP?

If the bus industry in the early eighties was a broad mixture of publicly owned local authority services, subsidiaries of a national operator and some private services, the rail industry was very different. British Rail, the national and sole operator, became synonymous for opponents of public ownership with the monolithic public corporation; it was once argued that Thatcherism was born from the frustration of the commuters of South-East England. Yet the privatisation of this industry was not announced until relatively late in the Thatcher era and implemented several years after that. However this maintenance of the rail industry in the public sector did not mark a more benevolent attitude towards the industry. Indeed, as shall be shown, the constraints put on the publicly owned railway could be seen as preparing the path for a form of privatisation.

Under the Thatcher/Major Governments there was much criticism of the absence of a coherent transport policy. Although there have been Government responses to these accusations<sup>1</sup> their attitude to the rail industry at times seemed to amount to disdain. It is alleged that Mrs Thatcher, an ex-opposition spokesperson on Transport, at her first meeting with the British Rail Board said "If any of you were any good you wouldn't

be here". Apocryphal or not, this story reflects the tensions felt by British Rail under Thatcherism. But it could also be argued that the Thatcher era - rather than representing a completely new attitude - marked an intensification of pressures which always existed on the railway because of the structure of public ownership adopted.

Certainly the institutional structures created by nationalisation concealed a number of conflicting tensions which periodically rose to the surface. Thus in this chapter the structure of the nationalised rail industry will be examined. As mentioned above this structure was much closer to the public corporation model outlined in Chapter 2 than that of the bus industry ever was. The test of accountability will be applied to this organisation for, as explained in the Introduction, this concept is central for public lawyers. As a public corporation much of British Rail's structural difficulties were generic to all of the nationalised industries. However these were coupled with specific difficulties of running a railway as part of the transport infrastructure.

This chapter will thus examine the structure adopted after nationalisation and the problems attached to it. Further reorganisations will also be examined. It shall be shown that these reorganisations took place right up to the eve of privatisation. After this the background to the privatisation proposals will be examined. These adopted a series of different models. This will prepare the ground for Chapter 7 which will encompass a detailed study of the actual procedure for privatisation and whether it delivered the elusive accountability.

## THE STRUCTURE OF BRITISH RAIL AFTER NATIONALISATION

When the Labour Government of 1945-51 nationalised the railways it did so only as part of a larger programme of providing a unified transport system in Britain. Part one of the Transport Act 1947 established the British Transport Commission as part of a “properly integrated system of public inland transport”.<sup>2</sup> Necessary as the idea of co-ordination is in transport<sup>3</sup> the model created by the legislation caused problems.

The BTC consisted of a small supervisory board which existed alongside a number of executives which dealt with the daily operation of each service. Such a structure was clearly prone to tensions particularly between the Railway Executive and the BTC. In 1948 the Railways accounted for 77% of the BTC’s gross receipts,<sup>4</sup> and this superiority may account for the haughty attitude to other forms of transport. Further, some transport historians argue that an even greater reason for tension lay in the fact that the executives, including the Railway Executive, were appointed directly by the minister and not by the BTC: “The biggest obstacle was the fact that the Commission did not appoint its own agents”.<sup>5</sup>

So, rather than co-ordination, the Commission was almost in competition with the newly unified four major railway companies. One participant in the process of reorganisation in the railway industry said, “much feeling and heat was generated”<sup>6</sup> in the conflict between Executive and Commission. For example expurgated minutes of

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<sup>2</sup> Transport Act 1947 s 2, on this section generally see Bonavia (1987) and unpublished thesis McDonald (1987).

the Railway Executive were sent to the BTC while the Executive kept the uncensored set.<sup>7</sup> Such problems not only undermined co-ordination but further exacerbated the problems of control; these were also apparent when looking at the structure of the Executive itself.

These tensions are significant as they highlight the difficulties that the public corporation had in working in a co-ordinated manner with other organisations. As explained in chapter 2, one of the major reasons behind the adoption of the corporation was because it allowed a degree of independence from central government. However this independence became a hindrance when trying to promote a co-ordinated transport system. There were also difficulties with trying to promote a co-ordinated economic policy for the country when there was a number of competing corporations. This poses two general questions of accountability, firstly the Government could not use its own creation to promote a co-ordinated transport policy, and secondly, the structure adopted prevented individual consumers holding the industry to account. This illustrates both the multi-layered nature of accountability and the failure of the public corporation to fulfil any of them.

As in the other nationalisations of the 1945-51 government, much experience was derived from the Second World War. This was true for the structure of the railway industry and the Executive which was “functional and highly centralised”,<sup>8</sup> functional as each member of the Executive could give direction to officers within his function anywhere in Britain ostensibly to “enforce standard practices”,<sup>9</sup> and centralised as the

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<sup>6</sup> Deakin (1964) p62

structure had “some roots in the military organisation model”<sup>10</sup> and all regional officers were directly responsible to the Executive. This dramatic centralised structure for the railways undoubtedly had some advantages: it allowed standardisation of rolling stock, created savings in the field of civil engineering and gave benefits in the computation of accounts and statistics.<sup>11</sup>

Yet this masked tensions which existed, particularly with the regions. For the chief Regional Officer was torn between two functions; that of co-ordinating his own region and that of implementing centralised rules from the Executive. Moreover departmental officers within the region were responsible directly to the Executive, not to the regional officer. Previous opponents of public ownership exploited this at the time. The then Director of the Chartered Institute of Transport (Lamb) in his presidential address stated “Second thoughts are often best, and an arrangement which gives full authority to the chief regional officer and makes him the medium for all major directions of the Executive should... secure the advantages obtainable from unification”.<sup>12</sup>

As so often occurs in British constitutional arrangements, diffuse chains of command allow for an obfuscation of control and accountability. Thus the idea of using public ownership as a means of controlling previously privately run concerns - which was extremely popular among railway workers<sup>13</sup> - became discredited. “The Railway Executive became as unpopular with those down the line, because of its central

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<sup>10</sup> Nash/Preston (1993), p95.

<sup>11</sup> Much in the same way as the larger bus operators could be seen to consolidate their position in the

commanding position, as with its master above”.<sup>14</sup> Meanwhile waiting in the wings was the Conservative Party with its decentralising programme. This sought to build on the alienation felt by the particular model of public ownership adopted, in a sense similar to privatisation. Rather than opt for a return to the private sector - perhaps the memories of the inefficiencies of this era were too recent - the Party opted for reorganisation within the sector. It largely retained the public corporation form. Thus the Party’s ability to criticise wholesale this particular structure’s lack of ‘accountability’ was limited. This is in line with the broad position adopted by Conservatives in the post-war period discussed in Chapter 2 and later criticised by Joseph and Thatcher.

## THE CONSERVATIVE RESTRUCTURING OF THE RAILWAYS.

It has already been noted in Chapter 3 that in general the Conservative Party did not reverse any of the nationalisation measures of the post-war Labour government. Only when the structures interfered with profitable businesses like iron and steel and road haulage did it put forward denationalisation measures. In general it was satisfied with the structure of the public corporation and the generous measures of compensation given to the private sector following public ownership. However as far as rail went the Conservatives did want to restructure. This was envisaged in their pre-election policy document "The Right Road for Britain": "British Railways should be re-organised into an appropriate number of regional railway systems, each with their own pride of identity, and co-ordinated *as to broad policy alone* by a central body (my emphasis)".<sup>15</sup>

This can be seen as exacerbating the internal difficulties of the newly nationalised rail undertakings. However there was also a desire to use nostalgia for the old railway companies<sup>16</sup> with an attempt to revamp the regional boards of the pre-war level. This was aided by old members of the private railway management like Sir James Milne of the old Great Western Railway who had much secret contact with the Conservative Party.<sup>17</sup> He had originally opposed state ownership and had put forward the alternative of the existing railway companies being turned into local transport

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<sup>15</sup> Quoted in Bonavia *op. cit.* p145

authorities.<sup>18</sup> Ironically enough he was also the original choice for the Chair of the Railway Executive.<sup>19</sup> Perhaps the use of nostalgia sought to play on people's dissatisfaction with the present but without promoting any substantive change such as a change in ownership back to the private sector.

The Transport Act 1953 abolished the Railway Executive but retained the British Transport Commission which was to implement transport policy. The White Paper prior to the legislation<sup>20</sup> had admitted that integration had not succeeded but the Commission was retained so as to provide a focus for Transport Policy. The possibility of any form of co-ordination was also weakened by the disposal by the Transport Commission of the road haulage companies. The staff of the Executive merged with the Commission which appointed the regional boards.<sup>21</sup> Thus the making of policy was still carried out within the 'corporate' structure. The question of it being a distant unaccountable body was not debated at this time. Indeed it would seem that these arguments were not used until the Joseph/Thatcher era.

However superficial these changes were in terms of ownership and accountability the idea of recreating powerful regional boards with minimal interference from the centre flew in the face of the experience of the railways in the last century. As mentioned in Chapter 2 nationalisation nearly occurred several times in the nineteenth century and the early decades of the twentieth. In fact in the words of a civil servant working in the railways: "as time passed and the work of the centre grew, the abolition of the Railway Executive became more and more difficult to understand. The centre of

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<sup>18</sup> MacDonald *op. cit.* p230

gravity of the railways was very much the Commission's headquarters and it became more so as the years went by".<sup>22</sup> This reorganisation of sorts was coupled with the Modernisation plan of 1955 which sought to upgrade the network and its rolling stock which was still dominated by steam. Unfortunately these ambitious plans also coincided with the railway facing economic catastrophe.

The original cost of the plan was to be £1660 million over 15 years, and the actual expenditure between 1955-9 was £587 million.<sup>23</sup> Yet the mid-fifties was exactly when the use of the car exploded. Between 1950-60 the number of vehicles in Britain doubled.<sup>24</sup> This corresponded with a dramatic fall in railway receipts which failed to cover working expenses from 1956 onwards.<sup>25</sup> Significantly for this work the fifties also were the high point for the use of the bus as a mode of transport. Thus the financial position of the railways was in a perilous situation.

In 1960 the Select Committee on Nationalised Industries compiled a report on the Rail industry. It concluded that in the railways there was "confusion in judging between what is economically right and what is socially desirable".<sup>26</sup> There was also criticism of the modernisation plan which a Treasury representative had described to the Select Committee as "merely a hotchpotch of the things that the Commission was saying it was desirable to try to achieve by 1970".<sup>27</sup> There was no economic study of the implications of the plan or the impact that road traffic would have on it.

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<sup>22</sup> *ibid.*, p81.

<sup>23</sup> Barker/Savage *op. cit.*, p221.

<sup>24</sup> Macdonald *op. cit.* p267

These criticisms echoed the Select Committee's reports on other nationalised industries; namely the failure to differentiate between commercial obligations and social responsibility. This division is particularly pertinent for the rail industry with its division between rural and urban services.<sup>28</sup> Furthermore, the concept of peak travel with different volumes of passengers at different times on the same route affected the rail industry.<sup>29</sup> Thus in the same way as the bus industry it would be impossible to distinguish a particular commercial service from a particular social service; the two overlap. The difficulty in drawing a line between commercial and social is one of the reasons why it was so hard to devise a scheme for rail privatisation (and even harder to put it into practice) as shall be shown in the next chapter. The Select Committee report paved the way for another reorganisation with the Transport Act 1962 which abolished the BTC and created the British Railways Board<sup>30</sup> whose first Chairman was Dr Beeching from ICI. His *Reshaping of the Railways* report hardly examined the social implications of the Railway at all but concentrated on which parts of the railway were commercially viable. The overall effect was to close down 5000 route miles and close 2363 stations.

Thus within the public corporation form there were a number of reorganisations at the management level. This did not coincide with either greater transparency in decision-making or an increase in external accountability. Rather the inevitable growth of a centralised structure was recognised yet with little control adopted over it. In a sense the reversal of the modest moves towards decentralisation highlight the lack of thought which goes into structural reform within the British state. The challenge to

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<sup>28</sup> Although neither now make a profit

the public corporation form from either the left or right did not manifest itself in this era. Yet the lack of accountability and co-ordination with other modes of public transport was transparently clear at this juncture.

The severe cutting of rail services was the effect of the divorcing of social responsibilities from the rest of the railways. This in turn stemmed from the structure of nationalisation and its subsequent reform which did not allow for any control or accountability. Thus no users or railway workers could give their definition of a 'social' railway and arguably this structure even excluded Government ministers: it was the Board which decided.<sup>31</sup> The primary pressures on the Board were commercial whereas the impetus for public ownership from the grassroots<sup>32</sup> and even to some extent from Morrison himself was social. This contradiction was not solved by the public corporation; rather its 'independence' encouraged the commercial ethic at the expense of the social. Again in this tension we see the different ideas in how to deliver accountability through different structures as outlined in the Introduction. Alongside this the structure of the BTC did not allow for proper co-ordination by its exclusion of road travel - which had this early stage of its development could have become part of an integrated transport network.

This perhaps was altered with the passing of the Transport Act in 1968 under the Labour Government of Harold Wilson. As explained in the examination of the bus industry, this established the PTEs which allowed a measure of co-ordination at a local level with elected councils co-ordinating their services. With local government reorganisation of the early seventies it also marked the era when subsidy began to be

paid at a local level. This was an attempt to harmonise local transport, in a sense like local BTCs. Yet although this was a worthy initiative it did not tackle the larger problem of the structure of British Rail. There was no nation-wide Transport Executive with elected officials to hold BR accountable. Perhaps it was felt that as a nationalised concern there were enough controls. This is debatable given the structural concerns and dissipation of accountability which was identified in Chapter Two.

Public ownership if it was to fulfil the aspirations of all those who supported it in the forties had to involve a system of providing socially necessary services. This reflects the impetus mentioned above. The concept of commercially viable services from the standpoint of these supporters was at best a secondary consideration and at worst completely irrelevant. However coinciding with these demands for public ownership was the state's adoption of a form of nationalisation which did not accept this. The state's view was that these industries could be more efficiently run under the form of the public corporation. The popular feelings did not come into it. This was particularly true for the railways which prior to nationalisation in the forties had a long history of state involvement. Thus the structure of the public corporation tended to reflect the Government's priorities of efficiency and commercialism rather than the socially inspired movement for public ownership. Indeed as previously noted its structure was heavily influenced by the joint-stock company with its separation of management and ownership. Thus it could be argued this further emphasised the priorities of 'commercialism'. When these aspects of a transport service become separated from its obligation to society problems occur, although a degree of

linked - commercialism will follow a successful integrated transport system. Yet the terms of debate during public ownership always focused on their separation. That can be seen both in the period following the 1960 Select Committee Report and the significant era of the eighties and the nineties under Thatcher and Major. Further if the solution of that problem was the key to dealing with the rail network then why did it exist for so long? What was never identified during this period was a structure for the railways which involved the public and employees in the definition of a 'socially necessary' railway. There was no external involvement of any group- thus in this sense the question of *public* accountability was placed to one side. However this was a contradiction which could not be ignored indefinitely. Ironically during the privatisation process as shall be identified there seemed to be more attention paid to different concepts of accountability than there was during the long period of public ownership.

## “COMMERCIALISATION” OF BRITISH RAIL IN THE THATCHER YEARS

The Eighties were viewed as a critical time by rail management: an essential programme of investment was needed to update the railway stock. Most of the equipment had been brought in under the 1955 Modernisation Plan which as has been seen ran into its own problems. In 1978 the Department of Transport had agreed to review the electrification programme proposed by the board. This general upgrading had begun with the West Coast Main Line in the sixties and seventies. A joint review on the subject was carried out by the Department and the BR Board from 1979-81. The management pinned its hopes for the new decade on a general upgrading of the network.

However the strategy of British Rail depended on this investment being forthcoming from the government. Although Norman Fowler was initially enthusiastic over the electrification programme<sup>33</sup> he delayed making a decision throughout his time of office claiming the rail network must become more productive. His successor, David Howell, was even more frank. He claimed to be “committed in principle”<sup>34</sup> to the ten-year electrification programme. However, he would only consider it on a route by route basis. Further, any investment proposed had to be measured against how the previous investment had performed. This allowed one journal to compare Fowler's

carrot and stick approach to being beaten by David Howell's stick.<sup>35</sup> The same approach was extended to the trains many of which were very old. Modern Railways, in 1982, under a headline "Toward the Geriatric Train"<sup>36</sup> wrote that British rail "remains an undertaking whose assets are in some places visibly wasting away".

The Government's policy or lack of it toward the investment programme was compounded by the Serpell Report of 1983. Serpell was a railway executive on the BR board and it was widely hoped by the corporation that he would produce a report generally supportive of its demands. This could not have been more wrong. The report criticised British Rail for being inaccurate in its forecasts and claimed the estimated costing of its investment was grossly inaccurate. Most importantly the report specifically rejected the claim that a High Investment Option would result in a financial return for the railways and so stated "we doubt whether the amount of PSO grant required in 1992... need be higher in real terms than the present level, provided the Board achieve the savings and efficiency improvements that are feasible".<sup>37</sup> It thus rejected any concept of improving central funding.

Most of the publicity around the report centred on its maps which examined the possibility of rationalising BR's major routes. With astonishing lack of political aplomb the report examined the possibility of a network of 1600 miles, claiming it would be financially viable. However those plans were just hypothetical musing - what was more significant was the way other elements of the report influenced rail management's thinking over the decade. It was clear that no high investment was going to be forthcoming. The emphasis was to be on restructuring BR to make it

more productive in its management and labour force. As Margaret Thatcher put it following the first series of ASLEF strikes in 1982: "If there is to be a future for BR it has to be modernised in its labour practices".<sup>38</sup> Reviewing the report Dodgson, a transport economist, claimed there were three main areas for BR to concentrate on to have a future:<sup>39</sup> a determined management, a clear statement of objectives and an initiative to deal with out-dated working practices. This would also necessarily involve a targeting of subsidies to the most cost-effective areas. Giving a speech on 2 November 1982<sup>40</sup> Howell said large subsidies to rail were causing "transport expectations to rise unchecked".

Such an approach signalled a tightening of subsidy rather than an extension of investment. This would seem to be classic Thatcherism yet as, one academic put it, it was merely an "intensification of existing trends".<sup>41</sup> Under the new Government the Public Service Obligation, the grant given to the railway, was cut back and the External Finance Limit was tightened. However both had also occurred under the previous Labour Administration. Indeed, the EFL was an initiative of the 74-79 government. The roots may have lain in the period of the early sixties when the notion of a commercial publicly owned railway began to be raised in the Select Committee Report.<sup>42</sup> Having less money British Rail needed to readjust in the areas highlighted in the Serpell report: management and labour productivity.

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<sup>37</sup> Serpell Report DoT (1983), p85.

<sup>38</sup> Modern Railways, April 1982.

<sup>39</sup> Dodgson (1983)

Thus the Thatcher administration, rather than initially tearing down the nationalised structure, used it to influence the industries. This process has been noted in other industries<sup>43</sup> but in rail in a sense it is clearest. Some could argue that this experience of the early years of Thatcherism and the last Labour Government shows that ultimately there was a form of democratic control of the nationalised industries, although a very convoluted and distant form. However rather than increase the accountability of the industries this *control* underlined the absence of that accountability. Strict financial targets and secret meetings carried out by ministers hardly amounted to a new accountability. Furthermore, the use of an outside study into the industry by Serpell in an ad hoc manner emphasised the lack of consistency which was employed when dealing with the publicly owned industries.

### The Reid's Reorganisations

The restructuring of the management of BR without investment in the rolling stock, given the catastrophic vision outlined above may seem akin to rearranging the deck-chairs on the Titanic. Yet one of these initiatives, the "sectorisation" of British Rail management, was labelled by the Board, "the single most important organisational change since nationalisation".<sup>44</sup> However as has been seen the notion of reorganising the structures of the industry to cope with a crisis was not new, as the Transport Acts of 1953 and 1962 testify. Along with a new corporate planning framework and appraisal of investment proposals the changes allegedly hastened the "commercialisation" of British Rail. In the words of the Board "(it) pays full regard to the needs of the market and of competition".<sup>45</sup>

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<sup>43</sup> See Prosser (1986). For example in the use of negative External Financial Limits in the Gas

As argued above this trend towards 'commercialisation' was not a modern trend, far less was it due solely to the impact of Thatcherism. Since the sixties both Labour and Conservative administrations have recognised the diverse nature of rail services. The 1968 Transport Act<sup>46</sup> and the 1974 Railways Act<sup>47</sup> emphasised the distinction between commercial and social rail services, as also described by the 1960 Select Committee report. The PSO was given to subsidise unremunerative but socially necessary routes. Peter Parker the Chairperson of the Board from 1975-83, formulated the concept of a "social railway"<sup>48</sup> which was not however entirely new. Essentially the sector management approach took this further. Thus once again the problems of the railway were put down to the elusive division between socially necessary and economic services which as argued above was encouraged by the particular structure of the public corporation.

The post-nationalisation model combined regional bases with functional separation. This was altered to try and separate policy from management with the decentralisation proposals of 1953, but it was not very successful as the nature of the railway demanded a strong central authority as was recognised with the establishment of the BR Board in 1963. The sectorisation of the eighties identified five main areas of rail service: Inter-City, Freight, Parcels, Network Southeast and Provincial services. In managerial jargon this was a matrix approach as the sectors intersected with function and region.<sup>49</sup> It also introduced the bottom-line concept whereby the director of a

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<sup>46</sup> 1968 c 73

sector had complete control of his own field with a separate profit and loss account. The separation into sectors also allowed the profitable areas of the rail network to be identified. This led, inevitably, to a greater emphasis on financial targeting - which had existed previously - with firm targets set in October 1983 and August 1984<sup>50</sup> for Inter-City and Parcels. Again the concept of 'commercialising' these sectors of the rail network was an old one but never before had such strict timetables been set. It coincided with the Secretary of State setting clear objectives for the PSO seeking a 25% cut by 1989/90.

The general process towards identifying the profitable sectors of the railways thus intersected with a tightening of subsidy. The underlying philosophy of the management shake-up was a clear linking of objectives with financial support. A central criticism in the Serpell Report had been that unrealisable targets were set by management with the hope that government would endlessly subsidise them.<sup>51</sup> Throughout the eighties the sectorisation approach was widely acclaimed as helping British Rail improve its general financial position, although a parallel factor may have been the development and sale of the land owned by BR in alliance with the private sector. Cynically, this allowed the Lex column in the Financial Times -following the release of the corporation's results of 1989- to label it "a property company with an irksome mass transit sideline".<sup>52</sup>

Indeed, although the management restructuring was declared successful it did not prevent a new plan being brought in under the next Chairman of British Rail labelled "Organising for Quality". Two transport experts called this inevitable given "the

government's commitment to privatise and the low level of esteem with which BR is viewed by the public".<sup>53</sup> But if the previous reorganisation had been successful why did these two attitudes exist? Significantly this reorganisation began in the early nineties and was completed in April 1992.

In discussion with a leading employee of Railtrack<sup>54</sup> (Scotland) the OFQ initiative was labelled the "shortest revolution in history". It was introduced the week before the Conservatives won the 1992 election with a commitment to privatise the rail industry. The period when the OFQ initiative was taken was when serious discussion had started on the possible sell-off of the network as examined below. The claims were of deepening the important changes of Sir Robert Reid in 1982 when he brought in his "five fingers"<sup>55</sup>, that is the sectorisation project. Much of the same terminology was used in the OFQ initiative with Bob Reid at the Transport Committee's investigation into privatisation claiming the "buck would stop"<sup>56</sup> at certain individuals' doors; bottom-line management. There was further decentralisation with the main sectors subdividing into different routes<sup>57</sup> and greater transparency in decisions allowing "simplicity and focus".<sup>58</sup>

One view of the OFQ initiative would be to see it as the final stepping-stone on the process from "commercial" British Rail to outright privatisation. This is supported by John Heath, a senior consultant to BR from 1978-93, who pointed out that the 27

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<sup>52</sup> Lex in the Financial Times 6 July 1989.

<sup>53</sup> Nash/Preston *op. cit.*, p96.

<sup>54</sup> Interview with Press Officer of Railtrack (Scotland).

<sup>55</sup> *Financial Times*, 10 July 1982.

profit centres created by OFQ were the basis of the 30 potential franchises post-privatisation.<sup>59</sup> This allowed the image to be created that the changes of 1 April 1994 were “a cleverly contrived continuation of the fundamental organisational changes introduced in April 1982 and April 1992”.<sup>60</sup> However we must always set this process in context. In the fifteen years of Conservative Government there were three major reorganisations at British Rail each claiming to stand on the shoulders of the other. It could be argued that these reorganisations stand in a direct line from the Beeching reorganisation of the sixties. However money became tighter and tighter, although some projects were agreed to -notably the electrification of the East Coast Main Line - other elements of the rolling stock continued their decay.

### ‘Productivity’ of the Worker.

The other side of the reorganisation equation was the attitude to the labour force. One word above all illustrates the standard by which railway workers had to live by: *productivity*. Indeed, it is remarkable to see the monotony with which this term was utilised, from Sir Peter Parker's assertion that it was the “rock on which we must build the future of the railway”<sup>61</sup> in 1976 to the Chief Executive in 1992, John Welsby, explaining that during the OFQ process they had “looked at achieving much greater productivity”.<sup>62</sup> The term has a variety of meanings. It amounted to a Trojan Horse of a concept - allowing the management's own agenda to be brought in along with it. For example, in the seventies productivity was allied to a wide electrification

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<sup>58</sup> HC 246 II, P47.

<sup>59</sup> In Heath(1994) FT 23 March 1994

programme on the railways<sup>63</sup> stemming from government's investment and the involvement of the PTEs.

However in the eighties the Government's - and to a large extent rail management's - attitude to productivity was aimed at the workforce. Not that management itself was inviolable, for during the 1982 shake-up a whole administrative sector was removed (the divisions) and later performance related pay was brought in for some sections of the management.<sup>64</sup> Yet the main burden fell on the worker: over the decade flexible rostering, extension of single manning and the introduction of guard-less trains all affected the workforce. There was a remarkable increase in productivity; over 1979-86/7, 24.2% compared to 1970-9, 10%.<sup>65</sup> But at what price?

It can be seen that there are two main areas where we can find the consequences. Firstly the number of people employed by the railways fell dramatically from 1979-86, by an estimated 23%. Again, this was a long-term wastage hastened by the Beeching era but given added impetus under Thatcherism. No dramatic redundancies were announced but slowly and steadily numbers left the industry. The second consequence has been studied by academics in the industrial relations field but is of particular relevance to public lawyers. That is the peculiar arena in which the management of a nationalised industry operates. Much weight has to be given to the political climate: "political considerations are an inherent rather than a contingent characteristic".<sup>66</sup>

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<sup>63</sup> As emphasised by Bagwell(1983) Chap 1.

Therefore the change of Thatcherism was that much more significant to British Rail's management. In the field of industrial relations there was a shift from cooption to coercion. For example a corporatist body had existed in the seventies called the Rail Council; it involved both management and unions and regularly lobbied government. This is in marked distinction to the management's approach in the disputes of the eighties particularly the ASLEF action over flexible rostering. In this appeals were made over the heads of the unions, threats were issued to the workforce and closed shop agreements were unilaterally revoked. Ferner argues the entire dispute was to appease a Government "demanding blood"; moreover, that it was carried out to confront the corporation's political costs.<sup>67</sup> Again, the change in BR's approach was not a dramatic turn-round but rather a more extreme example of existing tensions. If we accept that Thatcherism was an intensification of existing processes then we can see the beginning of a hardening of attitudes prior to 1979. This is particularly true of the document "The Challenge Of The Eighties" which listed a whole number of productivity savings aimed at the workforce. Admittedly this did coincide with Sir Peter Parker aiming for a "social partnership" in the railways but the seeds had been sown. It could be argued that the entire concept of a commercial railway needs to demand this from the workforce. Yet how this was compatible with a 'social' railway - even though both these concepts had been explicitly stated for over thirty years - was still not clear. In fact supporting the view that the structure of public ownership encouraged these tensions in the six years after nationalisation the number of industrial disputes escalated reflecting the disillusionment of the workforce in that form of public ownership.

The root of all the changes outlined above - both in the workforce and the management stem from a fundamental change. The emphasis from the mid-seventies onward was against any large-scale investment. This meant any future for the rail industry would largely be managing decline, management restructuring and productivity deals aside. Government used all its powers to transform British Rail: financial pressures, political attacks and industrial coercion. "Government control over railway policy was exercised through the purse strings rather than through legislation affecting the ownership and management of the railway system".<sup>68</sup> This was recognised by the management with Parker calling 1983 a "watershed" year for the industry. However none of this gave BR a long-term future in the public sector as the privatisation plans prove.

Thus the treatment of British Rail under Thatcherism was not completely new. The concepts of commercial and social responsibilities continued to be used. Tighter financial limits were used to pressurise the industry. Admittedly there was more pressure on the management to challenge the workforce but even this had been sign-posted by the previous Labour Government. What was missing again was the central concept of accountability. The centralised structure of the nationalised industry although criticised by Thatcher was certainly used to full effect, yet the idea of promoting accountability was not heard. The experience of the publicly owned network was a missed opportunity to introduce a form of accountability which could have clarified what was meant by the 'social railway'. This, in a sense, paved the way for privatisation, which as shall be shown tried to utilise the concept of more effective accountability as one of its justifications.

## THE PRIVATISATION PLANS 1988-1992.

In October 1988 when the Secretary of State for Transport, Paul Channon, announced the intention to sell off British Rail to the Conservative Party conference it was not the first time the idea had been floated. Following the 1983 election a report appeared in the Daily Telegraph claiming that Mrs Thatcher had commissioned private studies to examine possible sell-offs of the NHS and BR; this was strenuously denied. In the autumn of 1984 the influential think-tank, the IEA, published an article called: "BR: privatisation without tears"<sup>69</sup> by David Starkie.

However, 1988 was the first public endorsement. This was the period of the immediate after-glow of Thatcher's third electoral victory when all seemed possible in her 'revolution'. At this stage the plan seemed to consist of raising privatisation at conference to gain a standing ovation. There was no worked out timetable. Indeed, only one year later at Tory conference the new, and personally more Thatcherite, Transport Secretary Cecil Parkinson said the BR sell off was not a "high priority".<sup>70</sup> One of the reasons for the delay, apart from the prohibitive cost,<sup>71</sup> was the number of competing options for the privatisation model.

The management's plan was to transfer the industry wholesale to the private sector: BR plc. One could argue that the endless changing of management throughout the eighties was in order to make this option more attractive to the Government. This was

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<sup>69</sup> Starkie (1984). Despite the lack of prescience in its title this article remains significant when we

supported by economists like David Sawers<sup>72</sup> and the watch-dog body the Central Transport Consultative Committee which claimed any fragmentation would damage an integrated network. Many on the BR board believed their option would be the one adopted. However this coincided with the problems of the privatised utilities of Gas and Telecom - widely criticised as private sector monopolies. These criticisms definitely affected the structure of electricity privatisation and probably played a similar role in the embryonic discussions of rail privatisation. Further, the government remained very sceptical of the rail management particularly with its handling of the 1989 NUR dispute. This was emphasised in its search for a successor to Sir Robert Reid as chair bringing in an outsider from Shell ironically called Sir Bob Reid.<sup>73</sup> The notion, then, that the government would support a wholesale transfer to the private sector was based on weak hopes. In fact, as we shall see, during the course of the legislation any attempt to present British Rail as a unified entity post-privatisation was strongly opposed.

The two major Thatcherite think-tanks, the Centre for Policy Studies and the Adam Smith Institute, both came up with plans to break the network up prior to privatisation. The CPS plan by Andrew Gritten<sup>74</sup> sought to go back to the future with the creation of regionally based rail companies. This "golden age scenario" was suggested as being the Prime Minister's favoured option prior to the 1992 election.<sup>75</sup> Indeed it seems somewhat similar to the watered down proposals of the Transport Act 1953. The problem was that the result would be the creation of local monopolies with a very limited amount of direct competition. The only distinction would be their

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<sup>72</sup> FT 8 June 1988 and 5 Feb. 1992.

ability to measure their standards against rival companies: 'yardstick' competition as adopted in the water industries in England and Wales. As far as accountability goes it could be argued that making a service more local means it will be necessarily more accountable in one sense as it is closer to the area and people it serves. Again this was the argument of the Conservatives in the fifties and in a more concrete sense in the later creation of the PTEs.

The Adam Smith Institute published a report by Kenneth Irvine<sup>76</sup> who developed the argument of David Starkie that infrastructure and operations should be separated. In a certain sense, this corresponds with the model actually adopted and with developments in European Law.<sup>77</sup> The argument states that the entry costs to run a rail network are very high. There are the sunken costs of track and signalling which are difficult to identify, although an attempt to do this was made by the 'prime user' approach in BR in August 1984. Further, the cost of trains is extremely prohibitive and unlike the bus industry, there is hardly any second hand market. This being accepted, infrastructure could be owned by one body either in the public or private sector, which would then free the private sector to run train services paying a fixed charge to the owners of the track and trains. The comparison is with the use of roads with the driver paying taxes for the maintenance of the network. Although identifiable now as similar to the 1994 privatisation model at the time it was not regarded as viable.

Other options involved a hybrid of schemes with the possible complete sell off of certain sectors; for example, the Freight network. This was supported by ex-Tory

minister John Redwood<sup>78</sup> an ex-director of the CPS and leadership challenger to John Major in 1995. It was also suggested that Malcolm Rifkind, another Secretary of State, favoured the maintenance of all five sectors but selling them separately. It can be seen that the march from conference speech to policy document was extremely long and convoluted. The secrecy of British Government precludes a completely accurate discussion of how the White Paper<sup>79</sup> was drafted, but what is clear is that there was intense delay in making a decision. The Citizen's Charter assured an announcement would be made at the end of 1991, then it was to be published prior to the election of April. It actually did not come out until July 1992.

## **Conclusion**

The radical nature of privatising the rail network is widely accepted. The Guardian in its leader on the day of rail restructuring heralded the “harbinger of a privatisation so controversial that even Mrs Thatcher recoiled from it”.<sup>80</sup> As shown above the Thatcherite approach to the railways entailed exerting strong pressures to restructure the business without endorsing investment plans. Although there were changes within British Rail and with its relationship with the work force, this did not eliminate the contradiction of limiting investment in a run down rail network. Perhaps a transfer to the private sector was the only option in these circumstances. Certainly John Major stubbornly maintained this manifesto pledge to privatise even though he wished to emphasise “caring Conservatism not permanent revolution”<sup>81</sup> in the rest of that document. Perhaps the whole of the Thatcher/Major era was a preparation for privatisation in some form. But the absence of an accountable structure in the public

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<sup>77</sup> See next chapter. The main legislation was 91/440/EEC, OJ L237/25.

<sup>78</sup> Redwood(1988). Signals from a Railway Conference

sector was grist to the mill of the privatisers who can be seen as exploiting this secrecy of the nationalised sector. In a detailed way the next chapter will explore whether the privatisation proposals could be seen as producing greater accountability than the previous model in the public sector.

One could also argue that the attempt to separate socially necessary services from the rest is completely to misdirect the nature of a publicly owned railway. This could be seen as developing from the faulty model of public ownership adopted by the 1945-51 Labour government. The proposals for rail privatisation reopened the debate over whether the privatisation programme in general was a thought out plan or a pragmatic response to events. It also intersects with the study of what constitutional arrangements for industry can realise the notions of control and accountability and importantly in transport, co-ordination. A detailed study of the new rail network's structure will allow this.

# CHAPTER SEVEN.

## RAIL PRIVATISATION - A LIBERATION THEOLOGY?

**“We have evidence that the commercial framework is driving performance higher than the command structure of BR ever did”.**

Roger Salmon, Franchising Director September 1996.<sup>1</sup>

From the theoretical musings of think-tanks the privatisation of the railways took on actual statutory form following the 1992 electoral victory of the Conservatives. This privatisation, as observed previously, was unlike any other. Much of this was because of the particular difficulties in transferring a completely subsidised public service to the private sector. However another factor was the general shifting of priorities in relation to privatisation. Ironically, as will be shown, at times during the privatisation there was great emphasis placed on how little would change and on the strength of the new regulatory structures in protecting the interests of the consumer. This has been explored above using the example of the state’s changing attitude to the bus industry but the process of rail privatisation epitomises this theme. This chapter will explore those issues.

The process of taking the Railways Bill through Parliament was a huge task in itself.

The tortuous process involved threatened back-bench rebellions, House of Lords

... and government climb-downs. When the Royal Assent was finally

achieved the Government would probably have wished that was the end of the matter. Yet the whole process was just beginning and the difficulties in manoeuvring this Bill through the quasi-mediaeval structure of the British state would be nothing compared to the problems of actually trying to sell the railways.

This chapter intends to examine the model of Rail privatisation - which is a curious hybrid of sales, leasing and franchises. Clearly this “fell far short of the conventional pattern of privatisation of the last decade.”<sup>2</sup> Rather than just cataloguing the arrangement, a degree of examination will be needed of the intellectual underpinnings of this structure. This will advance the argument that the question of accountability - vital for public lawyers - was not solved by the structure of privatisation adopted even though this concept formed a large part of the justification for the sell-off.

This is probably best provided by examining the work of Sir Christopher Foster. His appointment as special adviser to John McGregor following the 1992 election and subsequent “elevation” to the Board of Railtrack - the “new” company controlling infrastructure in the reorganised rail industry- as a non-executive director make him most deserving of the title “architect of rail privatisation”. Although the new model has a haphazard feel to it there is a coherent intellectual current which drives it. It is also useful to see how these thoughts are linked to developments on a European stage.

Following this initial examination it will be necessary to look in a degree of depth at the structures of the new post-privatised railway, in particular the responsibilities of the new creations: the Rail Regulator, the Franchise Director and Railtrack. Through

this it will become clearer what the problems are and why the process of privatising has been subject to so many delays. This then will illustrate the difference from (or similarities to) other privatisations. Finally the tests of participation and accountability originally laid down in this theses will have to be tested against these new structures. A useful comparison could be the experience of the publicly owned railway examined in the previous chapter. Overall, however, this chapter and indeed the work exist in a changing environment - on almost a daily basis. It is hoped that the main structures and processes can nevertheless be identified and explored.

## **RAIL PRIVATISATION : THE CHOSEN MODEL.**

Although often heralded as a shambles - with some justification as the constant delays highlight - there is supposed to be a method in the madness of rail privatisation. This is perhaps best summarised by Sir Christopher Foster's claim that the whole process is a "complex amalgam of privatisation, deregulation and incentivisation which will result in productivity gains".<sup>3</sup> This structure is a result of the dismantling of the unitary corporation of British Rail which controlled all aspects of the rail industry. This dissolution creates over one hundred new companies all of which are expected to contract with each other to provide passenger services, maintain and provide the rolling stock and infrastructure and even plan the timetable.

The scheme was appropriately labelled the "exploding apple" by Modern Railways<sup>4</sup> as the core of the railway industry became the train operating unit (TOU) which provided passenger services by contracting with the myriad of new companies all of which are in the private sector. B.R. maintained these TOUs until they were awarded under a franchise agreement to a private sector operator. These new franchise operators then are responsible for the leasing of rolling stock from three newly privatised companies. They also seek the best maintenance of their equipment by tendering out services to competing companies which have emerged from the structures of BR itself. To hasten this process BR set up a vendor unit and in the words of its managing director David Blake: "the target I have is to have sold the

majority of the businesses by December 1995".<sup>5</sup> This target like many others in the industry was not met; however by late 1996 the sale of these core businesses was almost complete. Clearly the structure is a little convoluted and we are perhaps better served by looking at each method of disposal to the private sector separately.

Prior to this it is perhaps worth mentioning how this new "privatisation" differs from the prior use of private finance in the railway industry. Clearly there had been quite a substantial interface between the two. The Channel tunnel was constructed largely with private finance, while the proposed Heathrow rail link received 80% of its finance from the privatised British Airways Authority. Around 40% of freight was transported on privately owned wagons. Many argue from within the rail industry that the Organising for Quality initiative which was discussed in Chapter 6 would have resulted in some of their services being sold to the private sector, but as mentioned above this initiative was cut across by the privatisation.

Even general opponents of the privatisation proposals like the trade journal *Modern Railways* argue there are sensible parts of the industry to sell off: the engineering sector, British Rail Maintenance Ltd (BRML) and the British Rail Infrastructure Services (BRIS).<sup>6</sup> Yet the Government's plans went way beyond this and attempted to transfer the whole system into the private sector even where no significant private sector interest existed. An ironic counter point to this was the development of the 'private finance initiative' under the Government. This was brought in by Norman Lamont's mini-budget in the winter of 1992. It sought to stimulate infrastructure development by combining private sector money with public sector incentives.

When we examine how this plan has operated in the rail industry, the biggest “private finance initiative” has been the awarding of the contract to build rolling stock for the Northern line to GEC Alstom.<sup>7</sup> This was regarded by some industry commentators as a ‘revolution’<sup>8</sup> yet the Northern line remains part of a wholly publicly owned railway: the London Underground.<sup>9</sup> Compare this with the delays and uncertainties with the upgrading of the West Coast mainline in the new model railway - supposedly another centrepiece of the private finance initiative. This franchise was originally going to be among the first to be awarded but it was severely delayed largely because of the scale of upgrading required. Although Railtrack has put in place a £500 million modernisation of the line it has been admitted that this would improve the performance of the notoriously unreliable track but would not have the effect of dramatically cutting journey time so as to compete with the East Coast Main Line.<sup>10</sup> Now, however, the owners of the West Coast franchise Virgin Trains are involved in the redevelopment of the line and their rolling stock. It would seem that taking private sector investment for granted in every section of the railways is misplaced unless there is significant support from the public sector. However when the private sector has got involved in the process it is mostly where there is an element of certainty in the return. This will be examined in the process below.

Now it is possible to examine the amalgam of forms which this particular sell off has combined.

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<sup>7</sup> This was heralded in DoT Press Release 110 of 7th April 1995.

<sup>8</sup> Roger Ford in *Modern Railways* Feb. 1995, p80.

<sup>9</sup> Although a plan for the Tube’s privatisation was drawn up for the Centre for Policy Studies by

## 1 “Pure” Privatisation

The use of this label is perhaps a little inaccurate yet the popular view of the privatisation process is a disposal to the private sector by offering shares to the wider public. This underpinned the notion of a ‘shareholder democracy’ and popular capitalism so beloved of Thatcher and discussed in Chapter 3. This did not seem to be the case with rail privatisation as perhaps signified by Alfred Sherman’s reaction that he “could not see any point in denationalising or selling off an industry that did not make money”.<sup>11</sup> Certainly initially this was not the model that the Government was to rely on. The more important dimension would be the awarding of franchises which is studied below. Although the almost meaningless mantra of privatisation was mouthed in answer to all questions<sup>12</sup> in practice a more controlled gradual sell-off was to take place rather than the ‘big bang’ of previous privatisations.

This is not to say that there were to be no disposals to the private sector sold off simply, indeed that is the main purpose of the Vendor Unit as mentioned above. It had a lengthy list of businesses to dispose of.<sup>13</sup> Progress was not rapid prior to the selling

<sup>11</sup> Quoted by Gwyneth Dunwoody MP in Parliamentary debate, HC Deb, February 7<sup>th</sup> 1995, col 213.

<sup>12</sup> For example this exchange occurred during oral questions in the House of Commons

Mrs Bridget Prentice :

Is it not an absolute disgrace that four out of five of our stations [Network S.E.] are unstaffed after six o’clock in the evening given at least two attacks take place every day in the Network S.E. stations?

Mr Freeman :

The honourable lady is right. I think that B.R. is losing revenue because of the perception of fear. That is the situation in the public sector. Once we begin to franchise rail services matters will improve because there will be more commercial activity at the stations and because private sector operators will want to see more passengers using the train and will be more likely to have more staff and use the existing staff more flexibly.

of BRML in April 1995;<sup>14</sup> the only other sale since the privatisation process began had been of a small quarry in 1994. However throughout 1995 and 1996 there was a concerted effort to dispose of all the branches of the rail industry.

The last of these was the Infrastructure Services which were completed with the sale of Western Track Renewal on the 24th of July 1996. These attracted a fair level of private sector interest with only four management buy-outs being successful. Previously the Maintenance Depots had been sold in June 1995, the catering companies in October 1995, the signalling and telecommunications services were disposed of in January 1996 and the Train Engineering Service Companies (TESCOs) were sold in March 1996. Of these 'peripheral' industries those most difficult to sell were the Central Services of BR such as the Rail Industry newspaper.

Some of the larger sales have been highly controversial. The sale of the Rolling Stock Companies in November 1995 fetched £1.8 billion which was at that time the "most lucrative part of rail privatisation".<sup>15</sup> Also in the words of *Modern Railways* the sell off of the ROSCOS was an "aspartame privatisation: so loaded with sweeteners that it leaves a nasty taste in the mouth".<sup>16</sup> This was due to the guaranteed income they were promised by having relatively long leasing agreements with the TOCs and a number of subsidies. Even in this environment there was relatively little private sector interest

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Freightliner  
 Rail Express Systems  
 Rolling Stock Operating Companies  
 British Rail Infrastructure Services  
 - Track Renewal Units  
 - Infrastructure Maintenance Units  
 BR Telecom  
 Various businesses in Central services.

and two of the three companies were sold to MBOs which were backed by private finance. In August 1996 Porterbrook was resold to Stagecoach for £825 million making the owners £298 million profit. As shall be shown this event was closely connected with developments in the franchising of passenger services where Stagecoach has become one of the main bidders. It raised fears of mergers promoting anti-competitive conduct within the industry. John Swift, the Rail Regulator, warned of a possible reference to the MMC<sup>17</sup> and requested responses from the industry as to what his course of action should be. However Stagecoach was not referred to the MMC, providing it followed conditions laid down by the Government mainly to keep the company at 'arm's length' from its rail franchise.<sup>18</sup> It is questionable if this position will ensure Stagecoach's domination of the new rail industry or whether the company has taken on too much with its investment. In its analysis of the ROSCOs Modern Railways stated that "Porterbrook has more upsides but also the biggest downsides".<sup>19</sup> This is largely due to the predominance of elderly slam-door stock in the company's portfolio. This process highlights a significant trend under privatisation towards a distorted form of integration and consolidation within the industry, at times similar to the developments which were examined in the bus industry chapters. This again raises the spectre of accountability within the privatisation model which will be explored further when the franchising process is studied.

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<sup>16</sup> Modern Railways, May 1995, p.258

## Selling Shares: Railtrack

These disposals then were seen as part of the general move of the industry to the private sector. What then of the great share sell-off? It was stated by a group of lawyers relatively early on in the process that<sup>20</sup> rail privatisation was a two stage process with Government only receiving a financial return when Railtrack and the rolling stock companies were sold. The law firm Theodore Godard predicted that this would come sooner than later citing the end of the century as a possibility. Yet once again the supposed certain plans of a privatisation were thrown up in the air by the political manoeuvrings of the Government.

On the 24th of November 1994 Brian Mawhinney, who had only recently been appointed Transport secretary, made a Parliamentary statement on his desire to float Railtrack on the stock exchange during the lifetime of this current Parliament.<sup>21</sup> According to an interview carried out with a representative of Railtrack this day sticks firmly in the memory of all Railtrack employees. Significantly no date was given but a leaked memo<sup>22</sup> showed that the first quarter of 1996 had been pencilled in. Why this date took on a special significance for Railtrack employees was because the announcement represented a complete turn around from the original plans for privatisation. These plans had rested on the franchises being awarded to the private sector whilst the infrastructure remained in public hands albeit at 'arms length'. Yet

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<sup>19</sup> Modern Railways, November 1995 p650

now there was a reversal “infrastructure first, operations last”<sup>23</sup> which is more than a simple reordering of priorities; it amounted to a re-structuring of the privatisation.

Railtrack was sold in May 1996 for £1.95 billion in one tranche. On the first day of trading the price rose making an instant profit for initial purchasers, in line with other utility privatisations.<sup>24</sup> It was originally envisaged that there would be a two-stage sale but this was dropped, largely to embarrass the Labour Party and to make it more difficult for it to re-nationalise, but also to gain larger proceeds. The sale was in doubt until the last minute due to the high level of debt which Railtrack held. It is no accident that the original privatisation plans involved a substantial delay in selling the infrastructure in the separated industry. This was not least because the whole railway is a loss making service which requires large amounts of subsidy. In the new railway this was to be paid out by the Franchising Director to the TOUs who would then pay it back in access charges to Railtrack. Thus a sort of public sector merry go round would operate - yet this circle is broken if Railtrack goes private.

There were also worries that the heavy regulation of the industry as outlined below would put investors off. Also as we shall see the industry is very heavily regulated even though many of the cards are stacked in Railtrack’s favour, in the sense that it could use its monopoly position and size in negotiations with central Government and smaller rail companies. However this attitude has provoked a reaction by the Rail Regulator, as shall be illustrated, to the effect that with monopoly comes responsibilities in the ‘public interest’. In the end the Government had to wipe off £1 billion worth of debts in the run-up to privatisation. One minister said “We had to

agree to the debt figure because we were right up against the wire".<sup>25</sup> This illustrates the extent to which the sale was affected by straight-forward political motives. This makes it difficult to believe Christopher Foster's credo as outlined below was the sole driving force of the entire privatisation. Indeed the very sale of the infrastructure before the franchises were fully operating could be said to complicate the fulfilment of his philosophy. In other words the supremacy of the contract culture was not given time to develop before there was a complete disposal of the rail infrastructure. Many franchises had not been let by that point and the dealings between the different sections of the rail industry had not really been established. A useful counterpoint to this is the privatisation of the German rail network which has a timetable of 10 years. Although the Germans also separated infrastructure from operations there will be a period of 3 years before the operating services are sold and there are no plans to sell the infrastructure. This model is closer to that envisaged by the European Union and indeed in Foster's own thought.<sup>26</sup>

However the simple reason for selling Railtrack did not come from any Thatcherite argument for widening share ownership, although the Secretary of State did try to provide an historical link during his statement on Railtrack: "Privatisation has been one of the greatest achievements of this government since 1979".<sup>27</sup> Put bluntly the money was needed from the Railtrack sale to pay for cuts in direct taxation. Kenneth Clarke, at that time Chancellor, in another leaked memo stated that this privatisation was "an integral part of our budget arithmetic".<sup>28</sup> This contradicted earlier government claims most notably by Roger Freeman (the Transport Minister who

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<sup>25</sup> FT, 28th February 1996

piloted the privatisation bill through committee) who had given assurances of Railtrack remaining in the public sector for the foreseeable future. Further, he undertook that any proceeds from the sale of the infrastructure would be hypothecated to the railway industry; an undertaking which was then wholly rejected by the Government.

So this element of “pure” privatisation was reintroduced to this process to raise finance. There were added bonuses in selling Railtrack. First and foremost no further legislation was needed as the powers to dispose of Railtrack were already in the Railways Act.<sup>29</sup> It also took on a new impetus when there was a climb-down on the privatisation of the Post Office at the hands of a small number of backbench Conservatives rebels in October 1994.

In summary, then, rail privatisation had used ‘pure’ disposals only for smaller subsidiary businesses with a captive market with the exception of the ROSCOS. A late U-turn, though, changed the nature of the whole privatisation by offering the public flotation of Railtrack much earlier in the privatisation cycle than originally planned.

## 2 Leasing Agreements.

Leading on from an examination of the 'simple' sell-off are the arrangements which are in place to provide rolling stock for the rail industry. The ROSCOs as mentioned above were sold during 1995. These control a fleet of 11,000 and were separated into 3 different companies: Eversholt Train Leasing,<sup>30</sup> Porterbrook Leasing Company<sup>31</sup> and Angel Train Contracts.<sup>32</sup>

But a problem in the leasing agreements<sup>33</sup> is that they are out of any regulatory orbit. Thus the companies have no duty to maintain minimum standards of service in supplying rolling stock. They need only concentrate on the most profitable areas and not invest in newer rolling stock. This was a real problem when confronted with the investment hiatus in the rail industry which resulted in the closure of the ABB works of York in April 1995. In fact there were no new orders for rolling stock in 1994 at all the first year in which that had happened. This started to change in 1995 and 1996 with some successful franchise holders promising to replace or renew some of the rolling stock. One of the first of these was the successful franchisee on the Chiltern line, which ordered 12 new trains with Adtranz<sup>34</sup> to be leased through Porterbrook.

The leasing agreements, then, will dictate relationships between the privatised ROSCOs and the rest of the industry. This is in line with other industrialised countries which combine leasing with publicly owned railways. As an aside this combination of the public and private seems the model of Blair's New Labour Party

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<sup>30</sup> This will deal with solely electric trains.

<sup>31</sup> This will have both diesel and electric and supply fast trains for former Inter-City services.

<sup>32</sup> Again this has both diesel and electric and will deal primarily with the South East and the Great

and indeed John Prescott has been credited with virtually “inventing” train-leasing.<sup>35</sup> Any change which New Labour would make would involve placing the companies under regulatory structures.

### 3 Franchises.

The form of the leases- as written contracts -will be very similar to the franchise agreements which until late 1994 were seen as the lynch pin of the privatised railway by the Government. It is also clear that they remain centrally important to this work not least in the sense that they caused much delay and uncertainty in the whole process of the privatisation. However by the spring of 1997 the whole passenger network was operating under franchises.

In the words of the statute “it shall be the duty of the Franchising Director from time to time to designate as eligible for provision under franchise agreements such services for the carriage of passengers by railway as he may determine”.<sup>36</sup> He, Roger Salmon,<sup>37</sup> shall issue an invitation to tender<sup>38</sup> and then award it to “such persons as he may ... think fit”.<sup>39</sup> The franchises will include such information as planned services, provision for fares<sup>40</sup> and the length of the period of franchise. If the franchise is broken by the franchisee the Franchising Director can then terminate the agreement and seek to secure the further provision of the service.

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<sup>34</sup> Financial Times, 7th September 1996.

<sup>35</sup> Modern Railways May 1995, p258.

<sup>36</sup> Railways Act 1993 c.43, s23(1).

<sup>37</sup> Salmon resigned in the autumn of 1996 and was replaced by John O'Brien.

The main problem with this whole process has been the complexities in negotiating the franchise agreements which resulted in almost constant delays. For example the major reorganisation of the railway came on April 1st 1994; one week before this crucial day it was announced that the six franchises<sup>41</sup> originally envisaged for fast sale would not be disposed of until 1995.<sup>42</sup> As Frank Dobson, then Shadow Transport Secretary put it, "Rail privatisation is falling apart before they have even started"<sup>43</sup> or at least that was the impression at that stage.

This did not prevent the Government sticking to its timetable, claiming that 51% of passenger services would be franchised by spring 1996.<sup>44</sup> Six months later the regulator asked for expression of interest in these six with the addition of the Midland Main Line and Network South East.<sup>45</sup> On the 23rd March 1995 it was claimed that 37 different organisations were interested in running these franchises but that the invitation to tender on three of these franchises would be extended to May. These three- the Great Western the London, Tilbury and Southend and South West Trains were labelled the "turbo track".<sup>46</sup> These were the first three franchises to be awarded in December 1995.

The process by which they finally came to be awarded is a useful microcosm of the organised chaos of rail privatisation. The original announcement was delayed because of a successful challenge by judicial review by the pressure group Save Our

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<sup>41</sup> These six were Scotrail, the East Coast Main Line, the Great Western Main Line, the London, Tilbury and Southend line, South West Trains and the Gatwick Express.

<sup>42</sup> FT 23rd March 1994.

<sup>43</sup> Guardian, 23rd March 1994.

Railways.<sup>47</sup> Although the details of this did not affect the actual first three franchises it did delay the specific announcement. Furthermore, days before the announcement it was discovered that the person heading the favoured bid for the Great Western franchise had been the director of a bankrupt double glazing company. Then immediately prior to the successful bidder for the LTS line, Enterprise Rail, starting services it was subject to fraud investigations because of discrepancies in allocating ticket prices. Thus the franchise had to be re-awarded. These developments illustrate the pressure being applied to the Franchise Director to dispose of the franchises. Even after months of preparation errors were found in the franchise documents which further delayed the whole process.

However once the initial franchises were awarded there was steady progress - with some exceptions - in granting the remainder of the franchises. This may be due to the Office of the Franchising Director having a clearer framework for the franchises to be awarded or from external political pressures which were also apparent to dispose of all the franchises prior to the 1997 Election. Significantly, during 1996 when most of the franchises were awarded a distinct trend could be detected which suggests parallels with the bus industry. In particular it seemed that there was a core group of bidders for the franchises. By the end of December 1996 one company, Prism, had three franchises;<sup>48</sup> National Express,<sup>49</sup> Stagecoach<sup>50</sup> and the French utility CGEA<sup>51</sup> each had two. But these figures only tell part of the story, for every franchise list of chosen bidders is very similar. As there is little interest in owning one franchise most of the operators have put in bids for a whole series of them. As can be seen by a

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<sup>47</sup> For details of decision see Appendix.

cursory glance at the above list the 'new' bus giants have played an important role in this. Prism Rail is run by four senior directors from the bus industry and also by Kenneth Irvine who was mentioned in the previous chapter as one of the original authors of rail privatisation.<sup>52</sup> What is also clear is the absence of successful bids from rail management. Even where this was successful as in the case of the Great Western and the Chiltern lines they have needed backing from outside institutions. In the case of the GWR this was FirstBus.

This lack of success for management differs from the earlier privatisation of the bus industry where it will be remembered that MBOs dominated. Through these buy-outs and subsequent take-overs these companies grew to dominate the industry. The process of franchising has allowed these large operators to move into the rail industry preventing any similar developments on the part of rail management. Have the franchise director, the competition authorities and Government allowed this to occur unhindered? There had been recent developments with the new Labour Government announcing a referral of National Express to the competition authorities for its acquisition of the rail franchises of Scotrail and Central Rail in the Midlands.<sup>53</sup> In a sense, this is linked to the limiting of competition in the initial stages of this privatisation as determined by the Rail Regulator, which will be examined below. Perhaps this has meant that the Franchising Director is less worried about awarding the franchises to a few operators as there is no open access on the lines. The Rail Regulator has recently spoken approvingly of the situation "the success of the franchising programme... has been substantially dependent upon the previous

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<sup>51</sup> The South East and South Central lines

Government's decision in the mid-80s to introduce competition and deregulation into the bus industry".<sup>54</sup> Alongside this development, though, is the way in which the franchises themselves have developed.

Early on in the privatisation process it was thought that the franchises would be of standard length: seven years. This however has not always been the case in practice in many instances franchises have been lengthened on the guarantee of improving or renewing the rolling stock. For example, on the Midland Main Line, National Express has been granted a 10-year franchise providing there are "substantial service enhancements" and new rolling stock.<sup>55</sup> It has also won a 15-year franchise on the Gatwick Express line conditionally on bringing in a new fleet of trains. Similar developments have occurred on other franchises. This illustrates one of the reasons for the success of the larger bus companies many of which are quoted on the stock market. Put simply they have access to more capital to fund their proposals. This also limits the amount of subsidy which each franchise will require.

As explained all passenger services on the rail network require subsidy. A critical part of the franchise bidding process was the ability of the bidders to cut the amount of subsidy which would be necessary to run the services. So for example Sea Containers, the successful bidder for the East Coast Main Line, envisages an end to subsidy by the year 2002/3, having started off with a £64.6 million pound subsidy paid by the Franchising Director. This means subsidy will fall by £21.2 million a year. Perhaps this line is an exceptional case as it has had substantial upgrading in the late eighties and early nineties. But many of the other lines also make ambitious

claims on subsidy. For Network South Central the French Company CGEA has an initial subsidy of £85.3 million falling eventually to £34.6 million. Although this is still a substantial subsidy the cut of £50 million is also substantial. As explained above, much of the new franchise expenses will be in the form of fixed charges. Although the Regulator would like to see this altered, for the time being this is the state of affairs that will generally exist for the length of the first franchises. So any wish to cut subsidy must be based largely on an increase in passenger numbers. Fares cannot simply be increased because of the restrictions placed on these by the Secretary of State in 1995. This means that the franchise holders are largely “gambling on the British Economy”<sup>56</sup> and discounting the possibility of a downturn in rail use such as occurred in the recession of the early nineteen nineties in the South of England.

In the course of 1996 when 13 franchises were awarded great claims were made for the franchising process. The Franchising Director claimed it had revitalised the rail network leading to new investment and that ultimately it would save £2 billion.<sup>57</sup> John Major also hailed it as a success story apparently considering it as a model for the privatisation of the London Underground<sup>58</sup> and the Post Office for inclusion in the 1997 Conservative Manifesto. But the apparent successes in ending the hiatus in investment and cutting the amount of subsidy are all very conditional on growth in passenger numbers and the success of the franchisees to maintain their tight targets on cutting subsidy. Furthermore, it could be argued that the stringent demands on cutting subsidy encouraged larger groupings such as the ‘new’ bus operators and discouraged the railways’ own management in bidding for franchises.

The privatisation of the rail network, then, was originally seen as a testing ground for the new concept of franchising. This was altered by the rushing through of the sale of Railtrack, although throughout 1996 the alleged benefits of franchising were revived. But “rail privatisation” is a “complex amalgam” of the above three categories. Some could argue this is due to the innate difficulty in selling the railway; Foster has quoted a Victorian thinker Chadwick “where competition on the ground is impossible, an auction allows competition for the ground”. Yet an auction supposes a large number of interested bidders ready to compete against each other which was not generally the case, as will become clear when we examine how the Franchising Director has been working in this new environment. Foster’s words also provide a useful starting block for an examination of the intellectual support for this privatisation.

## **THE INTELLECTUAL BASIS OF RAIL**

### **PRIVATISATION.**

Sir Christopher Foster has been mentioned before in this work. Not only are his role and his general writings crucial in studying the privatisation of the railways but he has also provided a general overview of the entire British privatisation programme.<sup>59</sup> He has long been an adviser on transport including importantly the bus industry<sup>60</sup> and this covered periods of both Labour and Conservative Governments. As well as being the main adviser on Rail privatisation and the 1993 Act he also advised Barbara Castle on the 1968 Transport Act which created the Passenger Transport Authorities - quite successful examples of public sector bodies co-ordinating transport.

This chameleon - like approach to policy is not entirely surprising; above all he would probably consider himself a technocrat. For him the result of all privatisations has been productive efficiency gains. This above all else is the reason to support privatisations. He believes they work better than any other scheme such as incentive plans within the public sector.<sup>61</sup> These pragmatic views must be distinguished from the political rhetoric of others where privatisation has become something of a mantra. The latest example of this as explained above has come with the announcement of the sell-off of Railtrack. Yet notions of 'popular capitalism' have no real place in the thinking of Foster. Even a change of ownership is not critical providing the industry has a "greater distance from resumed political intervention".<sup>62</sup> This thinking is difficult to understand given the complex regulatory structures which even the privatised Railtrack is embroiled in as explained below. But, this aside, Foster's thinking depends on an increase in "efficiency" within the rail industry which could not be achieved in public sector arrangements.

Central to this efficiency increase is the notion of the importance of contract. One can see this with the introduction of franchises and leases - both written legal documents - into the once unitary rail industry. The underlying rationale is "the time has come to open the railways up to competition as far as possible and at the same time for the most part to replace command relationships within British Rail by contractual relationships between free-standing autonomous bodies".<sup>63</sup> This is the 'big idea' behind the whole complex process of rail privatisation: a shift from command to

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<sup>60</sup> See earlier chapters on bus deregulation

contract. He claims the transparency of contract is the method increasingly utilised for co-ordination by business especially with advances in information technology. Thus the explosion of the rail industry represents an attempt to put all parts of British Rail on a similar footing as potential contractors. Roger Salmon, the Franchise Director, believed that his role alongside the Regulator is to “work out the areas where the market, unaided, is likely to work poorly and in those cases make sure, through *regulation of contract* that it works well” (my emphasis).<sup>64</sup> Contract, then, is not only a clearer method of carrying out business; it is a protection against the shortcomings of the ‘market’. Surely this is an ironic development given the alleged centrality of contract to the market economy.

This thinking is in line with the general trend of current established thought on public services. This has involved market testing, competitive tendering and general aping of “private sector methods” in all spheres of the public sector: from the civil service to the NHS. In a public law context this process has been studied by a number of legal academics, perhaps understandably as the use of the contract within public services provides the ultimate interface between public and private law.

Ian Harden<sup>65</sup> in “The Contracting State”<sup>66</sup> writes of the benefits of “marketisation” within the Health Service and also generally as part of competitive tendering. The “values which underlie the symbolic appeal of contract should be taken seriously”.<sup>67</sup> A contract can provide clarity and define rights and responsibilities for users of public services. Thus Foster’s argument has some academic weight behind it. But how

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<sup>64</sup> Modern Railways, 1996 p155

convincing a justification is it? Before we examine the problems of the “new” railway in practise let us raise some theoretical criticism of the primacy of contract notion.

### Criticisms

Will the existence of a new era of contracting between parties produce a more “efficient” rail service? Leaving aside the suitability of contract in this area one should look at how many transaction costs have been generated. Several lawyers have labelled rail privatisation the “biggest legal project ever undertaken in the UK” and that a “paper mountain”<sup>68</sup> has been created. The phrase “lawyer’s paradise” was utilised a great deal in the second reading debate of the Railways Bill.<sup>69</sup> In fact the legal advisers on privatisation Linklaters and Paines claimed it to be the “largest and most complex project that the legal profession has ever undertaken”.<sup>70</sup>

Modern Railways gave the example of one franchise, the Inter City Great Western Main Line, whose contracts with Railtrack alone would amount to a Track Access Agreement, 20 station leases and 7 Light Maintenance Depots (LMD) leases - this is the tip of the documentation iceberg generated.<sup>71</sup> Other documents include: 125 station access documents, 18 depot access documents, 3 rolling stock master leases (with lease supplement for each train), spares procurement contract, intellectual property licences. The possibility of protracted litigation paralysing large sections of the rail business could be a real one. Yet Roger Salmon, the Franchising Director, has

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<sup>68</sup> Guardian, 10th Nov. 1994.

<sup>69</sup> See HC Deb. February 2<sup>nd</sup> 1993 col 204. The quote came from Robert Adley MP.

claimed to have a “no-fault incentive scheme to keep the lawyers in their place”.<sup>72</sup> His belief is that commercial interests will dictate that alternative dispute mechanisms will quickly develop. The Rail Regulator also hopes to encourage alternative dispute resolution bodies which will allow Railtrack to alter conditions where necessary.<sup>73</sup>

Sir Christopher himself argues that the best atmosphere for contracts is “where relations can be clearly expressed, continuously monitored and are unlikely to need to be altered”.<sup>74</sup> It could be argued<sup>75</sup> that this is precisely the situation which does not exist in the rail industry at the moment as is supported by the need for *alternative* bodies to hear disputes. These recognise the inadequacy of the courts in dealing with matters that could be dealt with in an alternative manner. If this is the case what differentiates a contract from a more informal approach? Furthermore, it seems that with the sale of Railtrack speeded up this diminishes the rationale of contract as there will be a degree of instability - in the sense that it is not simply an organ of the public sector albeit at ‘arm’s length’ - in its relationship with other companies. The desire to promote stability to counter this impression apparently lies behind the Regulator’s statements on through-ticketing and access charges and the Government’s announcement on train fares which will be fully explored later.

Equally the notion of a contract freely negotiated between two different parties is hardly apparent in the rail industry. Early on in the process there was evidence of Railtrack as owner of the infrastructure and signalling abusing its position in

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<sup>72</sup> Financial Times, 7th March 1994.

negotiations<sup>76</sup> with TOUs. During the signal workers' dispute in the summer of 1994 when services were not provided there was a dispute over how much compensation should be paid by Railtrack. The Managing Director of Network South Central stated in a presentation his view that Railtrack should pay all lost income when it failed to provide services<sup>77</sup> - whether through industrial disputes or damaged infrastructure. This is clearly the thinking of the managers of all the TOUs yet has been rejected by Railtrack which can exploit its monopoly in providing infrastructure.

The franchising process could also be said to reflect this. As has been shown above there were initially severe hold-ups in awarding the franchises. In the Scottish context the franchise for Scotrail is one that had been considerably delayed and by the end of 1996 still had not been awarded. The primary reason for this had been the existence of the Strathclyde Passenger Transport Authority which had used its negotiating skills and more importantly its financial weight<sup>78</sup> to delay the awarding of the franchise. This was due to the demands of 'hard-wiring' of the agreement; that is written guarantees of timetable requirements, the type of rolling stock required and other demands made on the new franchisee. The demands frustrated the Franchising Director's office, not least in the words of a senior SPTA official because Scotrail was seen as an "ideal" candidate for an early franchise because of its geographical unity: "an island linked with two causeways"<sup>79</sup> and status within the old rail network. In the event National Express was eventually successful in winning the franchise after agreeing nearly all of the demands of the SPTA and providing more financial guarantees than the existing Scotrail management did. What this illustrates in the

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<sup>76</sup> FT, 21st March 1994

context of contract is the lack of uniformity in awarding franchises. Negotiation has depended on the 'specific weight' of the parties involved, again contradicting the notion that contracts are 'freely' negotiated between the new players in the rail industry.

In the environment of competitive negotiation it is perhaps unrealistic to introduce complex contracts with the expectation that they will be placed in a drawer and forgotten about. It also underpins many fears of the management of the TOUs as expressed by one member of a failed management buy-out (MBO), "The terms and conditions clearly transfer all the risks and obligations of running a railway to the franchisees".<sup>80</sup> It seemed that this disparity was likely to increase as moves were made to soothe investors in Railtrack. However the more aggressive role of the Rail Regulator towards Railtrack's investment programme recently, as outlined below, has increased the pressure on the owner of the infrastructure. Moreover, the development of the franchises and the success of the bigger transport operators which can successfully weather the risk has reduced their instability, although not completely so. It seems to be the case, then, that the idea of contract as something made between equals is far from the case in the rail industry.

There are other problems with transplanting a contract culture into a once united structure. Law firms have found difficulties in transferring "customised" information into contracts.<sup>81</sup> Problems which previously may have been dealt with by internal memos now become potentially litigious situations. So the three main problems with the intellectual background to rail privatisation are the vastness of the task, the uneven

playing field in drawing up a contract and the difficulty in transferring information. In this environment it is unclear why Sir Christopher believed the 'primacy of contract' was appropriate to the rail industry.

Beyond a reliance on contract in the 'new' rail industry is the separation of rail infrastructure from operations. Of the privatisation models discussed in the late eighties<sup>82</sup> the model most similar to that adopted is the Starkie/ Adam Smith Institute plan. For justification of this new structure reference is often made to the European Union - but what is the background?

## **EUROPEAN DEVELOPMENTS**

The European approach seems at first sight to be similar to the structural changes adopted in Britain under privatisation. In a 1991 Council of Ministers Directive<sup>83</sup> a degree of separation is required between track and operations. This was to allow open access across the European Rail Network, and was developed to be alongside a common approach to charging tariffs for the use of the tracks. However, as a Commission official pointed out the main emphasis was on a "book-keeping operation plus management".<sup>84</sup> That is to say, separate accounts and management were required but any further physical separation was not compulsory - nor indeed was a transfer of ownership.

In Sweden where there is complete separation between Banverket which owns the infrastructure and SJ, which operates services, the situation is not analogous to that in

Britain. SJ can bid for operations and is involved in investment plans for the rail network. In fact SJ operates 99% of services in Sweden - a bus company won two contracts but lost one back to SJ.<sup>85</sup> In Germany where perhaps the situation is most similar to Britain (but not as developed) the rail operation has been split into three: passenger services, freight services and infrastructure. The debt of the railway companies was also written off before the privatisation process began. However the European policy can perhaps be seen in a different light from a move to privatisation. On the whole it is part of a wider agenda to gain an integrated transport policy across the entire European Union. The European Economic and Social Committee's report<sup>86</sup> on transport policy criticised the Commission for neglecting rail transport at the expense of road haulage. Thus the separation of infrastructure from services can be seen in this light - to give rail its proper place in the entire transport network. This is markedly different from British policy which has very little idea on how to integrate the railway into the general transport infrastructure. Interestingly, other countries which have opted for privatisation have maintained a vertically integrated network. For example, in New Zealand, Argentina, Mexico and the Czech Republic<sup>87</sup> the sale to the private sector was of both infrastructure and services. This demand was also made by a number of potential bidders for rail franchises in Britain, notably Scotrail<sup>88</sup> - as the removal of control of infrastructure was seen as taking too much power from the provider of services.

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<sup>85</sup> FT, 1st Feb. 1995.

<sup>86</sup> 90/C225/12. This partially formed the basis for the legislative proposals.

<sup>87</sup> Financial Times, 1st Feb. 1995.

Thus, the European developments can be viewed to some extent as similar to Britain although this is only superficially the case. They do not suppose a transfer of ownership to the private sector but rather allow for an integrated European rail network. A later set of directives in 1995 provide more details of the licensing of international services on a European level.<sup>89</sup> This again emphasises the nature of the European initiative. Where privatisation is occurring it seems that the opposite is happening with the rail industry sold as a vertically integrated network. It could be argued in Britain that the two processes of separation and the selling of franchises are contradictory. This could be tested by examining how the re-structured railway has operated in practice.

## THE STRUCTURES OF THE POST-PRIVATISED RAILWAY.

As well as the transfer to the private sector there have been a number of new creations arising from the remnants of the old structure of British Rail. Apart from British Rail being separated into the provider of infrastructure (Railtrack) and the providers of rail services, there is the creation of a number of smaller subsidiary companies many of which have been sold. Further, there is the creation of the Office of the Rail Regulator and the Franchise Director is a further example. This massive restructuring may account for the expense of privatisation. One estimate from the Labour Party put this figure at £664 million,<sup>90</sup> yet this figure was ever increasing in particular as regards consultancy fees. In fact the figures for consultancy were deemed too commercially sensitive to reveal in written answers in Parliament and details were not given.<sup>91</sup>

The official response to these costs are best summarised by the words of one DoT official: “ministers believe this is money well spent because privatisation will lead to a more efficient railway that will be less of a burden to the tax payer”.<sup>92</sup> However this statement underplays the fact that significant subsidy will still be paid from the state to the train operating companies. Indeed the existence of such expense was one of the reasons for the Treasury’s desire to privatise Railtrack in a hurried fashion to get some financial gain. Yet the whole process has proved costly in the ‘twilight zone’ between public and private ownership which now exists in the rail industry. Although

the sale of Railtrack and 13 of the franchises was completed the regulatory structures linked to the method of franchising make it very different from an ‘ordinary’ private industry. The main creations of this structure need to be examined.

### Office of the Rail Regulator

“I have been appointed by Parliament to promote the public interest in the new restructured railway”.<sup>93</sup>

John Swift Q.C. Rail Regulator.

One of the criticisms of rail privatisation is that the industry will be over-regulated; that is a large number of different bodies will ‘interfere’ to some extent in the running of passenger services. Clearly the leader in this field will be the Rail Regulator himself: a creation of the 1993 statute, as the above quote signifies. In the period following the restructuring of British Rail he has produced a number of controversial documents which have been received in a very mixed way. For example Modern Railways claims he is “exposing mercilessly the lack of precision in the privatisation proposals”,<sup>94</sup> while the Labour Party’s Shadow Transport Secretary labelled the office an unaccountable body “making extremely sensitive political decisions”.<sup>95</sup> These mixed reactions are explained in some part by the ambiguous role played by all regulators but in particular those for the rail industry.

As can be seen the Regulator was appointed before most of the privatisations took place. His role, then, is central to the ‘new’ railway. Further, the Labour Party has

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<sup>91</sup> This U-turn was announced by John Watts MP in a written answer. See HC Written Answers, 14<sup>th</sup> February, col 562.

<sup>92</sup> *Guardian* 5th August 1994

signalled that it will increase the 'accountability' of the railway by strengthening central control of the regulator thus further enhancing his role. As shall be explored, this was seen as an alternative to public ownership. Following the General Election John Prescott issued a statement from the enhanced transport department that they were committed to a "thorough review of rail regulation" and were looking to increase the sanctions available.<sup>96</sup> This led to a Concordat between the Government and the Regulator as to their respective rights and duties.<sup>97</sup> Thus in the context of this work the Rail Regulator is a good example of a model of attempting to increase accountability of a public service without requiring public ownership.

It is perhaps appropriate that this balancing act is carried out by a competition lawyer, the previous occupation of the present Rail Regulator.<sup>98</sup> The position was created in the 1993 statute<sup>99</sup> which also lays down his general duties.<sup>100</sup> The ambiguous role of the regulators in the privatised utilities has been referred to before; however section 4 of the Railways Act attempts to define the "public interest" which the regulator is expected to protect. In tandem with the Secretary of State the Regulator protects the interests of railway users; promotes the use of the rail network; promotes efficiency and economy on the part of railway providers; promotes competition in the provision of railway services; promotes measures which facilitate passengers making journeys over more than one passenger service; imposes minimum restrictions on operators and enables railway service providers to plan their business with a degree of certainty.<sup>101</sup>

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<sup>96</sup> Press Notice 103, 21st May 1997.

<sup>97</sup> Press Notice ORR/97/31

<sup>98</sup> It is also significant given the previous discussion over the new place of contract in the rail industry

These general duties are made more explicit and listed in the Department of Transport's Annual Report 1995.<sup>102</sup> The Office is to assist in the process of setting up subsidiary TOUs by granting licences so they can bid for franchises; approve terms on which the owners grant access to facilities; issue guidance following consultation for track access charges and has issued guidance on the competitive framework for the rail industry. In the commercial negotiations over access agreements the Regulator promotes the public interest. This extensive list of duties reveal the conflicting responsibilities of the Office of the Rail Regulator. Alongside these statutory defined duties, the Secretary of State for Transport also had powers to issue guidance to the Regulator which had to be taken account of.<sup>103</sup> This lasted until the end of 1996.

In a sense the problems experienced by the Regulator through his publication of documents expose the internal ambiguities of the British rail privatisation programme. For example, take the Regulator's statement on competition; he has made clear that in order for the franchises to succeed complete open access cannot be introduced all at once. "I believe that it is necessary to introduce controls to limit the competition initially to enable the process of franchising to be carried out successfully".<sup>104</sup> His solution would allow no significant competitive entry until 31st March 1999 with substantial restrictions until 2002. These proposals are put forward with the caveat that he remains "convinced that there are substantial benefits to both train operators and passengers to be realised by an increase in competition".<sup>105</sup> This eight-year delay in allowing full competition was clearly always going to exist in some form; any model of franchising would not make sense without a restriction on competitive entry.

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<sup>102</sup> Cmnd 2806, 1994-5.

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Future tensions in this area can perhaps be discerned in that, as mentioned above, the franchises have been of varying length. Thus many of the franchisees will have a vested interest in maintaining a limited competitive environment at least in their franchise areas. However the Regulator has recently stated that he “will not hesitate to use my enforcement powers” if any franchise fails to provide the service agreed and does not form part of a national network.<sup>106</sup>

Ironically this structure contrasts with the deregulated bus industry from which (as has been mentioned) many of the core of bidders of franchises come. There is no immediate *laissez-faire* approach to the rail industry; instead the regulator’s approach seems to be similar to other utilities like gas and telecommunications where competition was introduced slowly following the initial share disposal.<sup>107</sup> He writes in his policy document that the franchisees will themselves promote competition because they overlap in certain areas.<sup>108</sup> But this is clearly minimal; in order for franchises to succeed they need a degree of assurance on the security of their route. This is what the regulator is admitting so the statement could be seen as designed to get the franchisees off the ground. But the other effect is to protect consumers from the excesses of competition which is meant to benefit them. Thus a model of ‘open access’ competition some way in the future looks unrealistic and indeed contradictory to the overall model of the new rail industry.

Although the model of competition has been limited by the regulator, belief in the ‘market’ is still central to his principles. Thus in his written statement published in

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<sup>105</sup> *ibid.*, p2.

the Railtrack prospectus he states: “It is for me to seek to ensure that the working of commercial incentives and market forces promotes the public interest and leads to a better railway for passengers and freight customers”.<sup>109</sup> Further “I will aim to ensure that market forces work effectively and harmoniously so as to benefit passengers and freight customers and stimulate the development of innovative services”.<sup>110</sup> Thus the essence of this privatisation as far as the regulator goes is to *control* and *co-ordinate* the market. Beyond this he also sees his role as facilitating co-ordination with all bodies involved with the rail industry. This is “of critical importance as without it important public interest benefits would be denied to users”.<sup>111</sup> Indeed as mentioned above any franchise operator who see their service from a “narrow and parochial view” will be penalised. This may beg the question of why, if integration is critical, was the entire network split up? Yet do these powers amount to real constraints or are they merely aspirations as to the type of rail network the Rail regulator wishes to see?

One overriding power which the Rail regulator has is to approve track access agreements under s18 of the Act. This is linked to promoting the ‘public interest’ and ultimately gives him the power to determine the structure of charges made by Railtrack. His review of track access charges was carried out in two documents published in 1994/5. This scheme lays down the structure of charges for a six-year period, and is a unique phenomenon in that the contracts were in place before the sale as pointed out by the Rail Regulator.<sup>112</sup> On the 17th January 1995 it was announced that there would be cuts in the charges paid to Railtrack by the train operators. The initial reduction in the year 1995-6 would be 8%; for the next five years there would

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<sup>108</sup>ORR (1994), p2.

be a cut of 2% per year; overall this would amount to a 21% decrease. In financial terms there would be an overall reduction of £1.5bn with a total of £12bn over six years. The justification for such measures is to force Railtrack to cut costs and reduce government subsidy. In another bout of self-definition Swift claimed that his message to rail managers was “they had a regulator who is prepared to be tough”.<sup>113</sup>

Indeed the price control does seem to benefit once more those engaged in bidding for franchises. But where does it leave Railtrack? Sir Bob Horton, the Chairman of Railtrack, called the cuts “exceedingly challenging”<sup>114</sup> but overall investment in infrastructure becomes less certain. However the Lex column in the Financial Times claims that it offered a benefit to privatisation because there would be less emphasis on subsidy therefore the privatised industry will not be subject to political whim. Thus with this move the Regulator tipped the balance in favour of the franchisees. This occurred during the period when there were terminal delays in drawing up the first of the franchises. However his criticism of Railtrack has not ended there; part of his role is to prevent the company abusing its monopoly position. The Rail Regulator has clearly stated “The role of regulation, therefore, is to provide, through systems of control, what a competitive market should be expected to achieve through incentives”.<sup>115</sup> Further in his regime for track access charges he allowed for £3.5 billion to be used for additional investment in the rail network. To this end “with this stability of funding, I expect Railtrack to deliver an effective investment programme fulfilling its obligations to maintain and renew the network”.<sup>116</sup> To this end he has monitored its performance and has gained agreement that Railtrack will publish

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<sup>112</sup> ORR (1995), p2.

quality indicators indicating its performance on maintenance and renewal.<sup>117</sup> Again with this the balance is drawn between the market and social responsibilities: “Railtrack has commercial freedoms and commercial incentives. But with these come responsibility”.<sup>118</sup> However since privatisation Railtrack has been heavily criticised by the Rail Regulator for not meeting its targets on investment on a number of separate occasions. This resulted in the publication of Bulletin which stated the Office’s regulatory objectives towards Railtrack and that the company had an “historically unique opportunity to make a major contribution to the public interest”.<sup>119</sup> To this end he claimed the present statement by management was “disappointing in important aspects”.<sup>120</sup> Through this pressure the Regulator negotiated an amendment of the licence which went into more detail on the question of investment.<sup>121</sup>

The Regulator thus has a role in harnessing the market and monitoring the behaviour of Railtrack to ensure that the ‘public interest’ is upheld. Difficulties arise not only through the contradictory nature of the public interest but in his powers to enforce his intentions; these are certain to increase. However his constant monitoring of Railtrack has garnered results even if the process has been drawn out.

The ambiguities of the ‘public interest’ already witnessed in the discussion of competition policy were also present in his consultative document on ticket outlets. The most controversial aspect of this was the option for there to be a core group of

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<sup>116</sup> Prospectus, p86.

<sup>117</sup> Press Notice, ORR/96/7.

<sup>118</sup> Press Notice, ORR/96/8.

only 294 stations which could provide tickets. This was one of the options within the document and when presenting it the Regulator gave another interpretation to his powers “I am seeking to use my powers to promote a better railway which provides *better value* (my emphasis)”.<sup>122</sup>

Thus, does the regulator protect the railway user as consumer or as taxpayer? The ticketing proposals would not be welcomed by rail users but arguably in the long term could save money. These proposals have been withdrawn and will not be reviewed for another two years.<sup>123</sup> This shows perhaps that regulators are still very susceptible to political pressures. This was not before the Secretary of State revealed his lack of knowledge of the detail of rail privatisation when he declared he would not allow such a plan. As mentioned above the Regulator only had to “take into account” the guidance of the Secretary of State until the end of 1996; there is no compulsion involved. This perhaps revealed the prospect of another base of conflict within the new rail industry between Regulator and Government Department.

The problems of the Regulator then are both general and specific. General, in the sense of having to curtail severely the worst excesses of competition<sup>124</sup> to promote the consumers’ interest; specific because of the conflicting duties within the railway industry. Does he protect the rail user by protecting all services or by reducing subsidy or by hastening the introduction of the franchising of passenger services? With the privatisation of Railtrack have the goalposts now been moved so as completely to redefine his role? Has his role become mainly that of watchdog for the

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<sup>122</sup>Financial Times 13th Jan 1995

privatised Railtrack? His more recent pronouncements seem to suggest this and this element has been underlined since the election of the Labour Government as will be illustrated in the concluding part of this chapter.

The ambiguities of the regulator's role reflect the problems of privatisation which are also seen in the work of the Franchising Director.

## The Franchising Director

The Franchising Director, Roger Salmon, is also a creation of statute. But he is much more of a “ ‘creature’ of the Secretary of State”<sup>125</sup> for he has no statutory duties to uphold as the Regulator does. The Railways Act provides that the Office acts in accordance with instructions and guidance and any objectives given to him by the Secretary of State.<sup>126</sup> These objectives concern the provision of passenger services in the rail industry and the operation of any assets. He is also now in charge of the distribution of rail subsidy to the individual train operators through the Public Service Obligation (PSO) grant. The Office also oversees the drawing up and letting of the franchises. Further one of his more controversial new powers is the setting of Passenger Services Requirements (PSR) - these lay down the minimum services required to be run by the new passenger franchises. If the requirements are not met then the Franchising Director can withhold the PSO Grant.

The first publication of these PSRs was on the 31st January 1995 - they represented an overall cut of 20% in services required compared to BR's service.<sup>127</sup> The Government is quick to point out that it was the first time that rail services had to have a published minimum services, but the cuts in the services could be seen as giving the nod to franchise operators to run fewer services. In Labour's words not the axe but a sight of the 'scalpel'.<sup>128</sup> This is particularly the case with two of Scotrail's sleeper services which was not provided for in the PSR for Scotrail. Yet in a

<sup>125</sup> Characterisation used by Michael Meacher M.P. in HC Deb, February 7th 1995, col 201.

<sup>126</sup> Railways Act 1993, s5(1)(a). This was the basis of the successful legal challenge by the Save Our Railways group in December 1995. See Appendix

protracted legal battle the Court of Session held that Scotrail had not gone through the correct consultation procedure in withdrawing the sleeper service. This was because the sleeper was the only service to use a certain portion of track in Glasgow, although Scotrail attempted to counter this by running a “ghost train” service on this track.<sup>129</sup> This case - which was lost on appeal by Scotrail- illustrates the potential for legal battles in the new railway<sup>130</sup> and the nature in which the courts may intervene over such administrative processes.

In a sense, the difficulties experienced by the Regulator with the shift in emphasis in privatisation are felt even more severely by the Franchising Director- because he is tied more closely to the Government. It could be argued that a counterpoint to the Regulator’s announcement on the cutting of access charges<sup>131</sup> was the Government and Franchising Director’s capping of fare rises. The details of this were that there were to be no increases above inflation for the next three years for certain types of fares and in the four subsequent years the increases will be capped at 1% below the rate of inflation. At the time this was seen as another delay in the franchising process. It could be argued that this intervention further encouraged the growth of a group of core bidders for the franchises, in that management buy-out teams who may not have a great deal of capital<sup>132</sup> were further discouraged because of the limiting of one of the few flexible costs left for a train operating company.

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<sup>129</sup> See Appendix.

<sup>130</sup> Even though these actions were brought under judicial review provisions and not as a result directly of a contractual battle. See Appendix.

<sup>131</sup> See above.

Thus the 'successful' awarding of the franchises which took place in 1996 was aided by measures which supported the growth of a core group of bidders for the franchises. This meant that in general only existing larger transport interests could have the resources to bid successfully for them. Following the process of bus deregulation this led to the further consolidation of transport operators, and the Franchising Director's office and indirectly the Government encouraged this, not only with the rules on ticket pricing but with the requirement for franchise bidders to put up 15% of their expected annual turnover as a guarantee against commercial failure. The difficulties outlined above in the awarding of the Scotrail franchise also illustrate further the difficulty for management bidding successfully. The 'hard-wiring' demanded by the Passenger Transport Authority has been resisted largely because of the demands this would impose on the franchisee. Within the agreement the PTA wanted an exact timetable specified, a freeze on fares, guaranteed conditions for railway staff and the imposition of standards of cleanliness etc.<sup>133</sup> This is significant because Strathclyde through the Passenger Executive controlled almost a third of Scotrail's income.<sup>134</sup> The franchise was successfully let in the spring of 1997 and in confirmation of these trends a large transport operator was seen as the most suitable candidate for the franchise: National Express.<sup>135</sup>

Perhaps the problem lies in the nature of the franchise. As every passenger service in Britain operated at a loss then every line initially received a subsidy. Therefore, the entire franchise process reflects a system of subsidy-bidding - that is the team which offers to run the service for the lowest amount of money will be likely to succeed.

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<sup>133</sup> FT, 17th Feb. 1995.

But with so little control over the costs in running the TOC<sup>136</sup> the scope for cutting their expenditure seemed to be limited, although as has been mentioned some of the franchises have extremely ambitious plans for cutting subsidy and moving into profit.

This system of franchising has been criticised even by supporters of privatisation.<sup>137</sup>

Dnes argues that with inadequate competition for franchises, theoretically a successful franchisee could simply bid £1 less than his competitors. This would lead the way to the Franchising Director giving public subsidy to increase private profits. Dnes' solution was a form of price bidding whereby franchisees would bid in terms of the lowest fare they could charge.<sup>138</sup> Any variation in this could be negotiated by the TOC and the Franchising Director and an integrated system of arbitration which is the norm in private sector franchise agreements. These initial proposals have been superseded by the capping of fare rises as these cannot easily be varied by the franchise operators.

The stringent timetable of 51% of services in the private sector by April 1996 was not met. But the Franchising Director managed to let a series of franchises throughout 1996. For a number of reasons this led to a 'consolidation' within the rail industry which compounds further consolidation already experienced with the bus deregulation experience. This again raises the question of the nature of this particular privatisation and the arrangements for accountability.

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<sup>135</sup> But as mentioned above this caused the new Labour Government to refer this franchise to the MMC and required it to divest its Scottish bus service.

<sup>136</sup> This is estimated to be as low as 26.3% of costs. See *Modern Railways Privatisation Special*

## COMPARISONS AND CONCLUSIONS

After examining the structures of this most unique and peculiar privatisation and the underpinning ideology - if it is still valid- of the supremacy of contract it is necessary to refer back to the dominant themes of this thesis. Foster has written often of his belief in the catharsis of privatisation. “Anyone who has been through the process of privatisation will recognise the release of intellectual energy, even occasionally euphoria that occurs when management recognise a better way of doing something”.<sup>139</sup> Once management is liberated from the public sector a new energy is created which produces new initiatives and benefits for the industry. In rail he estimates that management will be able to concentrate on running train services whilst an independent body controls infrastructure. But what of the central question for public lawyers – accountability? Has this increased through this particular privatisation?

Foster’s almost theological approach towards rail privatisation is not justified by any examples of similar rail privatisations internationally. Thus this idea of a ‘liberated’ management has gained centre stage in the course of this sell-off. It reflects the changing environment in which privatisation has taken place. No longer do the arguments of popular capitalism or spreading share ownership gain such a wide audience. Perhaps this is because of the excessive salaries and advantages enjoyed by privatised utility chiefs or the scotching of the myth of the power of the individual

shareholder in the face of institutional domination.<sup>140</sup> There has been a clear drop in the level of support for privatisation over the last decade as reflected in opinion polls. The Annual Social Attitudes Report<sup>141</sup> throughout the eighties saw a drop in support for the question “should there be less state ownership?”. From the 1983 high of 49% - itself representing the alienation experienced at the hands of the public corporation- it fell to 24% in 1990.<sup>142</sup> Some could argue that this itself reflects the extent of privatisation in the eighties. However this was prior to the privatisation of the railways and the emphasis on protection of the rail passenger within the privatised system in a sense reflects this. In a sense Government has even recognised this implicitly with its re-orientation of regulation to protect the consumer rather than “holding the fort” for competition as originally proposed by Littlechild.<sup>143</sup> As both the nineties and rail privatisation progressed an increasing alienation grew from the private sector and ‘fat cats’. In the 1996 Social Attitudes report a majority of people believed “big business benefits the owners at the expense of the workers”.<sup>144</sup> In a sense this explains the strength of the Rail Regulator’s reaction to the monopoly of Railtrack. What these figures represent above all is the lack of support for the general propositions put forward in the mid-eighties of a ‘popular capitalism’. As these ideas became redundant and in the absence of any other reasoning, then, Foster’s liberation thought and his advantages of contract filled the vacuum of ideological support for privatisation.

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<sup>140</sup> Witnessed at the 1995 British Gas A.G.M. The general process is outlined in Saunders/Harris (1994).

<sup>141</sup> Compiled by Social Community Planning Research (SCPR).

<sup>142</sup> SCPR (1992) p118

Yet where does this leave the debate on enhancing accountability through ending the monolith of state ownership? It is clear that in many ways the privatisation of the rail network is unlike any other; no longer can one simply apply a deterministic attitude to privatisation according to which it was carried out simply to reduce the Public Sector Borrowing Requirement: “selling the family silver”. In the opening stages of rail privatisation it looked as if very little money would be raised initially leaving some wondering why it was even being attempted. This has altered now with the rushed sale of Railtrack and the Rolling Stock companies but this has hardly dented the PSBR and was used largely to finance slower tax rises. It is important to remember that the sale of Railtrack was never initially envisaged to take place as rapidly as it did. In any case there has been a very large initial outlay to pay for restructuring and consultancy costs in the new railway, leading *Modern Railways* to comment it was like paying people to steal the family silver.<sup>145</sup>

The rail privatisation programme is not easily labelled: its structures are complex and the justification multi-layered and to some degree contradictory. The splintering of the unitary structure of British Rail has divided the workforce and resulted in attempts to introduce localised bargaining. Perhaps this is one of the more conscious consequences of the sell-off as it matches developments in the other parts of the public sector- notably in the Health Service. Ultimately though, the structures seems to be determined by the clashing of a Thatcherite dogmatic belief in privatisation with an attempt to limit the worst effects for the more regulatory nineties. Thus the reintroduction of the profit motive by reintroducing the private sector in the running of train services is extremely controlled. In a strict sense the companies are not even

making profits; rather they are receiving subsidy which they are planning to cut over several years. However the most successful bidders for subsidy as already noted are those groups which control other industries which have profitable sidelines. The basic claim of privatisation that the incentive of private profit is superior to the inefficiency of state ownership is hardly proven by the rail privatisation model, as the privatised rail network relies on the state for finance and regulation. There is no free competition. The benefit of the private sector seems to be the ability to “rebrand” the rail service.

This combination of public subsidy to private operators colours the nature of the examination of accountability. Have the new structures of the rail industry provided a more *accountable* network? Central to this work has been the thesis that ownership is linked to enhancing accountability. In this case we have a predominantly privately owned rail network with a relatively powerful regulator. However does the complexity of regulation in the form of the franchises and the Office of the Rail Regulator make calls for the re-nationalisation of the rail industry irrelevant?

The Labour Party’s new approach to the rail industry should be examined here. Its model of controlling the new railway has fallen far short of calling for full public ownership. In a sense it is utilising the new structures of the railway to expand regulation rather than get involved in the expense of re-nationalising the rail network. In the prospectus for Railtrack the Party’s policy was outlined,<sup>146</sup> the tripartite structure of its policy involving “using the power to regulate, the power of the public

subsidy and the power to acquire ownership”.<sup>147</sup> In part this was an argument against those who wanted a firm commitment for the party to back public ownership. But it rejected any “dogmatic views on ownership”.<sup>148</sup> It also was an attempt to bolster external regulation as an accountable alternative to public ownership. The Party conceded that the regulator already had “considerable powers to secure changes to the regime as it applies to Railtrack”. Indeed “the powers of the Rail Regulator are central to the achievement of the objectives of a Labour Government”.<sup>149</sup> To this end there would be statutory changes to make the Rail Regulator more answerable to the Government. This seems to mean that the regulator will be made to be more aware of the public policy preferences of the Government. The power to demand that Railtrack reinvests in the network which the Rail Regulator already has to some degree (as mentioned above) would be extended. This was prior to the agreement which the Regulator received to alter the licence of Railtrack which occurred after a lengthy period of negotiation as mentioned above.

The use of public subsidy, again a unique aspect of the rail privatisation, is seen as a powerful weapon. This is quite clear from the lengthy dispute over the Scotrail franchise. This would take the form of cutting the amount of profits that would be available to Railtrack after disposing of property. “Railtrack is not a property company. It should not be regarded as one”.<sup>150</sup> The Party also emphasises that, unlike in the case of the other utilities, Railtrack does not have the option to refer the

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<sup>147</sup> Prospectus p102.

Regulator's decisions on price controls to the MMC. It will attempt to channel their subsidy in a fairer way to "encourage more intensive use of the system".<sup>151</sup>

This example of the Labour Party's policy on the 'new' railway illustrates the argument of the enhancing of accountability without any "dogmatic" reference to ownership. In a sense it is easy to advocate this in the rail industry, most notably because of the extensive subsidy which the state gives the railways. But the proposals reflect a wider argument on the nature of public ownership and the state. This goes right back to the earlier chapters of this work and the separation of ownership from accountability. Can the railways be fully accountable if they are not publicly owned?

The Office of the Rail Regulator sees its accountability as coming through its openness in coming to decisions. Further the Regulator is under the ambit of the Parliamentary Ombudsman and "I am accountable through the courts if there is illegality, irrationality or procedural impropriety"<sup>152</sup> i.e. through judicial review. Ultimately, though, his regulatory decisions are accountable because of their "predictability". These definitions of accountability are not very inspiring. Clearly the Labour Party wants to extend political control over the regulator but is this possible without a clearer statement of what the regulator is accountable for? Does it not represent a return to the role of the nationalised industry board with the regulator torn between governmental control and the operational decisions of the rail industry? Thus Government can wash its hands of responsibility and put the onus on the regulator.

The strengthening of the regulator's role could not have prevented the move towards consolidation within the franchises and the dominance of several operators. Thus any prospect of co-ordinating passenger services on a nation-wide level has been lost, although the Regulator has made it clear that this should be a priority. Perversely a form of co-ordination has begun to develop with the bus industry becoming involved in running train services. In Winchester, for example, in the South West of England all train and bus services are run by Stagecoach. The referral of National Express to the MMC because of its parallel transport interests in Scotland and the West Midlands has been mentioned before. The notion of an integrated transport network is being introduced in an arbitrary ad hoc manner. This exists alongside the Passenger Transport Authorities which have delayed the process for awarding several franchises including Scotrail. The Scotrail experience illustrates the power that elected authorities have to hold an industry to account even though they could not halt the change in ownership, although ironically the new owners of the franchises promised more investment in the network than the Government was prepared to do. Whether or not this materialises is a central question, especially given the referral to the Monopolies and Merger Commission.<sup>153</sup>

The Labour policy is also to respect any existing contracts within the rail network; meaning that they will let the franchises run their course. But this is a considerable gamble. As has been noted many of the charges for these franchises are fixed - what if they cannot meet their targets for subsidy reduction? Surely the greatest test for any structure is when something goes wrong. On this count franchises are largely untested, although the experience of South West Trains' inability to run registered

services offers an indication of what may develop. Perhaps it again illustrates why most of the franchises have gone to a hard core of bidders. They can perhaps afford to shoulder the losses because of their other operations.

In interview an employee of Railtrack labelled rail privatisation a “story without end”.<sup>154</sup> To some extent this creates difficulties for a work of this nature yet it does allow the spectator time to examine processes which have developed under the aegis of privatisation. In the rail network there has been a complete restructuring but with continuing government subsidy and extensive regulation it would be easy to believe nothing had changed. The ‘accountability’ of the nationalised industry has been replaced with ‘accountability’ through contract and the regulator - the latter will remain with Labour albeit with a more centrally directed regulator. For all the various definitions of accountability outlined in the Introduction ironically this is closest to that proposed by the proponents of the public corporation. This is because any accountability will be between the Government and the regulator of the industry, as accountability was meant to be delivered in the relationship between the Minister and the board of the public corporation. What is missing is a direct link in accountability between the public and the public service. As this chapter has illustrated the labyrinthine structures of the “new” railway are difficult to follow generally. This is also true for the users of the rail service. However, as in the bus industry, operators have found a way round the system to provide in part a locally integrated service. The state seems to have missed the opportunity of providing a more broadly integrated national transport service with an awareness of public accountability.

In the concluding chapter the dominant themes of this work will be tied together. The process of privatisation and deregulation in the transport sector raises important issues for the student of the modern state. It also illustrates the debasing of the notion of accountability and how this basic term for public lawyers must be redefined. An attempt to carry this out will be made in the following chapter which will also expand on the direct comparisons with the bus and rail industry.

## CHAPTER EIGHT: CONCLUSION.

The trend in modern public law is to create an academic structure with reference to some external source. This has proved necessary because of the dated approach of Dicey and the many new institutional developments in the British state. In a broader context it is also derived from the absence of a written British constitution or any definitive principles of administrative law. This trend was supported by specific examples in the introduction of this work. In the field of state intervention in the economy, one of the main areas of study for the 'new' public lawyers, the push towards both privatisation and deregulation has provided a form within which public lawyers have constructed their work. As described, Ian Harden and Norman Lewis in particular have argued that accountability, a central concept for public lawyers, can be delivered through the use of contract and the 'market'.

It has been the contention of this work that this belief is flawed. Furthermore, it is suggested that the peculiar experience of public ownership in Britain has separated accountability from ownership. This is in contrast to the actual reasons for which many industries were nationalised in the forties. In the field of public transport the disconnection of accountability from ownership has been witnessed in the recent privatisation of the rail network<sup>1</sup> and the deregulatory structure of the bus industry.<sup>2</sup>

By using these examples the purpose of this work is to argue that, specifically in the field of transport, accountability can only be fulfilled through a model of public ownership; thus the experience of deregulation and privatisation has shown that accountability is not more likely to be delivered using these latter methods.

This conclusion will seek to underline these arguments by highlighting the consequences of these models as outlined in earlier chapters. Firstly the problems of dealing with the concept of 'accountability' will be restated following the examination of competing models in the Introduction of this work. Then the particular trends of both bus deregulation and rail privatisation will be measured against any definition of accountability which is forthcoming. The similarities between these two developments already examined briefly will be restated and developed. Finally the question of ownership will be faced looking at the failure of the British model of nationalisation. If public ownership is central are there any structures which can be adopted for transport which will not face the difficulties that have been experienced previously?

## **ACCOUNTABILITY: A SINGLE CONCEPT?**

Before this work examined both deregulation of the bus network and privatisation of the rail industry the Introduction attempted to place both these processes in the context of public law. For public lawyers examining the multifarious ways in which the state operates, models of accountability are a central concern. Alongside this in the area of nationalisation and privatisation disciples of each would claim they could deliver an accountable structure. The central problem here is the variety of meanings ascribed to accountability. Some of the different models looked at included accountability through the public corporation, through being a shareholder and through the new regulators. Between public law academics there is even more discrepancy on how accountability can be delivered. This stems largely from the fact

that there is no unified model of constitutional or administrative law within the British tradition. Again the tensions between these different academics was outlined in the Introduction.

It could also be argued by some legal academics that another way in which accountability can be delivered in public law is through the process of judicial review. Such a model has not been examined at length in this work. There are various reasons for this. Although judicial review has dramatically expanded its ambit in recent years the courts have always been reluctant to determine how government intervenes in the economy whether via nationalisation or privatisation. Furthermore, it is not clear whether the courts would be a suitable forum in which to debate such issues given that judicial review is ostensibly concerned with procedural rather than substantive matters. There is also a school of public law thinkers who are extremely critical of using judicial review as a means of delivering accountability in any administrative context. This argument has been put by Harlow and Rawlings in their work on administrative law recently published in a second edition.<sup>3</sup> This relates to the arbitrary nature of judicial review both in the way in which an action is raised and the standards applied by the judiciary. However even in the field of transport deregulation and privatisation there have still been some significant legal cases. These are examined in the Appendix which also looks at how the cases relate to the general concept of accountability.

If it is accepted that accountability cannot be given one definite meaning in the context of privatisation which definition is relied upon in this work? Again an outline

of this was attempted in the Introduction. On the basis of this discussion it was argued that the model of the public corporation was flawed because of its lack of openness and the absence of a structure which was capable of delivering any model of accountability. This was exacerbated by the architects of the public corporation being very vague over how accountability would be delivered in the new creations. Privatisation, on the other hand, created a partially open structure through the use of the regulators. However the flaw here was the reintroduction of the profit motive – in particular the creation of value for the shareholder. This prevented a genuine accountability for the many and instead redirected it towards the “few”: the limited number of shareholders. Thus a new structure is needed which combines an open and accountable structure, which is designed to deliver accountability for the “many” and which does not rely on the profit motive.

This awareness of the importance of the public when delivering an accountable structure was summarised in the Introduction as the “public’s perception of accountability”. In the context of transport what does this mean? Both bus services and rail transport play a vital public role, and thus many people are dependent on them as their only means of transport. Through the years this has been acknowledged; for example through the creation of Public Service Requirements<sup>4</sup> in rail privatisation and the continued existence of subsidised bus routes. Thus, for the public, accountability can perhaps be derived from their perception of services. An accountable service, then, is one that in part provides a service that the public is satisfied with. Firstly, in substance that is the service is reliable, fast and relatively cheap. Furthermore the public should have a forum which they are aware which can

hear complaints and inquiries about the service operators and in a direct way hold them to account.

In a sense this argument echoes the argument of Stagecoach and other private operators in the transport industry that for them accountability is best defined by the customers. If they are not happy with their service they will not use it. Thus by responding to their needs the company is accountable through the marketplace. This is a standard argument in favour of the 'market' deciding but is now largely inappropriate here. This is because such an argument rests on a large degree of free competition. This is not what is happening in the rail industry, as far as passenger services go, until at least the next century as outlined by the Rail Regulator. Even then the amount of competition will be extremely limited. Furthermore, in the bus industry a process of consolidation and acquisitions has made the prospect of free competition extremely difficult to apply. So in summary many customers will have little choice, particularly those who have no other means of transport. Thus, using this simple definition of 'market' accountability, it does not exist at present in public transport. But that definition on its own is too sparse.

What of a more legal approach? Accountability through contracts and ultimately the courts was clearly the model preferred by Sir Christopher Foster and echoes the approach of Harden<sup>5</sup> and Lewis.<sup>6</sup> Rather than a public perception of accountability this relies on accountability stemming from a document backed with legal sanctions. The argument is that the clarity of contract will distinguish rights and duties and sets out clear standards in a way that the Morrisonian structures never could. Again this

form of accountability rests on the equality of the contractors<sup>7</sup> and the likelihood of a sanction being used. Through the example of rail privatisation the inherent inequality of contracting has been shown in the form of the size and weight of Railtrack and its negotiating powers, and the group of 'core-bidders' for franchises many of whom are backed up by large companies. Furthermore, the prospect of lengthy court cases relating to the voluminous contracts which exist has spurred the creation of alternative dispute resolution fora. Admittedly, this is not a development unique to the rail industry as there is immense pressure on the civil justice system in all contractual disputes. This suggests that legal actions will be a last resort, or that the new fora's deliberations should be binding.

Either way there seems to be little unique about the use of contract. Rather, if it loses its ultimate 'legal' sanction and it is not freely negotiated, what differentiates it from the 'command' structure that was much maligned in the old British Rail? Moreover, although many of the franchises may be published, many other contracts will not. Enforcement and hence accountability will be removed from the public in that customers will not be able directly to enforce any of the agreements. True accountability through contract in any context may be a chimera<sup>8</sup> but its use as holding public services accountable is especially unconvincing, particularly in the case of public transport. It was illustrated that in the course of rail privatisation the rush to franchise all the lines by May 1997 caused an enormous amount of pressure on the franchising office. Thus complex negotiations were rushed. It is yet to be shown what the full consequences of that will be - particularly if a franchisee collapses - but perhaps a precursor was the intervention of the Rail Regulator to fine

South West Trains for its withdrawal of services. This holding of the rail company to account was carried out *after* the fact. Moreover the use of a financial sanction carries less weight in the context of all train operators being supplied with Government subsidy which ultimately funds the fine. So the case for using contracts as the main means of delivering accountability in public services is unconvincing, but especially in transport, because of the particular political problem and the way in which the state still intervenes.

The problems of this structure of accountability aside, contractualisation does not solve the problem of remoteness from ordinary people using transport. It is likely that most of this 'accountability' would take place behind closed doors and the initial secrecy surrounding the documents of rail privatisation during the awarding of the franchises would also support this. However, there is another model of accountability that encompasses both the public perception of accountability and the contractual dimension: accountability through the Rail Regulator.

As was shown in some of the most recent work of the Regulator, he has been prepared to hold Railtrack to account as regards the implementation of its investment programme. Most recently he renegotiated its license to ensure it is more specific in its investment plans.<sup>9</sup> It has also been argued that recent interventions such as this have shown that he wants to be seen as the friend of the consumer.<sup>10</sup> In truth his role is more complex than that as s4 of the 1993 Railways Act shows with its multiple definition of the 'public interest'. However the central question remains; if the Rail

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<sup>8</sup> See Macaulay (1963). This was developed in a recent study of the use of contract in the public sector

Regulator holds Railtrack to account to whom is he accountable? His own definition of this in the prospectus for Railtrack is unconvincing; including as it does ‘judicial’ standards of accountability: “illegality, irrationality and procedural unfairness”.<sup>11</sup> This is an extremely indirect form of accountability for a regulator. As was argued the Labour party sees this gap and wants to fill it by making the regulator more accountable to the Government. Even after the General Election these plans are still quite vague<sup>12</sup> although the praise given to the Regulator’s recent success with Railtrack suggests that this approach towards Railtrack is one the Government wants to encourage.<sup>13</sup> Again it remains to be seen if in the present Parliamentary structures whether this will work any better than the ‘arm’s length’ relationship which ministers had with the nationalised industries.

So accountability is yet another concept riven with ambiguity. This problem is a particularly important one for public lawyers. Different definitions of accountability produce different solutions, sometimes with structural implications. Using the framework of the introduction of this work, Allan saw the courts as key,<sup>14</sup> Harden and Lewis the use of contract and the market, Prosser tends towards the structure of regulators. Each in a sense has his own model of accountability. This thesis argues that a concept of accountability needs to be directed to the public. This includes their perception of the delivery of services but would also involve them in holding the providers of services to account. That is particularly true in the field of transport as it remains a vital service for much of the community. Even apart from the views of

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<sup>10</sup> Another example was the tough standards he lay down for the train operating companies. See ORR Press Notice 97/29.

<sup>11</sup> This is taken from Lord Diplock’s reasoning in the GCHQ case: *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374.

those who rely on it, much government research has shown the need for a more integrated transport structure that encourages the use of public transport.<sup>15</sup> Thus accountability here must relate directly to public perceptions. This is not to ignore the more legal forms of accountability; these will have their place. Nevertheless, the central purpose is to remove the alienation people feel from transport services or transport providers;<sup>16</sup> the model of public ownership did not achieve this nor did the developments of deregulation and privatisation.

To develop these themes the two areas looked at in this work will be measured against the competing standards of accountability.

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<sup>14</sup> For the use of the courts in delivering a form of accountability during privatisation and deregulation, see Appendix.

<sup>15</sup> See the UK Round Table Group on Sustainable Development report and the Royal Commission on

## **'ACCOUNTABILITY' THROUGH BUS**

### **DEREGULATION.**

During the course of this work there have been significant developments in the field of the bus industry. From 1993-1996 there were a large number of acquisitions, stock market listings, references to the competition authorities and much consolidation within the bus industry. In some important senses this contradicted the original rationale for deregulation. However these developments were not surprising given both the structure of the privatisation of the various bus operators and the general nature of public transport which tends to a form of monopoly, as has been shown. These developments have important implications for the concept of accountability.

The first justification for deregulation in the Buses White paper was the inadequacy of large bus operators in providing an acceptable service for users of bus transport. The use of cross-subsidy meant that consumers were paying too much and the allocation of services was inefficient. When free competition was established new operators would use innovative methods to cut fares and raise the number of passengers. The accountability envisaged here would be accountability through the market - the Stagecoach argument outlined above. Under these standards as outlined in Chapters 4 and 5 deregulation has failed. Passenger numbers have fallen at the same rate as occurred during the regulatory period under the Traffic Commissioners. Although the

4. If it had, it would have increased the number of passenger journeys has fallen

report by the UK Round Table Group on Sustainable Development.<sup>17</sup> This specifically criticised the lack of co-ordination between rail and bus transport stating deregulation did not allow for this type of co-operation. Moreover, the rapid consolidation of the market has in many areas prevented a real choice of services as the large numbers of referrals to the competition authorities in the mid-nineties shows. Thus this model of accountability has proved not to be suitable for the bus industry.

However this market rationale for deregulation does not allow for many of the other concepts of accountability mentioned above to have any application. If the purpose of the 1985 Act was simply to lift the burden of regulation, some external body whether that is a regulator or a franchise agreement could not be used to hold the bus industry to account. Indeed, franchising was specifically rejected in the White Paper for services outside London.<sup>18</sup> However 'pure' deregulation was not completely achieved because of the existing role of the Traffic Commissioners and perhaps more significantly the role of the competition authorities. It was illustrated in Chapter 5 how these remnants of regulation were used in an attempt to make the industry more accountable. This process was haphazard with no uniform effect across Britain. Furthermore, the nature of the competition authorities prevented a coherent approach from being taken to the bus industry. The nature and powers of both the MMC and the OFT tends to support a case by case approach. This approach did not reflect the rapidly consolidating bus industry structure of the mid-nineties as was indeed understood by the competition authorities themselves with their reports often calling for a new approach to the bus industry as explained in Chapter 5. In a sense this approach culminated in the demands by the Transport Committee for a Regulator in

the bus industry in December 1995, yet this was rejected by the Government in strong terms.

Another consequence of the market approach was that it prevented the development of a coherent and persistent method of accountability. This is understandable because it would have been fiercely resisted by bus operators who were used to operating within minimal restraints. Thus within the bus industry it is difficult to apply **any** concept of accountability. This is because of the absence of any structured regulation and the growing consolidation within the industry which has made consumer choice more difficult. Perhaps the creation of a specialist regulator would have solved this but this was not implemented. In fact the idea was denigrated in the Government's response to the Transport Committee's report even though it would not have been far removed from previous shifts in Government policy, such as the referrals to the competition authorities and the change in the remit of the Traffic Commissioners.<sup>19</sup> This may be because to admit that this form of accountability was needed would be to say that the policy of accountability through the market, inherent in the Buses White paper, had failed.

For public lawyers the consequences for accountability is clear. Completely removing the state from the regulation of bus industry does not seem to be possible. Further, to the extent which the element of state control was completely removed, the absence of public operators also permitted the general trends of acquisition and consolidation, which is how the National Bus Company had originally come into being. Thus deregulation coupled with privatisation did not enhance accountability

either through a regulator or the 'market'; rather it removed the state from involving itself with an important area of transport policy. Once again accountability was defined by its absence.

## **'ACCOUNTABILITY' THROUGH RAIL**

### **PRIVATISATION.**

On the face of it similar problems of accountability should not occur with the rail industry. As was outlined when examining the structures of this privatisation there was much emphasis on how accountable to the consumer it was to be. All elements of the new railway from the Franchising Director to Rail Regulator to the Train Operating Companies emphasised their commitment to being accountable to the public. Moreover the use of subsidy still provides a strong link to the state, a point often made by New Labour in its desire not to make a commitment to renationalise Railtrack. The introduction of franchises and leases is a clear example of co-ordination by contract envisaged by Sir Christopher Foster. Thus a number of concepts of accountability could be realised with this structure.

Unlike the supposed competition in the deregulated bus industry which, it could be argued, existed in some form in the initial period following the 1985 Act, the Rail Regulator has frozen the concept of free competition for at least five years, except for freight. Choice where it does exist is between operators whose services overlap. There is evidence that this has proved difficult to implement because of the reluctance

a study by the Consumers Association.<sup>20</sup> However the claim would be that the accountability of the market would be through the franchise agreement and the bidding process prior to the awarding of those agreements. Built into the agreement would be undertakings on service innovation, rolling stock etc, which in theory competitors would have to meet to establish themselves in the market place. It has been shown that some franchises have been granted for a longer period on the basis of some or all of these criteria being fulfilled. In part this reflects why the Franchise Director believes himself to be protecting consumers as the franchises are supposed to encourage innovation and not a 'cosy' monopoly.

However this does not fully deal with the public perception of accountability. For rail passengers choice of service is probably not as important as regular services and absence of delay. However this requires investment in the infrastructure which is the preserve of Railtrack, although as mentioned the Regulator has gained assurances recently on the investment programme with the amendment of Railtrack's licence. Public perception could also relate to industrial disruption which has not perceptibly decreased following privatisation. Indeed rail workers are the one group which is completely alienated from the new structure<sup>21</sup> having lost national bargaining structures and gained new rail operators who expect more flexible practices from the workforce. In 1996 there were industrial disputes in 13 train-operating companies with the RMT; some were particularly bitter as in the Scotrail dispute. However ASLEF, the train driver's union, has managed to negotiate quite strong settlements with the new train operators. This reflects their members' skilled status which is not easily replaced.

So splintering the network will make creating a public perception of accountability very difficult to implement. The dispersing of this accountability over a number of different institutions does not allow for any close identification from the public; moreover there is no direct link with any of these bodies and the public. This is why the struggle over the Scotrail franchise is very important.<sup>22</sup> It could be argued that by being an elected body the SPTA is more aware of the importance of the public perception than other players in the 'new' railway hence its reluctance to sign away its sizeable subsidy without "cast-iron" guarantees on standards for travel. The difficulty of this is that the SPTA has been left almost alone in attempting to guarantee this public accountability, Scotrail being one of a handful of franchises that was not awarded until the spring of 1997.<sup>23</sup>

So the achievement of a public face of accountability will prove difficult. This is particularly true in a fragmented structure because there is no direct line of responsibility. Thus although it is relatively early days for the new structure of the railway there are few encouraging signs of enhanced public perceptions of a more responsive accountable rail service for passengers. The parallel argument often used that privatisation enhances accountability automatically through introducing rigours of the market also cannot be applied here. As previously explained, the Rail Regulator has already outlined the limitations on open access, which in any case whatever model of rail privatisation was used would have been difficult to establish. But with the additional model of bus deregulation to learn from and the way in which

the bidding for franchises has developed, perhaps the prospect of free competition being introduced even after the regulator's restrictions end is a little distant.

Nevertheless, it could be argued by supporters of this model of privatisation that although there may be an absence of a public perception of accountability in the 'new' railway this was doubly true of the nationalised sector. Alienation from British Rail was legendary with even John Major during the process of privatisation stating he wished to end the tradition of the rail network being part of "the stand up comedian's joke book"<sup>24</sup> and make it the "envy of the world".<sup>25</sup> So perhaps privatisation is not as important as the change in the culture of accountability behind the scenes. In Sir Christopher Foster's model this meant a shift from "command to contract". Reflecting modern public law thought this re-emphasises Harden's respect for the "concept of contract". The creation of a Rail Regulator, who uniquely was appointed *before* the privatisation took place, should also enhance the prospect of accountability for other public lawyers.

Yet the success of contracts as a tool for enhancing accountability is yet to be proved. The inequality of contract negotiations has been mentioned but there are other difficulties. In the field of passenger franchises, the speed with which they were awarded after a series of long delays suggest that there was an element of "standard form" contracting here, that is the framework of each franchise agreed might not be as uniquely crafted to the needs of a particular franchise as originally hoped. In contradiction to this, the terms of each franchise relating to length and rolling stock required have been quite variable, more variable than was originally envisaged. This

illustrates that the method of negotiation became standard allowing for some deviation but overall fulfilling the main task of awarding the franchise. This could be put down to the external political pressures on the Government which wished all of the franchises to be sold before the General Election in 1997. However it may also be interpreted as a statement on the complexity of transferring the operation of an important service like rail transport into a contractual document. In this sense standard terms are a relatively easy fall back position. Again to refer to the SPTA case this is perhaps the only real example of a true reflection of the complexities of a rail service being negotiated into a contractual form. Of course if this process had been repeated across the franchises the whole process would have taken years longer.

But even if the franchises and other contracts are of a 'standard form' does this provide an accountable structure? Again there is little evidence to support this contention. Furthermore, if a serious problem develops in the operation of a franchise will this not be too late to test the validity of the thesis? Is it not like having a lifeboat on a ship that has not been checked for leaks? The nature of contracts would suggest that any enhanced accountability relies on the documents being legally binding; that is being backed by legal sanction. But again the nature of the railway makes this prospect cumbersome and time-consuming. In a sense this has been recognised with the development of alternative dispute resolution procedures. The Rail Regulator has stated his wish to develop these mechanisms and indeed they have been developed. This process is understandable given the multiple contracts which exist but does it not negate the benefits of a 'contracting state' if the end result is co-operation without direct legal sanctions?

Alongside 'accountability' through contract lies the role of the Rail Regulator. It was noted in the previous chapter that the Regulator has his own conceptions of his accountability. These were seen to be limited. His future role was dependent on the outcome of the General election but Labour wants to make him more 'accountable' to the government. Again this method of enhancing accountability is flawed because of the nature of Parliamentary structures. In a sense it revisits an element of Morrisonian public ownership with a splitting of responsibility between the minister and another body. This inevitably will lead to tension between the two institutions. This change would also not solve the problem of the multi-layered role that a utility regulator is expected to play. The present definition is cumbersome and, arguably, contradictory. Will it be his role to promote competition or support the customer? The nature of the rail industry means that introducing open competition will not be easy. It may involve a degree of disruption which would affect the ultimate consumer. The link between introducing competition to this market and the rights of the customer are not completely clear. These elements are in a state of flux but without them there is no direct structure of accountability.

The structure of rail privatisation, then, contained attempts to tackle the question of accountability. The early creation of the regulator to apply the 'public interest' is in contrast to the appointment of regulators after the privatisation of other utilities. The fracturing of British Rail and the method of franchising rested on the intellectual belief that contracting between independent legal persons was a more 'accountable' method of running a railway. For the reasons outlined above the case for the increase

although a different structure was adopted to that of the deregulation of the bus industry, where franchising was specifically rejected, the two processes have overlapped quite considerably. The impact of this for an 'accountable' transport industry will now be examined.

## **SIMILARITIES AND OVERLAP.**

The awarding of the majority of the franchises in 1996 was greeted with audible relief by the Government. However the eventual result was not what was originally envisaged. The dominance of bus operators in winning franchises solely or in agreement with other companies reflected an intersection of the consolidation of the bus industry and the haste with which the franchising process was carried out in rail privatisation throughout 1996. This also highlights the contradictory approach adopted by the state.

Chapter 5 of this work outlined the changing way different parts of the state responded to the deregulation of the bus industry. Central to the approach in the mid-nineties was to make a large number of referrals to the competition authorities. This is unsurprising as it coincided with the period of intense acquisition and consolidation within the industry. But it is noticeable that these referrals tailed off as the rail franchising process took speed.<sup>26</sup> One must view the words of Stagecoach with caution in this context because of its vested interests but in interview Derek Scott - who was sceptical of the authorities' independence - believed this to be no coincidence. In a sense the entire success in awarding most of the franchises in 1996

was due to the processes which had occurred in the bus industry. Without these emerging giants who would have dominated the franchising process? Obviously management buy-out projects would have remained but for reasons previously outlined, predominantly their lack of access to the finance needed and the potential for cross-subsidy, it would have been difficult to award large numbers of franchises to these groups. Other transport operators like Sea Containers, operators of the Orient Express, and Virgin, with its airline, could have been involved (and were) but the deregulated, privatised bus companies were vital.

It could be argued that the Government swallowed its pride and allowed these consolidated operators to succeed. This may now be revised with the new Government as the speedy referral of National Express to the MMC mentioned above illustrates. However even the previous Government took the unprecedented step of warning Stagecoach it would be referred to the competition authorities if it succeeded in gaining the Scotrail franchise. Generally, however, though the bus companies were seen as ideal franchise holders. The question could be asked: why? It cannot be simply a question of finance as there were other companies with extensive finances interested in running franchises. Could it possibly be that they are used to operating in an intensively regulated environment? This may seem ridiculous to suggest of Stagecoach which have been a successful operator in exactly the opposite situation. But the other emerging operators to a greater or lesser extent came from the public sector either owned municipally or at a national level. As outlined in Chapter 4 in that system there was a developed structure for regulating bus routes by the Traffic Commissioners. However their experience of state regulation is perhaps not as

important as their ability to run buses. Does not the success of the bus companies reflect to some degree the benefits of the same operators running the buses and the trains?

If this is a method of integration it is an extremely haphazard one. Perhaps it does not reflect a deliberate policy but it does represent an inevitable policy shift. The experience of public transport has highlighted the difficulties in separating the socially necessary from the profitable routes; this applies to both rail and bus services. Arguably all transport legislation since the 1930 Act has been an attempt to tackle this. The intricacies of the franchising processes reflect these tensions with the Scotrail experience being a good example of dictating the 'social' needs of a railway. Deregulation of the bus network could be seen as the one attempt to challenge this view of combining social provision with economic success, particularly with the onslaught in the White Paper against the concept of cross-subsidy. This last model, in theory, supported the emergence of a number of small operators which had no desire nor ability to run a variety of routes. As outlined this is not what developed and the process of acquisition and mergers created a number of giant operators which did run a variety of services using their economies of scale and the dreaded concept of cross-subsidy. In retrospect, then, the Buses White paper and subsequent legislation was a Canute-like attempt to turn the tide on the process of consolidation within the transport industry, which is how the National Bus Company and Scottish Bus Group had been established themselves.

The consequences of this for rail privatisation are clear. Although the legislation

sense it also paved the way for further consolidation and integration. This was also witnessed within the rail industry with Stagecoach's purchase of one of the ROSCOs - Porterbrook. There has also been an element of consolidation within the maintenance companies. This was definitely not planned but because of the particular historical juncture and the desperation to dispose of the franchises the emerging bus operators filled the breach. But does this process confirm or undermine the central tenet of this work that ownership is central to the concept of accountability? Do the events outlined in this work not show that ultimately privatisation does result in an accountable structure?

Leaving aside the debate over whether the new structure of the railways are 'accountable', which has been examined above, this work would put forward the proposition that all the processes of deregulation and privatisation show the necessity for public ownership in the transport sector. The partial integration of transport services which has occurred during the franchising process of rail privatisation is ironically an attempt to mimic the public transport concept of an integrated transport service, but this time by the private sector. The memory of the British Transport Commission following the Second World War may be distant but the concepts underpinning it are being revisited notably by the large bus operators. The difference here is that the driving force behind these stock-market listed companies is increased profits and dividends. This ultimately is their *raison d'être*. The haphazard unaccountable form of integration now emerging can only develop so far because of the dominance of the private sector. This is because the driving force is not to provide an integrated service but to increase shareholder value for their listed

able to concentrate on providing an effective and integrated service. Thus full integration and true 'accountability' can only occur when public ownership is restored to the transport sector. But what model of public ownership could achieve this given the failure of the Morrisonian structures to carry this out in the post-war period?

## **MODELS OF OWNERSHIP.**

Those public lawyers who argue that the 'market' and contract provide a clearer structure of accountability than the archaic structures of the British state have an arguable case given the experience of public ownership. But to reject public ownership in all spheres because of this rests on an idealisation of the potential for accountability in the private sector and an exaggeration of the inefficiencies of public ownership. Norman Lewis, although advocating a case by case examination of whether privatisation is appropriate<sup>27</sup>, argues that "private enterprise may be generally preferred" because "internal control by the shareholders and external control by the capital market provide incentives to avoid inefficiency".<sup>28</sup> Thus accountability is delivered because of the necessity of making profit. As shown in the consolidation of the bus industry and latterly in the rail network this method of accountability is extremely dubious. Particularly in the sphere of transport it downplays the importance of public perceptions of accountability. Moreover, with the examples of the Passenger Transport Authorities there is already a model of ownership which utilises integration rather than the separate independent structures of Morrisonian public corporations. The 'indirect control' here is carried out by the local electorate as it elects their councillors who are then appointed to the Authority - thus there is a

link between the populace and the body which controls the transport network. This complements the direct control of Government which comes from the subsidy which is directed to the Authority.

Created in the sixties by the Transport Act 1968<sup>29</sup> these bodies were established to run a “properly integrated and efficient system of public passenger transport”.<sup>30</sup> These authorities fitted in well with the local authority reorganisation of the seventies particularly with the larger regional council structure in Scotland. In Strathclyde the size of the geographical jurisdiction meant the Passenger Transport Authority did create a real identity which was strengthened by the use of travel cards available across the whole region. That such bodies survived Thatcherism is perhaps surprising although it could be argued that local government reorganisation in Scotland and the abolition of the Metropolitan counties in England limited the bodies’ effectiveness as they were not tied to one particular authority but an amalgamation of many. The obstacles which were put in the place of the privatisation of Scotrail by the Authority shows the potential strength that the PTAs had. According to a leading official in the SPTA this was a surprise to the Conservative Government which apparently was unclear as to what the precise role of the Transport Authority was. The strength of the PTAs was based not simply on their focussing on integrated transport but also through their additional legitimacy by being made up of elected representatives, although they were elected as councillors not as members of the Transport Authority. This provides a form of accountability - albeit imperfect - which could be built on in a future model of public ownership.

An integrated publicly owned transport structure could provide an accountability that would be acceptable to public law standards. Elected authorities on a local basis which controlled bus and rail services could potentially provide a public perception of accountability. If this was coupled with the use of Traffic Commissioners and a regulatory structure for the rail industry services would also have another source of accountability external to that of the transport authorities. Moreover, these directly elected authorities could provide delegates to a national agency for transport services. In contrast to the existing PTAs the direct election of representatives to the transport authorities would provide a form of accountability in that it would give members of the public a feeling of participation in the process. It would remove the indirect nature of appointing an elected councillor to another public body. This action would seek to combat the public perception of the lack of accountability of services and providers which breeds an alienation from the provision of transport services, still prevalent in bus and rail services.

This concept needs further support. How does alienation differentiate from a general lack of interest? In the case of transport, users often complain of uncertainty in timetabling, irregularity of service and conditions of the buses. All of these factors cause frustration and more significantly where possible a return to the car. The public has no perception that it has any power to control or alter the situation.<sup>31</sup> Thus a wedge is placed between public transport and the public. Would the simple act of electing local transport authorities get round this? The idea of being accountable to the electorate is an overused concept particularly in the field of local government yet it could take on meaning here particularly if the representatives were drawn from

transport workers and users of the network. If those who are involved in an industry can have a direct link with its control then this will begin to diminish the dominant trend of alienation. These directly elected Transport Authorities would still have a close relationship with Central and Local Government as regards finance. Subsidy would still be dispersed through the Passenger Transport Authorities.

In the field of bus routes the old role of the Traffic Commissioner could be resurrected with its detailed examination of any potential new routes. This allows a specialised agency to judge whether particular bus services are needed and gives the operators a chance to justify the need for their proposed service. Holding operators to account this way would be more appropriate than the commercial 'accountability' alleged to have been created after deregulation. The old Traffic Courts, although openly scorned by the deregulation gurus of the eighties, did provide a fairer way of awarding routes than the free for all that emerged initially after deregulation, in the sense that they allowed a degree of participation and took many different factors into account before deciding if a route was necessary or not. Such awarding of routes could insist on standards of service much like the SPTA did in the awarding of the Scotrail franchise. This open, transparent structure is an external structure of accountability but clearer and more appropriate to transport than contract. Rather than using a detailed document backed by legal sanction, the institutional structure provides an open forum to discuss a specific transport service. This openness is perceptibly different from a written document listing both rights and duties. As a document has latent power in that one can rely on it but only when things go wrong. An open structure which allowed discussion and participation would prove stronger as

It could be argued that these structures are only an elaborate system of control where ownership is irrelevant. In a broader sense Lewis amongst others argues that the role of the state needs to be redefined in all spheres. Diffuseness is what is required in the delivery of public services whether it is “the state, the parish, the co-operative, self-help groups”.<sup>32</sup> But as the transport experience has shown there is no support for the notion that small ‘micro’ operators will fill the gaps unprovided by the monolithic public operator. This was the model that underpinned Ridley’s notion of bus deregulation<sup>33</sup> which was completely disproved by the later consolidation in that industry. If authorities are to have real weight in co-ordinating transport, public ownership has to be re-established in the dominant bus operators in each locale and the rail infrastructure. Again this responsibility could be shared among local authorities and at a national level. This would remove the private operators and their desire to increase shareholder value. In a sense this was attempted in the forties with the process of nationalisation but failed due to the nature of the institutional structures adopted. The reason for ownership rests on integration which as the private sector realises makes sense for transport operations. Integration only works, however, if it is accountable, that is it is truly responsive to the needs of the passenger and the people who work on it. For reasons outlined above this accountability cannot be delivered by the combination of deregulation and privatisation used at present in the transport sector.

Whilst an elected system of control on its own would be an improvement, without dominant services being taken back into public ownership there would still be a

confusion of priorities. For as witnessed in the last few years in the bus industry as companies gain a stock exchange listing and expand into other areas<sup>34</sup> the priority is profit. As the above reference to Lewis<sup>35</sup> shows that the primary way in which the private sector can avoid 'inefficiency' is by reference to its shareholders. This presumably means the dividends that are payable to the shareholders are a spur to the company's success. This surely is an example of putting the few before the many. Arguably companies can only be profitable if they serve the consumers. But this notion rests on an idea of free competition which it is hoped this work has illustrated operates neither in the rail nor the bus industry. In this context, therefore, profits can be maintained and expanded once a dominant grip on the market is created. Taking away private ownership of the dominant transport operators may not necessarily remove this immediately. The experience of Morrisonian public corporations illustrates the difficulty of simply changing the model of ownership and believing all flaws will be eliminated. But in the case of public transport public ownership would emphasise that the only purpose of the services would be to provide an integrated transport network and that control stems from the electors and users of transport not the shareholders of private companies.

In the public law debate on accountability this work would lean towards the public perception of accountability as being the most relevant. This is particularly true of an important societal resource like the public transport network. Thus any element of public activity could only be thought of as accountable in this sector if the public - transport users and workers in the industry - perceive it as so. This is an element which at the time of the nationalisation project of the forties was largely ignored as it

was thought that the public corporation form and Parliament would look after the interests of the public.<sup>36</sup> Moreover, the study of transport privatisation and deregulation has illustrated that the private delivery of these services has also overlooked this concept of accountability.

During this work representatives of the rail and bus industry were interviewed. Each had an agenda of crisis management, the best had to be made of a bad situation. In a sense modern public law follows a similar agenda. State ownership in Britain has failed so there can be no return to this method of public ownership. Thus a model of accountability has to be born outside the traditional institutions of the state whether in the 'market', through regulators or through post-modern legal theory. This may be in tune with current political debate with none of the major parties supporting an agenda of public ownership or if they do only within a limited framework with the innate belief that the private sector is superior.<sup>37</sup> But in an academic discipline this should not be the end of the story for public lawyers. By utilising the structures of privatisation and new public management the concept of public accountability has been compromised to the extent that its meaning has been turned on its head. That is, accountability seems to assume a 'market' dimension even in the delivery of public services. The link between this accountability and the public is at worst completely removed and at best extremely distant. The role of 'new' public lawyers<sup>38</sup> should consist in bringing accountability back to the 'public', not placing more obstacles in the way. In a sense the earlier work of Harden and Lewis recognises this with their application of the concept of 'immanent critique' which sought to draw on the

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<sup>35</sup> See Note 26

perception of accountability with the reality of the modern British state.<sup>39</sup> Yet the introduction of the 'market' and contract obfuscates any perception of the public interest. These concepts have their own definition of accountability which as explained rests on different premises from public accountability. In the realm of public services this is not an adequate framework. Private companies work to their own agenda which in the case of transport requires an element of integration; contract on this scale is an untried method which is exclusionary and not linked to the broader public. That is why in the case of transport it is time to remove these obstacles and involve the public. This system of elaborate control would be coupled with the public sector becoming the predominant operator in rail and bus services as it would remove the private sector's agenda and priorities. There may be a case for these in some elements of the delivery of public services. But it is the conclusion of this work that this is not the case in public transport. An unbridled intervention of the market in the bus industry and a more managed introduction of contractual relationships in the rail industry have been unsuccessful in delivering a more accountable public service.

The consequences of this are not purely academic. Transport has an important social role as explained but it also has a major environmental one. This perhaps increases the importance of a reassessment of public ownership. The future requires a learning of lessons from the past. Law as a discipline recognises this and in particular public law has almost had to reinvent itself from its Diceyan days whilst maintaining that which was worthwhile from that period. It would be a flaw to lose this overall perspective; public law thinkers should not get stuck in the present believing it holds the ideal solutions. This in a sense was Dicey's mistake in believing his view of

society to the exclusion of others. Tying a model of public law to the 'market' or contract may prevent dynamic development and may seem as archaic as Dicey in twenty years. Accepting its controls prevents a full examination of public ownership because it tends to assume *a priori* that the private sector is superior. This ignores the diffuse nature of accountability and the inability of private sector mechanisms to fulfil completely the 'public' aspect of accountability. It has to be tied to a model of public ownership with full involvement of those affected by this important public service. Linking the public law concept of accountability with a method of public ownership has been neglected for too long. But in the field of public transport at least it needs to be rediscovered. This work is hoped to be a small step on that road.

## APPENDIX:

### PRIVATISATION CASES.

**One important concept of accountability is dependent on the courts. This “legal” model would see the courts and the judges as providing a forum whereby institutions could be held to account. In public law this notion has underpinned the development of judicial review. Yet in the field of this work the provision of public transport the courts are probably not the most appropriate vehicle through which to gain an accountable service. However this appendix illustrates that the courts have intervened at a number of significant occasions in the privatisation process.**

Throughout the course of this work a number of significant court cases have taken place which have dealt with aspects of both rail privatisation and bus deregulation. These are worthy of comment for a number of reasons. Firstly all raise current public law themes as all were actions of judicial review. Moreover in the rail privatisation cases the decisions actually had an impact on the development of that process. The bus decision is significant as it illustrates the recognition of the new institutional structures in the bus industry as outlined in the preceding work.

Importantly for public law academics the courts -with one exception - seem quite at

Their ability to utilise the process of judicial review to deal with the relevant issues perhaps illustrates their flexibility. However, this ignores the arbitrary manner in which judicial review cases are raised through the rules of standing or title and interest. Furthermore, the different way in which the courts view their powers of review, as witnessed in the case below brought by Save our Railways. Finally, the state's response to their decisions illustrates some of the integral inequities of the British Constitution.

## **Highland Regional Council v British Railways Board**

**1996 SLT 274.**

Heard on 7th June 1995.

This Scottish case was raised at a critical time for the whole process of rail privatisation. Alongside the delays outlined in Chapter 7 it added to the impression that the project was about to self destruct.

The original action was one of judicial review brought by the Council in the Outer House of the Court of Session. The decision to be reviewed related to the publication of the Passenger Service Requirements for the train operating companies in the run-up to the letting of the franchises. The Requirements for Scotrail made no provision for the sleeper service from Fort William to London. This service was thought of by the Council as providing a necessary link with the Highlands.

This sleeper service was the only scheduled passenger service on three short sections of track in the West of Scotland. Thus, the removal of the sleeper would amount to the closure of these sections. However the closure of lines needed to follow a set procedure as outlined in ss 37-50 of the Railways Act 1993. This provided for a process of public hearings to justify their closure - in the words of Lord Hope these sections were designed to secure "the public interest" in any closure. To avoid the

sections of track. These services had no merit or purpose other than allowing Scotrail to circumnavigate the closure procedure.

These actions were challenged in the judicial review. It was argued that Scotrail acted irrationally and unreasonably in running these services to prevent it having to use the closure procedure. In the Outer House Lord Kirkwood did allow an interdict against Scotrail withdrawing the sleeper service but on the grounds of illegality rather than the Wednesbury test of reasonableness. This was because Scotrail's purpose was the need to find economies which they could do by cutting the sleeper service and running the 'ghost trains' - this itself was rational and reasonable. However it had committed an error as to the legal requirement of the Railways Act. This reasoning was upheld on appeal by the Inner House led by the Lord President Hope.

The Board had acted illegally because the services initiated by them had no conceivable use "apart from avoiding closure of that section of the line". In the reasoning of the court it did not amount to a 'railway passenger service' which under the Act it needed to prevent the closure procedure. In Lord Hope's judgement it would "lead to an absurdity" and would not give effect to the "true intention of the legislature" i.e. invoking the public interest when closing lines. Although this action was the "logical next step" as far as saving money goes it was a breach of the Act and was illegal. Thus it fell under one of the headings of judicial review given by Lord Diplock in the GCHQ case, illegality: **Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374.**

As a result of this decision the sleeper service was eventually saved so the decision had a long-term effect. However it came down to a question of direct statutory powers rather than a use of discretion which ultimately Scotrail could not challenge. In a sense this case reflected at an early part of the process the limitations of the 'new' railway. Thus for all the talk of flexibility and allowing the private sector to have discretion in running their services ultimately there were still limitations on removing services established by Parliament. In turn this reflects the role of the railway as a social services. In this way it shows the environment that a privately run railway will have to be administered. This illustrates the absence of free competition seen as so important by the proponents of privatisation in delivering accountability.

## **R v Director of Rail Franchising ex p Save our Railways &**

### **Others**

**The Times 12 Dec 1995.**

**Queens Bench Division.**

**The Times 18 Dec 1995. Court of Appeal.**

As in the above case this litigation took place at a critical point in the process of privatisation, literally in the week before the first franchises were awarded. Unlike the sleeper decision the appellate court disagreed with the reasoning of the court of first instance. Both of the decisions have significance for this work and public law in general.

Again this action of judicial review concerned the Passenger Service Requirements (PSRs) of the new franchises. It was argued that the PSRs published by the Franchising Director contradicted the Instructions issued by the Secretary of State for Transport. Under s5 of the 1993 Act the Director had to “fulfil any objectives” of the Government in accordance with any “instructions and guidance” given.

The instruction in question was issued by the Secretary of State as part of a single document - his Objectives, Instruction and Guidance to the Franchise Director - on 22nd March 1994. Paragraph 18 stated that all PSRs published for the franchises

franchise”. It was argued by Save Our Railways that the PSRs issued for several franchises represented a cut in services and not a service “based on” previous services. Thus the Franchising Director had acted outwith the instructions.

These arguments received short shrift from Macpherson J. at first instance. He was clearly uncomfortable dealing with the issues raised by rail privatisation. He stated it was extremely difficult for a judge to perform his duties in “an atmosphere which is full of disagreement over the merits”. Judges must apply themselves “simply and solely to the law”. In rejecting the case he wondered “in conclusion whether a case of this kind is at all suitable for ventilation in this court”. Issues raised by cases like this may obfuscate the true purpose of the court which is “to detect and deal with obvious and clear abuse of power or maladministration in terms of unlawfulness”.

In Macpherson J’s eyes the Franchising Director did not fall into this relatively narrow category for a number of reasons. He rejected the applicant’s attempt to use Parliamentary statements by Government Ministers in the case, as it was only the instructions which were under scrutiny. Moreover if the instructions were viewed as a whole they stressed the flexibility of the Franchising Director to “tailor services... more closely to demand”, Instruction number 18 was also flexible and was not subject to the narrow reading that it would only allow for minor reductions to existing timetables. On the phrase “based on” the judge even used the examples of films that are “based on” books - a statement which usually means they greatly differ from the original text. Further he stated that as the Franchising Director worked so closely to the Secretary of State the instructions were clearly being carried out to his

satisfaction. Thus if the courts intervened the Minister could simply alter the instruction. For all these reasons the action fell.

Unusually an appeal on this decision was allowed and the Court of Appeal overturned the reasoning of Macpherson J. In marked contrast to his ambivalent approach to the nature of this review the Court led by Sir Thomas Bingham M.R. stated that the case raised "serious, difficult and important issues". It also felt the document containing the instructions merited close inspection as although not primary or secondary legislation - a point overemphasised by Macpherson - the document was a communication to a senior public official. It was also laid before Parliament. The document "defines and circumscribes the Franchising Director's statutory duty" thus it places limit on the official.

The members of the Court did agree that the controversy raised by the decision was "wholly irrelevant to the problem we have to rescue". The substantive issue did not interest them. They also rejected the use of Parliamentary statements as a basis of a legitimate expectation. However they believed the limitations placed on the Franchising Director by the instructions were real. Thus any "changes ... must be marginal, not significant or substantial, as one deponent put it". They noted evidence from the Office of Rail Franchising which stated that the PSRs were cautious in including all loss making services. This did not follow the instructions given by the minister. The Court also explicitly rejected any legal effect of the fact that the Minister agreed with the actions of the Franchising Director: "the Secretary of State's approval cannot alter the effect of his predecessor's instructions".

In conclusion the Court held as unlawful the PSRs for a number of franchises: London, Tilbury and Southend line, the East Coast Main Line, Gatwick Express, Midland Main Line and Network South Central. The political effects of this were limited as the Secretary of State - Sir George Young - changed the instructions issued to the Franchising Director.<sup>1</sup>

In this case rail privatisation was thrust into a broader debate on judicial review. It is clear that the two courts adopted very different approaches to the decision making process and the court's role. Of the two Macpherson J's seems the most contradictory for although he claims to have been unaffected by the substantive context one of his grounds were that the instructions could simply be changed by the Minister. Thus the Court of Appeal apply a more consistent approach even though the ultimate effect shows the truth of Macpherson J's reasoning.

For rail privatisation it again shows the social ethos behind the railway service in Britain. The Government originally felt the need to use such language in its instructions because of the sensitive nature of rail services. In the process of privatisation, as noted in Chapter 7, much care was taken to emphasise how little was to change - this included timetabled services. However this contradicted the establishment of PSRs designed to attract the private sector. These contradictions clashed in the court room. Again this perhaps highlights the nature of judicial review as a surrogate political process - an idea not welcomed by Justice Macpherson.

## **R v Monopolies and Mergers Commission ex p Stagecoach**

### **Holdings plc.**

**The Times 23rd July 1996.**

This case does not directly concern the process of privatisation and deregulation in the same way as the preceding cases do. In many ways this case is more significant in the context of judicial review. However it is also important as it reflects the nature of the state's involvement in the bus industry even after deregulation. In that sense it underlines the conclusions in Chapter 5.

Stagecoach's action was of a judicial review of the MMC's two reports on their purchase of a 20% stake in Mainline and Strathclyde Buses. The facts of the latter case were examined in this work's case study. Stagecoach argued two grounds for review. Firstly that a merger had not occurred in either case therefore excluding the authority of the MMC. This ground was abandoned. The second was that there had been material unfairness in producing the reports because of basic procedural impropriety. That is the process of inquiry did not follow the process of natural justice.

The reports are compiled on the order of the Corporate Affairs Minister under the Fair Trading Act 1973. The MMC makes recommendations in the report which can be followed or expanded on by the minister. In the case of Strathclyde as mentioned in the case study Stagecoach was ordered to divest itself of its 20% holding. In the case

minister went further than this and also ordered it to divest. These decisions of the minister were challenged on two grounds. Firstly on the basis that no reasons were given for his decisions. Stagecoach argued that this was required because both the reports had been compiled prior to the formation of FirstBus which had made a 'fundamental difference' to both reports. This ground was again dropped even though the judge stated that it would have raised "interesting questions" as to the duty to give reasons. The ground they pursued was the reliance on the MMC reports which they claimed amounted to procedural impropriety.

The basis of these allegations were that Stagecoach was not made aware of other major operator's opinions in each of the hearings. Thus in this sense it did not know the case against it. The court agreed with Stagecoach that the standards of natural justice should be determined by the court and not by the MMC although the latter had some discretion, following the decision of **R v Take-Over Panel ex p Guinness [1990] 1 QB 146**. However they both believed in no way did the procedures in question amount to manifest unfairness and certainly "any unfairness was not capable of leading to judicial review".

Thus the more aggressive approach which the Government took to the bus industry throughout 1995 also had legal implications. Although the case here was quite weak it represented Stagecoach challenging its status within the bus industry; as revealed in Chapter 5 this centred around Stagecoach's belief that it was being singled out in the consolidation process for criticism. Again this echoes Macpherson J's criticism in the previous case of the process of judicial review being used for a surrogate political

private transport sector which in turn reflects the important social role of transport. That is the sheer number of investigations into the bus industry by the competition authorities reflected the developments within public transport but also the knock on effects this had in society in terms of the environment and also for bus users. It also emphasises again the problem of accountability in the deregulated sphere. It showed clearly that the bus industry could not do as it wished. For the nature of the deregulated market meant that the competition authorities had to fill the vacuum. Their lack of suitability for this role is further emphasised by the attitude that this court took to these decisions. Although it ruled that it could not set its own standards of fairness the way in which the MMC had come to its conclusion in this case was not challenged. Thus judicial review as a method of achieving accountability is further restricted and another method of improving accountability is closed down. This clearly has important consequences for public lawyers in their pursuit of accountability. It illustrates the limitation of using the courts to decide substantive issues on deregulation and privatisation. This shows the need for alternative structures to determine the accountability of public services.

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