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Beyond Hollowing Out: Straitjacketing the State

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Abstract
For two decades, the metaphor of 'hollowing out' dominated discussions about the changing role of the state in delivering public services. Today, this metaphor no longer captures important contemporary developments. European Union policy has expanded deeper and deeper into public service sectors, increasingly constraining government's capacities to deliver these services. I suggest a new metaphor to capture this: straitjacketing the state. People are straitjacketed when they are perceived to be at risk of damaging themselves through self-harm. Straitjacketing the state occurs when a state signs up to a new set of supranational rules which purportedly will help avoid it damaging itself, by restricting room for localised inefficient practices. However, due to the strength of the straitjacket, governments become significantly restricted in choosing policies for domestic implementation according to their preferences.

Keywords: hollowing out, EU competition rules, public service delivery, local government, straitjacketing the state, citizens

For two decades, the metaphor of 'hollowing out' the state has dominated discussions of ongoing changes regarding the state's role in delivering public services. Despite attracting criticism, it seems somehow that this metaphor refuses to die. In his classic definition published in this journal, Rhodes pointed out that spending cuts and public sector reforms of the 1980s and 1990s were reducing the autonomy and discretion of government bureaucracies.[1] Additionally, he argued the rise of complex transnational policy networks in Europe was blurring questions about accountability. In a nutshell, the state was not disappearing but it was being hollowed out, as central and local governments were losing functions—downwards to other agencies and upwards to the European Union (EU). Once governments woke up to this, Rhodes predicted, they would reverse these trends back to more traditional bureaucratic approaches. Self-consciously fancifully, Rhodes posited this reversal might occur around the year 2000.

Not only has this reversal not yet occurred, but I argue it is much harder for this reversal to occur now than in 1994. This is largely because governments across the EU have signed up to an increasingly broad set of binding rules on how public services can be provided. Moreover, it is not at all obvious how they can effectively back-track on these rules, bar actually leaving the EU or renegotiating the Treaty of Lisbon. When Rhodes looked to the Europeanisation of policy he observed how new, complex layers of transnational government made for greater 'conceptual fog', making accountability more difficult to trace. This paper *does not* take an anti-European stance: rather, it points to specific ways in which local and national governments have lost power over public service governance to the EU. I argue that, in this dense fog, processes of Europeanisation have ended up becoming something of a 'ball and chain' for domestic policy: central and local governments are effectively being tied down to new, important rules. These new rules, in turn, reduce governments' own capacities to choose policies on public service delivery according to their preferences.

Not only is Rhodes' reversal looking bleak; this new scenario constitutes a substantial step beyond that suggested by the hollowing-out metaphor. Hollowing out suggested the state retained its carapace of responsibilities but lost key capacities to carry them out. Today, states are seeing the erosion of some of these core responsibilities through Europeanisation. The new scenario can be described by the following trends:

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1. National governments in the EU were the signatories of specific, historic agreements, most importantly the 1957 Treaty of Rome. Buried deep in such pro-market agreements were implicit future directions that EU governance could take as regards public services. However, the significance of agreements such as the treaty for public services remained unclear, underdeveloped, and largely inactive, for decades.
2. In particular since the late 1980s, the EU has successfully increased its power over national and local public service delivery processes by rendering these implicit powers explicit.
3. As a consequence, central and local governments find themselves increasingly locked in to the new European powers, which restrict state action on the ground as regards their public service preferences.
4. Reversing these EU rules, once signed, is more complex at the European than the national level.

This paper examines the consequences of Europeanisation for governments' capacities to exert their preferences for public service policy at home. I suggest a new metaphor is required to capture this new predicament: straitjacketing the state. People are straitjacketed when they are perceived to be at risk of damaging themselves through self-harm. Straitjacketing the state occurs when a state signs up to a new set of supranational rules which will purportedly help avoid it damaging itself by restricting room for localized inefficient practices. However, due to the strength of the straitjacket, states end up significantly restricted in their choice of policies for domestic implementation according to their preferences.

As I set out my argument, I also pay some attention to why this is happening, and who is driving these changes. Multiple actors interact to play important roles in the formation of public service policy in Europe, the main ones being the Court of Justice of the European Union (CJEU), the Commission, Parliament, the Council of Ministers, EU social partners, member states, private actors and non-governmental organisations (NGOs). EU scholars continue to debate whether specific policy output from Brussels is the result of member state material interest (broadly, intergovernmentalism), or whether European institutions such as the Commission and the ECJ steer or drive outcomes that might not be possible if they did not exist (so-called supranationalism). My analysis here suggests it is the expanding remit of the Commission, above all, which is responsible for straitjacketing the state.

The rest of this article revisits the hollowing-out metaphor, modifying it in an age of heightened European intervention into local and national public services. First, I revisit the four core ideas of Rhodes' metaphor. Second, I 'reverse engineer' and argue that Rhodes' fourth trend, the 'Europeanisation of everything', needs to be brought to centre-stage, as the EU has become a powerful force in redefining public intervention. Third, I show how Europeanisation has created an ever more important EU layer of public service reform. I illustrate how Europeanisation is straitjacketing the state by looking at problems faced by local and national governments, which find their own powers to define what a public service is and how it can be delivered to be increasingly constrained. Rhodes' 'hollowing out' suggested the process was both inadvertent and reversible. I argue straitjacketing the state is neither. I argue that the means of transferring powers, via devolution, make reversal difficult. I also argue change is not inadvertent; rather, it is driven by specific actors, national preferences and interest groups, and pushed above all by the Commission. The 'straitjacketing the state' metaphor is increasingly apt to capture ongoing policy developments on public services in the EU.

Hollowing out the state

In his classic statement, Rhodes envisaged four major, interrelated trends affecting state provision of public services, which led to four significant problems. First, Rhodes argued the foundational premises used to justify public intervention were being reconsidered both in rhetorical and in practical terms. In other words, political rhetoric increasingly put state action on the defensive by interrogating whether private or public action was most desirable and efficient while, in practice, in the UK public ownership and employment

fell. Second and third, Rhodes discussed public sector reform, including alternative service delivery systems—particularly contracting out, which was replacing traditional direct methods of public service provision, and New Public Management, whereby managerial techniques from the private sector were preferred over the bureaucratic tradition associated with the public service ethos. Fourth, there was an Europeanisation of policy, a major consequence of which was the consolidation of new, complex layers of transnational policy networks, linking local policy actors to Brussels.

Why did this matter? Rhodes argued that, combined, these trends were leading to a decline in civil servants' autonomy and discretion in defence of the public interest, diminishing central government capacity and causing fragmentation, potentially leading to catastrophe. In addition, 'policy Europeanisation' augmented the complexity of the policy process, making the question of who is accountable for what murky, reducing democratic accountability.

These problems had a solution: reversal. Assuming governments are rational and seek to hold onto their core functions, they would recognise these trends were detrimental to their own continued *raison d'être* and return to mechanisms whereby they regained control over their core functions.

It is common for incoming governments to seek to reverse specific policies applied by previous governments. However, Europeanisation has become a much more significant trend than Rhodes originally predicted. It has led to situations whereby governments' policy preferences are increasingly constrained, tying governments to a new policy regime from which it is difficult to escape. The EU has produced a specific discourse on the role of the state in public services; once this emerges as European law, this confines government action. The EU has created new directives and norms to govern public service delivery with which member states must comply. These developments constrain local and national public service delivery choices by governments, as I will show.

Redefining public intervention: from 'Eurospeak' . . .

Rhodes observed how the role of the state in public service delivery was increasingly interrogated in British politics during the 1980s and 1990s, both rhetorically and in practice. I argue here it is at least as, if not more, important to consider how the role of the state in public service delivery is being recast, both rhetorically and in practice, by the EU. This section deals with EU rhetoric on public services; the next section explores the development of EU policy on public services.

EU rhetoric, or 'Eurospeak'—since it does not belong to any one national tradition but is an amalgamation of several traditions—has evolved dramatically over the past two decades. Eurospeak has a different dynamic to local and national rhetorical practices. Domestically, rhetoric is kept in check by the political ebbs and flows of democratic debate: governments from the left and right modify their political messages to suit ideology or preferences. For example, David Cameron's 'Big Society' is markedly softer when contrasted with Margaret Thatcher's bold assertion that 'There is no such thing as society'. In other words, democratic political processes ensure rhetoric on public services takes public opinion, at least partially, into account.

This is *not* the case in the ongoing evolution of Eurospeak on public services. Here, rhetoric is much more immune to political swings and election outcomes; instead, it drives steadily and relentlessly towards an increasingly market-friendly end point, which is the unmovable target of the Single Market. In the EU, one development leads to another, sooner or later: rhetorical developments tend only to be 'ratcheted up', and rarely reversed or eliminated once they have entered official documents such as Communications published by the EC. In my reading, the main driver of Eurospeak on public services has been the Commission, albeit in response to decisions taken by the CJEU—which are often, in turn, in response to complaints by private actors. So, for example, the CJEU kick starts a development, ruling in a specific case that a given public service is subject to Single Market rules; then the Commission 'frames' the policy rhetoric with a view to generalising the logic out to a potentially greater number of public services, as

occurred in the case of telecommunications and social services liberalization (discussed in the next section).

Eurospeak on public services is crucial but little understood. The roots of rhetoric on public services can be found in the 1957 Treaty of Rome. The founders rejected the term 'public service', instead opting to use the term 'service of general economic interest', or SGEI. SGEI was never defined according to particular sectors: rather, SGEIs were understood as 'economic' services that authorities considered of special importance to citizens. Crucially, SGEI *were not exempt* from competition, *unless* this undermined their ability to deliver public services adequately. Thus the reach of competition law could extend to basic infrastructure.

For decades, all this seemed not to matter much: these legal powers lay latent and the place of public services in the economy meant that competition was deemed either too sensitive to implement, or at least not a priority in the medium term. This started to change during the late 1980s. The key turning point was the 1986 Single European Act, which stressed the Single Market should be expanded into all sectors, including public services.

. . . to Euroaction

The first public services to be affected were those where it was easiest to argue the case that competition would not damage SGEI provision. Susanne Schmidt shows how different strategies were taken by the Commission in order to push this argument along, with help from other actors. In the case of telecommunications, the Commission became active after a private actor challenged BT's monopoly, which resulted in the 1985 British Telecom CJEU ruling that a specific subset of services provided by BT should be subjected to competition.[2] Using this decision, the Commission went on to expand the reach of liberalisation to all telecommunications services, after having garnered support from a group of member states and the CJEU. In the energy sector, private interests, technical change and lower growth potential were more muted than was the case for telecoms, hence the Commission resorted to threatening specific member states with infringement procedures to in order to 'herd' governments into complying and the Council of Ministers into agreeing.[3]

If it was relatively uncontroversial to argue that telecoms and energy could be subjected to competition without service deterioration, it would not be so straightforward to extend this argument to the rest of public services. After all, water and waste management and prisons were not mentioned in the treaties, and vocational education and social security were mentioned only in relation to supporting the movement of workers. These could not be categorised as SGEI, since they were not 'economic'. Or were they?

The Commission used its agenda-setting powers to frame this question on the role of the state in public services. Its first communication on the topic was published in 1996, revealingly entitled 'Services of General Interest' (henceforth SGI).[4] The title alone hints at the direction the Commission was taking: SGI was not a legal concept in the treaties, but rather a new term invented by the Commission. The introduction of SGI proved a fatal blow for government's future authority over public services.

The logic of the Commission was as follows. All public services were SGI: of these, many were also SGEI. Public services associated with SGEI were candidates for competition should this not damage service provision. Non-SGEI—that is, SGI minus SGEI—were, in principle, not candidates for competition, as they were 'non-market services'. They were therefore the responsibility of local and national governments. However, in a fatal twist, the Commission concluded that because the world of public services was dynamic, and subject to constant technological, organisational and political change, *any SGI could feasibly become transformed into a SGEI*. For example, if some sub-activities or all activities associated with a SGI were deemed potentially economically viable, these services could be considered as SGEI and therefore potentially be exposed to competition.[5]

This reasoning opened the door to potentially subjecting any public service to competition. The keystone to determining the role of government in public services was their perceived relationship to 'E' (by which the Commission used 'economics' or the 'market'

interchangeably), and not in the political decision of any government.

The next phase saw the extension of this logic to social services. Martinsen shows how, as liberalisation directives opened up air transportation and postal services from the 1990s, CJEU case law started chipping away at governments' sovereignty over the organisation of welfare states by extending its intervention into social services, especially patients' rights and cross-border health care.[6] Essentially, she argues that the 'closed' logic of the welfare state, associated with citizenship and territorial belonging, was increasingly trumped by the 'open' logic of 'Social Europe' and its demands as a Single Market—particularly, in this case, of services and people.

Further service liberalisation was then taken up by the Commission when it presented the draft Service Directive in 2004. This Directive was opposed widely by trade unions, local and national government associations and European policy actors. It is well known that this directive, which sought to encourage liberalisation across many service sectors, ended up being watered down and was finally passed as the Service Directive in 2006 after significant changes, including the explicit exclusion of a number of services: healthcare, temporary work agencies, audiovisual services and certain social services. These modifications slowed somewhat, but did not halt, the continued progression of single market law into public services.

Undeterred, the Commission continued to bring public services into the sphere of competition through an expansive single market logic. In the same year, 2006, the Commission invented another category, 'Social Services of General Interest', or SSGI.[7] Like SGI, this term had as yet no legal base. SSGI were loosely associated with health, social security schemes and social work, all of which had been excluded from the Service Directive. Borrowing again from the CJEU's rulings, the Commission stated that whether or not a service was 'economic' could be decided by whether or not it was paid for, either directly by users or indirectly by insurers or public authorities. Hence, they concluded, it would follow that almost all services offered in the social field could ultimately be considered 'economic activities'. In other words, almost all SSGI could potentially be exposed to competition rules.

The circle was complete. Despite the fact that Parliament, some member states, EU social partners and many NGOs argued that certain public services should be clearly exempt from competition, as decided by public authorities, the Commission's pro-competitive single market logic prevailed. The pivot on which the decision on the role of the state in public services would be taken was 'economics/the market'. Whenever any public or social service was deemed economic, it became subsumed into the SGEI category, and one onto which competition could be imposed by the Commission.

Next, the SGI concept was rendered legal—for the first time—when it entered the Treaty of Lisbon. This presents a double-edged sword for local and national governments: the Treaty of Lisbon states that governments have the right to provide and organise quality SGI; however, this right is positioned on a very slippery conceptual slope, which tips downwards towards the market. Governments' rights are delimited to 'non-economic' services. Once a service is considered economic, it must face competition unless it can be shown that this damages performance. In other words, what the Commission gave with one hand it took away with the other.

With these devices in place, the EU emerges as the ultimate decision-maker on the role of the state in public services. This has provided fertile ground for new EU policies on public services which prove to significantly constrain local and national governments, as I now argue.

Tie me up, tie me down: The consequences of Europeanising public service policy

On the ground, the expansion of EU rules constrains states. Once any public and social services is reconceptualised as having an economic dimension (SGEI or SSGI) it automatically becomes subject to the application of EU rules such as competition and public procurement.

At the most general level, EU rules increasingly overshadow, hierarchically, national and local rules. Local governments complain of the

sheer volume and complexity of growing EU legislation. The UK Local Government Association (LGA), which represents 351 English councils, twenty-two Welsh councils, thirty-one fire authorities and ten national parks, estimates that EU legislation constitutes over half of local government activity.[8] Increasingly, local authorities simply find themselves unable to cope with the huge task they face in comprehending, interpreting, managing and complying with highly complex EU rules. The significant rule-making capacity in Brussels and the more modest resources available for local government to respond underline this fundamental asymmetry.

Much of this EU legislation concerns public service delivery. Local and regional authorities complain that the Commission now interferes too much in defining which public and social services are economic. The Council of European Municipalities and Regions (CEMR) is the largest grouping of local government authorities in Europe, consisting of 150,000 local and regional authorities. The CEMR complains that though the Commission claims it is neutral, in practice it veers steadily towards applying internal market rules to public services in an overly market-focused way. Ultimately, the role a local authority can play in public service provision is increasingly contingent upon the relationship that the Commission perceives services to have with 'economics/the market'—despite the fact that the Treaty of Lisbon acknowledges national, regional and local authorities have wide discretion in deciding what constitutes SGEI. CEMR also criticises the Commission for its confusing definitions of services as economic or non-economic, pointing out that the details of this test are invented, and not found in the Treaty.[9] The Convention of Scottish Local Authorities (COSLA) complains that, though the Commission's intrusions are a problem for authorities across the EU, they are even more serious in countries such as England, Scotland, Wales and Ireland, which lack the constitutional protection of public services available in other countries such as France.[10] Authorities warn that local democratic choice is being eroded with this expansion of powers to categorise public services.

It is not that these authorities are against competition per se; many acknowledge the need to root out protectionism so local firms can exploit opportunities across Europe. The issue is where the line is to be drawn. CEMR claims the Commission is overstepping its remit as regards its own principles of proportionality and subsidiarity. Regarding proportionality, the Commission insists on competition even where the benefits are minimal or uncertain, as well as in cases that have little or no internal market relevance. The Commission's increased intervention into defining ever more public services as economic undermines the principle of subsidiarity, which asserts local authorities are usually better placed to know which public services need to be delivered to residents, and how.

There are dozens of examples of EU rules straitjacketing states: here, two must suffice. Europeanisation means that the Commission obliges governments to open up services to competition once they are designated as economic, unless the provider demonstrates that this damages service provision. Achieving the balance between the desire for competition and service protection is not always straightforward. The Commission's opening up of sectors to competition can prove controversial, more so the deeper it penetrates into the core of public and social services with strong social functions, as occurred during its intervention into so-called 'lifeline' ferry services: from the 1990s, the Commission liberalised cabotage. It is uncontroversial to suppose that much domestic shipping could be categorised as being economic, and therefore subject to competition from shipping firms around Europe. But to what extent should these rules apply to mostly non-profitable and vital ferry services carrying passengers and vehicles in Europe's periphery? Responding to complaints by third parties, the Commission increased pressure on the Scottish government to make the running of the so-called 'lifeline' ferries, which link the mainland to islands, compatible with EC law, since these services received government subsidies. The Altmark case in 2003 had set out four criteria which must be met should state finance of SGEI be exempt from state aid law. These criteria included: clarification that the activity genuinely constitutes a SGEI; *ex ante* calculation of compensation (not after the event); proof that the public service was not being overcompensated; and finally—and most controversially—that the service provi-

der was borne of a tender procedure which was resolved by award to the lowest bidder. If this was not the case, the service provider was required to successfully pass an 'efficiency test'. Particularly since this decision was made, the fact that an SGEI has been tendered is understood by the Commission as a guarantee that public money is being spent efficiently. The upshot in this case was that the Scottish government had to introduce complex competitive tendering procedures in order to justify continuing its ferry subsidies. The Commission's suggestion to 'unbundle' these ferry services prior to tender was finally avoided. The introduction of competition to ferry services met with concern locally: residents, politicians and scholars pointed out that while some ferry routes may potentially be economic, many are not. Competition may increase risks of cream-skimming and the abandonment of non-profitable routes, cutting off communities. A study by Paul Bennett showed the real potential for competition was minimal; the design of the tenders focused on cost and did little to guarantee service quality, adequate investment, social cohesion and low fares for users.[11]

The Commission has also increasingly imposed competition rules in social services, such as social housing. In 2005 it challenged the Dutch government for its subsidies to this sector, after receiving complaints from real estate developers. The Commission claimed that while some of the subsidies were usefully supporting non-economic service provision, a part of them was going to activities which were potentially economic. The upshot was that the Dutch government was forced to redesign its historical model of housing provision away from a broad concept of social housing to a narrower income-cap approach, more typical of UK practice. The Commission drew a line separating social housing from commercial housing. In effect, social housing in the Netherlands can now only be provided to the most vulnerable groups. The whole affair witnessed a spate of complaints to the Commission by private real estate developers about social housing provision across the EU. Even today the Dutch case is not settled: in 2014, social housing providers successfully appealed against the Commission's ruling imposing the income cap, and the question remains legally unresolved.

The road to the straitjacketed state is not entirely inevitable and linear. At the regional and European levels, local and national governments have successfully lobbied to slow, or modify, intrusion from Brussels into public service provision: for instance, the CEMR succeeded in removing children's and vulnerable peoples' care from the Service Directive and in the first use of the European Citizens' Initiative, over 1.5 million people signed against the inclusion of water into the Concessions Directive in 2013. There are occasions when, in response to discontent expressed when EU documents have classified certain services as 'economic', EU legislation itself has taken a step backward; the 2011 SGEI package, for example, took a somewhat more relaxed stance on at least certain services when compared with the 2005 version. Even when a given service is perceived as a SGEI by the Commission, citizens sometimes think otherwise, as seen in instances of re-municipalisations, such as that of Hamburg's energy grid in 2013. Re-municipalisation was justified on the grounds that energy supply is a basic public service and should not serve profit making ends. But none of this detracts from the underlying trend whereby EU rules are increasingly encroaching on the ways in which governments can provide services to their citizens. Indeed, a cynic might even argue that the EU allows for occasional exceptions to make the rest of its market-oriented policy more legitimate.

Conclusion: Straitjacketing the state

The original EU member states signed up in 1957 to a set of rules with only weak, implicit consequences for public services. From the 1980s, the Commission and the CJEU started applying these rules to a much broader range of services than was originally envisaged. EU policy has a different dynamic to that at the local or national levels: most new policy is approved on top of existing policy, so policy developments move uni-directionally towards more market; backtracking is minimal, and not common. All this is increasingly constraining local and national governments' ability to define what a public service is and how they can be financed and delivered. As a consequence, states are being straitjacketed.

Scholars continue to use the hollowing-out metaphor as a core concept when discussing public sector reform. But this metaphor requires rethinking, as it does not capture developments associated with the enhanced power of the EU over rules on public service provision. Moreover, hollowing out the state through redefining public intervention and public sector reform in Rhodes' metaphor was conceived as *reversible*: rational governments would notice their loss of capacity and move to regain lost ground.

Houdini got out of straitjackets. Can governments do something similar? Today, Rhodes' reversal looks increasingly unlikely. For one thing, the difficulty of reversing policy is conditioned by the way in which policy was organized. Delegation is easier to reverse than devolution. Because power was devolved, there is little governments can do to reverse this, bar fundamental treaty renegotiation or exiting the EU. States become straitjacketed twice over when World Trade Organization rules take up some of the developments in EU law, making services that are subject to competition (SGEI) also subject to compliance with free trade rules.[12] There is another, more informal, option associated with the politics of abandonment. Though the Commission has achieved the legal competence to intervene in potentially all public services, it does not have the resources to do so. It is entirely unfeasible that the Commission can 'police' the provision and delivery of all public and social services across Europe. It is possible that, as in its implementation of competition policy, Commission action will focus on addressing local practices most obviously inconsistent with EU rules. Even so, the mere threat of possible discipline from the Commission casts a long shadow over governments' tasks in delivering public services in the future.

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Notes

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