A narrative for public-private partnerships*

English and Belgian experiences contrasted

Yseult MARIQUE
Lecturer in French law – University of Essex

Public-private partnerships ("PPPs") became an important vehicle for investing in public infrastructure and public services in the nineties. They rely on long-term cooperation between public and private entities in order to deliver public services and infrastructures to end-users. *Value for Money* (*VfM*) and risk allocation are paramount factors in designing PPPs. The law does not explain fully how public-private partnerships accommodate these two parameters, especially when it comes to how public authorities use their discretion to achieve *VfM* and risk allocation. Public authorities use their discretion at all stages of PPPs: when choosing to invest in public services through PPPs, choosing the suitable procurement route, negotiating the contractual terms and conditions, choosing the contracting party, monitoring the contractual performance, etc. Confronted with day-to-day issues, public authorities use their discretion in a context framed by the law, institutions and communities, and according to principles of autonomy, solidarity and trust. Three different models of PPPs can be pinpointed depending on how the law, institutions and communities are articulated: market-analogue, state-analogue and community-analogue PPPs. This distinction is an important step in framing the general dynamics of PPPs, but it does not account for how public discretion is exercised in particular circumstances. In this respect, an ethical narrative, based on an ethic of care, needs to be developed to integrate in one interpretative framework the various elements participating in public discretion. It could then supplement, when needed, legal techniques.

"Narrative" here focuses on the key issues underlying the legal and non-legal techniques used in PPPs and the overarching solution to be privileged for these issues. In cases of conflicts between techniques or loopholes, narratives direct attention to the general aim the system promotes. Narratives then look for the techniques which best match this general aim. As a result, narratives foster creativity within the constraints of relating the means to the end. They provide explanations fitting the whole story line. Narratives also draw attention to who is telling them and how. Because PPPs rely on a wide range of legal and non-legal techniques, it is important to tease out their distinctiveness. In this respect, an ethical narrative would then focus on the dynamics balancing public and private interests in the particular circumstances of PPPs. Such a narrative would provide directions for the discussions regarding PPPs and their assessment, improvement and contribution to public services.

The current narrative is that PPPs rely on complex projects involving innovation and partnering between the public and private partners. In addition, these projects overall lack a formalised relationship with third parties. Across these relationships between PPP partners and with third parties trust is a key factor, supplementing the law, and is developed and maintained in various forms thanks to institutions and communities. An ethic of care would account for how these factors shape public discretion and how interests are integrated in public decisions tackling particularized issues.

The suggested narrative for framing PPPs relies on research into Belgian and English PPPs, looking at both their legal and institutional frameworks, and three case studies for each system. The main legal techniques (such as public procurement) are similar to some extent in the two countries. Yet English PPPs have mushroomed and been promoted, with the odd crisis and the on-going adaptation common to English way of governing. Belgian PPPs, by contrast, do not have many operational projects, with most PPPs being stuck in the procurement process. An investigation into the narratives of PPPs shows that public discretion and its control is a major focus of the scholarship in both countries. However, legal scholarship emerging in Flanders[1] and other parts of Belgium[2] is

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highly technical and rippled with administrative law issues. English legal scholarship investigates PPPs mostly as illustrations of the contractual techniques used by public authorities. Contrasting Belgian and English PPPs highlights the different legal mind maps in Belgium and England: the specific narrative dimensions of English PPPs contrast with the formal and technical limits of Belgian PPPs.

This suggested narrative for framing PPPs also builds on three case studies in each system. In England, the three cases are drawn from the London Underground PPPs ("LU PPPs"), accommodation PFIs (STEPS and PRIME) and PPPs bundled into programmes such as LIFT (General practitioners' building), *BsF* (Building schools for the Future) or waste PFIs. Belgian PPPs are illustrated with the Oosterweelverbinding (a major failure involving a tunnel and a bridge in Antwerp which was rejected by the local population through a public consultation), Aquiris (the water treatment plant in Brussels-North where the plant had to close for a few days, massively polluting the local river) and Flemish and French-speaking programmes to invest in school buildings. These cases illustrate major issues arising from PPPs in their elaboration and implementation and have been well-documented by the respective National Audit Offices.

The suggested narrative is constructed and tested in five steps. First, an analytical framework is developed to examine the public-private relationships involved in PPPs. PPPs are not legally defined, but they are present within a "regulatory space" where (non-) legal techniques and narratives are organised to define parties' commitments and expectations regarding the project. Three possible models connected to three different legal narratives, market-analogue, state-analogue and community-analogue, are suggested. These models are then tested on the various aspects of Belgian and English PPPs, to highlight their trust dimensions.

Secondly, the institutional and legal framework in Belgium and England, as well as the three case studies in each country, illustrate how the regulatory space is designed in the two countries. PPPs are presented as a change both in Belgium and England, but the parameters of changes differ. Specificities such as the expert communities in England and the process of federalisation in Belgium are underlined.

Thirdly, the contractual relationships between the public and private parties to PPPs (elaboration, contractual nexus, performance) are mostly designed around a market-analogue model. Yet narratives supplement legal techniques, shifting the economic rationality towards more cooperation between PPP partners.

Fourthly, the relationships between PPPs and third parties, especially regulatory bodies and end-users, do not rely on mutual exchange and economic rationality. The connection between PPPs and end-users is only shaped by legal techniques in extreme cases or via intermediaries. Narratives based on contracts or public law exist to frame the relationships but their actual impacts in practice are difficult to tease out with certainty.

Finally, PPPs need to be approached from a different perspective than that which sees them as a mere addition to public-private relationships and PPP-users relationships, with a contractual model in mind. They are whole projects, encapsulating the interests of public parties, private parties and end-users. PPPs are developing towards a community of actors acting upon a distinctive narrative, directing how the public and private sectors' and users'

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[1] Eg: Eubelius, *Ondernemen met de overheid – Publiek-private samenwerking* 2009; VAN GARSSE S, *De concessie in het raam van de publiek-private samenwerking – Een analyse van het openbaar en het private domein, van de domeinconcessie, de concessies van openbare werken, de concessies van diensten en hun aanbesteding* (Brugge, die Keure, 2007); FLAMEY P and KNAEPEN S, *Publiek-private samenwerking (PPS) – De fundamentele juridische spelregels en hun afdwingbaarheid* (Brugge, Vanden Broele, 2005); D'HOOGHE D and VANDENDRIESSCHE F, *Publiek – private samenwerking* (Brugge, die Keure, 2003).

[2] Eg: MOISES F, JAMINET JF and VANDEBURIE A, *Promotion immobilière publique – PPP en Région wallonne et en Communauté française* (Bruxelles, Larcier, 2009); MOISES F and BERTRAND V, 'Deux arrêts importants sur l'application de la réglementation des marchés publics et des concessions aux partenariats public-privé institutionnaliste (P.P.P.I.)' comment on CE, nr 194.417, 19 June 2009, Horizon Pléiades (2009) *Journal des Tribunaux* 753; MORIC K, *Les partenariats public-privé: Le choix du partenaire privé au regard du droit communautaire* (Bruxelles, Larcier, 2009); DURVIAUX AL, 'Des ambiguïtés de l'expression P.P.P. dans l'action publique: La gestion privée des parkings publics et le respect du droit à la vie privée' (2008) *Revue de droit de l'Université de Liège* 517; DE KEYSER S and LOMBAERT B, 'Droit public/Partenariat privé/public' in MARLIERE L (dir) *Les 25 marchés émergents du droit* (Bruxelles, Bruylant, 2006) 535; LOMBAERT B (ed), *Les partenariats public-privé – Un défi pour le droit des services publics, Actes du Colloque des FUSL du 19 novembre 2004* (Bruxelles, la Charte, 2005).

interests need to be articulated and decided upon. In this approach, a community-analogue model can be pinpointed.

Overall, the three PPP models can be pinpointed through looking at both the legal and institutional frameworks in England and case studies. The dimensions of trust underpinning the narratives of complexity-innovation-partnering and connection are multifaceted and interplay in sophisticated ways with institutions, law and communities. Difficulties with Belgian PPPs may be related to the incompleteness of this narrative in Belgium. Therefore, to account for the general direction in the exercise of public discretion in PPPs, an ethical narrative of care may supplement usefully the law.

I. Narratives for interpreting public-private partnerships

An ethical narrative of care needs to be understood against the backdrop of the specific issues arising from PPPs and their lack of legal definition. Developing the notion of a regulatory space is then useful for locating commitments and relationships between the public and private partners. This regulatory space is basically structured around (non-) legal techniques and narratives. Narratives are developed by communities, which are brought together by common ideals or mindsets, such as autonomy, solidarity and trust. Trust oils the tensions between autonomy and solidarity. Because of the balancing effect and multifaceted nature of trust, an ethic of care would police tensions between the interests involved in PPPs. These tensions are illustrated with the three available legal narratives, which are linked to three different models of PPPs.

The starting point for investigating PPPs is confronted with the lack of a legal definition for PPPs and the dearth of case law dealing directly with this notion. However, PPPs face legal core issues in articulating the expectations and commitments of the parties. PPPs, indeed, have two main features: they involve long-term relationships (often over 30 years) and they need to take into account their impacts on third parties, such as users and taxpayers, to secure success. These issues are known in English administrative law as "polycentric issues".

To tackle these polycentric issues, PPPs can be located within a "regulatory space", which underlines

> [the] defining […] character of the social relations between the occupants of that space. The notion of a 'regulatory space' focuses attention not only on who the actors involved in regulation are, but on structural factors which facilitate the emergence and development of networks and which contribute to the institutionalization of linkages.[3]

These linkages are the ways in which the actors interact. Public discretion is exercised within that space, shaping the public-private relationships alongside (non-) legal techniques and narratives (see Appendix 1 for a figure showing how regulatory space, techniques and narratives help to make sense of PPPs).

The regulatory space is then structured around the law, the coordinating techniques (competition, cooperation and authority, soft law and reflexive processes) and narratives. Narratives and communities of public and private entities driven by mutual trust or by making PPPs successful joint enterprises may or may not fully overlap. Here, an "ethic of care" provides a framework in which to integrate these communities around a common principle of trust among the public and private bodies involved in PPPs. An ethic of care would provide an overarching aim in this regulatory space to secure a common good, i.e., to deliver the regulatory aims valued by the collectivity.

Within the narratives available for structuring the regulatory space special attention needs to be devoted to the legal narratives, i.e., the narratives legal scholarship uses to make sense of PPPs. Three legal narratives are available in England. First, P. Vincent-Jones suggests a reading for any public contracts, legally enforceable or not. Among

[3] HANCHER L and MORAN M, 'Organizing Regulatory Space' in HANCHER L and MORAN M (eds), *Capitalism, Culture and Economic Regulation* (Oxford, Clarendon Press, 1989) 292.

these public contracts are PPPs featuring as economic contracts. Vincent-Jones highlights that public services operating through contracts should be made more responsive, i.e. more legitimate and efficient, through hybrid processes and a mix between public and private law.[4] Secondly, A. Davies develops a public law approach, whereby public law should develop mechanisms to make PPPs more accountable regarding the use of taxpayers' money.[5] Finally, a narrative focusing on the legal position of third parties to PPPs may need to be developed further on the basis of the self-development of individuals thanks to their belonging to a group.

On the basis of these legal narratives, the regulatory space may be structured according to three different models: market-analogue, state-analogue and community-analogue. The three models carry with them a distinctive interpretation of the techniques on which they rely to explain how the on-going relationships are sustained and directed towards the common good.

- '**Market-analogue**' emphasises competition and autonomy in the sense of the freedom and equality of PPP actors, matching the narrative of responsiveness. The law is limited to framing the market or to norms emerging from economic exchanges. An illustration of this would be financially free-standing PFIs (used to finance bridges, for instance).

- '**State-analogue**' emphasises public authority and private autonomy in the sense of protection against public discretion. It follows the public law narrative. In this model, the law offers a way to facilitate, control and call to account discretion. It also brings stability, strengthening systemic trust. An illustration of this would be PFIs where public missions are delegated to the private entity, for instance in PPP prisons.

- '**Community-analogue**' emphasises cooperation and autonomy in the sense of personal self-fulfilment through belonging to a group. The model would rely on webs of interpersonal relationships of trust fostered through shared ideals, meanings and identity. Questions arise regarding how the notion of 'shared' is developed, maintained and challenged. The law is required to keep a distance between public and private interests. An illustration of this would be social housing PFIs where tenants are actively participating in defining a common project for the area and its surroundings.

These three models of PPPs and the structures of their respective regulatory spaces are illustrated by looking at the institutional and legal frameworks of Belgian and English PPPs and supporting case studies (Section II), before turning to investigating the internal governance of PPPs (the relationships between the PPP partners) in Section III, the external governance of PPPs (the relationships between PPPs and third parties) in Section IV and considering them as a whole project in Section V.

II. PPPs in Belgian and English systems: techniques and dynamics

Both in Belgium and in England, PPPs bring in changes in the ways in which public services and infrastructures are delivered. Yet these changes need to be defined in more specific terms. To this end, the techniques available in the regulatory space to structure PPP commitments and expectations are mapped out in both countries. After an historical overview contrasting the regulatory space in both systems, the legal/ institutional context in England is detailed and illustrated with three cases. Then, the same exercise is carried out for Belgium. This results in refining part of the hypothesis and in suggesting an approach to how public discretion is shaped thanks to institutions, law and communities.

English and Belgian regulatory spaces are of a mixed economy nature, where European public procurement regulations are prominent. A mixed economy developed in fairly similar fashion in both England and Belgium until WWII. Until then, local government developed public services when needed. However, after WWII a large part of

[4] VINCENT-JONES P, *The New Public Contracting – Regulation, Responsiveness, Relationality* (Oxford, OUP, 2006) 406 + xxx p.
[5] DAVIES A, *The Public Law of Government Contracts* (Oxford, OUP, 2008) 343 + xxxii p.

the economy was nationalised in England, which made public enterprise even more prominent. No general policy of nationalisation was ever implemented in Belgium, even if the state organised economic planning and owned parts of economic actors (such as banks). Privatisation thus arises in different economic contexts in Belgium and England. However, in neither case can a legal conceptualisation of the process or a constitutional protection for specific public activities be found. Hence, PPPs actually bring change to the similar mixed economy legal settings in Belgium and England.

Regarding the institutional actors involved in PPPs, differences arise between English and Belgian PPPs. First, the English Treasury is a central department in England with possibly autonomous spending powers. In Belgium, the Treasury is split across entities in various regions/communities/federal levels and there is no strong link established between the Treasury and PPP policy. Local government powers are also different. In Belgium, local government have a constitutionally protected power to pursue local interests. No such general power exists in England, even if, in recent times, the powers of local authorities have been extended.[6] However, this difference should not be over-stated. In Belgium, local government are subject to general oversight from superior authorities, on grounds of legality and opportunity. In England, control is exercised by the central government, through finance and funding more than through legal oversight. Finally, public procurement is enshrined in the European context in both countries. However, Belgium struggles with the implementation of the procurement directives,[7] while England transposes European directives smoothly. The differences between the Belgian and English regulatory spaces are thus more of degree than of principle.

Against this background, English PPPs appeared in a specific context of economic recession at the beginning of the 1990s. PPPs and Private Finance Initiatives ("PFIs") were a way to loosen the conditions under which private finance could be invested in public infrastructures. Hence, PPPs, especially financially free-standing PPPs, may be designed according to market techniques, where no public money should be invested as the infrastructure and public services would be financed through payment by the users (a concession-type PPP). During this time, local government also tried out ways of innovating in public financing. These creative arrangements led to a series of financial contracts being struck down by courts. This led to banks expressing distrust in public authorities. For these reasons, when *New Labour* came to power in 1997 it took a series of measures to support PPPs: a specific PPP body was set up, a piece of legislation enabled local government to undertake PPPs,[8] model contracts (now *Standardisation of PFI Contracts (SoPC) Version 4* or "SoPC4") were drafted. PPPs developed into a state-analogue model where the state heavily supported the main features of PPPs. Ultimately, this practice relies on a dense network of experts supporting PPPs in various capacities (accounting, legal, public procurement, project management). The seeds to transform PPPs into communities of shared knowledge and practice are planted.

In England, accommodation PFIs (PRIME, STEPS) illustrate how PPPs can work through mostly commercial deals, with no services being directly provided to citizens but offices being made available to departments. The LU PPPs illustrate a highly sophisticated system of governance where market mechanisms have to be supported by administrative structures (especially the PPP Arbiter). LIFT illustrates how PFIs have been bundled into programmes where a community of market players is developed alongside community goals of transformations of health care premises.

In Belgium, PPPs are required to fit within administrative concepts such as concessions, public assets (domanialité publique) and so-called "mixed intercommunales" (joint corporate bodies involving public and private partners). As many uncertainties arose regarding the application of these mechanisms to PPPs, Flanders decided to simplify the legal regime for Flemish PPPs. The Flemish PPP Decree (of 18 July 2003) mainly targeted the public assets regime and set up a dedicated PPP body in charge of developing PPPs. However, the Court of Audit recently reported that the PPP decree is not often used and that issues of added value and risk allocation were not kept in check.[9]

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6 *Local Government Act* 2000 s 2.

7 ECJ, 23 April 2009, C-287/07, *Commission v Belgium*; ECJ, 23 April 2009, C-292/07, *Commission v Belgium*.

8 *Local Government (Contracts) Act* 1997.

9 Vlaams Parlement (2008-09) *verslag van het Rekenhof over publiek-private samenwerking bij de Vlaamse overheid verslag van het Rekenhof (Gewestaangelegenheid*), Stuk 37/1.

The Oosterweelverbinding had been one of the major PPP projects in Flanders and should have improved traffic flow between Rotterdam and Germany via Antwerp. Launched at the end of the 1990s, it stumbled on many issues, one of which was the need to coordinate the various public bodies with powers involved in such a project. A specific body was set up on the basis of a 2002 Flemish Decree. However, since then the project has only known problems. The last one was the outright rejection of the project by a local consultation in 2009. The future of this PPP is now uncertain.

Aquiris is one of the few Belgian PPPs currently in the implementation phase. It has involved the building and operating of a water treatment plants in Brussels. Its running involved highly technical matters relating to the technology used to reach the treatment targets. Yet the main legal issue arising was the contractual structure monitoring the performance of the contract. Two directors represent the Brussels government on the executive board. They have a double function: keeping an eye on the public interests involved in the water treatment plant and acting in their capacity as directors of the PPP as a corporate body. These two functions came into conflict when high levels of sand and concrete brought the plant to a temporary close, causing major pollution along the river. However, the two directors representing the Brussels government did not attend the meeting deciding on the closure and the Government could not take the necessary measures to prevent the pollution.

School buildings are a community matter in Belgium. Both the Flemish and French-speaking communities planned to invest in their under-funded school buildings thanks to PPPs. Both communities passed decrees to this effect. However, while the Flemish community succeeded in the procurement process, selecting a financial partner for this refurbishment programme, the French-speaking community reconsidered its choice and did not implement the decree.

This overview presents how legal techniques are used in Belgian and English PPPs, and how commitments and expectations are shaped within the regulatory space in each country. This leads to suggesting the hypothesis that PPPs operate within tensions between the structuring influences of institutions, law and communities in the regulatory space, where the tensions structure parties' discretion and so mediate possible conflicts between those structures. This is tested further by investigating the internal and external governance of PPPs.

III. Variations in organising long-term cooperation

Once the general setting of PPP regulatory space is explained, attention has to shift to the role of legal techniques in understanding the contractual relationships between public and private partners and their evolution over long periods of time following changes in priorities and social and economic conditions. It is possible then to see that the law is a starting point but that non-legal narratives are also needed. In England, these have been linked to complexity-innovation and partnering. In Belgium, PPPs struggle to develop such narratives because of rigidity in legal techniques.

The starting point of any analysis of long-term contracts is the relational theory developed by Macneil.[10] Yet it is difficult to merely transplant this theory to PPPs, as PPPs involve a public partner, sharpening the interdependence and asymmetry of information between parties. Hence, cooperation is even more important in PPPs than it is in private long-term contracts. This starts with the specificities of public procurement as the planning phase of PPP projects.

Public procurement is the legal technique shaping the elaboration process of PPPs. As PPPs involve highly tailored contracts, space for negotiation and mutual adjustments in the demand and offer are needed. The competitive

[10] MACNEIL I, 'Values in Contract: Internal and External' (1983) 78 *Northwestern University Law Review* 340-418.

dialogue was designed to leave open discussions on any matters connected to the contracts, provided that the contracts are of a particular complexity.[11]

The subject matter of PPPs (the contractual nexus, financial arrangements, *VfM* and risk allocation) involves techniques relying on competition and economic exchange. However, in practice, the financial arrangements involve financial flows far more intricate and complex than straightforward mutual exchanges. The fine-tuning of *VfM* requires high levels of communication between the PPP partners and risk allocation needs to be followed by risk management, which requires strong cooperation between the partners. Hence, economic rationality needs to be supplemented by cooperation between PPP partners.

The contractual technique provides the basic approach to the performance of PPPs. However, contract law is not appropriate for dealing with the consequences of supervening circumstances. Notably, English contract law does not accept principles of good faith. Here again practical cooperation is needed between PPP partners to work out solutions to specific issues arising during the course of projects.

In none of these three main phases – elaboration, contractual nexus and performance – do legal techniques provide a full account of the dynamics within the relationships and how the expectations and commitments of the parties may evolve. Hence, a non-legal narrative may help understand these. It may be articulated around the ideas of complexity, innovation and partnering. Complexity is a factual assessment relating to the project and a legal condition for using competitive dialogue. Innovation results from the techniques developed to reach *VfM* and managing risks. Partnering is an alternative to contractual governance. It is a form of gentleman's agreement, with general principles for how parties will behave towards each other during the relationships. However, partnering is not legally binding. This is the reason why parties must accept and commit to it. Yet, when parties need partnering commitments to be respected because they cannot find solutions to supervening circumstances they are unable to rely on partnering agreements. Hence, the law provides vantage points for the development of non-legal narratives moving the internal governance of PPPs away from competition towards cooperation, reducing the importance of economic rationality.

In Belgium, the situation is different. The main technique for PPPs is public procurement and not contract. The general terms applicable in any public procurement cannot be sufficiently tailored to PPPs. There is no space for innovation. The competitive dialogue is not implemented, leaving no space for a narrative based on complexity. *VfM* and risk allocation are only marginally used, leaving no space for innovation. Partnering is not possible because control is an important element in ensuring the correct implementation of the contracts, as the pollution in Aquiris illustrates. This lack of narratives to supplement the rigid legal techniques explains why Belgian PPPs meet with so little success.

Overall, techniques and narratives are needed to account for the internal governance of PPPs and their dynamics of cooperation. The external governance of PPPs also requires interactions and an ethic for how PPPs relate to third parties. The structures of these interactions are developed in the following section.

[11] Directive 2004/18 of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts art 29; *Public Contracts Regulations 2006* reg 18.

IV. A qualitative chasm between individuals and the system: challenging ethics

In internal governance the role of the law is limited but supplemented by non-legal narratives to explain the relationships between the public and private partners. This may be even stronger in the external governance of PPPs: normally the relationships between PPPs and third parties escape economic rationality because there is no necessary mutual exchange between them. Hence, ethics or moral distance between individuals and PPPs may structure PPP regulatory space even more. This moral distance is not obviously formalised and it may be heavily structured thanks to the interplays between institutions and communities and their underlying narratives. The legal techniques are only present in extreme cases or via intermediaries. However, the connection between PPPs and third parties is not that strong because narratives are not mutually reinforcing. A distinction has to be drawn between the relationships between PPPs and PPP bodies (or PPP regulators) and PPPs and end-users. There is no one single narrative. The developing legal narratives dealing with the relationships between PPPs and end-users are at odds with each other in England. In Belgium, PPPs challenge the traditional narrative of "public service".

Regarding the relationships with PPPs bodies, conversations are designed between HM Treasury, Partnerships UK (PUK), the Public Administration Select Committee (House of Commons) and the National Audit Office (NAO). However, these conversations happen at high technical levels and cross each other at multiple levels, which does not ensure that users' expectations and needs are taken into account in the regulatory conversations.

Legal techniques may play a role in formalising users' expectations into rights or in procedures (consultation, public involvement), ensuring interaction between PPPs and users. However, a review of the various legal techniques reveals that the law acknowledges individuals' positions only at the extremes (for instance through the recognition of legitimate expectations) or only through mediation (e.g. by the ombudsman, who needs to be accessed through the local MP). This results in a very limited role for the law as a technique accounting for how PPPs-users' relationships are structured.

Between these two sides a chasm emerges, a disconnection between PPPs and the needs of users in the techniques framing the relationships between PPPs and users. However, narratives organising these relationships may compensate for this disconnection. Yet the narratives of responsiveness and public law do not foster the same approach to morality or to the role public bodies may play. The narrative of responsiveness seeks to establish responsive public services; it does not detail how the hybrid of public and private law and procedure would realise this. This narrative of responsiveness seeks to by-pass public bodies while the public law narrative relies on public bodies to integrate linkages and specific terms in public contracts highlighting social and environmental concerns. However, these linkages lack legal enforceability. Finally, these two narratives may become operational only with difficulty as they are in tension with each other and are not supported by obvious communities.

In Belgium, the relationships between PPPs and third parties take place in a legal context where notions including public services and institutions such as the *Conseil d'Etat* (the Belgian administrative court) should be prominently concerned with protecting users. However, this traditional approach is challenged by PPPs. Changes in the legal context have been triggered by the implementation of PPPs in Belgium. For instance, in Flanders political control of PPPs has been strengthened and the Court of Audit is periodically involved in reporting on the Oosterweelverbinding. Changes also occur because the concept of public services has been used to decide on the transparency requirements of PPPs. However, this application results in a weakening of users' legal protection. Finally, distrust features highly in the end-user – PPP relationships, as the rejection of the Oosterweelverbinding by the local inhabitants and the Aquiris pollution show. Thus, legal techniques do not protect users of PPPs, no positive narrative for PPPs is emerging but instead there is one revolving around public distrust, and no community linking PPPs and users may be found. PPPs have also been plagued with poor success up to now.

Overall, the external governance of PPPs highlights how a qualitative chasm emerges from the interplays between institutions, law and communities. A more encompassing ethical narrative needs to bridge this chasm between regulation and individual expectations.

V. PPPs/PFIs as whole projects: from economic rationality to moral communities?

Such a narrative may be constructed by approaching PPPs not from a contractual perspective but from a whole project perspective. This would suggest that one can bridge the gap by thinking of all those participating in and using the products of PPPs as part of moral communities, rather than as economically rational actors in purely contractual relationships. This is expressed in terms of "care", an idea developed through further case studies.

In England, ideas related to trust and equitable concepts are also floating around PPPs. These ideas are related to the priority given to interests in the decision-making process. In a legal trust the trustee needs to act in the beneficiary's interest when managing the assets the settlor transfers to him. The legal trust relies on morality and the confidence placed in the trustee regarding the priority given to the interests pursued. In PPPs there is no such clear priority given to third parties such as users. However, the individual interests of the public and private parties need to be set aside. Both the public and the private parties need to give the priority to the interests of their joint enterprise if they want the PPP to become successful. This prioritisation is not merely built into PPP contracts. The priority results from a series of legal institutions and techniques and the legal and non-legal context and communities shaped around the PPP project. One good illustration of this can be found in *BsF*. In these projects there are PPP partnering agreements, local joint ventures and framework procurement, creating a community of market players. Similar mechanisms also exist in LIFT and in waste PFIs.

In Belgium, the situation is completely different. Trust is built into only a few legal techniques. For instance, public procurement leads to construction contracts which rely on the *intuitu personae*. However, as a rule, Belgium does not know trust-like institutions. The general context of PPPs is one where the narrative surrounding public services is heavily challenged for its distinctiveness in shaping a social bond across society. In Flanders, the legal literature advocates developing a private law system to solve PPP-related issues (for instance public assets).[12] In the French-speaking literature, authors suggest that the public service narrative should be revisited with new notions of quality, transparency and efficiency, as developed in EU directives regulating utilities.[13]

Conclusions: PPPs as kaleidoscopes of forms and ethics?

PPPs can be organised around three different models which design the regulatory space: market-analogue, state-analogue and community-analogue PPPs. These models can be traced in the various relationships structuring PPPs and in the various cases illustrating PPPs. When it comes to accounting for how public discretion is used in PPPs a general narrative is developed, step-by-step, around complexity-innovation and partnering. The narrative organising PPP-users' relationships still needs fine-tuning, and is oscillating for the moment between a responsiveness and a public law narrative. Another option would be to highlight the distinctiveness of PPPs-users' relationships in emphasising the self-development of individuals through belonging to a group or community; here, the one made up of PPP actors and users.

In any case, these narratives supplement legal techniques in accounting for the dynamics of PPPs and are shaped by the interplays between institutions, the law and communities. Trust is an important component of the various relationships involved in PPPs and appears in multiple forms to oil them and the tension between autonomy and

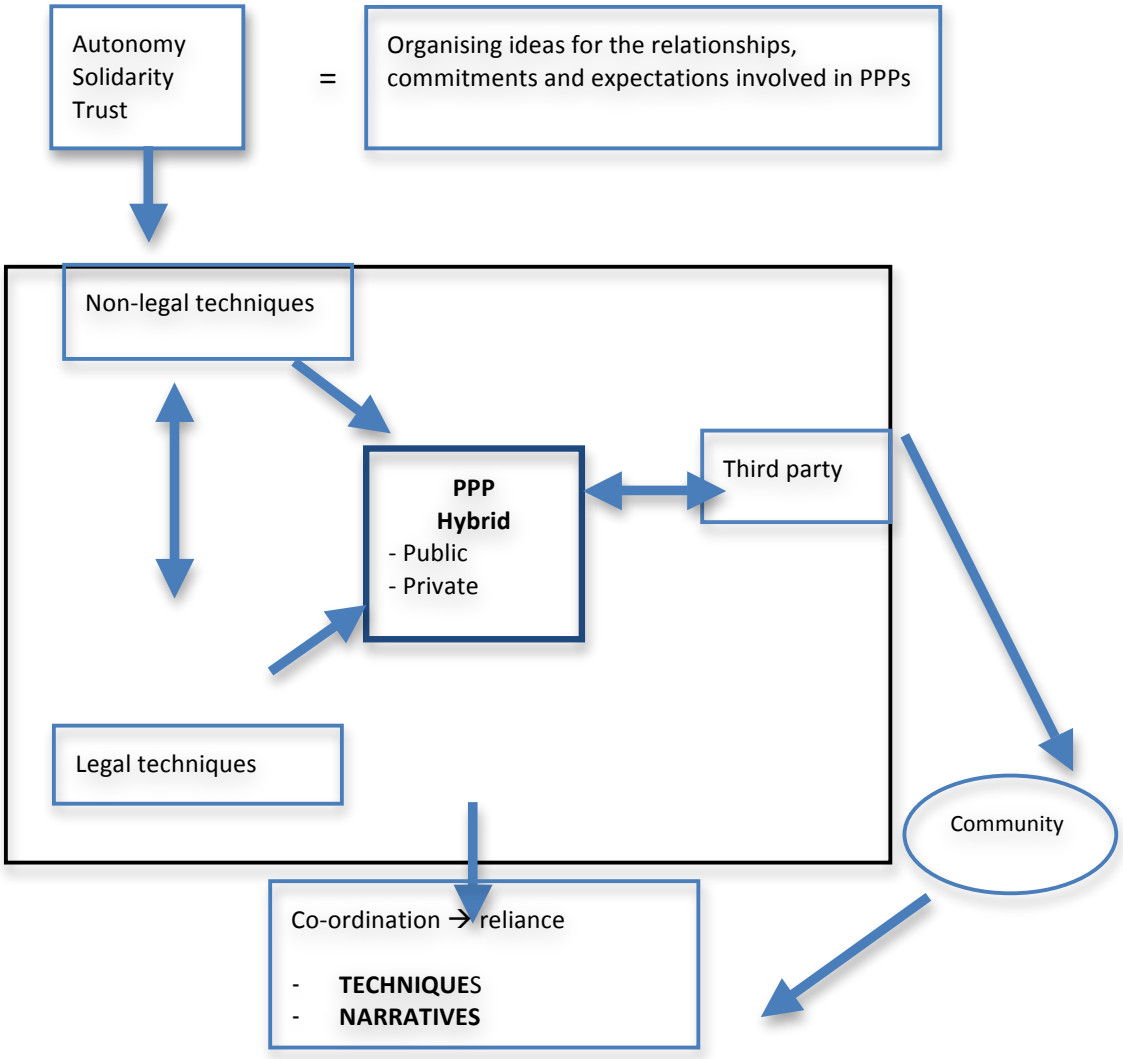
[12] VAN GARSSE, *op.cit.*, para 1303 svts.

[13] DUMONT H, 'L'européanisation du droit des services publics, ou le service public entre menace et renouveau' in DUMONT H *et al* (dirs), *Le service public - 2. Les 'lois' du service public* (Bruxelles, la Charte, 2009) 327.

solidarity in PPPs. Hence the need for a narrative integrating these various facets of trust, institutions, the law and communities: a narrative of care. Suggesting such a narrative of care would emphasise the need to find ways to implement theoretical or ideal conceptions of the common good in concrete and particularised situations and in meeting individuals' needs. An ethic of care would value the differentiation in parties' positions within a relationship.

The particular implementation of this narrative of care may sound utopian, but its very idea may provide a framework for assessing PPPs and their contribution to meeting users' needs and expectations.

FIGURE 1: PPP REGULATORY SPACE



Legend:
PPP regulatory space involves a series of relationships between public and private actors and third parties. This dissertation seeks to provide an account for how these relationships and their connected commitments and expectations are structured. Techniques and narratives are mechanisms for coordinating these relationships.